

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

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

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

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

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

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

TITLE I—NONDISCRIMINATION IN FEDERALLY FUNDED PROGRAMS AND ACTIVITIES

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

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

Subtitle B—Harassment

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

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

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

TITLE III—AIR CARRIER ACCESS ACT OF 1986 AMENDMENT

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

TITLE IV—AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS

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

TITLE V—CIVIL RIGHTS REMEDIES AND RELIEF

Subtitle A—Prevailing Party

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

Subtitle B—Arbitration

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

Subtitle C—Expert Witness Fees

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

Subtitle D—Equal Remedies Act of 2004

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

TITLE VI—PROHIBITIONS AGAINST SEX DISCRIMINATION

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

TITLE VII—PROTECTIONS FOR WORKERS

Subtitle A—Protection for Undocumented Workers

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

Subtitle B—Fair Labor Standards Act Amendments

- Sec. 711. Short title.
- Sec. 712. Findings.
- Sec. 713. Purposes.
- Sec. 714. Remedies for State employees.

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

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

7 **SEC. 101. FINDINGS.**

8 Congress finds the following:

1 (1) This subtitle is made necessary by a deci-
2 sion of the Supreme Court in *Alexander v. Sandoval*,
3 532 U.S. 275 (2001) that significantly impairs stat-
4 utory protections against discrimination that Con-
5 gress has erected over a period of almost 4 decades.
6 The *Sandoval* decision undermines these statutory
7 protections by stripping victims of discrimination
8 (defined under regulations that Congress required
9 Federal departments and agencies to promulgate to
10 implement title VI of the Civil Rights Act of 1964
11 (42 U.S.C. 2000d et seq.)) of the right to bring ac-
12 tion in Federal court to redress the discrimination
13 and by casting doubt on the validity of the regula-
14 tions themselves.

15 (2) The *Sandoval* decision attacks settled expect-
16 ations created by title VI of the Civil Rights Act of
17 1964, title IX of the Education Amendments of
18 1972 (also known as the “Patsy Takemoto Mink
19 Equal Opportunity in Education Act”) (20 U.S.C.
20 1681 et seq.), the Age Discrimination Act of 1975
21 (42 U.S.C. 6101 et seq.), and section 504 of the Re-
22 habilitation Act of 1973 (29 U.S.C. 794) (collec-
23 tively referred to in this Act as the “covered civil
24 rights provisions”). The covered civil rights provi-
25 sions were designed to establish and make effective

1 the rights of persons to be free from discrimination
2 on the part of entities that are subject to 1 or more
3 of the covered civil rights provisions, as appropriate
4 (referred to in this Act as “covered entities”). In
5 1964 Congress adopted title VI of the Civil Rights
6 Act of 1964 to ensure that Federal dollars would not
7 be used to subsidize or support programs or activi-
8 ties that discriminated on racial, color, or national
9 origin grounds. In the years that followed, Congress
10 extended these protections by enacting laws barring
11 discrimination in federally funded activities on the
12 basis of sex in title IX of the Education Amend-
13 ments of 1972, age in the Age Discrimination Act
14 of 1975, and disability in section 504 of the Reha-
15 bilitation Act of 1973.

16 (3) From the outset, Congress and the execu-
17 tive branch made clear that the regulatory process
18 would be used to ensure broad protections for bene-
19 ficiaries of the law. The first regulations promul-
20 gated by the Department of Justice under title VI
21 of the Civil Rights Act of 1964 (42 U.S.C. 2000d
22 et seq.) forbade the use of “criteria or methods of
23 administration which have the effect of subjecting
24 individuals to discrimination . . .” (section 80.3 of
25 title 45, Code of Federal Regulations) and prohib-

1 ited retaliation against persons participating in liti-
2 gation or administrative resolution of charges of dis-
3 crimination brought under the Act. These regula-
4 tions were drafted by the same executive branch offi-
5 cials who played a central role in drafting title VI
6 of the Civil Rights Act of 1964. The language used
7 is, in relevant respects, virtually indistinguishable
8 from regulations under the several Acts in effect
9 today. For example, section 304 of the Age Dis-
10 crimination Act of 1975 (42 U.S.C. 6103) required
11 the Secretary of the Department of Health, Edu-
12 cation, and Welfare (HEW) (now Health and
13 Human Services (HHS)) to promulgate “general
14 regulations” to effectuate the purposes of the Act.
15 These “government-wide regulations,” governing age
16 discrimination in programs and activities receiving
17 Federal financial assistance condemn “any actions
18 which have [a discriminatory] effect, on the basis of
19 age . . .” (section 90.12 of title 45, Code of Federal
20 Regulations).

21 (4) None of the regulations under the laws ad-
22 dressed in this subtitle have ever been invalidated.
23 In 1966, Congress considered and rejected a pro-
24 posal to invalidate the disparate impact regulations
25 promulgated pursuant to title VI of the Civil Rights

1 Act of 1964 (42 U.S.C. 2000d et seq.). In 1975,
2 Congress reviewed and maintained the implementing
3 regulations promulgated pursuant to title IX of the
4 Education Amendments of 1972 (20 U.S.C. 1681 et
5 seq.), pursuant to a statutory procedure designed to
6 afford Congress the opportunity to invalidate provi-
7 sions deemed to be inconsistent with congressional
8 intent. The Supreme Court has recognized that
9 Congress’s failure to disapprove regulations implies
10 that the regulations accurately reflect congressional
11 intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S.
12 512, 533–34 (1982). Moreover, the Supreme Court
13 explicitly recognized congressional approval of the
14 regulations promulgated to implement section 504 of
15 the Rehabilitation Act of 1973 (29 U.S.C. 794) in
16 *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624,
17 634 (1984), stating that “[t]he regulations particu-
18 larly merit deference in the present case: the respon-
19 sible Congressional committees participated in their
20 formation and both these committees and Congress
21 itself endorsed the regulations in their final form.”.

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

1 ment. Congress acknowledged that it could not se-
2 cure compliance solely through enforcement actions
3 initiated by the Attorney General. *Newman v. Piggie*
4 *Park Enterprises*, 390 U.S. 400 (1968) (per cu-
5 riam).

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

13 (7)(A) Notwithstanding the decision of the Su-
14 preme Court in *Cort v. Ash*, 422 U.S. 66 (1975) to
15 abandon prior precedent and require explicit statu-
16 tory statements of a right of action, Congress and
17 the Courts both before and after *Cort* have recog-
18 nized an implied right of action under the above
19 statutes. For example, Congress has consistently
20 provided the means for enforcing the statutes. In
21 1972, Congress established a right to attorney's fees
22 in private actions brought under title VI of the Civil
23 Rights Act of 1964 (42 U.S.C. 2000d et seq.) and
24 title IX of the Education Amendments of 1972 (20
25 U.S.C. 1681 et seq.) that continued with enactment

1 of the Civil Rights Attorneys' Fees Awards Act of
2 1976 (Public Law 94–559; 90 Stat. 2641). In 1973,
3 Congress provided a right to attorney's fees for pre-
4 vailing parties under section 504 of the Rehabilita-
5 tion Act of 1973 (29 U.S.C. 794) without expressly
6 stating that there was a right of action. In 1978
7 Congress amended the Age Discrimination Act of
8 1975 (42 U.S.C. 6101 et seq.) to include a right to
9 attorney's fees. Because the Age Discrimination Act
10 of 1975 was enacted while the Cort decision was
11 pending, Congress also enacted in 1978 a limited
12 private right of action to enforce the Age Discrimi-
13 nation Act of 1975.

14 (B) The Senate Report that accompanied the
15 Civil Rights Attorneys' Fees Awards Act of 1976
16 (Public Law 94–559; 90 Stat. 2641) stated that
17 “All of these civil rights laws . . . depend heavily
18 upon private enforcement, and fee awards have
19 proved an essential remedy if private citizens are to
20 have a meaningful opportunity to vindicate the im-
21 portant congressional policies which these laws con-
22 tain.” S. Rep. No. 94–1011 (1976).

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

1 title VI of the Civil Rights Act of 1964 (42 U.S.C.
2 2000d et seq.) while permitting it under the statute.
3 The regulations were congressionally mandated and
4 their promulgation was specifically directed by Con-
5 gress under section 602 of that Act (42 U.S.C.
6 2000d-1) “to effectuate” the antidiscrimination pro-
7 visions of the statute. Title VI of the Civil Rights
8 Act of 1964 stressed the importance of the regula-
9 tions by requiring them to be “approved by the
10 President”. Similarly, the regulations promulgated
11 pursuant to title IX of the Education Amendments
12 of 1972 (20 U.S.C. 1681 et seq.) were also congres-
13 sionally authorized and specifically directed by Con-
14 gress to effectuate the provisions of the statute.
15 Title IX of the Education Amendments of 1972
16 stressed the importance of the regulations by requir-
17 ing them to be “approved by the President”.

18 (9) Regulations that prohibit practices that
19 have the effect of discrimination are consistent with
20 prohibitions of disparate treatment that require a
21 showing of intent, as the Supreme Court has ac-
22 knowledged in the following decisions:

23 (A) A disparate impact standard allows a
24 court to reach discrimination that could actu-
25 ally exist under the guise of compliance with

1 the law. *Griggs v. Duke Power Co.*, 401 U.S.
2 424 (1971).

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

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

13 (D) The disparate impact method of proof
14 is critical to ferreting out stereotypes under-
15 lying intentional discrimination. *Watson v. Fort*
16 *Worth Bank & Trust*, 487 U.S. 977 (1988).

17 (10) The interpretation of title VI of the Civil
18 Rights Act of 1964 (42 U.S.C. 2000d et seq.), title
19 IX of the Education Amendments of 1972 (20
20 U.S.C. 1681 et seq.), and other statutes barring dis-
21 crimination by covered entities as prohibiting prac-
22 tices that have disparate impact and that are not
23 justified as necessary to achieve the goals of the pro-
24 grams or activities supported by the Federal finan-
25 cial assistance is powerfully reinforced by the use of

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

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

16 (12) In contrast, a failure to reinstate or con-
17 firm a private right of action would leave vindication
18 of the rights to equality of opportunity solely to Fed-
19 eral agencies, which may fail to take necessary and
20 appropriate action because of administrative over-
21 burden or other reasons. Action by Congress to
22 specify a private right of action is necessary to en-
23 sure that persons will have a remedy if they are de-
24 nied equal access to education, housing, health, envi-
25 ronmental protection, transportation, and many

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

3 (13) As a result of the Supreme Court's deci-
4 sion in Sandoval, courts have dismissed numerous
5 claims brought under the regulations promulgated
6 pursuant to title VI of the Civil Rights Act of 1964
7 (42 U.S.C. 2000d et seq.) that challenged actions
8 with an unjustified discriminatory effect. Although
9 the Sandoval Court did not address title IX of the
10 Education Amendments of 1972 (20 U.S.C. 1681 et
11 seq.), lower courts have similarly dismissed claims
12 under such Act. Courts relying on the Sandoval deci-
13 sion have also dismissed claims seeking redress for
14 unlawful retaliation against persons who opposed
15 prohibited acts, brought actions, or participated in
16 actions, under title VI of the Civil Rights Act of
17 1964 and title IX of the Education Amendments of
18 1972. Because judicial interpretation of the Age
19 Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
20 has tracked that of title VI of the Civil Rights Act
21 of 1964 and title IX of the Education Amendments
22 of 1972, without clarification of Sandoval, plaintiffs
23 run the risk that courts may dismiss claims brought
24 under regulations promulgated pursuant to the Age
25 Discrimination Act of 1975 challenging actions with

1 an unjustified discriminatory effect and claims seek-
2 ing redress for unlawful retaliation against persons
3 who have brought or participated in actions under
4 the Age Discrimination Act of 1975.

5 (14) Section 504 of the Rehabilitation Act of
6 1973 (29 U.S.C. 794) has received different treat-
7 ment by the Supreme Court. In *Alexander v. Choate*,
8 469 U.S. 287 (1985), the Court proceeded on the
9 assumption that the statute itself prohibited some
10 actions that had a disparate impact on handicapped
11 individuals—an assumption borne out by congres-
12 sional statements made during passage of the Act.
13 In *Sandoval*, the Court appeared to accept this prin-
14 ciple of *Alexander*. Moreover, the Supreme Court ex-
15 plicitly recognized congressional approval of the reg-
16 ulations promulgated to implement section 504 of
17 the Rehabilitation Act of 1973 in *Consolidated Rail*
18 *Corp. v. Darrone*, 465 U.S. 624, 634 (1984). Rely-
19 ing on the validity of the regulations, Congress in-
20 corporated the regulations into the statutory require-
21 ments of section 204 of the Americans with Disabil-
22 ities Act of 1990 (42 U.S.C. 12134). Thus it does
23 not appear at this time that there is a risk that the
24 private right of action to challenge disparate impact

1 discrimination under section 504 of the Rehabilita-
2 tion Act of 1973 will become unavailable.

3 (15) Since the enactment of title VI of the Civil
4 Rights Act of 1964, title IX of the Education
5 Amendments of 1972, the Age Discrimination Act of
6 1975, and section 504 of the Rehabilitation Act of
7 1973, Congress has intended that the prohibitions
8 on discrimination in those provisions include a prohi-
9 bition on retaliation. The ability to prevent retalia-
10 tion against persons who oppose any policy or prac-
11 tice prohibited by those provisions, or make a
12 charge, testify, assist, or participate in any manner
13 in an investigation, proceeding, or hearing under
14 those provisions, is essential to realizing the prohibi-
15 tions on discrimination in those provisions.

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

22 **SEC. 102. PROHIBITED DISCRIMINATION.**

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

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

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

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

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

18 “(ii) the aggrieved person demonstrates (con-
19 sistent with the demonstration required under title
20 VII with respect to an ‘alternative employment prac-
21 tice’) that a less discriminatory alternative policy or
22 practice exists, and the covered entity refuses to
23 adopt such alternative policy or practice.

24 “(B)(i) With respect to demonstrating that a par-
25 ticular policy or practice causes a disparate impact as de-

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

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

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

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

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

1 (b) EDUCATION AMENDMENTS OF 1972.—Section
2 901 of the Education Amendments of 1972 (20 U.S.C.
3 1681) is amended—

4 (1) by redesignating subsection (c) as sub-
5 section (e); and

6 (2) by inserting after subsection (b) the fol-
7 lowing:

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

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

24 “(ii) the aggrieved person demonstrates (con-
25 sistent with the demonstration required under title

1 VII of the Civil Rights Act of 1964 (42 U.S.C.
2 2000e et seq.) with respect to an ‘alternative em-
3 ployment practice’) that a less discriminatory alter-
4 native policy or practice exists, and the covered enti-
5 ty refuses to adopt such alternative policy or prac-
6 tice.

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

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

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

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

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

9 (c) AGE DISCRIMINATION ACT OF 1975.—Section
10 303 of the Age Discrimination Act of 1975 (42 U.S.C.
11 6102) is amended—

12 (1) by striking “Pursuant” and inserting “(a)
13 Pursuant”; and

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

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

20 “(i) a person aggrieved by discrimination on the
21 basis of age (referred to in this title as an ‘aggrieved
22 person’) demonstrates that an entity subject to this
23 title (referred to in this title as a ‘covered entity’)
24 has a policy or practice that causes a disparate im-
25 pact on the basis of age and the covered entity fails

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

6 “(ii) the aggrieved person demonstrates (con-
7 sistent with the demonstration required under title
8 VII of the Civil Rights Act of 1964 (42 U.S.C.
9 2000e et seq.) with respect to an ‘alternative em-
10 ployment practice’) that a less discriminatory alter-
11 native policy or practice exists, and the covered enti-
12 ty refuses to adopt such alternative policy or prac-
13 tice.

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

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

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

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

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

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

15 **SEC. 103. RIGHTS OF ACTION.**

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

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

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

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

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

3 (b) EDUCATION AMENDMENTS OF 1972.—Section
4 902 of the Education Amendments of 1972 (20 U.S.C.
5 1682) is amended—

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

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

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

14 (c) AGE DISCRIMINATION ACT OF 1975.—Section
15 305(e) of the Age Discrimination Act of 1975 (42 U.S.C.
16 6104(e)) is amended in the first sentence of paragraph
17 (1), by striking “this Act” and inserting “this title, includ-
18 ing a regulation promulgated to carry out this title,”.

19 **SEC. 104. RIGHT OF RECOVERY.**

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

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

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

1 person under this title against a covered entity who has
 2 engaged in unlawful intentional discrimination (not a
 3 practice that is unlawful because of its disparate impact)
 4 prohibited under this title (including its implementing reg-
 5 ulations), the aggrieved person may recover equitable and
 6 legal relief (including compensatory and punitive dam-
 7 ages), attorney’s fees (including expert fees), and costs,
 8 except that punitive damages are not available against a
 9 government, government agency, or political subdivision.

10 “(b) CLAIMS BASED ON THE DISPARATE IMPACT
 11 STANDARD OF PROOF.—In an action brought by an ag-
 12 grievied person under this title against a covered entity
 13 who has engaged in unlawful discrimination based on dis-
 14 parate impact prohibited under this title (including its im-
 15 plementing regulations), the aggrieved person may recover
 16 equitable relief, attorney’s fees (including expert fees), and
 17 costs.”.

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

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

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

1 engaged in unlawful intentional discrimination (not a
2 practice that is unlawful because of its disparate impact)
3 prohibited under this title (including its implementing reg-
4 ulations), the aggrieved person may recover equitable and
5 legal relief (including compensatory and punitive dam-
6 ages), attorney’s fees (including expert fees), and costs,
7 except that punitive damages are not available against a
8 government, government agency, or political subdivision.

9 “(b) CLAIMS BASED ON THE DISPARATE IMPACT
10 STANDARD OF PROOF.—In an action brought by an ag-
11 grievied person under this title against a covered entity
12 who has engaged in unlawful discrimination based on dis-
13 parate impact prohibited under this title (including its im-
14 plementing regulations), the aggrieved person may recover
15 equitable relief, attorney’s fees (including expert fees), and
16 costs.”.

17 (c) AGE DISCRIMINATION ACT OF 1975.—

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

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

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

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

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

14 (A) ELIMINATING WAIVER OF RIGHT TO
 15 FEES IF NOT REQUESTED IN COMPLAINT.—Sec-
 16 tion 305(e)(1) of the Age Discrimination Act of
 17 1975 (42 U.S.C. 6104(e)) is amended—

18 (i) by striking “to enjoin a violation”
 19 and inserting “to redress a violation”; and

20 (ii) by striking the second sentence
 21 and inserting the following: “The Court
 22 shall award the costs of suit, including a
 23 reasonable attorney’s fee (including expert
 24 fees), to the prevailing plaintiff.”.

1 (B) ELIMINATING UNNECESSARY MAN-
2 DATES: TO EXHAUST ADMINISTRATIVE REM-
3 EDIES; AND TO DELAY SUIT LONGER THAN 180
4 DAYS TO OBTAIN AGENCY REVIEW.—Section
5 305(f) of the Age Discrimination Act of 1975
6 (42 U.S.C. 6104(f)) is amended by striking
7 “With respect to actions brought for relief
8 based on an alleged violation of the provisions
9 of this title,” and inserting “Actions brought
10 for relief based on an alleged violation of the
11 provisions of this title may be initiated in a
12 court of competent jurisdiction, pursuant to
13 section 305(e), or before the relevant Federal
14 department or agency. With respect to such ac-
15 tions brought initially before the relevant Fed-
16 eral department or agency,”.

17 (C) ELIMINATING DUPLICATIVE “REASON-
18 ABLENESS” REQUIREMENT; CLARIFYING THAT
19 “REASONABLE FACTORS OTHER THAN AGE” IS
20 DEFENSE TO A DISPARATE IMPACT CLAIM, NOT
21 AN EXCEPTION TO ADA COVERAGE.—Section
22 304(b)(1) of the Age Discrimination Act of
23 1975 (42 U.S.C. 6103(b)(1)) is amended by
24 striking “involved—” and all that follows
25 through the period and inserting “involved such

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

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

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

21 “(2) In an action brought by an aggrieved person
22 under this section against a covered entity who has en-
23 gaged in unlawful discrimination based on disparate im-
24 pact prohibited under this section (including its imple-
25 menting regulations), the aggrieved person may recover

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

3 **SEC. 105. CONSTRUCTION.**

4 (a) RELIEF.—Nothing in this subtitle, including any
5 amendment made by this subtitle, shall be construed to
6 limit the scope of, or the relief available under, section
7 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794),
8 the Americans with Disabilities Act of 1990 (42 U.S.C.
9 12101 et seq.), or any other provision of law.

10 (b) DEFENDANTS.—Nothing in this subtitle, includ-
11 ing any amendment made by this subtitle, shall be con-
12 strued to limit the scope of the class of persons who may
13 be subjected to civil actions under the covered civil rights
14 provisions.

15 **SEC. 106. EFFECTIVE DATE.**

16 (a) IN GENERAL.—This subtitle, and the amend-
17 ments made by this subtitle, are retroactive to April 24,
18 2001, and effective as of that date.

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

1 **Subtitle B—Harassment**

2 **SEC. 111. FINDINGS.**

3 Congress finds the following:

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

16 (2) Courts have confirmed that covered entities
17 are liable for harassment on the basis of race, color,
18 or national origin under title VI of the Civil Rights
19 Act of 1964 (42 U.S.C. 2000d et seq.) (referred to
20 in this subtitle as “title VI”), e.g., *Bryant v. Inde-*
21 *pendent School District No. I-38*, 334 F.3d 928
22 (10th Cir. 2003) (liability for student-on-student ra-
23 cial harassment). Moreover, judicial interpretation of
24 the similarly worded Age Discrimination Act of 1975
25 (42 U.S.C. 6101 et seq.) and section 504 of the Re-

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

3 (3) As these courts have properly recognized,
4 harassment on a prohibited basis under a program
5 or activity, whether perpetrated by employees or
6 agents of the program or activity, by peers of the
7 victim, or by others who conduct harassment under
8 the program or activity, is a form of unlawful and
9 intentional discrimination that inflicts substantial
10 harm on beneficiaries of the program or activity and
11 violates the obligation of a covered entity to main-
12 tain a nondiscriminatory environment.

13 (4) In a 5 to 4 ruling, the Supreme Court held
14 that students subjected to sexual harassment may
15 receive a damages remedy under title IX only when
16 school officials have “actual notice” of the harass-
17 ment and are “deliberately indifferent” to it. *Gebser*
18 *v. Lago Vista Independent School District*, 524 U.S.
19 274 (1998). See also *Davis v. Monroe County Board*
20 *of Education*, 526 U.S. 629 (1999).

21 (5) The standard delineated in *Gebser* and fol-
22 lowed in *Davis* has been applied by lower courts re-
23 garding the liability of covered entities for damages
24 for harassment based on race, color, or national ori-
25 gin under title VI. E.g., *Bryant v. Independent*

1 School District No. I–38, 334 F.3d 928 (10th Cir.
2 2003). Because of the similarities in the wording
3 and interpretation of the underlying statutes, this
4 standard may be applied to claims for damages
5 brought under the Age Discrimination Act of 1975
6 (42 U.S.C. 6101 et seq.) and section 504 of the Re-
7 habilitation Act of 1973 (29 U.S.C. 794) as well.

8 (6) Although they do not affect the relevant
9 standards for individuals to obtain injunctive and
10 equitable relief for harassment on the basis of race,
11 color, sex, national origin, age, or disability under
12 covered programs and activities, Gebser and its
13 progeny severely limit the availability of remedies for
14 such individuals by imposing new, more stringent
15 standards for recovery of damages under title VI
16 and title IX, and potentially under the Age Discrimi-
17 nation Act of 1975 and section 504 of the Rehabili-
18 tation Act of 1973. Yet in many cases, damages are
19 the only remedy that would effectively rectify past
20 harassment.

21 (7) As recognized by the dissenters in Gebser,
22 these limitations on effective relief thwart Congress’s
23 underlying purpose to protect students from harass-
24 ment. By making the “policy choice” to “rank[] pro-
25 tection of the school district’s purse above the pro-

1 tection of immature high school students”, the
2 Gebser case “is not faithful to the intent of the pol-
3 icymaking branch of our Government”. Gebser, 524
4 U.S. at 306 (Stevens, J., dissenting).

5 (8) The rulings in Gebser and its progeny cre-
6 ate an incentive for covered entities to insulate
7 themselves from knowledge of harassment on the
8 basis of race, color, sex, national origin, age, or dis-
9 ability rather than adopting and enforcing practices
10 that will minimize the danger of such harassment.
11 The rulings thus undermine the purpose of prohibi-
12 tions on discrimination in the civil rights laws: “to
13 induce [covered programs or activities] to adopt and
14 enforce practices that will minimize the danger that
15 vulnerable students [or other beneficiaries] will be
16 exposed to such odious behavior”. Gebser, 524 U.S.
17 at 300 (Stevens, J., dissenting).

18 (9) The Gebser ruling contravened the interpre-
19 tations of title VI and title IX by the Department
20 of Education, which interpretations recognized liabil-
21 ity for damages for harassment based on race, color,
22 sex, or national origin based on agency principles.
23 Sexual Harassment Guidance: Harassment of Stu-
24 dents by School Employees, Other Students, or
25 Third Parties, 62 Fed. Reg. 12034 (March 13,

1 1997); Racial Incidents and Harassment Against
2 Students at Educational Institutions: Investigative
3 Guidance, 59 Fed. Reg. 11448 (March 10, 1994).

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

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

14 (A) ensure that students and other bene-
15 ficiaries of federally funded programs and ac-
16 tivities have protection from harassment on the
17 basis of race, color, sex, national origin, age, or
18 disability that is comparable in strength and ef-
19 fectiveness to that available to employees under
20 title VII of the Civil Rights Act of 1964 (42
21 U.S.C. 2000e et seq.), the Age Discrimination
22 in Employment Act of 1967 (29 U.S.C. 621 et
23 seq.), and title I of the Americans with Disabil-
24 ities Act of 1990 (42 U.S.C. 12111 et seq.);

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

4 (C) deter incidents of harassment; and

5 (D) provide appropriate remedies for dis-
 6 crimination.

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

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

19 **SEC. 112. RIGHT OF RECOVERY.**

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

23 “(c) CLAIMS BASED ON HARASSMENT.—

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

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

7 “(2) AVAILABILITY OF DAMAGES.—

8 “(A) TANGIBLE ACTION BY AGENT OR EM-
9 PLOYEE.—If an agent or employee of a covered
10 entity engages in unlawful harassment under a
11 program or activity that results in a tangible
12 action to the aggrieved person, damages shall
13 be available against the covered entity.

14 “(B) NO TANGIBLE ACTION BY AGENT OR
15 EMPLOYEE.—If an agent or employee of a cov-
16 ered entity engages in unlawful harassment
17 under a program or activity that results in no
18 tangible action to the aggrieved person, no
19 damages shall be available against the covered
20 entity if it can demonstrate that—

21 “(i) it exercised reasonable care to
22 prevent and correct promptly any harass-
23 ment based on race, color, or national ori-
24 gin; and

1 “(ii) the aggrieved person unreason-
2 ably failed to take advantage of preventive
3 or corrective opportunities offered by the
4 covered entity that—

5 “(I) would likely have provided
6 redress and avoided the harm de-
7 scribed by the aggrieved person; and

8 “(II) would not have exposed the
9 aggrieved person to undue risk, effort,
10 or expense.

11 “(C) HARASSMENT BY THIRD PARTY.—If a
12 person who is not an agent or employee of a
13 covered entity subjects an aggrieved person to
14 unlawful harassment under a program or activ-
15 ity, and the covered entity involved knew or
16 should have known of the harassment, no dam-
17 ages shall be available against the covered enti-
18 ty if it can demonstrate that it exercised rea-
19 sonable care to prevent and correct promptly
20 any harassment based on race, color, or na-
21 tional origin.

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

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

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

11 “(ii) undertaken prompt, thorough,
12 and impartial investigations pursuant to
13 its complaint procedure; and

14 “(iii) taken immediate and appro-
15 priate corrective action designed to stop
16 harassment that has occurred, correct its
17 effects on the aggrieved person and ensure
18 that the harassment does not recur.

19 “(E) PUNITIVE DAMAGES.—Punitive dam-
20 ages shall not be available under this subsection
21 against a government, government agency, or
22 political subdivision.

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

1 “(A) DEMONSTRATES.—The term ‘dem-
2 onstrates’ means meets the burdens of produc-
3 tion and persuasion.

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

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

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

18 “(C) UNLAWFUL HARASSMENT.—The term
19 ‘unlawful harassment’ means harassment that
20 is unlawful under this title.”.

21 (b) EDUCATION AMENDMENTS OF 1972.—Section
22 902A of the Civil Rights Act of 1964, as added by section
23 104, is amended by adding at the end the following:

24 “(c) CLAIMS BASED ON HARASSMENT.—

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

9 “(2) AVAILABILITY OF DAMAGES.—

10 “(A) TANGIBLE ACTION BY AGENT OR EM-
11 PLOYEE.—If an agent or employee of a covered
12 entity engages in unlawful harassment under a
13 program or activity that results in a tangible
14 action to the aggrieved person, damages shall
15 be available against the covered entity.

16 “(B) NO TANGIBLE ACTION BY AGENT OR
17 EMPLOYEE.—If an agent or employee of a cov-
18 ered entity engages in unlawful harassment
19 under a program or activity that results in no
20 tangible action to the aggrieved person, no
21 damages shall be available against the covered
22 entity if it can demonstrate that—

23 “(i) it exercised reasonable care to
24 prevent and correct promptly any harass-
25 ment based on sex; and

1 “(ii) the aggrieved person unreason-
2 ably failed to take advantage of preventive
3 or corrective opportunities offered by the
4 covered entity that—

5 “(I) would likely have provided
6 redress and avoided the harm de-
7 scribed by the aggrieved person; and

8 “(II) would not have exposed the
9 aggrieved person to undue risk, effort,
10 or expense.

11 “(C) HARASSMENT BY THIRD PARTY.—If a
12 person who is not an agent or employee of a
13 covered entity subjects an aggrieved person to
14 unlawful harassment under a program or activ-
15 ity, and the covered entity knew or should have
16 known of the harassment, no damages shall be
17 available against the covered entity if it can
18 demonstrate that it exercised reasonable care to
19 prevent and correct promptly any harassment
20 based on sex.

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

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

3 “(i) established, adequately publicized,
4 and enforced an effective, comprehensive,
5 harassment prevention policy and com-
6 plaint procedure that is likely to provide
7 redress and avoid harm without exposing
8 the person subjected to the harassment to
9 undue risk, effort, or expense;

10 “(ii) undertaken prompt, thorough,
11 and impartial investigations pursuant to
12 its complaint procedure; and

13 “(iii) taken immediate and appro-
14 priate corrective action designed to stop
15 harassment that has occurred, correct its
16 effects on the aggrieved person, and ensure
17 that the harassment does not recur.

18 “(E) PUNITIVE DAMAGES.—Punitive dam-
19 ages shall not be available under this subsection
20 against a government, government agency, or
21 political subdivision.

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

23 “(A) DEMONSTRATES.—The term ‘dem-
24 onstrates’ means meets the burdens of produc-
25 tion and persuasion.

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

3 “(i) a significant adverse change in an
4 individual’s status caused by an agent or
5 employee of a covered entity with regard to
6 the individual’s participation in, access to,
7 or enjoyment of, the benefits of a program
8 or activity; or

9 “(ii) an explicit or implicit condition
10 by an agent or employee of a covered enti-
11 ty on an individual’s participation in, ac-
12 cess to, or enjoyment of, the benefits of a
13 program or activity based on the individ-
14 ual’s submission to the harassment.

15 “(C) UNLAWFUL HARASSMENT.—The term
16 ‘unlawful harassment’ means harassment that
17 is unlawful under this title.”.

18 (c) AGE DISCRIMINATION ACT OF 1975.—Section
19 305(g) of the Age Discrimination Act of 1975, as added
20 by section 104, is amended by adding at the end the fol-
21 lowing:

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

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

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

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

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

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

18 “(aa) would likely have provided redress
19 and avoided the harm described by the ag-
20 grievied person; and

21 “(bb) would not have exposed the ag-
22 grievied person to undue risk, effort, or expense.

23 “(iii) If a person who is not an agent or employee
24 of a covered entity subjects an aggrieved person to unlaw-
25 ful harassment under a program or activity, and the cov-

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

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

11 “(I) established, adequately publicized, and en-
12 forced an effective, comprehensive, harassment pre-
13 vention policy and complaint procedure that is likely
14 to provide redress and avoid harm without exposing
15 the person subjected to the harassment to undue
16 risk, effort, or expense;

17 “(II) undertaken prompt, thorough, and impar-
18 tial investigations pursuant to its complaint proce-
19 dure; and

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

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

4 “(C) As used in this paragraph:

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

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

8 “(I) a significant adverse change in an in-
9 dividual’s status caused by an agent or em-
10 ployee of a covered entity with regard to the in-
11 dividual’s participation in, access to, or enjoy-
12 ment of, the benefits of a program or activity;
13 or

14 “(II) an explicit or implicit condition by an
15 agent or employee of a covered entity on an in-
16 dividual’s participation in, access to, or enjoy-
17 ment of, the benefits of a program or activity
18 based on the individual’s submission to the har-
19 assment.

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

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

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

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

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

17 “(I) it exercised reasonable care to prevent and
18 correct promptly any harassment based on disability;
19 and

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

23 “(aa) would likely have provided redress
24 and avoided the harm described by the ag-
25 grieved person; and

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

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

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

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

22 “(II) undertaken prompt, thorough, and impar-
23 tial investigations pursuant to its complaint proce-
24 dure; and

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

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

8 “(C) As used in this paragraph:

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

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

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

18 “(II) an explicit or implicit condition by an
19 agent or employee of a covered entity on an in-
20 dividual’s participation in, access to, or enjoy-
21 ment of, the benefits of a program or activity
22 based on the individual’s submission to the har-
23 assment.

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

1 **SEC. 113. CONSTRUCTION.**

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

6 **SEC. 114. EFFECTIVE DATE.**

7 (a) **IN GENERAL.**—This subtitle, and the amend-
8 ments made by this subtitle, are retroactive to June 22,
9 1998, and effective as of that date.

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

15 **TITLE II—UNIFORMED SERVICES**
16 **EMPLOYMENT AND REEM-**
17 **PLOYMENT RIGHTS ACT OF**
18 **1994 AMENDMENT**

19 **SEC. 201. AMENDMENT TO THE UNIFORMED SERVICES EM-**
20 **PLOYMENT AND REEMPLOYMENT RIGHTS**
21 **ACT OF 1994.**

22 (a) **FINDINGS.**—Congress makes the following find-
23 ings:

24 (1) The Federal Government has an important
25 interest in attracting and training a military to pro-
26 vide for the National defense. The Constitution

1 grants Congress the power to raise and support an
2 army for purposes of the common defense. The Na-
3 tion’s military readiness requires that all members of
4 the Armed Forces, including those employed in State
5 programs and activities, be able to serve without
6 jeopardizing their civilian employment opportunities.

7 (2) The Uniformed Services Employment and
8 Reemployment Rights Act of 1994, commonly re-
9 ferred to as “USERRA” and codified as chapter 43
10 of title 38, United States Code, is intended to safe-
11 guard the reemployment rights of members of the
12 uniformed services (as that term is defined in sec-
13 tion 4303(16) of title 38, United States Code) and
14 to prevent discrimination against any person who is
15 a member of, applies to be a member of, performs,
16 has performed, applies to perform, or has an obliga-
17 tion to perform service in a uniformed service. Effec-
18 tive enforcement of the Act depends on the ability of
19 private individuals to enforce its provisions in court.

20 (3) In *Seminole Tribe of Florida v. Florida*,
21 517 U.S. 44 (1996), the Supreme Court held that
22 congressional legislation enacted pursuant to the
23 commerce clause of Article I, section 8, of the Con-
24 stitution cannot abrogate the immunity of States
25 under the 11th amendment to the Constitution.

1 Some courts have interpreted Seminole Tribe of
2 Florida v. Florida as a basis for denying relief to
3 persons affected by a State violation of USERRA.
4 In addition, in Alden v. Maine 527 U.S. 706, 712
5 (1999), the Supreme Court held that this immunity
6 also prohibits the Federal Government from sub-
7 jecting “non-consenting states to private suits for
8 damages in state courts.” As a result, although
9 USERRA specifically provides that a person may
10 commence an action for relief against a State for its
11 violation of that Act, persons harmed by State viola-
12 tions of that Act lack important remedies to vindi-
13 cate the rights and benefits that are available to all
14 other persons covered by that Act. Unless a State
15 chooses to waive sovereign immunity, or the Attor-
16 ney General brings an action on their behalf, per-
17 sons affected by State violations of USERRA may
18 have no adequate Federal remedy for such viola-
19 tions.

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

1 tion by Congress to specify such a private right of
2 action ensures that persons affected by State viola-
3 tions of USERRA have a remedy if they are denied
4 their rights and benefits under that Act.

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

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

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

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

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

18 “(j)(1)(A) A State’s receipt or use of Federal finan-
19 cial assistance for any program or activity of a State shall
20 constitute a waiver of sovereign immunity, under the 11th
21 amendment to the Constitution or otherwise, to a suit
22 brought by an employee of that program or activity under
23 this chapter for the rights or benefits authorized the em-
24 ployee by this chapter.

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

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

10 **TITLE III—AIR CARRIER ACCESS** 11 **ACT OF 1986 AMENDMENT**

12 **SEC. 301. FINDINGS.**

13 Congress finds the following:

14 (1) In *Love v. Delta Air Lines*, 310 F. 3d 1347
15 (11th Cir. 2002), the United States Court of Ap-
16 peals for the Eleventh Circuit held that when Con-
17 gress passed the Air Carrier Access Act of 1986,
18 adding a provision now codified at section 41705 of
19 title 49, United States Code (referred to in this title
20 as the “ACAA”), Congress did not intend to create
21 a private right of action with which individuals with
22 disabilities could sue air carriers in Federal court for
23 discrimination on the basis of disability. The court
24 recognized that other courts of appeals have held
25 that the ACAA created a private right of action.

1 Nevertheless, the court, relying on the Supreme
2 Court's decision in *Alexander v. Sandoval*, 532 U.S.
3 275 (2001), concluded that the ACAA did not create
4 a private right of action.

5 (2) The absence of a private right of action
6 leaves enforcement of the ACAA solely in the hands
7 of the Department of Transportation, which is over-
8 burdened and lacks the resources to investigate,
9 prosecute violators for, and remediate all of the vio-
10 lations of the rights of travelers who are individuals
11 with disabilities. Nor can the Department of Trans-
12 portation bring an action that will redress the injury
13 of an individual resulting from such a violation. The
14 Department of Transportation can take action that
15 fines an air carrier or requires the air carrier to
16 obey the law in the future, but the Department is
17 not authorized to issue orders that redress the inju-
18 ries sustained by individual air passengers. Action
19 by Congress is necessary to ensure that individuals
20 with disabilities will have adequate remedies avail-
21 able when air carriers violate the ACAA (including
22 its regulations), and only courts may provide this re-
23 dress to individuals.

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

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

10 (4) Unlike other civil rights statutes, the ACAA
11 does not contain a fee-shifting provision under which
12 a prevailing plaintiff can be awarded attorney’s fees.
13 Action by Congress is necessary to correct this
14 anomaly. The availability of attorney’s fees is essen-
15 tial to ensuring that persons who have been ag-
16 grievied by violations of the ACAA can enforce their
17 rights. The inclusion of a fee-shifting provision in
18 the ACAA will permit individuals to serve as private
19 attorneys general, a necessary role on which enforce-
20 ment of civil rights statutes depends.

21 **SEC. 302. CIVIL ACTION.**

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

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

1 violation implementing such subsection) may bring a civil
2 action in the district court of the United States in the
3 district in which the aggrieved person resides, in the dis-
4 trict containing the air carrier's principal place of busi-
5 ness, or in the district in which the violation took place.
6 Any such action must be commenced within 2 years after
7 the date of the violation.

8 “(2) In any civil action brought by an aggrieved per-
9 son pursuant to paragraph (1), the plaintiff may obtain
10 both equitable and legal relief, including compensatory
11 and punitive damages. The court in such action shall, in
12 addition to such relief awarded to a prevailing plaintiff,
13 award reasonable attorney's fees, reasonable expert fees,
14 and costs of the action to the plaintiff.”.

15 **TITLE IV—AGE DISCRIMINATION**
16 **IN EMPLOYMENT ACT AMEND-**
17 **MENTS**

18 **SEC. 401. SHORT TITLE.**

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

21 **SEC. 402. FINDINGS.**

22 Congress finds the following:

23 (1) Since 1974, the Age Discrimination in Em-
24 ployment Act of 1967 (29 U.S.C. 621 et seq.) (re-
25 ferred to in this section as the “ADEA”) has prohib-

1 ited States from discriminating in employment on
2 the basis of age. In *EEOC v. Wyoming*, 460 U.S.
3 226 (1983), the Supreme Court upheld Congress’s
4 constitutional authority to prohibit States from dis-
5 criminating in employment on the basis of age. The
6 prohibitions of the ADEA remain in effect and con-
7 tinue to apply to the States, as the prohibitions have
8 for more than 25 years.

9 (2) Age discrimination in employment remains
10 a serious problem both nationally and among State
11 agencies, and has invidious effects on its victims, the
12 labor force, and the economy as a whole. For exam-
13 ple, age discrimination in employment—

14 (A) increases the risk of unemployment
15 among older workers, who will as a result be
16 more likely to be dependent on government re-
17 sources;

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

20 (C) adversely effects the morale and pro-
21 ductivity of older workers; and

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

24 (3) Private civil suits by the victims of employ-
25 ment discrimination have been a crucial tool for en-

1 enforcement of the ADEA since the enactment of that
2 Act. In *Kimel v. Florida Board of Regents*, 528 U.S.
3 62 (2000), however, the Supreme Court held that
4 Congress had not abrogated State sovereign immu-
5 nity to suits by individuals under the ADEA. The
6 Federal Government has an important interest in
7 ensuring that Federal financial assistance is not
8 used to subsidize or facilitate violations of the
9 ADEA. Private civil suits are a critical tool for ad-
10 vancing that interest.

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

1 Federal financial assistance will use that assistance
2 to violate that Act, or that the assistance will other-
3 wise subsidize or facilitate violations of that Act.

4 (5) Federal law has long treated nondiscrimina-
5 tion obligations as a core component of programs or
6 activities that, in whole or part, receive Federal fi-
7 nancial assistance. That assistance should not be
8 used, directly or indirectly, to subsidize invidious dis-
9 crimination. Assuring nondiscrimination in employ-
10 ment is a crucial aspect of assuring nondiscrimina-
11 tion in those programs and activities.

12 (6) Discrimination on the basis of age in pro-
13 grams or activities receiving Federal financial assist-
14 ance is, in contexts other than employment, forbid-
15 den by the Age Discrimination Act of 1975 (42
16 U.S.C. 6101 et seq.). Congress determined that it
17 was not necessary for the Age Discrimination Act of
18 1975 to apply to employment discrimination because
19 the ADEA already forbade discrimination in employ-
20 ment by, and authorized suits against, State agen-
21 cies and other entities that receive Federal financial
22 assistance. In section 1003 of the Rehabilitation Act
23 Amendments of 1986 (42 U.S.C. 2000d-7), Con-
24 gress required all State entities subject to the Age
25 Discrimination Act of 1975 to waive any immunity

1 from suit for discrimination claims arising under the
2 Age Discrimination Act of 1975. The earlier limita-
3 tion in the Age Discrimination Act of 1975, origi-
4 nally intended only to avoid duplicative coverage and
5 remedies, has in the wake of the Kimel decision be-
6 come a serious loophole leaving millions of State em-
7 ployees without an important Federal remedy for
8 age discrimination, resulting in the use of Federal fi-
9 nancial assistance to subsidize or facilitate violations
10 of the ADEA.

11 (7) The Supreme Court has upheld Congress's
12 authority to condition receipt of Federal financial
13 assistance on acceptance by the States or other cov-
14 ered entities of conditions regarding or related to the
15 use of that assistance, as in *Cannon v. University of*
16 *Chicago*, 441 U.S. 677 (1979). The Court has fur-
17 ther recognized that Congress may require a State,
18 as a condition of receipt of Federal financial assist-
19 ance, to waive the State's sovereign immunity to
20 suits for a violation of Federal law, as in *College*
21 *Savings Bank v. Florida Prepaid Postsecondary*
22 *Education Expense Board*, 527 U.S. 666 (1999). In
23 the wake of the Kimel decision, in order to assure
24 compliance with, and to provide effective remedies
25 for violations of, the ADEA in State programs or ac-

1 activities receiving or using Federal financial assist-
2 ance, and in order to ensure that Federal financial
3 assistance does not subsidize or facilitate violations
4 of the ADEA, it is necessary to require such a waiv-
5 er as a condition of receipt or use of that assistance.

6 (8) A State's receipt or use of Federal financial
7 assistance in any program or activity of a State will
8 constitute a limited waiver of sovereign immunity
9 under section 7(g) of the ADEA (as added by sec-
10 tion 404). The waiver will not eliminate a State's
11 immunity with respect to programs or activities that
12 do not receive or use Federal financial assistance.
13 The State will waive sovereign immunity only with
14 respect to suits under the ADEA brought by employ-
15 ees within the programs or activities that receive or
16 use that assistance. With regard to those programs
17 and activities that are covered by the waiver, the
18 State employees will be accorded only the same rem-
19 edies that are accorded to other covered employees
20 under the ADEA.

21 (9) The Supreme Court has repeatedly held
22 that State sovereign immunity does not bar suits for
23 prospective injunctive relief brought against State
24 officials, as in *Ex parte Young* (209 U.S. 123
25 (1908)). Clarification of the language of the ADEA

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

7 (10) In *Griggs v. Duke Power Co.*, 401 U.S.
8 424, 431 (1971), the Supreme Court recognized that
9 title VII of the Civil Rights Act of 1964 (42 U.S.C.
10 2000e et seq.) “proscribes not only overt discrimina-
11 tion [in employment] but also [employment] prac-
12 tices that are fair in form, but discriminatory in op-
13 eration. . . .” In doing so, the Court relied on sec-
14 tion 703(a)(2) of title VII of the Civil Rights Act of
15 1964 (42 U.S.C. 2000e–2(a)(2)), which contains
16 language identical to section 4(a)(2) of the ADEA,
17 except that the latter substitutes the word age for
18 the grounds of prohibited discrimination specified by
19 title VII of the Civil Rights Act of 1964: “race,
20 color, religion, sex, or national origin.” The Court
21 has confirmed that this and other related statutory
22 language, identical to both title VII of the Civil
23 Rights Act of 1964 and the ADEA, supports appli-
24 cation of the disparate impact doctrine. Connecticut

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

3 (11) Other indicia of Congress’s intent to per-
4 mit the disparate impact method of proving viola-
5 tions of the ADEA are legion, and include numerous
6 other textual parallels between the ADEA and title
7 VII of the Civil Rights Act of 1964, such as in the
8 two laws’ substantive prohibitions. *Lorillard v. Pons*,
9 434 U.S. 575, 584 (1978) (the ADEA’s substantive
10 prohibitions “were derived in haec verba from Title
11 VII”). Moreover, the ADEA and title VII of the
12 Civil Rights Act of 1964 share “a common purpose:
13 ‘the elimination of discrimination in the work-
14 place.’”. *McKennon v. Nashville Banner Pub. Co.*,
15 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer &*
16 *Co. v. Evans*, 441 U.S. 750, 756 (1979)). Inter-
17 preting title VII of the Civil Rights Act of 1964 in
18 a consistent manner is particularly appropriate when
19 “the two provisions share a common *raison d’etre*.”
20 *Northercross v. Board of Educ. of Memphis City*
21 *Schools*, 412 U.S. 427, 428 (1973).

22 (12) The ADEA’s legislative history confirms
23 Congress’s intent to redress all “arbitrary” age dis-
24 crimination in the workplace, including arbitrary
25 facially neutral policies and practices falling more

1 harshly on older workers. Such policies continue to
2 be based on the kind of “subconscious stereotypes
3 and prejudices” which cannot be “adequately policed
4 through disparate treatment analysis,” and thus, re-
5 quire application of the disparate impact theory of
6 proof. *Watson v. Fort Worth Bank & Trust*, 487
7 U.S. 977, 990 (1988). As the Supreme Court has
8 noted, these prejudices are “the essence of age dis-
9 crimination.” *Hazen Paper Co. v. Biggins*, 507 U.S.
10 604, 610, n.15 (1993).

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

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

1 1999); *EEOC v. Francis W. Parker School*, 41 F.3d
2 1073, 1076–77 (7th Cir. 1994); *Ellis v. United Air-*
3 *lines, Inc.*, 73 F.3d 999, 1006–07 (10th Cir. 1996);
4 *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719,
5 732 (3d Cir. 1995); *Lyon v. Ohio Educ. Ass’n and*
6 *Prof’l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir.
7 1995). Congress did not intend the ADEA to be in-
8 terpreted to provide older workers less protections
9 against discrimination than those protected under
10 title VII of the Civil Rights Act of 1964. As a result,
11 it is necessary to clarify the burden of proof in a dis-
12 parate impact case under the ADEA, and thereby
13 reaffirm that victims of age discrimination in em-
14 ployment discrimination may state a cause of action
15 based on the disparate impact method of proving
16 discrimination in appropriate circumstances.

17 **SEC. 403. PURPOSES.**

18 The purposes of this title are—

19 (1) to provide to State employees in programs
20 or activities that receive or use Federal financial as-
21 sistance the same rights and remedies for practices
22 violating the Age Discrimination in Employment Act
23 of 1967 (29 U.S.C. 621 et seq.) as are available to
24 other employees under that Act, and that were avail-
25 able to State employees prior to the Supreme

1 Court’s decision in *Kimel v. Florida Board of Re-*
2 *gents*, 528 U.S. 62 (2000);

3 (2) to provide that the receipt or use of Federal
4 financial assistance for a program or activity con-
5 stitutes a State waiver of sovereign immunity from
6 suits by employees within that program or activity
7 for violations of the Age Discrimination in Employ-
8 ment Act of 1967;

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

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

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

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

20 “(g)(1)(A) A State’s receipt or use of Federal finan-
21 cial assistance for any program or activity of a State shall
22 constitute a waiver of sovereign immunity, under the 11th
23 amendment to the Constitution or otherwise, to a suit
24 brought by an employee of that program or activity under

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

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

6 “(2) An official of a State may be sued in the official
7 capacity of the official by any employee who has complied
8 with the procedures of subsections (d) and (e), for injunc-
9 tive relief that is authorized under this Act. In such a suit
10 the court may award to the prevailing party those costs
11 authorized by section 722 of the Revised Statutes (42
12 U.S.C. 1988).”.

13 **SEC. 405. DISPARATE IMPACT CLAIMS.**

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

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

19 “(A) an aggrieved party demonstrates that an
20 employer, employment agency, or labor organization
21 has a policy or practice that causes a disparate im-
22 pact on the basis of age and the employer, employ-
23 ment agency, or labor organization fails to dem-
24 onstrate that the challenged policy or practice is

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

3 “(B) the aggrieved party demonstrates (con-
4 sistent with the demonstration standard under title
5 VII of the Civil Rights Act of 1964 (42 U.S.C.
6 2000e et seq.) with respect to an ‘alternative em-
7 ployment practice’) that a less discriminatory alter-
8 native policy or practice exists, and the employer,
9 employment agency, or labor organization refuses to
10 adopt such alternative policy or practice.

11 “(2)(A) With respect to demonstrating that a par-
12 ticular policy or practice causes a disparate impact as de-
13 scribed in paragraph (1)(A), the aggrieved party shall
14 demonstrate that each particular challenged policy or
15 practice causes a disparate impact, except that if the ag-
16 grieved party demonstrates to the court that the elements
17 of an employer, employment agency, or labor organiza-
18 tion’s decisionmaking process are not capable of separa-
19 tion for analysis, the decisionmaking process may be ana-
20 lyzed as one policy or practice.

21 “(B) If the employer, employment agency, or labor
22 organization demonstrates that a specific policy or prac-
23 tice does not cause the disparate impact, the employer,
24 employment agency, or labor organization shall not be re-

1 quired to demonstrate that such policy or practice is nec-
2 essary to the operation of its business.

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

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

10 **SEC. 406. EFFECTIVE DATE.**

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

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

1 **TITLE V—CIVIL RIGHTS**
2 **REMEDIES AND RELIEF**
3 **Subtitle A—Prevailing Party**

4 **SEC. 501. SHORT TITLE.**

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

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

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

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

12 “(a) In determining the meaning of any Act of Con-
13 gress, or of any ruling, regulation, or interpretation of the
14 various administrative bureaus and agencies of the United
15 States, or of any judicial or administrative rule, which pro-
16 vides for the recovery of attorney’s fees, the term ‘pre-
17 vailing party’ shall include, in addition to a party who sub-
18 stantially prevails through a judicial or administrative
19 judgment or order, or an enforceable written agreement,
20 a party whose pursuit of a nonfrivolous claim or defense
21 was a catalyst for a voluntary or unilateral change in posi-
22 tion by the opposing party that provides any significant
23 part of the relief sought.

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

1 but not a plaintiff, to satisfy certain different or additional
 2 criteria to qualify for the recovery of attorney’s fees, sub-
 3 section (a) shall not affect the requirement that such de-
 4 fendant satisfy such criteria.

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

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

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

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

19 **Subtitle B—Arbitration**

20 **SEC. 511. SHORT TITLE.**

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

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

2 Section 1 of title 9, United States Code, is amended
3 by striking “of seamen” and all that follows through
4 “commerce”.

5 **SEC. 513. UNENFORCEABILITY OF ARBITRATION CLAUSES**
6 **IN EMPLOYMENT CONTRACTS.**

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

12 (b) EXCEPTIONS.—

13 (1) WAIVER OR CONSENT AFTER DISPUTE
14 ARISES.—Subsection (a) shall not apply with respect
15 to any dispute if, after such dispute arises, the par-
16 ties involved knowingly and voluntarily consent to
17 submit such dispute to arbitration.

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

22 **SEC. 514. APPLICATION OF AMENDMENTS.**

23 This subtitle and the amendment made by section
24 512 shall apply with respect to all employment contracts
25 in force before, on, or after the date of enactment of this
26 subtitle.

1 **Subtitle C—Expert Witness Fees**

2 **SEC. 521. PURPOSE.**

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

6 **SEC. 522. FINDINGS.**

7 Congress finds the following:

8 (1) This subtitle is made necessary by the deci-
9 sion of the Supreme Court in *West Virginia Univer-*
10 *sity Hospitals Inc. v. Casey*, 499 U.S. 83 (1991). In
11 *Casey*, the Court, per Justice Scalia, ruled that ex-
12 pert fees were not recoverable under section 722 of
13 the Revised Statutes (42 U.S.C. 1988), as amended
14 by the Civil Rights Attorneys' Fees Awards Act of
15 1976 (Public Law 94–559; 90 Stat. 2641), because
16 the Civil Rights Attorneys' Fees Awards Act of 1976
17 expressly authorized an award of an “attorney’s fee”
18 to a prevailing party but said nothing expressly
19 about expert fees.

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

1 witnesses were “essential” and “necessary” to the
2 successful prosecution of the plaintiffs case, and the
3 expert fees were not paltry but amounted to
4 \$104,133. Justice Stevens also pointed out that the
5 majority opinion requiring the plaintiff to “assume
6 the cost of \$104,133 in expert witness fees is at war
7 with the congressional purpose of making the pre-
8 vailing party whole.”. Casey (499 U.S. at 111).

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

1 2795), and the Natural Gas Pipeline Safety Act
2 Amendments of 1976 (Public Law 94–477; 90 Stat.
3 2073). Casey (499 U.S. at 88). Congress had done
4 the same in other years on dozens of occasions.
5 Casey (499 U.S. at 88–90 & n. 4).

6 (4) In the same year that the Supreme Court
7 decided Casey, Congress responded quickly but only
8 through the Civil Rights Act of 1991 (Public Law
9 102–166; 105 Stat. 1071) by amending title VII of
10 the Civil Rights Act of 1964 (42 U.S.C. 2000e et
11 seq.) and section 722 of the Revised Statutes (42
12 U.S.C. 1988) with express authorizations of the re-
13 covery of expert fees in successful employment dis-
14 crimination litigation. It is long past time to correct,
15 in Federal civil rights litigation, Casey’s denial of ex-
16 pert fees.

17 **SEC. 523. EFFECTIVE PROVISIONS.**

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

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

23 (2) by striking subsection (c).

24 (b) FAIR LABOR STANDARDS ACT OF 1938.—Section
25 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.

1 216(b)) is amended by inserting “(including expert fees)”
2 after “attorney’s fee”.

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

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

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

11 (2) in section 813(e)(2), by inserting “(includ-
12 ing expert fees)” after “attorney’s fee”; and

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

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

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

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

1 amended by inserting “(including expert fees)” after “at-
2 torney’s fee”.

3 (h) EQUAL CREDIT OPPORTUNITY ACT.—Section
4 706(d) of the Equal Credit Opportunity Act (15 U.S.C.
5 1691e(d)) is amended by inserting “(including expert
6 fees)” after “attorney’s fee”.

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

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

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

13 (j) FREEDOM OF INFORMATION ACT.—Section
14 552(a)(4)(E) of title 5, United States Code, is amended
15 by inserting “(including expert fees)” after “attorney
16 fees”.

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

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

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

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

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

5 **Subtitle D—Equal Remedies Act of**
 6 **2004**

7 **SEC. 531. SHORT TITLE.**

8 This subtitle may be cited as the “Equal Remedies
 9 Act of 2004”.

10 **SEC. 532. EQUALIZATION OF REMEDIES.**

11 Section 1977A of the Revised Statutes (42 U.S.C.
 12 1981a), as added by section 102 of the Civil Rights Act
 13 of 1991, is amended—

14 (1) in subsection (b)—

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

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

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

21 **TITLE VI—PROHIBITIONS**
 22 **AGAINST SEX DISCRIMINATION**

23 **SEC. 601. SHORT TITLE.**

24 This title may be cited as the “Paycheck Fairness
 25 Act”.

1 **SEC. 602. FINDINGS.**

2 Congress makes the following findings:

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

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

14 (3) The existence of such pay disparities—

15 (A) depresses the wages of working fami-
16 lies who rely on the wages of all members of the
17 family to make ends meet;

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

20 (C) has been spread and perpetuated,
21 through commerce and the channels and instru-
22 mentalities of commerce, among the workers of
23 the several States;

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

1 (E) constitutes an unfair method of com-
2 petition in commerce;

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

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

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

11 (4)(A) Artificial barriers to the elimination of
12 discrimination in the payment of wages on the basis
13 of sex continue to exist decades after the enactment
14 of the Fair Labor Standards Act of 1938 (29 U.S.C.
15 201 et seq.) and the Civil Rights Act of 1964 (42
16 U.S.C. 2000a et seq.).

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

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

21 (ii) substantially reducing the number of
22 working women earning unfairly low wages,
23 thereby reducing the dependence on public as-
24 sistance;

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

3 (iv) remedying the effects of past discrimi-
4 nation on the basis of sex and ensuring that in
5 the future workers are afforded equal protection
6 on the basis of sex; and

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

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

17 (6) Certain employers have already made great
18 strides in eradicating unfair pay disparities in the
19 workplace and their achievements should be recog-
20 nized.

21 **SEC. 603. ENHANCED ENFORCEMENT OF EQUAL PAY RE-**
22 **QUIREMENTS.**

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

1 “(iv) a differential” and all that follows through the period
2 and inserting the following: “(iv) a differential based on
3 a bona fide factor other than sex, such as education, train-
4 ing or experience, except that this clause shall apply only
5 if—

6 “(I) the employer demonstrates that—

7 “(aa) such factor—

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

10 “(BB) furthers a legitimate business
11 purpose, except that this item shall not
12 apply where the employee demonstrates
13 that an alternative employment practice
14 exists that would serve the same business
15 purpose without producing such differen-
16 tial and that the employer has refused to
17 adopt such alternative practice; and

18 “(bb) such factor was actually applied and
19 used reasonably in light of the asserted jus-
20 tification; and

21 “(II) upon the employer succeeding under sub-
22 clause (I), the employee fails to demonstrate that
23 the differential produced by the reliance of the em-
24 ployer on such factor is itself the result of discrimi-
25 nation on the basis of sex by the employer.

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

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

11 (c) ELIMINATION OF ESTABLISHMENT REQUIRE-
12 MENT.—Section 6(d) of the Fair Labor Standards Act of
13 1938 (29 U.S.C. 206(d)) is amended—

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

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

18 (d) NONRETALIATION PROVISION.—Section 15(a)(3)
19 of the Fair Labor Standards Act of 1938 (29 U.S.C.
20 215(a)(3)) is amended—

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

23 (2) by inserting before the semicolon the fol-
24 lowing: “, or has inquired about, discussed, or other-
25 wise disclosed the wages of the employee or another

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

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

8 (1) by inserting after the first sentence the fol-
9 lowing: “Any employer who violates section 6(d)
10 shall additionally be liable for such compensatory or
11 punitive damages as may be appropriate, except that
12 the United States shall not be liable for punitive
13 damages.”;

14 (2) in the sentence beginning “An action to”,
15 by striking “either of the preceding sentences” and
16 inserting “any of the preceding sentences of this
17 subsection”;

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

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

1 as a class action as provided by the Federal Rules
2 of Civil Procedure.”; and

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

4 (A) by striking “in such action” and in-
5 serting “in any action brought to recover the li-
6 ability prescribed in any of the preceding sen-
7 tences of this subsection”; and

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

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

13 (1) in the first sentence—

14 (A) by inserting “or, in the case of a viola-
15 tion of section 6(d), additional compensatory or
16 punitive damages,” before “and the agree-
17 ment”; and

18 (B) by inserting before the period the fol-
19 lowing: “, or such compensatory or punitive
20 damages, as appropriate”;

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

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

4 (4) in the last sentence—

5 (A) by striking “commenced in the case”
6 and inserting “commenced—
7 “(1) in the case”;

8 (B) by striking the period and inserting
9 “; or”; and

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

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

14 **SEC. 604. TRAINING.**

15 The Equal Employment Opportunity Commission
16 and the Office of Federal Contract Compliance Programs,
17 subject to the availability of funds appropriated under sec-
18 tion 609, shall provide training to Commission employees
19 and affected individuals and entities on matters involving
20 discrimination in the payment of wages.

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

22 The Secretary of Labor shall conduct studies and
23 provide information to employers, labor organizations, and
24 the general public concerning the means available to elimi-
25 nate pay disparities between men and women, including—

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

4 (2) publishing and otherwise making available
5 to employers, labor organizations, professional asso-
6 ciations, educational institutions, the media, and the
7 general public the findings resulting from studies
8 and other materials, relating to eliminating the pay
9 disparities;

10 (3) sponsoring and assisting State and commu-
11 nity informational and educational programs;

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

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

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

23 **SEC. 606. TECHNICAL ASSISTANCE AND EMPLOYER REC-**
24 **OGNITION PROGRAM.**

25 (a) GUIDELINES.—

1 (1) IN GENERAL.—The Secretary of Labor shall
2 develop guidelines to enable employers to evaluate
3 job categories based on objective criteria such as
4 educational requirements, skill requirements, inde-
5 pendence, working conditions, and responsibility, in-
6 cluding decisionmaking responsibility and de facto
7 supervisory responsibility.

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

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

21 (b) EMPLOYER RECOGNITION.—

22 (1) PURPOSE.—It is the purpose of this sub-
23 section to emphasize the importance of, encourage
24 the improvement of, and recognize the excellence of
25 employer efforts to pay wages to women that reflect

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

3 (2) IN GENERAL.—To carry out the purpose of
4 this subsection, the Secretary of Labor shall estab-
5 lish a program under which the Secretary shall pro-
6 vide for the recognition of employers who, pursuant
7 to a voluntary job evaluation conducted by the em-
8 ployer, adjust their wage scales (such adjustments
9 shall not include the lowering of wages paid to men)
10 using the guidelines developed under subsection (a)
11 to ensure that women are paid fairly in comparison
12 to men.

13 (3) TECHNICAL ASSISTANCE.—The Secretary of
14 Labor may provide technical assistance to assist an
15 employer in carrying out an evaluation under para-
16 graph (2).

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

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

22 (a) IN GENERAL.—There is established the Secretary
23 of Labor’s National Award for Pay Equity in the Work-
24 place, which shall be evidenced by a medal bearing the
25 inscription “Secretary of Labor’s National Award for Pay

1 Equity in the Workplace”. The medal shall be of such de-
2 sign and materials, and bear such additional inscriptions,
3 as the Secretary of Labor may prescribe.

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

6 (1) submit a written application to the Sec-
7 retary of Labor, at such time, in such manner, and
8 containing such information as the Secretary may
9 require, including at a minimum information that
10 demonstrates that the business has made substantial
11 effort to eliminate pay disparities between men and
12 women, and deserves special recognition as a con-
13 sequence; and

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

17 (c) MAKING AND PRESENTATION OF AWARD.—

18 (1) AWARD.—After receiving recommendations
19 from the Secretary of Labor, the President or the
20 designated representative of the President shall an-
21 nually present the award described in subsection (a)
22 to businesses that meet the qualifications described
23 in subsection (b).

24 (2) PRESENTATION.—The President or the des-
25 ignated representative of the President shall present

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

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

6 (1)(A) a corporation, including a nonprofit cor-
7 poration;

8 (B) a partnership;

9 (C) a professional association;

10 (D) a labor organization; and

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

13 (2) an entity carrying out an education referral
14 program, a training program, such as an apprentice-
15 ship or management training program, or a similar
16 program; and

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

20 **SEC. 608. COLLECTION OF PAY INFORMATION BY THE**
21 **EQUAL EMPLOYMENT OPPORTUNITY COM-**
22 **MISSION.**

23 Section 709 of the Civil Rights Act of 1964 (42
24 U.S.C. 2000e–8) is amended by adding at the end the fol-
25 lowing:

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

3 “(A) complete a survey of the data that is cur-
4 rently available to the Federal Government relating
5 to employee pay information for use in the enforce-
6 ment of Federal laws prohibiting pay discrimination
7 and, in consultation with other relevant Federal
8 agencies, identify additional data collections that will
9 enhance the enforcement of such laws; and

10 “(B) based on the results of the survey and
11 consultations under subparagraph (A), issue regula-
12 tions to provide for the collection of pay information
13 data from employers as described by the sex, race,
14 and national origin of employees.

15 “(2) In implementing paragraph (1), the Commission
16 shall have as its primary consideration the most effective
17 and efficient means for enhancing the enforcement of Fed-
18 eral laws prohibiting pay discrimination. For this purpose,
19 the Commission shall consider factors including the impo-
20 sition of burdens on employers, the frequency of required
21 reports (including which employers should be required to
22 prepare reports), appropriate protections for maintaining
23 data confidentiality, and the most effective format for the
24 data collection reports.”.

1 these provisions are subject to a variety of sanctions,
2 including reinstatement of workers found to be ille-
3 gally discharged because of their union support or
4 activity and provision of backpay to those employees.
5 Such sanctions serve to remedy and deter illegal ac-
6 tions by employers.

7 (3) In *Hoffman Plastic Compounds Inc. v.*
8 *NLRB*, 535 U.S. 137 (2002), the Supreme Court
9 held by a 5 to 4 vote that Federal immigration pol-
10 icy, as articulated in the Immigration Reform and
11 Control Act of 1986, prevented the NLRB from
12 awarding backpay to an undocumented immigrant
13 who was discharged in violation of the NLRA be-
14 cause of his support for union representation at his
15 workplace.

16 (4) The decision in *Hoffman* has an impact on
17 all employees, regardless of immigration or citizen-
18 ship status, who try to improve their working condi-
19 tions. In the wake of *Hoffman Plastics*, employers
20 may be more likely to report to the Department of
21 Homeland Security minority workers, regardless of
22 their immigration or citizenship status, who pursue
23 claims under the NLRA against their employers.
24 Fear that employers may retaliate against employees
25 that exercise their rights under the NLRA has a

1 chilling effect on all employees who exercise their
2 labor rights.

3 (5) The NLRA is not the only Federal employ-
4 ment statute that provides for a backpay award as
5 a remedy for an unlawful discharge. For example,
6 courts routinely award backpay to employees who
7 are found to have been discharged in violation of
8 title VII of the Civil Rights Act of 1964 (42 U.S.C.
9 2000e et seq.) or the Fair Labor Standards Act of
10 1938 (29 U.S.C. 201 et seq.) (in retaliation for com-
11 plaining about a failure to comply with the minimum
12 wage). In the wake of the Hoffman decision, defend-
13 ant employers will now argue that backpay awards
14 to unlawfully discharged undocumented workers are
15 barred under Federal employment statutes and even
16 under State employment statutes.

17 (6) Because the Hoffman decision prevents the
18 imposition of sanctions on employers who discrimi-
19 nate against undocumented immigrant workers, em-
20 ployers are encouraged to employ such workers for
21 low-paying and dangerous jobs because they have no
22 legal redress for violations of the law. This creates
23 an economic incentive for employers to hire and ex-
24 ploit undocumented workers, which in turn tends to

1 undermine the living standards and working condi-
2 tions of all Americans, citizens and noncitizens alike.

3 (7) The Hoffman decision disadvantages many
4 employers as well. Employers who are forced to com-
5 pete with firms that hire and exploit undocumented
6 immigrant workers are saddled with an economic
7 disadvantage in the labor marketplace. The unin-
8 tended creation of an economic inducement for em-
9 ployers to exploit undocumented immigrant workers
10 gives those employers an unfair competitive advan-
11 tage over employers that treat workers lawfully and
12 fairly.

13 (8) The Court’s decision in Hoffman makes
14 clear that “any ‘perceived deficiency in the NLRA’s
15 existing remedial arsenal’ must be ‘addressed by
16 congressional action[.]’” Hoffman Plastic Com-
17 pounds Inc. v. NLRB, 535 U.S. 137, 152 (2002)
18 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883,
19 904 (1984)). In emphasizing the importance of back
20 pay awards, Justice Breyer noted that such awards
21 against employers “help[] to deter unlawful activity
22 that both labor laws and immigration laws seek to
23 prevent”. Hoffman Plastic Compounds Inc. v.
24 NLRB, 535 U.S. 137, 152 (2002). Because back
25 pay awards are designed both to remedy the individ-

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

5 **SEC. 702. CONTINUED APPLICATION OF BACKPAY REM-**
6 **EDIES.**

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

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

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

16 “(B) violation of a provision of Federal law
17 related to the employment verification system
18 described in subsection (b) in establishing or
19 maintaining the employment relationship.”.

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

1 **Subtitle B—Fair Labor Standards**
2 **Act Amendments**

3 **SEC. 711. SHORT TITLE.**

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

6 **SEC. 712. FINDINGS.**

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

10 (1) Since 1974, the FLSA has regulated States
11 with respect to the payment of minimum wage and
12 overtime rates. In *Garcia v. San Antonio Metropolitan*
13 *Transit Authority*, 469 U.S. 528 (1985), the Su-
14 preme Court upheld Congress’s constitutional au-
15 thority to regulate States in the payment of min-
16 imum wages and overtime. The prohibitions of the
17 FLSA remain in effect and continue to apply to the
18 States.

19 (2) Wage and overtime violations in employ-
20 ment remain a serious problem both nationally and
21 among State and other public and private entities
22 receiving Federal financial assistance, and has invid-
23 ious effects on its victims, the labor force, and the
24 general welfare and economy as a whole. For exam-
25 ple, seven State governments have no overtime laws

1 at all. Fourteen State governments have minimum
2 wage and overtime laws; however, they exclude em-
3 ployees covered under the FLSA. As such, public
4 employees, since they are covered under the FLSA
5 are not protected under these State laws. Addition-
6 ally, four States have minimum wage and overtime
7 laws which are inferior to the FLSA. Further, the
8 Department of Labor continues to receive a substan-
9 tial number of wage and overtime charges against
10 State government employers.

11 (3) Private civil suits by the victims of employ-
12 ment law violations have been a crucial tool for en-
13 forcement of the FLSA. In *Alden v. Maine*, 527
14 U.S. 706 (1999), however, the Supreme Court held
15 that Congress lacks the power under the 14th
16 amendment to the Constitution to abrogate State
17 sovereign immunity to suits for legal relief by indi-
18 viduals under the FLSA. The Federal Government
19 has an important interest in ensuring that Federal
20 financial assistance is not used to facilitate viola-
21 tions of the FLSA, and private civil suits for mone-
22 tary relief are a critical tool for advancing that in-
23 terest.

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

1 victims of such violations lack important remedies
2 for vindication of their rights available to all other
3 employees covered by the FLSA. In the absence of
4 the deterrent effect that such remedies provide,
5 there is a great likelihood that State entities car-
6 rying out federally funded programs and activities
7 will use Federal financial assistance to violate the
8 FLSA, or that the Federal financial assistance will
9 otherwise subsidize or facilitate FLSA violations.

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

16 (6) The Court has further recognized that Con-
17 gress may require State entities, as a condition of
18 receipt of Federal financial assistance, to waive their
19 State sovereign immunity to suits for a violation of
20 Federal law, as in *College Savings Bank v. Florida*
21 *Prepaid Postsecondary Education Expense Board*,
22 527 U.S. 666 (1999).

23 (7) In the wake of the *Alden* decision, it is nec-
24 essary, in order to foster greater compliance with,
25 and adequate remedies for violations of, the FLSA,

1 particularly in federally funded programs or activi-
2 ties operated by State entities, to require State enti-
3 ties to consent to a waiver of State sovereign immu-
4 nity as a condition of receipt of such Federal finan-
5 cial assistance.

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

14 **SEC. 713. PURPOSES.**

15 The purposes of this subtitle are—

16 (1) to provide to State employees in programs
17 or activities that receive or use Federal financial as-
18 sistance the same rights and remedies for practices
19 violating the FLSA as are available to other employ-
20 ees under the FLSA, and that were available to
21 State employees prior to the Supreme Court's deci-
22 sion in *Alden v. Maine*, 527 U.S. 706 (1999);

23 (2) to provide that the receipt or use of Federal
24 financial assistance for a program or activity con-
25 stitutes a State waiver of sovereign immunity from

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

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

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

7 Section 16 of the Fair Labor Standards Act of 1938
8 (29 U.S.C. 216) is amended by adding at the end the fol-
9 lowing:

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

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

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