

110TH CONGRESS
2D SESSION

S. 2554

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

IN THE SENATE OF THE UNITED STATES

JANUARY 24, 2008

Mr. KENNEDY (for himself, Mr. LEAHY, Mr. DODD, Mr. BINGAMAN, Mr. KERRY, Mr. HARKIN, Ms. MIKULSKI, Mr. AKAKA, Mrs. BOXER, Mr. FEINGOLD, Mrs. MURRAY, Mr. DURBIN, Mr. SCHUMER, Ms. CANTWELL, Mrs. CLINTON, Mr. LAUTENBERG, Mr. OBAMA, Mr. MENENDEZ, Mr. CARDIN, and Mr. BROWN) 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 “Civil Rights Act of
5 2008”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 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

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TITLE II—EMPLOYER ACCOUNTABILITY FOR DISCRIMINATION
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TITLE IV—IMPROVED ACCOUNTABILITY FOR OTHER VIOLATIONS
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- Sec. 411. Short title.
- Sec. 412. Definition of prevailing party.

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- Sec. 422. Amendment to Federal Arbitration Act.
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Subtitle E—Equal Remedies Act of 2008

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- Sec. 466. Short title.
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- Sec. 468. Purposes.
- Sec. 469. Remedies for State employees.

1 **TITLE I—NONDISCRIMINATION**
 2 **IN FEDERALLY FUNDED PRO-**
 3 **GRAMS AND ACTIVITIES**
 4 **Subtitle A—Private Rights of Ac-**
 5 **tion and the Disparate Impact**
 6 **Standard of Proof**

7 **SEC. 101. FINDINGS.**

8 Congress finds the following:

9 (1) This subtitle is made necessary by a deci-
 10 sion of the Supreme Court in *Alexander v. Sandoval*,
 11 532 U.S. 275 (2001) that significantly impairs stat-
 12 utory protections against discrimination that Con-
 13 gress has erected over a period of almost 4 decades.
 14 The *Sandoval* decision undermines these statutory

1 protections by stripping victims of discrimination
2 (defined under regulations that Congress required
3 Federal departments and agencies to promulgate to
4 implement title VI of the Civil Rights Act of 1964
5 (42 U.S.C. 2000d et seq.)) of the right to bring ac-
6 tion in Federal court to redress the discrimination.

7 (2) The Sandoval decision contradicts settled
8 expectations created by title VI of the Civil Rights
9 Act of 1964, title IX of the Education Amendments
10 of 1972 (also known as the “Patsy Takemoto Mink
11 Equal Opportunity in Education Act”) (20 U.S.C.
12 1681 et seq.), the Age Discrimination Act of 1975
13 (42 U.S.C. 6101 et seq.), and section 504 of the Re-
14 habilitation Act of 1973 (29 U.S.C. 794) (collec-
15 tively referred to in this Act as the “covered civil
16 rights provisions”). The covered civil rights provi-
17 sions were designed to establish and make effective
18 the rights of persons to be free from discrimination
19 on the part of entities that are subject to 1 or more
20 of the covered civil rights provisions, as appropriate
21 (referred to in this Act as “covered entities”). In
22 1964 Congress adopted title VI of the Civil Rights
23 Act of 1964 to ensure that Federal dollars would not
24 be used to subsidize or support programs or activi-
25 ties that discriminated on racial, color, or national

1 origin grounds. In the years that followed, Congress
2 extended these protections by enacting laws barring
3 discrimination in federally funded education activi-
4 ties on the basis of sex in title IX of the Education
5 Amendments of 1972, and discrimination in feder-
6 ally funded activities on the basis of age in the Age
7 Discrimination Act of 1975 and disability in section
8 504 of the Rehabilitation Act of 1973.

9 (3) All of the statutes cited in this section were
10 designed to confer a benefit on persons subject to
11 discrimination. As Congress has consistently recog-
12 nized, effective enforcement of the statutes and pro-
13 tection of the rights guaranteed under the statutes
14 depend heavily on the efforts of private attorneys
15 general. Congress acknowledged that it could not se-
16 cure compliance solely through administrative efforts
17 and enforcement actions initiated by the Attorney
18 General. *Newman v. Piggie Park Enterprises*, 390
19 U.S. 400 (1968) (per curiam).

20 (4) The Supreme Court has made it clear that
21 individuals suffering discrimination under these stat-
22 utes have a private right of action in the Federal
23 courts, and that this is necessary for effective pro-
24 tection of the law, although Congress did not make
25 such a right of action explicit in the statute involved.

1 Cannon v. University of Chicago, 441 U.S. 677
2 (1979).

3 (5) Furthermore, for effective enforcement of
4 the statutes cited in this section, it is necessary that
5 the private right of action include a means to chal-
6 lenge all forms of discrimination that are prohibited
7 by the statutes, including practices that have a dis-
8 parate impact and are not justified as necessary to
9 achieve the legitimate goals of programs or activities
10 supported by Federal financial assistance.

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

21 (7) In contrast, a failure to reinstate or confirm
22 a private right of action would leave vindication of
23 the rights to equality of opportunity solely to Fed-
24 eral agencies. Action by Congress to specify a pri-
25 vate right of action is necessary to ensure that per-

1 sons will have a remedy if they are denied equal ac-
2 cess to education, housing, health, environmental
3 protection, transportation, and many other programs
4 and services by practices of covered entities that re-
5 sult in discrimination.

6 (8) As a result of the Supreme Court's decision
7 in *Sandoval*, courts have dismissed numerous claims
8 brought under the regulations promulgated pursuant
9 to title VI of the Civil Rights Act of 1964 (42
10 U.S.C. 2000d et seq.) that challenged actions with
11 an unjustified discriminatory effect. Although the
12 *Sandoval* Court did not address title IX of the Edu-
13 cation Amendments of 1972 (20 U.S.C. 1681 et
14 seq.), lower courts have similarly dismissed claims
15 under such title.

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

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

13 (10) 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. 102. PROHIBITED DISCRIMINATION.**

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

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

23 and

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

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

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

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

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

1 grieved person demonstrates to the court that the elements
2 of a covered entity’s decisionmaking process are not capa-
3 ble of separation for analysis, the decisionmaking process
4 may be analyzed as 1 policy or practice.

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

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

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

16 (b) EDUCATION AMENDMENTS OF 1972.—Section
17 901 of the Education Amendments of 1972 (20 U.S.C.
18 1681) is amended—

19 (1) by redesignating subsection (c) as sub-
20 section (e); and

21 (2) by inserting after subsection (b) the fol-
22 lowing:

23 “(c)(1)(A) Subject to the conditions described in
24 paragraphs (1) through (9) of subsection (a), discrimina-
25 tion (including exclusion from participation and denial of

1 benefits) based on disparate impact is established under
2 this title only if—

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

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

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

1 practice causes a disparate impact, except that if the ag-
2 grieved person demonstrates to the court that the elements
3 of a covered entity’s decisionmaking process are not capa-
4 ble of separation for analysis, the decisionmaking process
5 may be analyzed as 1 policy or practice.

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

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

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

17 (c) AGE DISCRIMINATION ACT OF 1975.—Section
18 303 of the Age Discrimination Act of 1975 (42 U.S.C.
19 6102) is amended—

20 (1) by striking “Pursuant” and inserting “(a)
21 Pursuant”; and

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

23 “(b)(1)(A) Subject to the conditions described in sub-
24 sections (b) and (c) of section 304, discrimination (includ-
25 ing exclusion from participation and denial of benefits)

1 based on disparate impact is established under this title
2 only if—

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

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

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

1 practice causes a disparate impact, except that if the ag-
 2 grieved person demonstrates to the court that the elements
 3 of a covered entity’s decisionmaking process are not capa-
 4 ble of separation for analysis, the decisionmaking process
 5 may be analyzed as 1 policy or practice.

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

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

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

17 **SEC. 103. RIGHTS OF ACTION.**

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

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

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

24 “(b) Any person aggrieved by the failure of a covered
 25 entity to comply with this title, including any regulation

1 promulgated pursuant to this title, may bring a civil action
2 in any Federal or State court of competent jurisdiction
3 to enforce such person's rights.”.

4 (b) EDUCATION AMENDMENTS OF 1972.—Section
5 902 of the Education Amendments of 1972 (20 U.S.C.
6 1682) is amended—

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

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

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

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

20 **SEC. 104. RIGHT OF RECOVERY.**

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

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

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

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

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

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

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

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

21 (c) AGE DISCRIMINATION ACT OF 1975.—

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

25 “(g)(1) In an action brought by an aggrieved person
26 under this title against a covered entity who has engaged

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

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

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

17 (A) ELIMINATING WAIVER OF RIGHT TO
18 FEES IF NOT REQUESTED IN COMPLAINT.—Sec-
19 tion 305(e)(1) of the Age Discrimination Act of
20 1975 (42 U.S.C. 6104(e)) is amended—

21 (i) by striking “to enjoin a violation”
22 and inserting “to redress a violation”; and
23 (ii) by striking the second sentence
24 and inserting the following: “The Court
25 shall award the costs of suit, including a

1 reasonable attorney’s fee (including expert
2 fees), to the prevailing plaintiff.”.

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

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

1 striking “involved—” and all that follows
2 through the period and inserting “involved such
3 action reasonably takes into account age as a
4 factor necessary to the normal operation or the
5 achievement of any statutory objective of such
6 program or activity.”.

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

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

23 “(2) In an action brought by an aggrieved person
24 under this section against a covered entity who has en-
25 gaged in unlawful discrimination based on disparate im-

1 pact prohibited under this section (including its imple-
2 menting regulations), the aggrieved person may recover
3 equitable relief, attorney’s fees (including expert fees), and
4 costs.”.

5 **SEC. 105. CONSTRUCTION.**

6 (a) RELIEF.—Nothing in this subtitle, including any
7 amendment made by this subtitle, shall be construed to
8 limit the scope of, or the relief available under, section
9 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794),
10 the Americans with Disabilities Act of 1990 (42 U.S.C.
11 12101 et seq.), or any other provision of law.

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

17 **SEC. 106. EFFECTIVE DATE.**

18 (a) IN GENERAL.—This subtitle, and the amend-
19 ments made by this subtitle, take effect on the date of
20 enactment of this Act.

21 (b) APPLICATION.—This subtitle, and the amend-
22 ments made by this subtitle, apply to all actions or pro-
23 ceedings pending on or after the date of enactment of this
24 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.

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

14 (9)(A) Legislative action is necessary and ap-
15 propriate to reverse *Gebser* and its progeny and re-
16 store the availability of a full range of remedies for
17 harassment based on race, color, sex, national origin,
18 age, or disability.

19 (B) Restoring the availability of a full range of
20 remedies for harassment will—

21 (i) ensure that students and other bene-
22 ficiaries of federally funded programs and ac-
23 tivities have protection from harassment on the
24 basis of race, color, sex, national origin, age, or
25 disability that is comparable in strength and ef-

1 fectiveness to that available to employees under
2 title VII of the Civil Rights Act of 1964 (42
3 U.S.C. 2000e et seq.), the Age Discrimination
4 in Employment Act of 1967 (29 U.S.C. 621 et
5 seq.), and title I of the Americans with Disabil-
6 ities Act of 1990 (42 U.S.C. 12111 et seq.);

7 (ii) encourage covered entities to adopt and
8 enforce meaningful policies and procedures to
9 prevent and remedy harassment;

10 (iii) deter incidents of harassment; and

11 (iv) provide appropriate remedies for dis-
12 crimination.

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

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

1 **SEC. 112. RIGHT OF RECOVERY.**

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

5 “(c) CLAIMS BASED ON HARASSMENT.—

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

14 “(2) AVAILABILITY OF DAMAGES.—

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

21 “(B) NO TANGIBLE ACTION BY AGENT OR
22 EMPLOYEE.—If an agent or employee of a cov-
23 ered entity engages in unlawful harassment
24 under a program or activity that results in no
25 tangible action to the aggrieved person, no

1 damages shall be available against the covered
2 entity if it can demonstrate that—

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

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

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

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

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

1 any harassment based on race, color, or na-
2 tional origin.

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

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

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

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

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

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

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

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

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

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

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

1 (b) EDUCATION AMENDMENTS OF 1972.—Section
2 902A of the Civil Rights Act of 1964, as added by section
3 104, is amended by adding at the end the following:

4 “(c) CLAIMS BASED ON HARASSMENT.—

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

13 “(2) AVAILABILITY OF DAMAGES.—

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

20 “(B) NO TANGIBLE ACTION BY AGENT OR
21 EMPLOYEE.—If an agent or employee of a cov-
22 ered entity engages in unlawful harassment
23 under a program or activity that results in no
24 tangible action to the aggrieved person, no

1 damages shall be available against the covered
2 entity if it can demonstrate that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 (c) AGE DISCRIMINATION ACT OF 1975.—Section
23 305(g) of the Age Discrimination Act of 1975, as added
24 by section 104, is amended by adding at the end the fol-
25 lowing:

1 “(3)(A) If 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 age; and

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

22 “(aa) would likely have provided redress
23 and avoided the harm described by the ag-
24 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 age.

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 age includes a demonstration by the covered entity that
15 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 title.”.

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

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

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

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

20 “(I) it exercised reasonable care to prevent and
21 correct promptly any harassment based on disability;
22 and

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

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

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

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

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

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

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

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

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

11 “(C) As used in this paragraph:

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

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

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

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

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

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

5 **SEC. 113. CONSTRUCTION.**

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

10 **SEC. 114. EFFECTIVE DATE.**

11 (a) IN GENERAL.—This subtitle, and the amend-
12 ments made by this subtitle, take effect on the date of
13 enactment of this Act.

14 (b) APPLICATION.—This subtitle, and the amend-
15 ments made by this subtitle, apply to all actions or pro-
16 ceedings pending on or after the date of enactment of this
17 Act.

1 **TITLE II—EMPLOYER ACCOUNT-**
2 **ABILITY FOR DISCRIMINA-**
3 **TION BASED ON MILITARY**
4 **SERVICE**

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

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

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

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

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

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

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

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

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

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

23 “(2) In the case of an action against a State (as an
24 employer) by a person, the action may be brought in a

1 district court of the United States or State court of com-
2 petent jurisdiction.”;

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

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

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

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

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

1 **TITLE III—EMPLOYER ACCOUNT-**
2 **ABILITY FOR AGE DISCRIMI-**
3 **NATION**

4 **SEC. 301. SHORT TITLE.**

5 This title may be cited as the “Older Workers’ Rights
6 Restoration Act of 2008”.

7 **SEC. 302. FINDINGS.**

8 Congress finds the following:

9 (1)(A) Age discrimination in employment re-
10 mains a serious problem both nationally and among
11 State agencies, and has invidious effects on its vic-
12 tims, the labor force, and the economy as a whole.

13 (B) For example, age discrimination in employ-
14 ment—

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

19 (ii) prevents the best use of available labor
20 resources;

21 (iii) adversely affects the morale and pro-
22 ductivity of older workers; and

23 (iv) perpetuates unwarranted stereotypes
24 about the abilities of older workers.

1 (C) As a result, the Federal Government has an
2 important interest in ensuring that Federal financial
3 assistance is not used to subsidize or facilitate viola-
4 tions of the Age Discrimination in Employment Act
5 of 1967 (29 U.S.C. 621 et seq.) (referred to in this
6 section as the “ADEA”).

7 (2) Private civil suits by the victims of employ-
8 ment discrimination have been a crucial tool for en-
9 forcement of the ADEA since the enactment of that
10 Act. In *Kimel v. Florida Board of Regents*, 528 U.S.
11 62 (2000), however, the Supreme Court held that
12 Congress had not abrogated State sovereign immu-
13 nity to suits by individuals under the ADEA.

14 (3) As a result of the *Kimel* decision, although
15 age-based discrimination by State employers remains
16 unlawful, the victims of such discrimination lack im-
17 portant remedies for vindication of their rights that
18 are available to all other employees covered under
19 that Act, including employees in the private sector,
20 local government, and the Federal Government. In
21 the absence of the deterrent effect that such rem-
22 edies provide, there is a greater likelihood that enti-
23 ties carrying out programs and activities receiving
24 Federal financial assistance will use that assistance

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

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

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

1 under section 7(g) of the ADEA (as added by sec-
2 tion 304). The waiver will not eliminate a State's
3 immunity with respect to programs or activities that
4 do not receive or use Federal financial assistance.
5 The State will waive sovereign immunity only with
6 respect to suits under the ADEA brought by employ-
7 ees within the programs or activities that receive or
8 use that assistance. With regard to those programs
9 and activities that are covered by the waiver, the
10 State employees will be accorded only the same rem-
11 edies that are accorded to other covered employees
12 under the ADEA.

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

24 (7) In 1991, Congress reaffirmed that title VII
25 of the Civil Rights Act of 1964 permits victims of

1 employment bias to state a cause of action for dis-
2 parate impact discrimination when it added a provi-
3 sion to title VII of the Civil Rights Act of 1964 to
4 clarify the burden of proof in disparate impact cases
5 in section 703(k) of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e-2(k)).

7 (8) In *Smith v. City of Jackson*, 544 U.S. 228
8 (2005), the Supreme Court held that the ADEA per-
9 mits older workers to state a cause of action for dis-
10 parate impact discrimination. The Smith Court in-
11 correctly held, however, that the scope of disparate
12 impact claims is narrower under the ADEA than
13 under title VII. Congress did not intend the ADEA
14 to be interpreted to provide older workers less pro-
15 tections against discrimination than those protected
16 under title VII of the Civil Rights Act of 1964. As
17 a result, it is necessary to clarify the burden of proof
18 in a disparate impact case under the ADEA.

19 **SEC. 303. PURPOSES.**

20 The purposes of this title are—

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

1 other employees under that Act, and that were avail-
2 able to State employees prior to the Supreme
3 Court’s decision in *Kimel v. Florida Board of Re-*
4 *gents*, 528 U.S. 62 (2000);

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

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

15 (4) to clarify the disparate impact standard of
16 proof in claims under the Age Discrimination in
17 Employment Act of 1967.

18 **SEC. 304. REMEDIES FOR STATE EMPLOYEES.**

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

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

1 brought by an employee of that program or activity under
2 this Act for equitable, legal, or other relief authorized
3 under this Act.

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

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

14 **SEC. 305. DISPARATE IMPACT CLAIMS.**

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

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

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

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

10 **SEC. 306. 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 IV—IMPROVED ACCOUNT-**
2 **ABILITY FOR OTHER VIOLA-**
3 **TIONS OF CIVIL RIGHTS AND**
4 **WORKERS’ RIGHTS**

5 **Subtitle A—Air Carrier Access Act**
6 **of 1986 Amendment**

7 **SEC. 401. FINDINGS.**

8 Congress finds the following:

9 (1) Relying on the Supreme Courts’s decision in
10 Alexander v. Sandoval, 532 U.S. 275 (2001), some
11 courts have erroneously held that when Congress
12 passed the Air Carrier Access Act of 1986 (Public
13 Law 99–435; 100 Stat. 1080), adding a provision
14 now codified at section 41705 of title 49, United
15 States Code (referred to in this subtitle as the
16 “ACAA”), Congress did not intend to create a pri-
17 vate right of action with which individuals with dis-
18 abilities could sue air carriers in Federal court for
19 discrimination on the basis of disability. Love v.
20 Delta Air Lines, 310 F. 3d 1347 (11th Cir. 2002)

21 (2) The absence of a private right of action
22 leaves enforcement of the ACAA solely in the hands
23 of the Department of Transportation, which is over-
24 burdened and lacks the resources to investigate,
25 prosecute violators for, and remediate all of the vio-

1 lations of the rights of travelers who are individuals
2 with disabilities. Nor can the Department of Trans-
3 portation bring an action that will redress the injury
4 of an individual resulting from such a violation. The
5 Department of Transportation can take action that
6 fines an air carrier or requires the air carrier to
7 obey the law in the future, but the Department is
8 not authorized to issue orders that redress the inju-
9 ries sustained by individual air passengers. Action
10 by Congress is necessary to ensure that individuals
11 with disabilities will have adequate remedies avail-
12 able when air carriers violate the ACAA (including
13 its regulations), and only courts may provide this re-
14 dress to individuals.

15 (3) When an air carrier violates the ACAA and
16 discriminates against an individual with a disability,
17 frequently the only way to compensate that indi-
18 vidual for the harm the individual has suffered is
19 through an award of money damages.

20 (4) Unlike other civil rights statutes, the ACAA
21 does not contain a fee-shifting provision under which
22 a prevailing plaintiff can be awarded attorney's fees.
23 Action by Congress is necessary to correct this
24 anomaly. The availability of attorney's fees is essen-
25 tial to ensuring that persons who have been ag-

1 grieved by violations of the ACAA can enforce their
2 rights. The inclusion of a fee-shifting provision in
3 the ACAA will permit individuals to serve as private
4 attorneys general, a necessary role on which enforce-
5 ment of civil rights statutes depends.

6 **SEC. 402. CIVIL ACTION.**

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

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

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

1 **Subtitle B—Prevailing Party**

2 **SEC. 411. SHORT TITLE.**

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

5 **SEC. 412. DEFINITION OF PREVAILING PARTY.**

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

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

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

22 “(b)(1) If an Act, ruling, regulation, interpretation,
23 or rule described in subsection (a) requires a defendant,
24 but not a plaintiff, to satisfy certain different or additional
25 criteria to qualify for the recovery of attorney’s fees, sub-

1 section (a) shall not affect the requirement that such de-
 2 fendant satisfy such criteria.

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

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

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

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

17 **Subtitle C—Arbitration**

18 **SEC. 421. SHORT TITLE.**

19 This subtitle may be cited as the “Preservation of
 20 Civil Rights Protections Act of 2008”.

21 **SEC. 422. AMENDMENT TO FEDERAL ARBITRATION ACT.**

22 Section 1 of title 9, United States Code, is amended
 23 by striking “of seamen” and all that follows through
 24 “commerce”.

1 **SEC. 423. UNENFORCEABILITY OF ARBITRATION CLAUSES**
2 **IN EMPLOYMENT CONTRACTS.**

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

8 (b) EXCEPTIONS.—

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

14 (2) COLLECTIVE BARGAINING AGREEMENTS.—
15 Subsection (a) shall not preclude the enforcement of
16 any of the rights or terms of a valid collective bar-
17 gaining agreement.

18 **SEC. 424. APPLICATION OF AMENDMENTS.**

19 This subtitle and the amendment made by section
20 422 shall apply with respect to all employment contracts
21 in force before, on, or after the date of enactment of this
22 subtitle.

1 **Subtitle D—Expert Witness Fees**

2 **SEC. 431. 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. 432. 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 Attorney’s Fees Awards Act of
15 1976 (Public Law 94–559; 90 Stat. 2641), because
16 the amendment made by the Civil Rights Attorney’s
17 Fees Awards Act of 1976 expressly authorized an
18 award of an “attorney’s fee” to a prevailing party
19 but said nothing expressly 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.

24 (3) In the Civil Rights Act of 1991 (Public Law
25 102–166; 105 Stat. 1071), Congress amended title

1 VII of the Civil Rights Act of 1964 (42 U.S.C.
2 2000e et seq.) and section 722 of the Revised Stat-
3 utes (42 U.S.C. 1988) to include express authoriza-
4 tions of the recovery of expert fees in successful em-
5 ployment discrimination litigation. It is long past
6 time to ensure that expert fees are available in Fed-
7 eral litigation under other civil rights statutes.

8 **SEC. 433. EFFECTIVE PROVISIONS.**

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

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

14 (2) by striking subsection (c).

15 (b) FAIR LABOR STANDARDS ACT OF 1938.—Section
16 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.
17 216(b)) is amended by inserting “(including expert fees)”
18 after “attorney’s fee”.

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

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

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

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

3 (d) IDEA.—Section 615(i)(3)(B) of the Individuals
4 with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B))
5 is amended by inserting “(including expert fees)” after
6 “reasonable attorney’s fees”.

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

11 (f) REHABILITATION ACT OF 1973.—Section 505(b)
12 of the Rehabilitation Act of 1973 (29 U.S.C. 794a(b)) is
13 amended by inserting “(including expert fees)” after “at-
14 torney’s fee”.

15 (g) EQUAL CREDIT OPPORTUNITY ACT.—Section
16 706(d) of the Equal Credit Opportunity Act (15 U.S.C.
17 1691e(d)) is amended by inserting “(including expert
18 fees)” after “attorney’s fee”.

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

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

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

1 (i) FREEDOM OF INFORMATION ACT.—Section
2 552(a)(4)(E) of title 5, United States Code, is amended
3 by inserting “(including expert fees)” after “attorney
4 fees”.

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

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

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

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

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

17 **Subtitle E—Equal Remedies Act of**
18 **2008**

19 **SEC. 441. SHORT TITLE.**

20 This subtitle may be cited as the “Equal Remedies
21 Act of 2008”.

22 **SEC. 442. EQUALIZATION OF REMEDIES.**

23 Section 1977A of the Revised Statutes (42 U.S.C.
24 1981a) is amended—

25 (1) in subsection (b)—

- 1 (A) by striking paragraph (3); and
2 (B) by redesignating paragraph (4) as
3 paragraph (3); and
4 (2) in subsection (c), by striking “section—”
5 and all that follows through the period, and insert-
6 ing “section, any party may demand a jury trial.”.

7 **Subtitle F—Prohibitions Against**
8 **Sex Discrimination**

9 **SEC. 451. FINDINGS.**

10 Congress makes the following findings:

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

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

22 (3) The existence of such pay disparities—

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

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

3 (C) burdens commerce and the free flow of
4 goods in commerce; and

5 (D) in many instances, may deprive work-
6 ers of equal protection on the basis of sex in
7 violation of the 5th and 14th amendments.

8 (4) Artificial barriers to the elimination of dis-
9 crimination in the payment of wages on the basis of
10 sex continue to exist decades after the enactment of
11 the Fair Labor Standards Act of 1938 (29 U.S.C.
12 201 et seq.) and the Civil Rights Act of 1964 (42
13 U.S.C. 2000a et seq.).

14 **SEC. 452. ENHANCED ENFORCEMENT OF EQUAL PAY RE-**
15 **QUIREMENTS.**

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

24 “(I) the employer demonstrates that—

25 “(aa) such factor—

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

3 “(BB) furthers a legitimate business
4 purpose, except that this item shall not
5 apply where the employee demonstrates
6 that an alternative employment practice
7 exists that would serve the same business
8 purpose without producing such differen-
9 tial and that the employer has refused to
10 adopt such alternative practice; and

11 “(bb) such factor was actually applied and
12 used reasonably in light of the asserted jus-
13 tification; and

14 “(II) upon the employer succeeding under sub-
15 clause (I), the employee fails to demonstrate that
16 the differential produced by the reliance of the em-
17 ployer on such factor is itself the result of discrimi-
18 nation on the basis of sex by the employer.

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

22 (b) APPLICATION OF PROVISIONS.—Section 6(d)(1)
23 of the Fair Labor Standards Act of 1938 (29 U.S.C.
24 206(d)(1)) is amended by adding at the end the following:
25 “The provisions of this subsection shall apply to applicants

1 for employment if such applicants, upon employment by
2 the employer, would be subject to any provisions of this
3 section.”.

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

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

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

11 (d) NONRETALIATION PROVISION.—Section 15(a)(3)
12 of the Fair Labor Standards Act of 1938 (29 U.S.C.
13 215(a)(3)) is amended—

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

16 (2) by inserting before the semicolon the fol-
17 lowing: “, or has inquired about, discussed, or other-
18 wise disclosed the wages of the employee or another
19 employee, or because the employee (or applicant) has
20 made a charge, testified, assisted, or participated in
21 any manner in an investigation, proceeding, hearing,
22 or action under section 6(d)”.

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

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

7 (2) in the sentence beginning “An action to”,
8 by striking “either of the preceding sentences” and
9 inserting “any of the preceding sentences of this
10 subsection”;

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

15 (4) by inserting after the sentence referred to
16 in paragraph (3), the following: “Notwithstanding
17 any other provision of Federal law, any action
18 brought to enforce section 6(d) may be maintained
19 as a class action as provided by the Federal Rules
20 of Civil Procedure.”; and

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

22 (A) by striking “in such action” and in-
23 serting “in any action brought to recover the li-
24 ability prescribed in any of the preceding sen-
25 tences of this subsection”; and

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

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

6 (1) in the first sentence—

7 (A) by inserting “or, in the case of a viola-
8 tion of section 6(d), additional compensatory or
9 punitive damages,” before “and the agree-
10 ment”; and

11 (B) by inserting before the period the fol-
12 lowing: “, or such compensatory or punitive
13 damages, as appropriate”;

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

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

21 (4) in the last sentence—

22 (A) by striking “commenced in the case”
23 and inserting “commenced—
24 “(1) in the case”;

1 (B) by striking the period and inserting “;
2 or”; and

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

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

7 **Subtitle G—Protections for**
8 **Workers**

9 **CHAPTER 1—PROTECTION FOR**
10 **UNDOCUMENTED WORKERS**

11 **SEC. 461. FINDINGS.**

12 Congress finds the following:

13 (1) The National Labor Relations Act (29
14 U.S.C. 151 et seq.) (in this chapter referred to as
15 the “NLRA”), enacted in 1935, guarantees the right
16 of employees to organize and to bargain collectively
17 with their employers. The NLRA implements the na-
18 tional labor policy of assuring free choice and en-
19 couraging collective bargaining as a means of main-
20 taining industrial peace. The National Labor Rela-
21 tions Board (in this chapter referred to as the
22 “NLRB”) was created by Congress to enforce the
23 provisions of the NLRA.

24 (2) Under section 8 of the NLRA, employers
25 are prohibited from discriminating against employ-

1 ees “in regard to hire or tenure of employment or
2 any term or condition of employment to encourage
3 or discourage membership in any labor organiza-
4 tion”. (29 U.S.C. 158(a)(3)). Employers who violate
5 these provisions are subject to a variety of sanctions,
6 including reinstatement of workers found to be ille-
7 gally discharged because of their union support or
8 activity and provision of backpay to those employees.
9 Such sanctions serve to remedy and deter illegal ac-
10 tions by employers.

11 (3) In *Hoffman Plastic Compounds Inc. v.*
12 *NLRB*, 535 U.S. 137 (2002), the Supreme Court
13 held by a 5 to 4 vote that Federal immigration pol-
14 icy, as articulated in amendments made by the Im-
15 migration Reform and Control Act of 1986 (Public
16 Law 99–603; 100 Stat. 3359), prevented the NLRB
17 from awarding backpay to an undocumented immi-
18 grant who was discharged in violation of the NLRA
19 because of his support for union representation at
20 his workplace.

21 (4) The decision in *Hoffman* has an impact on
22 all employees, regardless of immigration or citizen-
23 ship status, who try to improve their working condi-
24 tions. In the wake of *Hoffman Plastics*, employers
25 may be more likely to report to the Department of

1 Homeland Security minority workers, regardless of
2 their immigration or citizenship status, who pursue
3 claims under the NLRA against their employers.
4 Fear that employers may retaliate against employees
5 that exercise their rights under the NLRA has a
6 chilling effect on all employees who exercise their
7 labor rights.

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

22 (6) Because the Hoffman decision prevents the
23 imposition of sanctions on employers who discrimi-
24 nate against undocumented immigrant workers, em-
25 ployers are encouraged to employ such workers for

1 low-paying and dangerous jobs because they have no
2 legal redress for violations of the law. This creates
3 an economic incentive for employers to hire and ex-
4 ploit undocumented workers, which in turn tends to
5 undermine the living standards and working condi-
6 tions of all Americans, citizens and noncitizens alike.

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

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

1 that both labor laws and immigration laws seek to
 2 prevent”. *Hoffman Plastic Compounds Inc. v.*
 3 *NLRB*, 535 U.S. 137, 152 (2002). Because back
 4 pay awards are designed both to remedy the individ-
 5 ual’s private right to be free from discrimination as
 6 well as to enforce the important public policy against
 7 discriminatory employment practices, Congress must
 8 take the following corrective action.

9 **SEC. 462. CONTINUED APPLICATION OF BACKPAY REM-**
 10 **EDIES.**

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

14 “(4) **BACKPAY REMEDIES.**—Backpay or other
 15 monetary relief for unlawful employment practices
 16 shall not be denied to a present or former employee
 17 as a result of the employer’s or the employee’s—

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

20 “(B) violation of a provision of Federal law
 21 related to the employment verification system
 22 described in subsection (b) in establishing or
 23 maintaining the employment relationship.”.

24 (b) **EFFECTIVE DATE.**—The amendment made by
 25 subsection (a) shall apply to any failure to comply or any

1 violation that occurs prior to, on, or after the date of en-
2 actment of this subtitle.

3 **CHAPTER 2—FAIR LABOR STANDARDS**
4 **ACT AMENDMENTS**

5 **SEC. 466. SHORT TITLE.**

6 This chapter may be cited as the “Workers’ Minimum
7 Wage and Overtime Rights Restoration Act of 2008”.

8 **SEC. 467. FINDINGS.**

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

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

21 (2) Wage and overtime violations in employ-
22 ment remain a serious problem both nationally and
23 among State and other public and private entities
24 receiving Federal financial assistance, and has invid-
25 ious effects on its victims, the labor force, and the

1 general welfare and economy as a whole. For exam-
2 ple, 7 State governments have no overtime laws at
3 all. Fourteen State governments have minimum
4 wage and overtime laws; however, they exclude em-
5 ployees covered under the FLSA. As such, public
6 employees, since they are covered under the FLSA
7 are not protected under these State laws. Addition-
8 ally, 4 States have minimum wage and overtime laws
9 which are inferior to the FLSA. Further, the De-
10 partment of Labor continues to receive a substantial
11 number of wage and overtime charges against State
12 government employers.

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

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

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

18 (6) The Court has further recognized that Con-
19 gress may require State entities, as a condition of
20 receipt of Federal financial assistance, to waive their
21 State sovereign immunity to suits for a violation of
22 Federal law, as in *College Savings Bank v. Florida*
23 *Prepaid Postsecondary Education Expense Board*,
24 527 U.S. 666 (1999).

1 (7) In the wake of the Alden decision, it is nec-
2 essary, in order to foster greater compliance with,
3 and adequate remedies for violations of, the FLSA,
4 particularly in federally funded programs or activi-
5 ties operated by State entities, to require State enti-
6 ties to consent to a waiver of State sovereign immu-
7 nity as a condition of receipt of such Federal finan-
8 cial assistance.

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

17 **SEC. 468. PURPOSES.**

18 The purposes of this chapter 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 FLSA as are available to other employ-
23 ees under the FLSA, and that were available to
24 State employees prior to the Supreme Court's deci-
25 sion in *Alden v. Maine*, 527 U.S. 706 (1999);

1 (2) to provide that the receipt or use of Federal
2 financial assistance for a program or activity con-
3 stitutes a State waiver of sovereign immunity from
4 suits by employees within that program or activity
5 for violations of the FLSA; and

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

9 **SEC. 469. REMEDIES FOR STATE EMPLOYEES.**

10 Section 16 of the Fair Labor Standards Act of 1938
11 (29 U.S.C. 216) is amended by adding at the end the fol-
12 lowing:

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

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

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