

108TH CONGRESS  
2D SESSION

**S.** \_\_\_\_\_

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IN THE SENATE OF THE UNITED STATES

\_\_\_\_\_ introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

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

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

3 **SECTION 1. SHORT TITLE.**

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

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

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

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

TITLE I—NONDISCRIMINATION IN FEDERALLY FUNDED PROGRAMS AND ACTIVITIES

2

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

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

Subtitle B—Harassment

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

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

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

TITLE III—AIR CARRIER ACCESS ACT OF 1986 AMENDMENT

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

TITLE IV—AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS

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

TITLE V—CIVIL RIGHTS REMEDIES AND RELIEF

Subtitle A—Prevailing Party

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

Subtitle B—Arbitration

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

Subtitle C—Expert Witness Fees

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

Subtitle D—Equal Remedies Act of 2004

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

TITLE VI—PROHIBITIONS AGAINST SEX DISCRIMINATION

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

TITLE VII—PROTECTIONS FOR WORKERS

Subtitle A—Protection for Undocumented Workers

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

Subtitle B—Fair Labor Standards Act Amendments

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

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

7 **SEC. 101. FINDINGS.**

8 Congress finds the following:

- 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-

1       gress has erected over a period of almost 4 decades.  
2       The Sandoval decision undermines these statutory  
3       protections by stripping victims of discrimination  
4       (defined under regulations that Congress required  
5       Federal departments and agencies to promulgate to  
6       implement title VI of the Civil Rights Act of 1964  
7       (42 U.S.C. 2000d et seq.)) of the right to bring ac-  
8       tion in Federal court to redress the discrimination  
9       and by casting doubt on the validity of the regula-  
10      tions themselves.

11           (2) The Sandoval decision attacks settled expecta-  
12      tions created by numerous Acts of Congress de-  
13      signed to establish and make effective the rights of  
14      persons to be free from discrimination on the part  
15      of recipients of Federal financial assistance. In 1964  
16      Congress adopted title VI of the Civil Rights Act of  
17      1964 to ensure that Federal dollars would not be  
18      used to subsidize or support programs or activities  
19      that discriminated on racial, color, or national origin  
20      grounds. In the years that followed, Congress ex-  
21      tended these protections by enacting laws barring  
22      discrimination in federally funded activities on the  
23      basis of sex in title IX of the Education Amend-  
24      ments of 1972 (also known as the “Patsy Takemoto  
25      Mink Equal Opportunity in Education Act”) (20

1 U.S.C. 1681 et seq.), disability in section 504 of the  
2 Rehabilitation Act of 1973 (29 U.S.C. 794), and age  
3 in the Age Discrimination Act of 1975 (42 U.S.C.  
4 6101 et seq.).

5 (3) From the outset, Congress and the execu-  
6 tive branch made clear that the regulatory process  
7 would be used to ensure broad protections for bene-  
8 ficiaries of the law. The first regulations promul-  
9 gated by the Department of Justice under title VI  
10 of the Civil Rights Act of 1964 (42 U.S.C. 2000d  
11 et seq.) forbade recipients to “utilize criteria or  
12 methods of administration which have the effect of  
13 subjecting individuals to discrimination . . .” (section  
14 80.3 of title 45, Code of Federal Regulations) and  
15 prohibited retaliation against persons participating  
16 in litigation or administrative resolution of charges  
17 of discrimination brought under the Act. These reg-  
18 ulations were drafted by the same executive branch  
19 officials who played a central role in drafting title VI  
20 of the Civil Rights Act of 1964. The language used  
21 is, in relevant respects, virtually indistinguishable  
22 from regulations under the several Acts in effect  
23 today. For example, section 304 of the Age Dis-  
24 crimination Act of 1975 (42 U.S.C. 6103) required  
25 the Secretary of the Department of Health, Edu-

1 cation, and Welfare (HEW) (now Health and  
2 Human Services (HHS)) to promulgate “general  
3 regulations” to effectuate the purposes of the Act.  
4 These “government-wide regulations,” governing age  
5 discrimination in programs and activities receiving  
6 Federal financial assistance condemn “any actions  
7 which have [a discriminatory] effect, on the basis of  
8 age . . .” (section 90.12 of title 45, Code of Federal  
9 Regulations).

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

1       512, 533–34 (1982). Moreover, the Supreme Court  
2       explicitly recognized congressional approval of the  
3       regulations promulgated to implement section 504 of  
4       the Rehabilitation Act of 1973 (29 U.S.C. 794) in  
5       Consolidated Rail Corp. v. Darrone, 465 U.S. 624,  
6       634 (1984), stating that “[t]he regulations particu-  
7       larly merit deference in the present case: the respon-  
8       sible Congressional committees participated in their  
9       formation and both these committees and Congress  
10      itself endorsed the regulations in their final form.”.

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

20           (6) 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

1       such a right of action explicit in the statute. Cannon  
2       v. University of Chicago, 441 U.S. 677 (1979).

3               (7)(A) Notwithstanding the decision of the Su-  
4       preme Court in Cort v. Ash, 422 U.S. 66 (1975) to  
5       abandon prior precedent and require explicit statu-  
6       tory statements of a right of action, Congress and  
7       the Courts both before and after Cort have recog-  
8       nized an implied right of action under the above  
9       statutes. For example, Congress has consistently  
10      provided the means for enforcing the statutes. In  
11      1972, Congress established a right to attorney's fees  
12      in private actions brought under title VI of the Civil  
13      Rights Act of 1964 (42 U.S.C. 2000d et seq.) and  
14      title IX of the Education Amendments of 1972 (20  
15      U.S.C. 1681 et seq.) that continued with enactment  
16      of the Civil Rights Attorneys' Fees Awards Act of  
17      1976 (Public Law 94-559; 90 Stat. 2641). In 1973,  
18      Congress provided a right to attorney's fees for pre-  
19      vailing parties under section 504 of the Rehabilita-  
20      tion Act of 1973 (29 U.S.C. 794) without expressly  
21      stating that there was a right of action. In 1978  
22      Congress amended the Age Discrimination Act of  
23      1975 (42 U.S.C. 6101 et seq.) to include a right to  
24      attorney's fees. Because the Age Discrimination Act  
25      of 1975 was enacted while the Cort decision was

1 pending, Congress also enacted in 1978 a limited  
2 private right of action to enforce the Age Discrimi-  
3 nation Act of 1975.

4 (B) The Senate Report that accompanied the  
5 Civil Rights Attorneys' Fees Awards Act of 1976  
6 (Public Law 94-559; 90 Stat. 2641) stated that  
7 "All of these civil rights laws . . . depend heavily  
8 upon private enforcement, and fee awards have  
9 proved an essential remedy if private citizens are to  
10 have a meaningful opportunity to vindicate the im-  
11 portant congressional policies which these laws con-  
12 tain." S. Rep. No. 94-1011 (1976).

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

1       pursuant to title IX of the Education Amendments  
2       of 1972 (20 U.S.C. 1681 et seq.) were also congress-  
3       sionally authorized and specifically directed by Con-  
4       gress to effectuate the provisions of the statute.  
5       Title IX of the Education Amendments of 1972  
6       stressed the importance of the regulations by requir-  
7       ing them to be “approved by the President”.

8               (9) Regulations that prohibit practices that  
9       have the effect of discrimination are consistent with  
10       prohibitions of disparate treatment that require a  
11       showing of intent, as the Supreme Court has ac-  
12       knowledged in the following decisions:

13               (A) A disparate impact standard allows a  
14       court to reach discrimination that could actu-  
15       ally exist under the guise of compliance with  
16       the law. *Griggs v. Duke Power Co.*, 401 U.S.  
17       424 (1971).

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

23               (C) An invidious purpose may often be in-  
24       ferred from the totality of the relevant facts, in-  
25       cluding, where true, that the practice bears

1 more heavily on one race than another. Wash-  
2 ington v. Davis, 426 U.S. 229 (1976).

3 (D) The disparate impact method of proof  
4 is critical to ferreting out stereotypes under-  
5 lying intentional discrimination. Watson v. Fort  
6 Worth Bank & Trust, 487 U.S. 977 (1988).

7 (10) The interpretation of title VI of the Civil  
8 Rights Act of 1964 (42 U.S.C. 2000d et seq.), title  
9 IX of the Education Amendments of 1972 (20  
10 U.S.C. 1681 et seq.), and other statutes barring dis-  
11 crimination by recipients of Federal financial assist-  
12 ance as prohibiting practices that have disparate im-  
13 pact and that are not justified as necessary to  
14 achieve the goals of the programs or activities sup-  
15 ported by the Federal funds is powerfully reinforced  
16 by the use of such a standard in enforcing title VII  
17 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et  
18 seq.). When the Supreme Court wavered on the ap-  
19 plication of a disparate impact standard under title  
20 VII, Congress specifically reinstated it as law in the  
21 Civil Rights Act of 1991 (Public Law 102–166; 105  
22 Stat. 1071).

23 (11) By reinstating a private right of action  
24 under title VI of the Civil Rights Act of 1964 (42  
25 U.S.C. 2000d et seq.) and confirming that right for

1 other civil rights statutes, Congress is not acting in  
2 a manner that would expose recipients of Federal  
3 funds to unfair findings of discrimination. The legal  
4 standard for a disparate impact claim has never  
5 been structured so that a finding of discrimination  
6 could be based on numerical imbalance alone.

7 (12) In contrast, a failure to reinstate or con-  
8 firm a private right of action would leave vindication  
9 of the rights to equality of opportunity solely to Fed-  
10 eral agencies, which may fail to take necessary and  
11 appropriate action because of administrative over-  
12 burden or other reasons. Action by Congress to  
13 specify a private right of action is necessary to en-  
14 sure that persons will have a remedy if they are de-  
15 nied equal access to education, housing, health,  
16 transportation, and many other programs and serv-  
17 ices by practices of Federal fund recipients that re-  
18 sult in discrimination.

19 (13) As a result of the Supreme Court's deci-  
20 sion in *Sandoval*, courts have dismissed numerous  
21 claims brought under the regulations promulgated  
22 pursuant to title VI of the Civil Rights Act of 1964  
23 (42 U.S.C. 2000d et seq.) that challenged actions  
24 with an unjustified discriminatory effect. Although  
25 the *Sandoval* Court did not address title IX of the

1 Education Amendments of 1972 (20 U.S.C. 1681 et  
2 seq.), lower courts have similarly dismissed claims  
3 under such Act. Courts relying on the Sandoval deci-  
4 sion have also dismissed claims seeking redress for  
5 unlawful retaliation against persons who brought ac-  
6 tions or participated in actions under title VI of the  
7 Civil Rights Act of 1964 and title IX of the Edu-  
8 cation Amendments of 1972. Because judicial inter-  
9 pretation of the Age Discrimination Act of 1975 (42  
10 U.S.C. 6101 et seq.) has tracked that of title VI of  
11 the Civil Rights Act of 1964 and title IX of the  
12 Education Amendments of 1972, without clarifica-  
13 tion of Sandoval, plaintiffs run the risk that courts  
14 may dismiss claims brought under regulations pro-  
15 mulgated pursuant to the Age Discrimination Act of  
16 1975 challenging actions with an unjustified dis-  
17 criminatory effect and claims seeking redress for un-  
18 lawful retaliation against persons who have brought  
19 or participated in actions under the Age Discrimina-  
20 tion Act of 1975.

21 (14) Section 504 of the Rehabilitation Act of  
22 1973 (29 U.S.C. 794) has received different treat-  
23 ment by the Supreme Court. In *Alexander v. Choate*,  
24 469 U.S. 287 (1985), the Court proceeded on the  
25 assumption that the statute itself prohibited some

1 actions that had a disparate impact on handicapped  
2 individuals—an assumption borne out by congres-  
3 sional statements made during passage of the Act.  
4 In Sandoval, the Court appeared to accept this prin-  
5 ciple of Alexander. Moreover, the Supreme Court ex-  
6 plicitly recognized congressional approval of the reg-  
7 ulations promulgated to implement section 504 of  
8 the Rehabilitation Act of 1973 in Consolidated Rail  
9 Corp. v. Darrone, 465 U.S. 624, 634 (1984). Rely-  
10 ing on the validity of the regulations, Congress in-  
11 corporated the regulations into the statutory require-  
12 ments of section 204 of the Americans with Disabil-  
13 ities Act of 1990 (42 U.S.C. 12134). Thus it does  
14 not appear at this time that there is a risk that the  
15 private right of action to challenge disparate impact  
16 discrimination under section 504 of the Rehabilita-  
17 tion Act of 1973 will become unavailable.

18 (15) Since the enactment of title VI of the Civil  
19 Rights Act of 1964, title IX of the Education  
20 Amendments of 1972, the Age Discrimination Act of  
21 1975, and section 504 of the Rehabilitation Act of  
22 1973, Congress has intended that the prohibitions  
23 on discrimination in those provisions include a prohi-  
24 bition on retaliation. The ability to prevent retalia-  
25 tion against persons who oppose any policy or prac-

1        tice prohibited by those provisions, or make a  
2        charge, testify, assist, or participate in any manner  
3        in an investigation, proceeding, or hearing under  
4        those provisions, is essential to realizing the prohibi-  
5        tions on discrimination in those provisions.

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

12 **SEC. 102. PROHIBITED DISCRIMINATION.**

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

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

16        and

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

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

21            “(i) a person aggrieved by discrimination on the  
22        basis of race, color, or national origin (referred to in  
23        this title as an ‘aggrieved person’) demonstrates that  
24        a recipient of Federal financial assistance (referred  
25        to in this title as a ‘recipient’) has a policy or prac-

1           tice that causes a disparate impact on the basis of  
2           race, color, or national origin and the recipient fails  
3           to demonstrate that the challenged policy or practice  
4           is related to and necessary to achieve the non-  
5           discriminatory goals of the program or activity al-  
6           leged to have been operated in a discriminatory  
7           manner; or

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

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

23          “(ii) If the recipient demonstrates that a specific pol-  
24          icy or practice does not cause the disparate impact, the  
25          recipient shall not be required to demonstrate that such

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

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

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

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

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

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

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

22 “(c)(1)(A) Subject to the conditions described in  
23 paragraphs (1) through (9) of subsection (a), discrimina-  
24 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 a recipient of Federal fi-  
6 nancial assistance (referred to in this title as a ‘re-  
7 cipient’) has a policy or practice that causes a dis-  
8 parate impact on the basis of sex and the recipient  
9 fails to demonstrate that the challenged policy or  
10 practice is related to and necessary to achieve the  
11 nondiscriminatory goals of the program or activity  
12 alleged 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 recipient re-  
20 fuses to 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 recipient's decisionmaking process are not capable of  
3 separation for analysis, the decisionmaking process may  
4 be analyzed as one policy or practice.

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

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

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

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

22       (c) AGE DISCRIMINATION ACT OF 1975.—Section  
23 303 of the Age Discrimination Act of 1975 (42 U.S.C.  
24 6102) is amended—

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

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

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

9           “(i) a person aggrieved by discrimination on the  
10 basis of age (referred to in this title as an ‘aggrieved  
11 person’) demonstrates that a recipient of Federal fi-  
12 nancial assistance (referred to in this title as a ‘re-  
13 cipient’) has a policy or practice that causes a dis-  
14 parate impact on the basis of age and the recipient  
15 fails to demonstrate that the challenged policy or  
16 practice is related to and necessary to achieve the  
17 nondiscriminatory goals of the program or activity  
18 alleged to have been operated in a discriminatory  
19 manner; or

20           “(ii) the aggrieved person demonstrates (con-  
21 sistent with the demonstration required under title  
22 VII of the Civil Rights Act of 1964 (42 U.S.C.  
23 2000e et seq.) with respect to an ‘alternative em-  
24 ployment practice’) that a less discriminatory alter-

1 native policy or practice exists, and the recipient re-  
2 fuses to adopt such alternative policy or practice.

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

12 “(ii) If the recipient demonstrates that a specific pol-  
13 icy or practice does not cause the disparate impact, the  
14 recipient shall not be required to demonstrate that such  
15 policy or practice is necessary to achieve the goals of its  
16 program or activity.

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

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

23 “(c) No person in the United States shall be sub-  
24 jected to discrimination, including retaliation, because  
25 such person opposed any policy or practice prohibited by

1 this title, or because such person made a charge, testified,  
2 assisted, or participated in any manner in an investiga-  
3 tion, proceeding, or hearing under this title.”.

4 **SEC. 103. RIGHTS OF ACTION.**

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

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

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

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

16 (b) EDUCATION AMENDMENTS OF 1972.—Section  
17 902 of the Education Amendments of 1972 (20 U.S.C.  
18 1682) is amended—

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

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

22 “(b) Any person aggrieved by the failure of a recipi-  
23 ent to comply with this title, including any regulation pro-  
24 mulgated pursuant to this title, may bring a civil action

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

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

8 **SEC. 104. RIGHT OF RECOVERY.**

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

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

13 “(a) CLAIMS BASED ON PROOF OF INTENTIONAL  
14 DISCRIMINATION.—In an action brought by an aggrieved  
15 person under this title against a recipient who has en-  
16 gaged in unlawful intentional discrimination (not a prac-  
17 tice that is unlawful because of its disparate impact) pro-  
18 hibited under this title (including its implementing regula-  
19 tions), the aggrieved person may recover equitable and  
20 legal relief (including compensatory and punitive dam-  
21 ages), attorney's fees (including expert fees), and costs,  
22 except that punitive damages are not available against a  
23 government, government agency, or political subdivision.

24 “(b) CLAIMS BASED ON THE DISPARATE IMPACT  
25 STANDARD OF PROOF.—In an action brought by an ag-

1 grieved person under this title against a recipient who has  
2 engaged in unlawful discrimination based on disparate im-  
3 pact prohibited under this title (including its implementing  
4 regulations), the aggrieved person may recover equitable  
5 relief, attorney's fees (including expert fees), and costs.”.

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

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

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

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

1 pact prohibited under this title (including its implementing  
2 regulations), the aggrieved person may recover equitable  
3 relief, attorney's fees (including expert fees), and costs.”.

4 (c) AGE DISCRIMINATION ACT OF 1975.—

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

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

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

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

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

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

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

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

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

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

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

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

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

7 “(2) In an action brought by an aggrieved person  
8 under this section against a recipient who has engaged in  
9 unlawful discrimination based on disparate impact prohib-  
10 ited under this section (including its implementing regula-  
11 tions), the aggrieved person may recover equitable relief,  
12 attorney's fees (including expert fees), and costs.”.

13 **SEC. 105. CONSTRUCTION.**

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

20 (b) DEFENDANTS.—Nothing in this subtitle, includ-  
21 ing any amendment made by this subtitle, shall be con-  
22 strued to limit the scope of the class of persons who may  
23 be subjected to civil actions under title VI of the Civil  
24 Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX  
25 of the Education Amendments of 1972 (20 U.S.C. 1681

1 et seq.), the Age Discrimination Act of 1975 (42 U.S.C.  
2 6101 et seq.), or section 504 of the Rehabilitation Act of  
3 1973.

4 **SEC. 106. EFFECTIVE DATE.**

5 (a) IN GENERAL.—This subtitle, and the amend-  
6 ments made by this subtitle, are retroactive to April 24,  
7 2001, and effective as of that date.

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

14 **Subtitle B—Harassment**

15 **SEC. 111. FINDINGS.**

16 Congress finds the following:

17 (1) As the Supreme Court has held, recipients  
18 of Federal financial assistance are liable for harass-  
19 ment on the basis of sex under their education pro-  
20 grams and activities under title IX of the Education  
21 Amendments of 1972 (20 U.S.C. 1681 et seq.) (re-  
22 ferred to in this subtitle as “title IX”). *Franklin v.*  
23 *Gwinnett County Public Schools*, 503 U.S. 60, 75  
24 (1992) (damages remedy available for harassment of  
25 student by a teacher coach); *Davis v. Monroe Coun-*

1 ty Board of Education, 526 U.S. 629, 633 (1999)  
2 (authorizing damages action against school board for  
3 student-on-student sexual harassment).

4 (2) Courts have confirmed that recipients of  
5 Federal financial assistance are liable for harass-  
6 ment on the basis of race, color, or national origin  
7 under title VI of the Civil Rights Act of 1964 (42  
8 U.S.C. 2000d et seq.) (referred to in this subtitle as  
9 “title VI”), e.g., *Bryant v. Independent School Dis-*  
10 *trict No. I-38*, 334 F.3d 928 (10th Cir. 2003) (li-  
11 *ability for student-on-student racial harassment*).  
12 Moreover, judicial interpretation of the similarly  
13 worded Age Discrimination Act of 1975 (42 U.S.C.  
14 6101 et seq.) and section 504 of the Rehabilitation  
15 Act of 1973 (29 U.S.C. 794) has tracked that of  
16 title VI and title IX.

17 (3) As these courts have properly recognized,  
18 harassment on a prohibited basis under a program  
19 or activity, whether perpetrated by employees or  
20 agents of the program or activity, by peers of the  
21 victim, or by others who conduct harassment under  
22 the program or activity, is a form of unlawful and  
23 intentional discrimination that inflicts substantial  
24 harm on beneficiaries of the program or activity and  
25 violates the obligation of a recipient of Federal fi-

1 nancial assistance to maintain a nondiscriminatory  
2 environment.

3 (4) In a 5 to 4 ruling, the Supreme Court held  
4 that students subjected to sexual harassment may  
5 receive a damages remedy under title IX only when  
6 school officials have “actual notice” of the harass-  
7 ment and are “deliberately indifferent” to it. *Gebser*  
8 *v. Lago Vista Independent School District*, 524 U.S.  
9 274 (1998). See also *Davis v. Monroe County Board*  
10 *of Education*, 526 U.S. 629 (1999).

11 (5) The standard delineated in *Gebser* and fol-  
12 lowed in *Davis* has been applied by lower courts re-  
13 garding the liability of recipients of Federal financial  
14 assistance for damages for harassment based on  
15 race, color, or national origin under title VI. E.g.,  
16 *Bryant v. Independent School District No. I-38*,  
17 334 F.3d 928 (10th Cir. 2003). Because of the simi-  
18 larities in the wording and interpretation of the un-  
19 derlying statutes, this standard may be applied to  
20 claims for damages brought under the Age Discrimi-  
21 nation Act of 1975 (42 U.S.C. 6101 et seq.) and  
22 section 504 of the Rehabilitation Act of 1973 (29  
23 U.S.C. 794) as well.

24 (6) Although they do not affect the relevant  
25 standards for individuals to obtain injunctive and

1 equitable relief for harassment on the basis of race,  
2 color, sex, national origin, age, or disability under  
3 covered programs and activities, Gebser and its  
4 progeny severely limit the availability of remedies for  
5 such individuals by imposing new, more stringent  
6 standards for recovery of damages under title VI  
7 and title IX, and potentially under the Age Discrimi-  
8 nation Act of 1975 and section 504 of the Rehabili-  
9 tation Act of 1973. Yet in many cases, damages are  
10 the only remedy that would effectively rectify past  
11 harassment.

12 (7) As recognized by the dissenters in Gebser,  
13 these limitations on effective relief thwart Congress's  
14 underlying purpose to protect students from harass-  
15 ment. By making the "policy choice" to "rank[] pro-  
16 tection of the school district's purse above the pro-  
17 tection of immature high school students", the  
18 Gebser case "is not faithful to the intent of the pol-  
19 icymaking branch of our Government". Gebser, 524  
20 U.S. at 306 (Stevens, J., dissenting).

21 (8) The rulings in Gebser and its progeny cre-  
22 ate an incentive for recipients of Federal financial  
23 assistance to insulate themselves from knowledge of  
24 harassment on the basis of race, color, sex, national  
25 origin, age, or disability rather than adopting and

1 enforcing practices that will minimize the danger of  
2 such harassment. The rulings thus undermine the  
3 purpose of prohibitions on discrimination in the civil  
4 rights laws: “to induce [covered programs or activi-  
5 ties] to adopt and enforce practices that will mini-  
6 mize the danger that vulnerable students [or other  
7 beneficiaries] will be exposed to such odious behav-  
8 ior”. Gebser, 524 U.S. at 300 (Stevens, J., dis-  
9 senting).

10 (9) The Gebser ruling contravened the interpreta-  
11 tions of title VI and title IX by the Department  
12 of Education, which interpretations recognized liabil-  
13 ity for damages for harassment based on race, color,  
14 sex, or national origin based on agency principles.  
15 Sexual Harassment Guidance: Harassment of Stu-  
16 dents by School Employees, Other Students, or  
17 Third Parties, 62 Fed. Reg. 12034 (March 13,  
18 1997); Racial Incidents and Harassment Against  
19 Students at Educational Institutions: Investigative  
20 Guidance, 59 Fed. Reg. 11448 (March 10, 1994).

21 (10) Legislative action is necessary and appro-  
22 priate to reverse Gebser and its progeny and restore  
23 the availability of a full range of remedies for har-  
24 assment based on race, color, sex, national origin,  
25 age, or disability. The Gebser majority itself invited

1 Congress to “speak directly on the subject” of dam-  
2 ages liability to provide additional guidance to the  
3 courts. 524 U.S. at 292.

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

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

17 (B) encourage recipients of Federal finan-  
18 cial assistance to adopt and enforce meaningful  
19 policies and procedures to prevent and remedy  
20 harassment;

21 (C) deter incidents of harassment; and

22 (D) provide appropriate remedies for dis-  
23 crimination.

24 (12) Congress has the same affirmative powers  
25 to enact legislation restoring the availability of a full

1 range of remedies for harassment as it did to enact  
2 the underlying statutory prohibitions on harassment,  
3 including powers under section 5 of the 14th amend-  
4 ment and section 8 of article I of the Constitution.

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

11 **SEC. 112. RIGHT OF RECOVERY.**

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

15 “(c) CLAIMS BASED ON HARASSMENT.—

16 “(1) RIGHT OF RECOVERY.—In an action  
17 brought by an aggrieved person under this title  
18 against a recipient who has engaged in unlawful har-  
19 assment, the aggrieved person may recover equitable  
20 and legal relief (including compensatory and punitive  
21 damages subject to the provisions of paragraph (2)),  
22 attorney’s fees (including expert fees), and costs.

23 “(2) AVAILABILITY OF DAMAGES.—

24 “(A) TANGIBLE ACTION BY AGENT OR EM-  
25 PLOYEE.—If an agent or employee of a pro-

1           gram or activity engages in unlawful harass-  
2           ment that results in a tangible action to the ag-  
3           grieved person under the program or activity,  
4           damages shall be available against the recipient  
5           involved.

6                   “(B) NO TANGIBLE ACTION BY AGENT OR  
7           EMPLOYEE.—If an agent or employee of a pro-  
8           gram or activity engages in unlawful harass-  
9           ment that results in no tangible action to the  
10          aggrieved person under the program or activity,  
11          no damages shall be available against the re-  
12          cipient if the recipient can demonstrate that—

13                   “(i) the recipient exercised reasonable  
14          care to prevent and correct promptly any  
15          harassment based on race, color, or na-  
16          tional origin; and

17                   “(ii) the aggrieved person unreason-  
18          ably failed to take advantage of preventive  
19          or corrective opportunities offered by the  
20          recipient that—

21                   “(I) would likely have provided  
22          redress and avoided the harm de-  
23          scribed by the aggrieved person; and

1                   “(II) would not have exposed the  
2                   aggrieved person to undue risk, effort,  
3                   or expense.

4                   “(C) HARASSMENT BY THIRD PARTY.—If a  
5                   person who is not an agent or employee of a  
6                   program or activity subjects an aggrieved per-  
7                   son to unlawful harassment under that program  
8                   or activity, and the recipient involved knew or  
9                   should have known of the harassment, no dam-  
10                  ages shall be available against the recipient if  
11                  the recipient can demonstrate that the recipient  
12                  exercised reasonable care to prevent and correct  
13                  promptly any harassment based on race, color,  
14                  or national origin.

15                  “(D) DEMONSTRATION.—For purposes of  
16                  subparagraphs (B) and (C), a showing that the  
17                  recipient has exercised reasonable care to pre-  
18                  vent and correct promptly any harassment  
19                  based on race, color, or national origin includes  
20                  a demonstration by the recipient that the recipi-  
21                  ent has—

22                         “(i) established, adequately publicized,  
23                         and enforced an effective, comprehensive,  
24                         harassment prevention policy and com-  
25                         plaint procedure that is likely to provide

1 redress and avoid harm without exposing  
2 the person subjected to the harassment to  
3 undue risk, effort, or expense;

4 “(ii) undertaken prompt, thorough,  
5 and impartial investigations pursuant to  
6 its complaint procedure; and

7 “(iii) taken immediate and appro-  
8 priate corrective action designed to stop  
9 harassment that has occurred, correct its  
10 effects on the aggrieved person and ensure  
11 that the harassment does not recur.

12 “(E) PUNITIVE DAMAGES.—Punitive dam-  
13 ages shall not be available under this subsection  
14 against a government, government agency, or  
15 political subdivision.

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

17 “(A) DEMONSTRATES.—The term ‘dem-  
18 onstrates’ means meets the burdens of produc-  
19 tion and persuasion.

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

22 “(i) a significant adverse change in an  
23 individual’s status caused by an agent or  
24 employee of a program or activity with re-  
25 gard to the individual’s participation in,

1 access to, or enjoyment of, the benefits of  
2 the program or activity; or

3 “(ii) an explicit or implicit condition  
4 by an agent or employee of the program or  
5 activity on an individual’s participation in,  
6 access to, or enjoyment of, the benefits of  
7 a program or activity based on the individ-  
8 ual’s submission to the harassment.

9 “(C) UNLAWFUL HARASSMENT.—The term  
10 ‘unlawful harassment’ means harassment that  
11 is unlawful under this title.”

12 (b) EDUCATION AMENDMENTS OF 1972.—Section  
13 902A of the Civil Rights Act of 1964, as added by section  
14 104, is amended by adding at the end the following:

15 “(c) CLAIMS BASED ON HARASSMENT.—

16 “(1) RIGHT OF RECOVERY.—In an action  
17 brought by an aggrieved party under this title  
18 against a recipient who has engaged in unlawful har-  
19 assment, the aggrieved person may recover equitable  
20 and legal relief (including compensatory and punitive  
21 damages subject to the provisions of paragraph (2)),  
22 attorney’s fees (including expert fees), and costs.

23 “(2) AVAILABILITY OF DAMAGES.—

24 “(A) TANGIBLE ACTION BY AGENT OR EM-  
25 PLOYEE.—If an agent or employee of a pro-

1           gram or activity engages in unlawful harass-  
2           ment that results in a tangible action to the ag-  
3           grieved person under the program or activity,  
4           damages shall be available against the recipient  
5           involved.

6                   “(B) NO TANGIBLE ACTION BY AGENT OR  
7           EMPLOYEE.—If an agent or employee of a pro-  
8           gram or activity engages in unlawful harass-  
9           ment that results in no tangible action to the  
10          aggrieved person under the program or activity,  
11          no damages shall be available against the re-  
12          cipient if the recipient can demonstrate that—

13                   “(i) the recipient exercised reasonable  
14          care to prevent and correct promptly any  
15          harassment based on sex; and

16                   “(ii) the aggrieved person unreason-  
17          ably failed to take advantage of preventive  
18          or corrective opportunities offered by the  
19          recipient that—

20                   “(I) would likely have provided  
21          redress and avoided the harm de-  
22          scribed by the aggrieved person; and

23                   “(II) would not have exposed the  
24          aggrieved person to undue risk, effort,  
25          or expense.

1           “(C) HARASSMENT BY THIRD PARTY.—If a  
2 person who is not an agent or employee of a  
3 program or activity subjects an aggrieved per-  
4 son to unlawful harassment under that program  
5 or activity, and the recipient involved knew or  
6 should have known of the harassment, no dam-  
7 ages shall be available against the recipient if  
8 the recipient can demonstrate that the recipient  
9 exercised reasonable care to prevent and correct  
10 promptly any harassment based on sex.

11           “(D) DEMONSTRATION.—For purposes of  
12 subparagraphs (B) and (C), a showing that the  
13 recipient has exercised reasonable care to pre-  
14 vent and correct promptly any harassment  
15 based on sex includes a demonstration by the  
16 recipient that the recipient has—

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

1                   “(ii) undertaken prompt, thorough,  
2                   and impartial investigations pursuant to  
3                   its complaint procedure; and

4                   “(iii) taken immediate and appro-  
5                   priate corrective action designed to stop  
6                   harassment that has occurred, correct its  
7                   effects on the aggrieved person, and ensure  
8                   that the harassment does not recur.

9                   “(E) PUNITIVE DAMAGES.—Punitive dam-  
10                  ages shall not be available under this subsection  
11                  against a government, government agency, or  
12                  political subdivision.

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

14                  “(A) DEMONSTRATES.—The term ‘dem-  
15                  onstrates’ means meets the burdens of produc-  
16                  tion and persuasion.

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

19                         “(i) a significant adverse change in an  
20                         individual’s status caused by an agent or  
21                         employee of a program or activity with re-  
22                         gard to the individual’s participation in,  
23                         access to, or enjoyment of, the benefits of  
24                         the program or activity; or

1                   “(ii) an explicit or implicit condition  
2                   by an agent or employee of the program or  
3                   activity on an individual’s participation in,  
4                   access to, or enjoyment of, the benefits of  
5                   a program or activity based on the individ-  
6                   ual’s submission to the harassment.

7                   “(C) UNLAWFUL HARASSMENT.—The term  
8                   ‘unlawful harassment’ means harassment that  
9                   is unlawful under this title.”.

10           (c) AGE DISCRIMINATION ACT OF 1975.—Section  
11 305(g) of the Age Discrimination Act of 1975, as added  
12 by section 104, is amended by adding at the end the fol-  
13 lowing:

14           “(3)(A) If an action brought by an aggrieved person  
15 under this title against a recipient who has engaged in  
16 unlawful harassment, the aggrieved person may recover  
17 equitable and legal relief (including compensatory and pu-  
18 nitive damages subject to the provisions of subparagraph  
19 (B)), attorney’s fees (including expert fees), and costs.

20           “(B)(i) If an agent or employee of a program or ac-  
21 tivity engages in unlawful harassment that results in a  
22 tangible action to the aggrieved person under the program  
23 or activity, damages shall be available against the recipient  
24 involved.

1           “(ii) If an agent or employee of a program or activity  
2 engages in unlawful harassment that results in no tangible  
3 action to the aggrieved person under the program or activ-  
4 ity, no damages shall be available against the recipient if  
5 the recipient can demonstrate that—

6           “(I) the recipient exercised reasonable care to  
7 prevent and correct promptly any harassment based  
8 on age; and

9           “(II) the aggrieved person unreasonably failed  
10 to take advantage of preventive or corrective oppor-  
11 tunities offered by the recipient that—

12           “(aa) would likely have provided redress  
13 and avoided the harm described by the ag-  
14 grieved person; and

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

17           “(iii) If a person who is not an agent or employee  
18 of a program or activity subjects an aggrieved person to  
19 unlawful harassment under that program or activity, and  
20 the recipient involved knew or should have known of the  
21 harassment, no damages shall be available against the re-  
22 cipient if the recipient can demonstrate that the recipient  
23 exercised reasonable care to prevent and correct promptly  
24 any harassment based on age.

1           “(iv) For purposes of clauses (ii) and (iii), a showing  
2 that the recipient has exercised reasonable care to prevent  
3 and correct promptly any harassment based on age in-  
4 cludes a demonstration by the recipient that the recipient  
5 has—

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

12           “(II) undertaken prompt, thorough, and impar-  
13 tial investigations pursuant to its complaint proce-  
14 dure; and

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

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

22           “(C) As used in this paragraph:

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

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

1           “(I) a significant adverse change in an in-  
2           dividual’s status caused by an agent or em-  
3           ployee of a program or activity with regard to  
4           the individual’s participation in, access to, or  
5           enjoyment of, the benefits of the program or ac-  
6           tivity; or

7           “(II) an explicit or implicit condition by an  
8           agent or employee of the program or activity on  
9           an individual’s participation in, access to, or en-  
10          joyment of, the benefits of a program or activity  
11          based on the individual’s submission to the har-  
12          assment.

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

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

18          “(3)(A) In an action by an aggrieved person under  
19          this section against a recipient who has engaged in unlaw-  
20          ful harassment, the aggrieved person may recover equi-  
21          table and legal relief (including compensatory and punitive  
22          damages subject to the provisions of subparagraph (B)),  
23          attorney’s fees (including expert fees), and costs.

24          “(B)(i) If an agent or employee of a program or ac-  
25          tivity engages in unlawful harassment that results in a

1 tangible action to the aggrieved person under the program  
2 or activity, damages shall be available against the recipient  
3 involved.

4 “(ii) If an agent or employee of a program or activity  
5 engages in unlawful harassment that results in no tangible  
6 action to the aggrieved person under the program or activ-  
7 ity, no damages shall be available against the recipient if  
8 the recipient can demonstrate that—

9 “(I) the recipient exercised reasonable care to  
10 prevent and correct promptly any harassment based  
11 on disability; and

12 “(II) the aggrieved person unreasonably failed  
13 to take advantage of preventive or corrective oppor-  
14 tunities offered by the recipient that—

15 “(aa) would likely have provided redress  
16 and avoided the harm described by the ag-  
17 grieved person; and

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

20 “(iii) If a person who is not an agent or employee  
21 of a program or activity subjects an aggrieved person to  
22 unlawful harassment under that program or activity, and  
23 the recipient involved knew or should have known of the  
24 harassment, no damages shall be available against the re-  
25 cipient if the recipient can demonstrate that the recipient

1 exercised reasonable care to prevent and correct promptly  
2 any harassment based on disability.

3 “(iv) For purposes of clauses (ii) and (iii), a showing  
4 that the recipient has exercised reasonable care to prevent  
5 and correct promptly any harassment based on disability  
6 includes a demonstration by the recipient that the recipi-  
7 ent has—

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

14 “(II) undertaken prompt, thorough, and impar-  
15 tial investigations pursuant to its complaint proce-  
16 dure; and

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

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

24 “(C) As used in this paragraph:

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

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

4                   “(I) a significant adverse change in an in-  
5 dividual’s status caused by an agent or em-  
6 ployee of a program or activity with regard to  
7 the individual’s participation in, access to, or  
8 enjoyment of, the benefits of the program or ac-  
9 tivity; or

10                   “(II) an explicit or implicit condition by an  
11 agent or employee of the program or activity on  
12 an individual’s participation in, access to, or en-  
13 joyment of, the benefits of a program or activity  
14 based on the individual’s submission to the har-  
15 assment.

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

18 **SEC. 113, CONSTRUCTION.**

19           Nothing in this subtitle, including any amendment  
20 made by this subtitle, shall be construed to limit the scope  
21 of the class of persons who may be subjected to civil ac-  
22 tions under title VI of the Civil Rights Act of 1964 (42  
23 U.S.C. 2000d et seq.), title IX of the Education Amend-  
24 ments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimi-

1 nation Act of 1975 (42 U.S.C. 6101 et seq.), or section  
2 504 of the Rehabilitation Act of 1973.

3 **SEC. 114. EFFECTIVE DATE.**

4 (a) IN GENERAL.—This subtitle, and the amend-  
5 ments made by this subtitle, are retroactive to June 22,  
6 1998, and effective as of that date.

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

12 **TITLE II—UNIFORMED SERVICES**  
13 **EMPLOYMENT AND REEM-**  
14 **PLOYMENT RIGHTS ACT OF**  
15 **1994 AMENDMENT**

16 **SEC. 201. AMENDMENT TO THE UNIFORMED SERVICES EM-**  
17 **PLOYMENT AND REEMPLOYMENT RIGHTS**  
18 **ACT OF 1994.**

19 (a) FINDINGS.—Congress makes the following find-  
20 ings:

21 (1) The Federal Government has an important  
22 interest in attracting and training a military to pro-  
23 vide for the National defense. The Constitution  
24 grants Congress the power to raise and support an  
25 army for purposes of the common defense. The Na-

1       tion’s military readiness requires that all members of  
2       the Armed Forces, including those employed in State  
3       programs and activities, be able to serve without  
4       jeopardizing their civilian employment opportunities.

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

18           (3) In *Seminole Tribe of Florida v. Florida*,  
19      517 U.S. 44 (1996), the Supreme Court held that  
20      congressional legislation enacted pursuant to the  
21      commerce clause of Article I, section 8, of the Con-  
22      stitution cannot abrogate the immunity of States  
23      under the 11th amendment to the Constitution.  
24      Some courts have interpreted *Seminole Tribe of*  
25      *Florida v. Florida* as a basis for denying relief to

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

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

1           tions of USERRA have a remedy if they are denied  
2           their rights and benefits under that Act.

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

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

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

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

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

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

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

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

7           **TITLE III—AIR CARRIER ACCESS**  
8           **ACT OF 1986 AMENDMENT**

9           **SEC. 301. FINDINGS.**

10          Congress finds the following:

11                 (1) In *Love v. Delta Air Lines*, 310 F. 3d (11th  
12 Cir. 2002), the United States Court of Appeals for  
13 the Eleventh Circuit held that when Congress passed  
14 the Air Carrier Access Act of 1986, adding a provi-  
15 sion now codified at section 41705 of title 49,  
16 United States Code (referred to in this title as the  
17 “ACAA”), Congress did not intend to create a pri-  
18 vate right of action with which individuals with dis-  
19 abilities could sue air carriers in Federal court for  
20 discrimination on the basis of disability. The court  
21 recognized that other courts of appeals have held  
22 that the ACAA created a private right of action.  
23 Nevertheless, the court, relying on the Supreme  
24 Court’s decision in *Alexander v. Sandoval*, 532 U.S.

1       275 (2001), concluded that the ACAA did not create  
2       a private right of action.

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

22           (3) When an air carrier violates the ACAA and  
23      discriminates against an individual with a disability,  
24      frequently the only way to compensate that indi-  
25      vidual for the harm the individual has suffered is

1 through an award of money damages. For example,  
2 violations of the ACAA may result in travelers who  
3 are individuals with disabilities missing flights for  
4 business appointments or important personal events,  
5 or in such travelers suffering humiliating treatment  
6 at the hands of air carriers. Those harms cannot be  
7 remedied solely through injunctive relief.

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

19 **SEC. 302. CIVIL ACTION.**

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

22 “(d) CIVIL ACTION.—(1) Any person aggrieved by an  
23 air carrier's violation of subsection (a) (including any reg-  
24 ulation implementing such subsection) may bring a civil  
25 action in the district court of the United States in the

1 district in which the aggrieved person resides, in the dis-  
2 trict containing the air carrier's principal place of busi-  
3 ness, or in the district in which the violation took place.  
4 Any such action must be commenced within 2 years after  
5 the date of the violation.

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

13 **TITLE IV—AGE DISCRIMINATION**  
14 **IN EMPLOYMENT ACT AMEND-**  
15 **MENTS**

16 **SEC. 401. SHORT TITLE.**

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

19 **SEC. 402. FINDINGS.**

20 Congress finds the following:

21 (1) Since 1974, the Age Discrimination in Em-  
22 ployment Act of 1967 (29 U.S.C. 621 et seq.) (re-  
23 ferred to in this section as the ‘ADEA’) has prohib-  
24 ited States from discriminating in employment on  
25 the basis of age. In *EEOC v. Wyoming*, 460 U.S.

1       226 (1983), the Supreme Court upheld Congress's  
2       constitutional authority to prohibit States from dis-  
3       criminating in employment on the basis of age. The  
4       prohibitions of the ADEA remain in effect and con-  
5       tinue to apply to the States, as the prohibitions have  
6       for more than 25 years.

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

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

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

18               (C) adversely effects the morale and pro-  
19      ductivity of older workers; and

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

22               (3) Private civil suits by the victims of employ-  
23      ment discrimination have been a crucial tool for en-  
24      forcement of the ADEA since the enactment of that  
25      Act. In *Kimel v. Florida Board of Regents*, 528 U.S.

1       62 (2000), however, the Supreme Court held that  
2       Congress had not abrogated State sovereign immu-  
3       nity to suits by individuals under the ADEA. The  
4       Federal Government has an important interest in  
5       ensuring that Federal financial assistance is not  
6       used to subsidize or facilitate violations of the  
7       ADEA. Private civil suits are a critical tool for ad-  
8       vancing that interest.

9               (4) As a result of the Kimel decision, although  
10       age-based discrimination by State employers remains  
11       unlawful, the victims of such discrimination lack im-  
12       portant remedies for vindication of their rights that  
13       are available to all other employees covered under  
14       that Act, including employees in the private sector,  
15       local government, and the Federal Government. Un-  
16       less a State chooses to waive sovereign immunity, or  
17       the Equal Employment Opportunity Commission  
18       brings an action on their behalf, State employees  
19       victimized by violations of the ADEA have no ade-  
20       quate Federal remedy for violations of that Act. 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 (5) Federal law has long treated nondiscrimina-  
4 tion obligations as a core component of programs or  
5 activities that, in whole or part, receive Federal fi-  
6 nancial assistance. That assistance should not be  
7 used, directly or indirectly, to subsidize invidious dis-  
8 crimination. Assuring nondiscrimination in employ-  
9 ment is a crucial aspect of assuring nondiscrimina-  
10 tion in those programs and activities.

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

1       crimination Act of 1975. The earlier limitation in  
2       the Age Discrimination Act of 1975, originally in-  
3       tended only to avoid duplicative coverage and rem-  
4       edies, has in the wake of the Kimel decision become  
5       a serious loophole leaving millions of State employ-  
6       ees without an important Federal remedy for age  
7       discrimination, resulting in the use of Federal finan-  
8       cial assistance to subsidize or facilitate violations of  
9       the ADEA.

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

1       ance, and in order to ensure that Federal financial  
2       assistance does not subsidize or facilitate violations  
3       of the ADEA, it is necessary to require such a waiver  
4       as a condition of receipt or use of that assistance.

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

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

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

6 (10) In *Griggs v. Duke Power Co.*, 401 U.S.  
7 424, 431 (1971), the Supreme Court recognized that  
8 title VII of the Civil Rights Act of 1964 (42 U.S.C.  
9 2000e et seq.) “proscribes not only overt discrimina-  
10 tion [in employment] but also [employment] prac-  
11 tices that are fair in form, but discriminatory in op-  
12 eration. . . .” In doing so, the Court relied on sec-  
13 tion 703(a)(2) of title VII of the Civil Rights Act of  
14 1964 (42 U.S.C. 2000e–2(a)(2)), which contains  
15 language identical to section 4(a)(2) of the ADEA,  
16 except that the latter substitutes the word age for  
17 the grounds of prohibited discrimination specified by  
18 title VII of the Civil Rights Act of 1964: “race,  
19 color, religion, sex, or national origin.” The Court  
20 has confirmed that this and other related statutory  
21 language, identical to both title VII of the Civil  
22 Rights Act of 1964 and the ADEA, supports appli-  
23 cation of the disparate impact doctrine. *Connecticut*  
24 *v. Teal*, 457 U.S. 440 (1982); *General Electric Co.*  
25 *v. Gilbert*, 429 U.S. 125 (1976).

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

20          (12) The ADEA’s legislative history confirms  
21          Congress’s intent to redress all “arbitrary” age dis-  
22          crimination in the workplace, including arbitrary  
23          facially neutral policies and practices falling more  
24          harshly on older workers. Such policies continue to  
25          be based on the kind of “subconscious stereotypes

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

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

17 (14) Subsequently, several lower courts and  
18 Federal Courts of Appeal have mistakenly relied on  
19 language in the Supreme Court’s opinion in *Hazen*  
20 *Paper Co. v. Biggins*, 507 U.S. 604 (1993), to sug-  
21 gest that the disparate impact method of proof does  
22 not apply to claims under the ADEA. *Mullin v.*  
23 *Raytheon Co.*, 164 F.3d 696, 700–01 (1st Cir.  
24 1999); *EEOC v. Francis W. Parker School*, 41 F.3d  
25 1073, 1076–77 (7th Cir. 1994); *Ellis v. United Air-*

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

15 **SEC. 403. PURPOSES.**

16 The purposes of this title are—

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

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 Age Discrimination in Employ-  
6           ment Act of 1967;

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

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

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

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

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

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

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

11 **SEC. 405. DISPARATE IMPACT CLAIMS.**

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

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

17                   “(A) an aggrieved party demonstrates that an  
18 employer, employment agency, or labor organization  
19 has a policy or practice that causes a disparate im-  
20 pact on the basis of age and the employer, employ-  
21 ment agency, or labor organization fails to dem-  
22 onstrate that the challenged policy or practice is  
23 based on reasonable factors that are job-related and  
24 consistent with business necessity other than age; or

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

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

19          “(B) If the employer, employment agency, or labor  
20          organization demonstrates that a specific policy or prac-  
21          tice does not cause the disparate impact, the employer,  
22          employment agency, or labor organization shall not be re-  
23          quired to demonstrate that such policy or practice is nec-  
24          essary to the operation of its business.

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

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

8    **SEC. 406. EFFECTIVE DATE.**

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

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

20                   **TITLE V—CIVIL RIGHTS**

21                   **REMEDIES AND RELIEF**

22                   **Subtitle A—Prevailing Party**

23    **SEC. 501. SHORT TITLE.**

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

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

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

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

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

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

24 “(2) If an Act, ruling, regulation, interpretation, or  
25 rule described in subsection (a) requires a party to satisfy  
26 certain criteria, unrelated to whether or not such party

1 has prevailed, to qualify for the recovery of attorney’s fees,  
2 subsection (a) shall not affect the requirement that such  
3 party satisfy such criteria.”.

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

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

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

## 12 **Subtitle B—Arbitration**

### 13 **SEC. 511. SHORT TITLE.**

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

### 16 **SEC. 512. AMENDMENT TO FEDERAL ARBITRATION ACT.**

17 Section 1 of title 9, United States Code, is amended  
18 by striking “of seamen” and all that follows through  
19 “commerce”.

### 20 **SEC. 513. UNENFORCEABILITY OF ARBITRATION CLAUSES** 21 **IN EMPLOYMENT CONTRACTS.**

22 (a) PROTECTION OF EMPLOYEE RIGHTS.—Notwith-  
23 standing any other provision of law, any clause of any  
24 agreement between an employer and an employee that re-

1 quires arbitration of a dispute arising under the Constitu-  
2 tion or laws of the United States shall not be enforceable.

3 (b) EXCEPTIONS.—

4 (1) WAIVER OR CONSENT AFTER DISPUTE  
5 ARISES.—Subsection (a) shall not apply with respect  
6 to any dispute if, after such dispute arises, the par-  
7 ties involved knowingly and voluntarily consent to  
8 submit such dispute to arbitration.

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

13 **SEC. 514. APPLICATION OF AMENDMENTS.**

14 This subtitle and the amendment made by section  
15 512 shall apply with respect to all employment contracts  
16 in force before, on, or after the date of enactment of this  
17 subtitle.

18 **Subtitle C—Expert Witness Fees**

19 **SEC. 521. PURPOSE.**

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

23 **SEC. 522. FINDINGS.**

24 Congress finds the following:

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

13          (2) This subtitle is especially necessary both be-  
14          cause of the important roles played by experts in  
15          civil rights litigation and because expert fees often  
16          represent a major cost of the litigation. In fact, in  
17          Casey itself, as pointed out by Justice Stevens in  
18          dissent, the district court had found that the expert  
19          witnesses were "essential" and "necessary" to the  
20          successful prosecution of the plaintiffs case, and the  
21          expert fees were not paltry but amounted to  
22          \$104,133. Justice Stevens also pointed out that the  
23          majority opinion requiring the plaintiff to "assume  
24          the cost of \$104,133 in expert witness fees is at war

1 with the congressional purpose of making the pre-  
2 vailing party whole.”. Casey (499 U.S. at 111).

3 (3) Much of the rationale for denying expert  
4 fees as part of the shifting of attorney’s fees under  
5 provisions of law such as section 722 of the Revised  
6 Statutes (42 U.S.C. 1988), whose language does not  
7 expressly include expert fees, was based on the fact  
8 that many fee-shifting statutes enacted by Congress  
9 “explicitly shift expert witness fees as well as attor-  
10 ney’s fees.”. Casey (499 U.S. at 88). In fact, Justice  
11 Scalia pointed out that in 1976—the same year that  
12 Congress amended section 722 of the Revised Stat-  
13 utes (42 U.S.C. 1988) by providing for the shifting  
14 of attorney’s fees—Congress expressly authorized  
15 the shifting of attorney’s fees and of expert fees in  
16 the Toxic Substances Control Act (15 U.S.C. 2601  
17 et seq.), the Consumer Product Safety Act (15  
18 U.S.C. 2051 et seq.), the Resource Conservation and  
19 Recovery Act of 1976 (Public Law 94–580; 90 Stat.  
20 2795), and the Natural Gas Pipeline Safety Act  
21 Amendments of 1976 (Public Law 94–477; 90 Stat.  
22 2073). Casey (499 U.S. at 88). Congress had done  
23 the same in other years on dozens of occasions.  
24 Casey (499 U.S. at 88–90 & n. 4).

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

12 **SEC. 523. EFFECTIVE PROVISIONS.**

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

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

18                (2) by striking subsection (c).

19          (b) FAIR LABOR STANDARDS ACT OF 1938.—Section  
20          16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.  
21          216(b)) is amended by inserting “(including expert fees)”  
22          after “attorney’s fee”.

23          (c) VOTING RIGHTS ACT OF 1965.—Section 14(e) of  
24          the Voting Rights Act of 1965 (42 U.S.C. 1973l(e)) is

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

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

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

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

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

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

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

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

23 (h) EQUAL CREDIT OPPORTUNITY ACT.—Section  
24 706(d) of the Equal Credit Opportunity Act (15 U.S.C.

1 1691e(d)) is amended by inserting “(including expert  
2 fees)” after “attorney’s fee”.

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

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

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

9 (j) FREEDOM OF INFORMATION ACT.—Section  
10 552(a)(4)(E) of title 5, United States Code, is amended  
11 by inserting “(including expert fees)” after “attorney  
12 fees”.

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

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

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

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

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

1     **Subtitle D—Equal Remedies Act of**  
2                                     **2004**

3     **SEC. 531. SHORT TITLE.**

4             This subtitle may be cited as the “Equal Remedies  
5 Act of 2004”.

6     **SEC. 532. EQUALIZATION OF REMEDIES.**

7             Section 1977A of the Revised Statutes (42 U.S.C.  
8 1981a), as added by section 102 of the Civil Rights Act  
9 of 1991, is amended—

10                 (1) in subsection (b)—

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

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

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

17                     **TITLE VI—PROHIBITIONS**  
18                     **AGAINST SEX DISCRIMINATION**

19     **SEC. 601. SHORT TITLE.**

20             This title may be cited as the “Paycheck Fairness  
21 Act”.

22     **SEC. 602. FINDINGS.**

23             Congress makes the following findings:

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

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

10           (3) The existence of such pay disparities—

11           (A) depresses the wages of working fami-  
12 lies who rely on the wages of all members of the  
13 family to make ends meet;

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

16           (C) has been spread and perpetuated,  
17 through commerce and the channels and instru-  
18 mentalities of commerce, among the workers of  
19 the several States;

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

22           (E) constitutes an unfair method of com-  
23 petition in commerce;

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

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

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

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

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

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

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

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

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

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

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

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

19 **SEC. 603. ENHANCED ENFORCEMENT OF EQUAL PAY RE-**  
20 **QUIREMENTS.**

21 (a) **REQUIRED DEMONSTRATION FOR AFFIRMATIVE**  
22 **DEFENSE.**—Section 6(d)(1) of the Fair Labor Standards  
23 Act of 1938 (29 U.S.C. 206(d)(1)) is amended by striking  
24 “(iv) a differential” and all that follows through the period  
25 and inserting the following: “(iv) a differential based on

1 a bona fide factor other than sex, such as education, train-  
2 ing or experience, except that this clause shall apply only  
3 if—

4 “(I) the employer demonstrates that—

5 “(aa) such factor—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (1) in the first sentence—

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

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

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

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

4           (4) in the last sentence—

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

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

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

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

14 **SEC. 604. TRAINING.**

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

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

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

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

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

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

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

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

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

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

25          (a) GUIDELINES.—

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

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

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

21          (b) EMPLOYER RECOGNITION.—

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

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

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

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

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

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

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

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

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

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

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

17 (c) MAKING AND PRESENTATION OF AWARD.—

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

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

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

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

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

8 (B) a partnership;

9 (C) a professional association;

10 (D) a labor organization; and

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

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

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

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

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

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

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

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

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

1 **SEC. 609. AUTHORIZATION OF APPROPRIATIONS.**

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

4 **TITLE VII—PROTECTIONS FOR**  
5 **WORKERS**

6 **Subtitle A—Protection for**  
7 **Undocumented Workers**

8 **SEC. 701. FINDINGS.**

9 Congress finds the following:

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

21 (2) Under section 8 of the NLRA, employers  
22 are prohibited from discriminating against employ-  
23 ees “in regard to hire or tenure of employment or  
24 any term or condition of employment to encourage  
25 or discourage membership in any labor organiza-  
26 tion”. (29 U.S.C. 158(a)(3)). Employers who violate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3     **SEC. 711. SHORT TITLE.**

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

6     **SEC. 712. FINDINGS.**

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

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

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

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

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

23 (4) After the *Alden* decision, wage and overtime  
24 violations by State employers remain unlawful, but  
25 victims of such violations lack important remedies

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

9 (5) The Supreme Court has upheld Congress's  
10 authority to condition receipt of Federal funds on  
11 acceptance by State or other public or private recipi-  
12 ents of conditions regarding or related to the use of  
13 those funds, as in *Cannon v. University of Chicago*,  
14 441 U.S. 677 (1979).

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

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

1       ties operated by State entities, to require State enti-  
2       ties to consent to a waiver of State sovereign immu-  
3       nity as a condition of receipt of such Federal finan-  
4       cial assistance.

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

13 **SEC. 713. PURPOSES.**

14      The purposes of this subtitle are—

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

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

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

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

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

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

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

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