
H.R.3809

Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004 (Introduced in House)

SECTION 1. SHORT TITLE.

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

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TITLE I--NONDISCRIMINATION IN FEDERALLY FUNDED PROGRAMS AND ACTIVITIES

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

SEC. 101. FINDINGS.

Congress finds the following:

(1) This subtitle is made necessary by a decision of the Supreme Court in *Alexander v. Sandoval*, 532 U.S.

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

(2) The Sandoval decision attacks settled expectations created by title VI of the Civil Rights Act of

1964, title IX of the Education Amendments of 1972 (also known as the 'Patsy Takemoto Mink Equal Opportunity in Education Act') (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (collectively referred to in this Act as the 'covered civil rights provisions'). The covered civil rights provisions were designed to establish and make effective the rights of persons to be free from discrimination on the part of entities that are subject to 1 or more of the covered civil rights provisions, as appropriate (referred to in this Act as 'covered entities'). In 1964 Congress adopted title VI of the Civil Rights Act of 1964 to ensure that Federal dollars would not be used to subsidize or support programs or activities that discriminated on racial, color, or national origin grounds. In the years that followed, Congress extended these protections by enacting laws barring discrimination in federally funded activities on the basis of sex in title IX of the Education Amendments of 1972, age in the Age Discrimination Act of 1975, and disability in section 504 of the Rehabilitation Act of 1973.

(3) From the outset, Congress and the executive branch made clear that the regulatory process would be used to ensure broad protections for beneficiaries of the law. The first regulations promulgated by the Department of Justice under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) forbade the use of 'criteria or methods of administration which have the effect of subjecting individuals to discrimination . . .' (section 80.3 of title 45, Code of Federal Regulations) and prohibited retaliation against persons participating in litigation or administrative resolution of charges of discrimination brought under the Act. These regulations were drafted by the same executive branch officials who played a central role in drafting title VI of the Civil Rights Act of 1964. The language used is, in relevant respects, virtually indistinguishable from regulations under the several Acts in effect today. For example, section 304 of the Age Discrimination Act of 1975 (42 U.S.C. 6103) required the Secretary of the Department of Health, Education, and Welfare (HEW) (now Health and Human Services (HHS)) to promulgate 'general regulations' to effectuate the purposes of the Act. These 'government-wide regulations,' governing age discrimination in programs and activities receiving Federal financial assistance condemn 'any actions which have [a discriminatory] effect, on the basis of age . . .' (section 90.12 of title 45, Code of Federal Regulations).

(4) None of the regulations under the laws addressed in this subtitle have ever been invalidated. In 1966, Congress considered and rejected a proposal to invalidate the disparate impact regulations promulgated pursuant to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.). In 1975, Congress reviewed and maintained the implementing regulations promulgated pursuant to title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), pursuant to a statutory procedure designed to afford Congress the opportunity to invalidate provisions deemed to be inconsistent with congressional intent. The Supreme Court has recognized that Congress's failure to disapprove regulations implies that the regulations accurately reflect congressional intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 533-34 (1982). Moreover, the Supreme Court explicitly recognized congressional approval of the regulations promulgated to implement section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984), stating that '[t]he regulations particularly merit deference in the present case: the responsible Congressional committees participated in their formation and both these committees and Congress itself endorsed the regulations in their final form.'

(5) All of the civil rights provisions cited in this section were designed to confer a benefit on persons who were discriminated against. They relied heavily on private attorneys general for effective enforcement. Congress acknowledged that it could not secure compliance solely through enforcement actions initiated by the Attorney General. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) (per curiam).

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

(7)(A) Notwithstanding the decision of the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975) to abandon prior precedent and require explicit statutory statements of a right of action, Congress and the Courts both before and after *Cort* have recognized an implied right of action under the above statutes. For example, Congress has consistently provided the means for enforcing the statutes. In 1972, Congress established a right to attorney's fees in private actions brought under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) that continued with enactment of the Civil Rights Attorneys' Fees Awards Act of 1976

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

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

(8) The Supreme Court had no basis in law or in legislative history in *Sandoval* for denying a right of action under regulations promulgated pursuant to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) while permitting it under the statute. The regulations were congressionally mandated and their promulgation was specifically directed by Congress under section 602 of that Act (42 U.S.C. 2000d-1) 'to effectuate' the antidiscrimination provisions of the statute. Title VI of the Civil Rights Act of 1964 stressed the importance of the regulations by requiring them to be 'approved by the President'. Similarly, the regulations promulgated pursuant to title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) were also congressionally authorized and specifically directed by Congress to effectuate the provisions of the statute. Title IX of the Education Amendments of 1972 stressed the importance of the regulations by requiring them to be 'approved by the President'.

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

(A) A disparate impact standard allows a court to reach discrimination that could actually exist under the guise of compliance with the law. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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

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

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

(10) The interpretation of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), and other statutes barring discrimination by covered entities as prohibiting practices that have disparate impact and that are not justified as necessary to achieve the goals of the programs or activities supported by the Federal financial assistance is powerfully reinforced by the use of such a standard in enforcing title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). When the Supreme Court wavered on the application of a disparate impact standard under title VII, Congress specifically reinstated it as law in the Civil Rights Act of 1991 (Public Law 102-166; 105 Stat. 1071).

(11) By reinstating a private right of action under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and confirming that right for other civil rights statutes, Congress is not acting in a manner that would expose covered entities to unfair findings of discrimination. The legal standard for a disparate impact claim

has never been structured so that a finding of discrimination could be based on numerical imbalance alone.

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

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

unlawful retaliation against persons who opposed prohibited acts, brought actions, or participated in actions, under title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972. Because judicial interpretation of the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) has tracked that of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, without clarification of *Sandoval*, plaintiffs run the risk that courts may dismiss claims brought under regulations promulgated pursuant to the Age Discrimination Act of 1975 challenging actions with an unjustified discriminatory effect and claims seeking redress for unlawful retaliation against persons who have brought or participated in actions under the Age Discrimination Act of 1975.

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

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

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

SEC. 102. PROHIBITED DISCRIMINATION.

(a) Civil Rights Act of 1964- Section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d) is amended--

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

(2) by adding at the end the following:

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

`(i) a person aggrieved by discrimination on the basis of race, color, or national origin (referred to in this title as an `aggrieved person') demonstrates that an entity subject to this

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