NO. 20-219

IN THE

Supreme Court of the United States

JANE CUMMINGS, *Petitioner*,
v.
PREMIER REHAB KELLER, P.L.L.C., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the compensatory damages authorized as a remedy for victims of discrimination under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies include compensation for emotional distress.

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice (AAJ) is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for all Americans seeking legal recourse for wrongful conduct.

The issues presented in this case are of keen interest to AAJ's members and substantial importance to the public interest throughout the United States. Congress has enacted a variety of statutes with private rights of action that seek to deter the scourge of discrimination through its Spending Clause authority. A reading that narrows the available damages from what has traditionally been available would undermine its effectiveness and fail to give effect to the self-evident congressional design in these statutes that prohibit recipients of federal financial assistance from engaging in discrimination.

Amicus files this brief to demonstrate that antipathy toward emotional distress damages is not

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondents have consented to the filing of this brief.

warranted, because they are responsibly awarded in cases where the merits justify them.

SUMMARY OF ARGUMENT

Ample authority exists to hold that Title VI and the statutes that adopt its remedy permit the award of emotional-distress damages, whether one relies on congressional purpose, the nature of the public policy that the remedies are designed to address, contract law, or precedent.

The courts below went astray on this question because of an apparent antipathy toward emotional-distress damages and an inapt comparison of that category of compensation to punitive damages. Critics of emotional-distress and other forms of non-pecuniary damages ignore the substantial empirical evidence that provide a more reassuring picture of how juries and judges view them and determine their amount. Those studies uniformly conclude that pain and suffering damages track the severity of the injury and demonstrate a strong correlation between the judgments that judges, lawyers, and jurors bring to their propriety and their size.

The Fifth Circuit's concern that federal funding recipients have adequate notice that emotional-distress damages might be available for a breach of the anti-discrimination obligation they undertake is misplaced. Not only is there a long history of awarding emotional-distress damages for breaches of contract, particularly where, as here, the gravamen of the contractual obligation is one where a violation is likely to cause that result, but the intentionality of the violation of duty changes the calculus sufficiently to impute notice.

In addition to the availability of emotional-distress damages under contract-law principles, further guidance supporting this form of compensation can be derived from tort liability often characterized as quasi-contractual in nature. Products liability, medical and legal malpractice, and insurance bad faith cases generally sound in tort but grow out of a contractual relationship. Yet, in each of these causes of action, emotional-distress damages can be awarded in appropriate cases.

Together, these different ways of examining the Question Presented support an inexorable conclusion that emotional-support damages should be available as a remedy for violations of the anti-discrimination obligation that the Title VI remedies address.

ARGUMENT

I. THE COURTS BELOW DEMONSTRATED AN INAPT ANTIPATHY TOWARD EMOTIONAL SUPPORT DAMAGES THAT SHOULD NOT GUIDE THIS COURT'S DECISION.

Before this Court is a seemingly straightforward question: are damages for emotional distress available to prevailing plaintiffs under Title VI of the Civil Rights Act of 1964 (Title VI), Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d *et seq*.), Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, 87 Stat. 394 (29 U.S.C. 794), and other similar statutes that adopt the same remedy?

The answer should be equally straightforward. Courts have long held emotional-distress damages

were available in these types of cases[2] and in disputes involving contractual relationships more generally,[3] particularly where the gist of the injury to be remedied indisputably includes mental suffering.[4] The nature of anti-discrimination statutes like those at issue here, remedy the emotional toll that discrimination exacts by creating a badge of inferiority[5] and suffice to create the requisite notice that emotional-distress damages are available in a private lawsuit vindicating Congress's explicit purpose. *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), U.S.C.C.A.N. 1964, p. 2394 (Title VI was intended to address "the injustices and humiliations of racial and other discrimination.") (quoted in *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 626 (1983) (Marshall, J., dissenting). *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007)

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[2] *See, e.g., Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994). *See also Johnson v. City of Saline*, 151 F.3d 564, 567, 573 (6th Cir. 1998) (holding that damages for "mental suffering" were available as compensation under the Rehabilitation Act and noting that "each of our sister circuits reaching the question has held that compensatory damages are available for violations of § 504.").

[3] *See, e.g., Sw. Tel. & Tel. Co. v. Pearson*, 137 S.W. 733, 737 (Tex. Civ. App. 1911), *writ refused; Renihan v. Wright*, 25 N.E. 822, 825-26 (Ind. 1890); *Wadsworth v. Western Union Tel. Co.*, 8 S.W. 574, 575-79 (Tenn. 1888).

[4] *See, e.g., Univ. of S. Mississippi v. Williams*, 891 So. 2d 160, 174 (Miss. 2004); *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981).

[5] This Court has long recognized that the anti-discrimination principles of our Constitution and laws fight an implication of "inferiority in civil society, [which] lessen[s] the security of [victims'] enjoyment of the rights which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated on other grounds by, Taylor v. Louisiana*, 419 U.S. 522 (1975).

("a frequent consequence of discrimination is that the victim will suffer emotional distress").

Moreover, this Court has been guided in its determinations of the scope of available damages by the fact that these statutes evidence "no express congressional intent to limit the remedies available." *Sossamon v. Texas*, 563 U.S. 277, 288 (2011). *See also Franklin v. Gwinnett Cnty. Pub. Schs*, 503 U.S. 60, 70-71 (1992) ("absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."). Every applicable rubric – congressional intent, contract principles, and precedent – supports a favorable decision for the Petitioner.

Nonetheless, antipathy toward emotional-distress damages influenced the decisions of the courts below, skewing their analysis of the Question Presented. Yet, as empirical evidence and practical experience demonstrate, there is no warrant to have an aversion to emotional-distress damages as compensation and such antipathy should not factor into this Court's analysis.

A. The Courts Below Erroneously Treated Emotional Support Damages as Similar to Punitive Damages.

Aversion toward emotional distress damages plainly influenced the courts below and skewed their application of relevant directions from this Court's precedents. The district court acknowledged that, this Court authorized use of "any available remedy to make good the wrong done" "[w]here legal rights [established by a federal statute] have been invaded." Pet. App. 23a (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). It further recognized that punitive damages were not available, because this Court held that they "are not compensatory" for the "loss caused by that failure" to comport conduct to the federal grant's anti-discrimination requirements. Pet. App. 24a (quoting *Barnes v. Gorman*, 536 U.S. 181, 189 (2002)).

The court then made an unsupported leap that the compensatory damages anticipated by Congress in the statute and described by this Court in *Barnes* meant only compensation for pecuniary losses, a holding consistent with only a handful of outlier district courts. *See* Pet. App. 23a (listing cases). It then compounded its error by holding that emotional-distress damages "punish defendants for the outrageousness of their conduct," rather than compensate for the injury to the plaintiff. Pet App. 24a.

The Fifth Circuit affirmed the district court's decision by focusing on a supposed lack of notice for emotional-distress damages. Pet. App. 8a. In support of that conclusion, the court labeled the availability of emotional-distress damages the "exceptional situation" as a matter of contract law, and therefore

insufficient to constitute notice. Pet. App. 10a. Critical to its analysis was the erroneous view that emotional-distress damages are as foreign to compensation for contract breaches as punitive damages are. Pet. App. 10a.

An erroneous equivalency between emotional-distress damages and punitive damages plagued both decisions. They failed to appreciate that "compensatory damages and punitive damages . . . serve distinct purposes." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001). While punitive damages are intended to punish and deter, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), emotional distress damages comprise a "species of ordinary compensatory damages," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 520 (2008), that compensate for the "suffering of the injured person." *St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 658 (1915). They serve no punitive purpose, just an entirely compensatory one.

In further describing the difference between punitive damages and compensation for pain and suffering in *Cooper Indus.*, this Court highlighted the differences in how a jury's constitutionally protected factfinding function operates on them. The Court mandated *de novo* review of punitive damages because the amount of "punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Indus.*, 532 U.S. at 437 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)). While this Court found that punitive damages in the 19th century may have once "compensate[d] for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time," it had

"evolved" since then "[a]s the types of compensatory damages available to plaintiffs have broadened." *Id.* at 437 n. 11.[6]

Cooper Indus. justified treating punitive damages as outside the jury's Seventh Amendment factfinding function because they were not a "measure of actual damages suffered." *Id.* at 459 (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)). In doing so, the Court used the 1915 decision in *Craft* as an exemplar for "actual damages," *see id.* at 437, that are constitutionally committed to the jury's determination. As this Court well understood, *Craft* held that "damages for pain and suffering . . . involve[] only a question of fact." 237 U.S. at 661. *See also Cooper Indus.*, 532 U.S. at 446 (Ginsburg, J., dissenting) (citing *Craft* for that proposition). Emotional-distress damages, then, are what this Court has long termed "actual damages."

B. Criticisms of Emotional Distress Damages Should Play No Role in Determining their Availability.

Stale but frequent critiques of either the value of emotional-distress damages as compensation for real injuries or the task of assessing them should not guide the inquiry before this Court, as it may have the courts below. Relevant studies demonstrate the

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[6] This account of the relevant history that asserts punitive damages once had a compensatory purpose is disputed in Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today,* 78 Chi.-Kent L. Rev. 163 (2003). Nonetheless, both accounts make clear that pain and suffering damages always compensated and never punished.

misguided nature of these complaints, which generally fall into two categories.

The first criticism posits that there is no discernible "market value" for the injury and that "money damages alone will not . . . end one's emotional distress." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy,* 73 Cal. L. Rev. 772 (1985). We are, however, long past the time where we must struggle with whether monetary compensation serves as a useful remedy for emotional distress.

This Court recognized that the idea that "damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871," referring to damages under Section 1983 and citing contemporaneous treatises and legislative debate. *Carey v. Piphus*, 435 U.S. 247, 255 & n.9 (1978). Our civil justice system, *Carey* teaches, embraces the "'cardinal principle of damages'" as a remedy. *Id*. at 254-55 (quoting 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956)).[7] Moreover, damages to compensate for emotional distress resulting from a deprivation of rights is proper because it is a "personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." *Id*. at 263-64. *Carey's* observation about the type of injury inherent in a deprivation of rights applies with full force to rights observed as condition

[7] Recovery for intangible losses, like emotional distress, can be traced to Roman Law, where intentional harms merited pain and suffering damages, but negligent ones did not. Jeffrey O'Connell & Keith Carpenter, *Payment for Pain and Suffering through History*, 50 Ins. Counsel J. 411, 411 (1983).

for receiving federal funds, because the conduct prohibited in statutes like the one before this Court and the injury suffered here, remain comparable to those subject to other anti-discrimination measures, such as Section 1983.

The criticism that there is no accepted monetary measure for emotional distress attempts to contrast its existence with what are categorized a "economic damages," which purport to have a discernible value. However, even economic damages are not a matter of simple mathematics. Lost profits for future sales, valuations of property, future medical expenses, lost future wages, life plans, and a variety of other components of economic damages must be estimated on the basis of the best available evidence and usually involve the proffer of expert evidence. In addition, different jurisdictions have adopted different jurisdictions approaches to how to discount future economic damages to present values, how to tax recoveries, and how to account for medical and more general inflations. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev. 391, 398–99 (2005).

Long ago, this Court recognized that the changes in the law, in family size, spousal earnings affecting the applicable tax bracket, and even unforeseen deductions can occur to render future wages uncertain. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 494 (1980). Still, the law permits competing expert testimony of "future employment itself, future health, future personal expenditures, future interest rates, and future inflation" even though "matters of estimate and prediction." *Id*. It does so because "the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the

essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life." *Id*.

In light of these types of evidentiary presentations, juries may not engage in "speculation or guesswork," but they "may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). This Court has long recognized that "[d]ifficulty of ascertainment" cannot prevent recovery. *Id*. at 265. Thus, damages presentations, whether consisting of economic damages or emotional distress, face similar dilemmas in establishing their value, but that does not render them speculative or invalid.

The second critique of emotional-distress damages asserts that verdicts reflect sympathy biases in favor of victims, hostility to business, and juror generosity unbounded by evidence, yet "statistical and other analyses of actual jury damage awards offer a more reassuring assessment." Valerie P. Hans and Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. Empirical Legal Stud. 120, 121, 125 (2011) (footnote omitted).

Courts have ample experience discerning whether a plaintiff has mustered "objective verification of her emotional distress, chronic anxiety, and frustration" and apply well-understood criteria to determine whether damages compensating for emotional distress are excessive. *See, e.g.*, *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 503 (4th Cir. 2007). Studies also "routinely find that more serious injuries, measured in a number of different ways, typically

produce greater jury damage awards that reflect their relative severity." Hans and Reyna, 8 J. Empirical Legal Stud. at 125. In other words, courts require rigorous proof of emotional distress, not just conclusory assertions of it, and judges and juries issue compensation that properly correspond with the gravity of the injury proven.

Jurors are also skeptical of claims emotional distress, putting a plaintiff to his or her proof. *See, e.g.*, Shari S. Diamond, Michael J. Saks, & Stephan Landsman, *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DePaul L. Rev. 301 (1998). They are "highly suspicious of plaintiffs and unsympathetic when they encounter complaints from individuals they suspect may be whining or greedy." Shari Seidman Diamond and Jessica M. Salerno, "Empirical Analysis of Juries in Tort Cases," Jennifer Arlen, ed., Research Handbook on the Economics of Torts, at 422 (2013).

1. Criticism of emotional-distress damages does not provide a valid basis for limiting the availability of damages.

One major reason to disregard the misleading criticisms lodged against emotional-distress damages the anecdotal nature of much of it. Professor Michael Saks has explained that much anecdotal fodder is misleading and inaccurate, focus on outlier cases, and lack the type of reliable data that provides a fuller picture of that type that serious policy-makers ought to find necessary. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?*, 140 U. Pa. L. Rev. 1147, 1161

(1992). Crediting isolated incidents as representative distorts what a comprehensive body of data might show.[8]

2. Studies confirm that juries award pain-and-suffering damages responsibly and in line with the severity of the injury.

The same type of inapt "audible criticism" aimed at punitive damages has also targeted damages for emotional distress and other intangible injuries. Once again, public debate revolves around distorted media reports, which tend to highlight outlier verdicts[9] before any reduction takes place through remittitur or comparative negligence. Verdict reports also fail to appreciate that the amounts that defendants ultimately pay to satisfy judgments are usually significantly less than a jury awards, a process scholars refer to as receiving a "haircut." *See, e.g.*, David A. Hyman, *et al. Do Defendants Pay What Juries Award?: Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003,* 4 J. Empirical Legal Stud. 3 (2007).

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[8] This Court recognized that the "audible criticism" aimed at punitive damages did not align with the rigorous empirical studies that existed, which showed that "discretion to award punitive damages has not mass-produced runaway awards," but instead evidenced "an overall restraint." *Exxon Shipping*, 554 U.S. at 497-99.

[9] *See generally* Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DePaul L. Rev. 539 (2006); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 Law & Hum. Behav. 419 (1996).

Studies comparing judicial and jury assessments of damages, however, regularly find substantial agreement on both the severity of the injury meriting damages and what damages should be assessed. *See* Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751 (1999) ("regression models suggest that different decisionmakers--people with different roles in the legal system, different experience with personal injury cases, and different demographic backgrounds--relied on the same injury attributes in similar ways and gave them similar relative weight when evaluating the severity of injuries."). *See also* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 267-338 (2007) (summarizing research on civil jury verdicts and awards); Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 Ga. L. Rev. 431, 434-40 (2007) (detailing views of Georgia judges that noneconomic damages are not high compared to the evidence and that occasions for remittitur are rare).

Researchers over a long period of time consistently reach the conclusion that the size of the economic damages awarded aligns the size of noneconomic damages awarded because of the seriousness of the injury, regardless of whether the decision-maker is a judge or a jury. Hans & Reyna, 8 J. Empirical Legal Stud. at 141; Diamond and Salerno, *supra* at 426. When variability occurs between different cases with different damages, researchers attribute the differences to trial strategy. Defendants put on different amounts of evidence on damages questions, including times where no evidence is adduced at all, and plaintiffs "differed a great deal in the quality and quantum of evidence that

they put before the jury." Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 881 (1998) (footnote omitted).

To the suggestion that pain and suffering awards vary unpredictably, one researcher, working with an insurance industry database, found that "pain and suffering compensation does vary in a systematic and predictable fashion." W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?,* 8 Int'l Rev. L. & Econ. 203, 219 (1988). The variances, he found, are entirely rational and not the product of an uninformed or biased approach. Although noneconomic damages increase as economic damages increase, he found it is not the "consequence of a standard mark-up of the magnitude of the economic loss compensation," but instead tracks "injury severity." *Id.* at 217.

The accusation that juries are overly sympathetic to plaintiffs or to emotional appeals "finds little support in studies of jury behavior." Shari Seidman Diamond and Jessica M. Salerno, "Empirical Analysis of Juries in Tort Cases," Jennifer Arlen, ed., Research Handbook on the Economics of Torts, at 421 (2013). Indeed, portrayals of jurors as pro-plaintiff, guided by sympathy, and likely to award high damages is rebutted empirical research that "calls those stereotypes into doubt. Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 Fla. St. U. L. Rev. 469, 470 (2005).

Further evidence that the claim that juries have a pro-plaintiff bias is the stuff of fiction is evident from a consistent plaintiff win rate of around 50 percent

across studies. Diamond and Salerno, *supra* at 421-22 (summarizing studies).

The Justice Department's Bureau of Justice Statistics compiled statistics during the decade of the 2000s from both state and federal courts, consistent with a 50-50 win rate. In federal court, plaintiffs prevailed in tort cases generally at a rate of 48 percent and in product liability cases at a rate of 34 percent. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 208713, Federal Tort Trials and Verdicts, 2002-03, at 1 (Aug. 2005). The median damage award was $201,000. *Id*. at 6.

In the 75 largest counties in the country, state courts reported an overall plaintiff win rate of 55 percent, with the rates being 52 percent in tort and 65 percent in contract cases. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 202803, Civil Trial Cases and Verdicts in Large Counties, 2001, at 1 (Apr. 2004). Median awards in these cases were only $37,000. *Id*. A subsequent survey, the most recent available, found the plaintiff win rate stayed the same, but that the median awards had dropped to $28,000. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 223851, Civil Bench and Jury Trials in State Courts, 2005, at 3, 1 (Oct. 2008).

Even though these statistics do not cover emotional-distress damages in isolation, as that data is not reported separately, it confirms, based on a uniformity across studies that juries demonstrate the same type of "overall restraint" this Court found in *Exxon Shipping* in both liability and overall damage determinations.

The problem with damages is not one of overly generous juries whose sympathies for an injured party overrides the evidence. Jurors are skeptical of plaintiffs' claims. They "believe that there are too many frivolous lawsuits today and that plaintiffs who sue and receive money damages in general receive too much rather than too little." Robbennolt, 32 Fla. St. U. L. Rev. at 470 (citation omitted). In fact, a leading treatise on tort law declares that "undercompensation may be one of tort law's most significant problems," with overcompensation only evident when losses are very small. Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 502 (2d ed., 2021 update).

The bottom line is that empirical studies paint a far more reassuring picture of pain and suffering awards than might be gleaned from media accounts, political rhetoric, or the popular wisdom. The criticism of emotional-distress damages should not factor into this Court's analysis of the Question Presented.

II. Sufficient Notice of Potential Emotional-Distress Damages Exists when Intentional Discrimination Occurs, and Tort Cases that Involving Quasi-Contractual Relationships Deepen that Notice.

A. Federal Funding Recipients Have Sufficient Notice that the Full Compensation Is Available for Intentional Discrimination.

This Court has compared statutes invoking authority to condition federal funding on following federal direction pursuant to the Spending Clause, U.S. Const., art. I, § 8, cl. 1, like the law at issue in this case, to contractual arrangements, describing the bargain as being an agreement to abide by federally imposed conditions in return for federal monies. *Barnes*, 536 U.S. at 186. *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (a federal-funding recipient voluntarily and knowingly accepts [the contract's] terms").

Pennhurst is instructive on the notice issue. There, this Court held that recipients of federal funds lack notice that an *unintentional* violation could generate the full panoply of remedies that might otherwise be available. *Pennhurst*, 451 U.S. at 28–29. However, this Court subsequently made clear that the "notice problem does not arise . . . [where] intentional discrimination is alleged," because the statute obligates the recipient "not to discriminate." *Franklin*, 503 U.S. at 74-75 (1992). As the *Franklin* Court observed, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Id.* at 75.

The distinction between intentional and unintentional discrimination drawn in *Pennhurst* and *Franklin* makes eminent good sense and is consistent with other relevant areas of law. For example, "courts vary the use of proximate cause in tort cases, depending on whether the underlying tort is an intentional one or not." Sandra F. Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. 1199, 1202 (2013). Fewer concerns attach to intentional misconduct because the gap between attenuated causation versus direct effect evaporate at the same time that the need to assure accountability increases. *Id*. at 1206.

When a tortfeasor causes harm intentionally, liability follows regardless of how remote the likelihood of harm might be and includes liability for more harm than one who is solely negligent. Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 33 (2010). There is no expectation that potential liability is different when the breach of duty is contractually imposed, particularly when the obligation is an anti-discrimination one.

Using the same rationale that the Restatement expresses in tort, New Jersey, for example, permits plaintiffs to recover for emotional-distress damages resulting from breach of contract where the breach was "both intentional and outrageous and proximately cause[d] severe, foreseeable emotional distress."[10] *Picogna v. Bd. of Education*, 671 A.2d 1035, 1037 (N.J. 1996).

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[10] A variation on this rule has consistently been stated by various Restatements of Contract. *See, e.g.*, Restatement of Contracts § 341 (1932) ("In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton

Other states apply a similar rule for intentional breaches that cause foreseeable emotional distress. *See, e.g.*, *Growe v. Johnson*, 314 So. 3d 87, 99 (La. App. 4th Cir. 2021); *Taylor v. Honda Motorcars, Inc.*, 135 N.E.3d 1284, 1292 (Ct. App. 2019); *Fava v. Liberty Mut. Ins. Corp.*, 338 F. Supp. 3d 1217, 1222 (D.N.M. 2018) (applying New Mexico law); *Culpepper Enterprises Inc. v. Parker*, 270 So. 3d 116, 131 (Miss. Ct. App. 2018); *Gregory & Swapp, PLLC v. Kranendonk*, 424 P.3d 897, 905 (Utah 2018); *Brown v. State Farm Fire & Cas. Co.*, 358 F. Supp. 3d 1265, 1282 (N.D. Ala. 2018) (applying Alabama law); *John Hancock Mut. Life Ins. Co. v. Banerji*, 858 N.E.2d 277, 288 (Mass. 2006); *Parks v. Wells Fargo Home Mortg., Inc.*, 398 F.3d 937, 941 (7th Cir. 2005) (applying Illinois law and recognizing mental suffering damages' availability where foreseeable); *Giampapa v. Am. Fam. Mut. Ins. Co.*, 64 P.3d 230, 238 (Colo. 2003); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 93 (N.C. 1990).

Still others permit recovery when the distress is connected with a physical injury, as did Restatement (Second) of Contracts § 353 (1981). *See, e.g.*, *Marchisio v. Carrington Mortg. Servs., LLC*, 919 F.3d 1288, 1314–15 (11th Cir. 2019) (Florida law); *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 147 (3d Cir. 2000) (Pennsylvania law); *Moorehead v. State Farm Fire & Cas. Co.*, 123 F. Supp. 2d 1004, 1006 (W.D. Va. 2000) (applying Virginia law); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 444 (Del. 1996). Unlike the Fifth Circuit's assessment, these are

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or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.").

not exotic exceptions to the law of contracts but well-established practices, regularly applied.

While physical injury provides one basis for permitting emotional-distress damages for breach of contract, a second justification in the Restatement, permitting emotional-distress damages for breach of contract exists where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353. These types of contracts, according to many remaining states, seek services where a breach is likely to cause emotional distress. For example, in Michigan, a "contract to care for one's child [or an elderly parent] is a matter of 'mental concern and solicitude,'" rather than "pecuniary aggrandizement," that inherently provides notice of potential emotional-distress damages. *Lane v. KinderCare Learning Centers, Inc.*, 588 N.W.2d 715, 718 (Mich. 1998). In Texas, "plaintiffs may recover mental-anguish damages on breach-of-contract claims against those with whom they contract to prepare a dead family member's body. *Hardin v. Obstetrical & Gynecological Assocs. P.A.*, 527 S.W.3d 424, 444 (Tex. App. 2017).

Here, Respondent Premier Rehab received federal funding that obligated it not to discriminate against a third-party beneficiary like Petitioner Jane Cummings, knew or should have known that discrimination creates emotional distress in the victim, and understood that its services were the option for personal care that was identified by medical professionals as the only facility capable of rendering the care Cummings needed. Pet. App. 2a, 16a. Thus, the facts in this matter satisfy nearly every rendition of contract law that would recognize the availability of emotional-distress damages. In addition, the

upshot of Premier Rehab's refusal to accommodate Cummings's needs as a disabled person was increased back pain, Pet. App. 2a, a physical manifestation that separately and additionally justifies emotional-distress damages in jurisdictions where a connected physical injury must occur.

The totality of the circumstances thus provides the requisite notice. As this Court stated in *Barnes*, approvingly quoting Justice Marshall:

> When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. ... The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed.

Barnes, 536 U.S. at 189 (quoting *Guardians Ass'n*, 463 U.S. at 633 (Marshall, J., dissenting). A recipient of federal funding must anticipate that its breach of the incredibly important anti-discrimination obligation should include everything necessary to make the beneficiary discriminated against whole, including emotional-distress damages.

B. Tort Actions Deemed Quasi-Contract Provide Useful Lessons about the Availability of Emotional-Distress Damages.

This Court has recognized that the contract analogy it adopted for Spending Clause legislation is imperfect and, as a result, has taken care "not to imply that *all* contract-law rules apply to Spending Clause legislation." *Id*. at 186 (emphasis in orig.). *See also*

Sossamon, 563 U.S. at 290. Analogous is not equivalent.

While Spending Clause legislation has many of the attributes of a contract, civil rights legislation also reflect attributes of tort. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (§ 1983 "creates a species of tort liability"); *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (Fair Housing Act "sounds basically in tort"); *id.* at 195-96 (comparing racial discrimination to dignitary torts). Even where this Court has denied that an analogy to tort law applies, such as with Title VII, *United States v. Burke*, 504 U.S. 229, 241 (1992), it has employed tort principles when useful. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) (applying "textbook tort law" to arrive at the applicable causation standard); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (acknowledging that "Title VII borrows from tort law the avoidable consequences doctrine").

A number of torts have quasi-contractual aspects to them. Products liability, for example, is unquestionably a tort that derives from the purchase of a product, creating a contract between consumer and manufacturer and seller that implies warranties for merchantability and fitness for a particular use. *See* U.C.C. §§ 2-314 & 2-315. Products liability reflects a "public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986). The theory of products liability is that "responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'" *Id.* at 866-67 (quoting *Escola v. Coca Cola Bottling Co. of*

Fresno, 150 P.2d 436, 441 (Cal. 1944) (concurring op.)).

Under its admiralty authority, this Court chose to adopt a tort-based version of product liability when personal injury occurs to assure that the full array of damages are available to a plaintiff. *Id.* at 868, 871. In its analysis, the type of injury defined the scope of damages, rather than the theory of the case.

Medical malpractice provides another example of a cause of action sounding in tort that arises from a contractual relationship. Older caselaw considered and permitted damages for emotional distress under contract theories. *See, e.g.*, *Stewart v. Rudner*, 84 N.W.2d 816, 824 (Mich. 1957) (woman whose child was stillborn may recover damages for mental suffering for breach of contract by doctor who had agreed, but failed, to perform Caesarean section).

More modern caselaw sees the same breach of duty as a form of negligence, yet still recognizes that emotional-distress damages are available, sometimes invoking the emotional-distress harm's connection to a personal injury. *See, e.g.*, *Krishnan v. Ramirez*, 42 S.W.3d 205, 218 (Tex. App. 2001). Other courts dispense with the physical-risk requirement. *See, e.g.*, *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011) (permitting emotional-distress damages where patient received a misdiagnosis of being HIV positive).

The same rationale is applied in some states to justify emotional-distress damages in cases of legal malpractice, as long as the consequences were apparent and thus foreseeable. *Miranda v. Said*, 836

N.W.2d 8, 33 (Iowa 2013); *Gore v. Rains & Block*, 473 N.W.2d 813, 819 (Mich. App. 1991).

Yet, another tort that grows out of a contractual relationship is insurance bad faith. It exists when an insurer violates its legal duty to act in good faith when settling its policyholders' claims and is considered a tort in Arizona. *Filasky v. Preferred Risk Mut. Ins. Co.*, 734 P.2d 76, 82 (Ariz. 1987). In other states, such as Rhode Island, "violation of this duty sounds in contract as well as in tort." *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980).

Regardless of its classification, damages for emotional distress are regularly available in insurance bad-faith cases upon sufficient proof. *Filasky*, 734 P.2d at 82; *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 40 (Ky. 2017); *Miller v. Kenny*, 325 P.3d 278, 293 (Wash. 2014); *Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 432 (Haw. 2011); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1234 (Idaho 2010); *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004); *Bailey v. Farmers Union Co-op. Ins. Co. of Nebraska*, 498 N.W.2d 591, 603 (Neb. 1992); *Bibeault*, 417 A.2d at 319.

The availability of emotional-distress damages in these quasi-contractual instances suggests that there are no narrow exceptions when liability derives from a contractual obligation, and that the dividing line between tort and contract is not as impermeable as the courts below presupposed. Torts, particularly torts like products liability, malpractice, and insurance bad faith, strongly suggest that federal funding recipients should have no expectation that violation of their anti-discrimination contractual

obligations, when operating intentionally and in bad faith, should excuse them from damages for emotional distress, an entirely foreseeable consequence of discriminatory conduct.

Discrimination affects unique aspects of a person's well-being. Title VI and its progeny recognize that effect and impose a social-policy obligation that is unlike the pecuniary goals of a commercial contract and thus underscore the limitations of the contract analogy. The purpose of the liability that Title VI remedies "is not to reassign economic benefits to their rightful owner, but to compensate [third-party beneficiaries] for injury they suffer and to 'eradicat[e] discrimination throughout the economy.'" *Burke*, 504 U.S. at 250 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

Emotional-distress damages, then, are an essential part of the remedial scheme. In cases like this one, where they are the only damages available, their denial would render the congressional purpose a nullity.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the decision of the Fifth Circuit.

August 26, 2021

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