No. 20-219

IN THE

Supreme Court of the United States

JANE CUMMINGS,

Petitioner,

v.

PREMIER REHAB KELLER, P.L.L.C.,

Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who specialize in the law of remedies, contracts, and torts. They are thus familiar with the well-established principle that where there is a right, there is a remedy, and they are also well versed in the longstanding use of emotional distress damages to vindicate that principle and ensure that individuals who are subject to discrimination are fairly compensated for their injuries.

Amici curiae are:

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- Jean C. Love, Professor of Law, Santa Clara University School of Law
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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Jane Cummings was referred by two doctors to Respondent Premier Rehab Keller, P.L.L.C. ("Premier Rehab"), a physical therapy provider that receives federal funds, to seek treatment for her chronic back pain. Because Cummings is both deaf

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

and legally blind, she communicates using American Sign Language (ASL) and asked Premier Rehab to provide her with an ASL interpreter. Premier Rehab refused, and Cummings was forced to seek treatment elsewhere, despite being told by both doctors that Premier Rehab was the "best" provider in her area.

Cummings sued, alleging that Premier Rehab violated the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2), and the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18116. Cummings sought, among other things, damages for the "humiliation, frustration, and emotional distress" she experienced as a result of Premier Rehab's refusal to accommodate her disabilities and provide her with treatment. Pet. App. 16a.

The district court dismissed Cummings's claim, concluding that "[d]amages for emotional distress are unrecoverable," *id.* at 23a, and the court below affirmed. According to the court below, even though federal funding recipients are generally liable for "compensatory damages," *id.* at 6a, and for "those remedies traditionally available in suits for breach of contract," *id.* at 7a (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)), Cummings could not recover because, in the court's view, "emotional distress damages are not available for breach of contract," *id.* at 9a (citing Restatement (Second) of Contracts § 353 (1981)).

The decision of the court below is wrong. To start, as Cummings's brief explains, "the governing rule in the specific context here is that emotional-distress damages are available in cases involving breaches of contractual anti-discrimination provisions." Pet'r Br. 35. And more broadly, the decision is at odds with the well-established legal principle that "where there is a legal right, there is also a legal remedy," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (citations omitted),

and the long use of emotional distress damages to vindicate that legal principle.

"[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* at 163 (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)). The Framers were steeped in English common law traditions and understood that legal rights were meaningless without the ability to go to court to obtain a remedy when those rights were violated. *See id.* ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). The Framers enshrined this principle in our national charter, providing in Article III of the Constitution that the federal courts could hear "all Cases, in Law and Equity," U.S. Const. art. III, § 2.

It is no surprise, then, that this Court has repeatedly affirmed the power and duty of federal courts to award appropriate remedies to individuals who have statutory causes of action. As this Court said in *Marbury*, if judges could not fairly compensate plaintiffs after their legal rights were violated, the country would cease to be "a government of laws" and would become one "of men." 5 U.S. at 163.

In the years following *Marbury*, this Court has repeatedly applied the presumption that where there is a right there is a remedy, *see, e.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946) (money damages are available as "necessary relief" to plaintiffs injured by federal officers' unconstitutional searches), including in cases involving the statutory anti-discrimination provisions at issue here, *see, e.g.*, *Barnes*, 536 U.S. at 181 (compensatory damages are available for violations of § 202 of the Americans with Disabilities Act of 1990 and § 504

of the Rehabilitation Act of 1973); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (compensatory damages are available under Title IX of the Education Amendments of 1972). In the latter two cases, this Court affirmed the "well settled rule that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Barnes*, 536 U.S. at 189 (internal quotation marks omitted).

American courts have always considered emotional distress damages to be one of the remedies available to "make good the wrong done" and ensure that plaintiffs receive fair compensation for their legal injuries. These damages have long been used to compensate plaintiffs for their injuries, provided that those injuries were the "natural and proximate" consequences of the violation at issue. Jabez Sutherland, *Treatise on the Law of Damages* § 50, 103 (1893). In other words, "mental suffering," *id.* § 95, at 197, "indignity," 2 Simon Greenleaf, *Law of Evidence* § 267, at 272 (2d ed. 1848), and "humiliation," *Gould v. Christianson*, 10 F. Cas. 857, 864 (S.D.N.Y. 1836), were all proper subjects of compensation when they resulted from a legal violations.

Significantly, courts have long awarded damages for emotional distress to individuals who have experienced discriminatory treatment or exclusion. For example, in cases involving contracts between common carriers and their passengers, which implicitly included a right to fair treatment, passengers could recover damages for emotional distress—the "proximate[] result[]" of the "infraction of contractual obligation," *Austro-Am. S.S. Co. v. Thomas*, 248 F. 231, 234 (2d Cir. 1917); *see id.* (the plaintiff could recover damages for "mental suffering [that] proximately resulted"

from the defendant's agent's use of "insulting and injurious language" toward her).

To assess emotional distress damages, courts have relied on "the sound discretion of a jury," just as they would if any other type of damages were at issue. William Hale, *Handbook on the Law of Damages* § 30, at 70 (1896); 3 Blackstone, *supra*, at 397 (if "damages are to be recovered, a jury must . . . assess them"). Indeed, as commentators have made clear, damages for mental suffering are no more indeterminate or "vague" than those imposed in other circumstances, Hale, *supra*, at 93. Furthermore, while these valuations have been left to the jury's discretion, courts have routinely reviewed them to ensure that they were based on competent evidence.

In sum, it is well established that when a plaintiff has a legal right and a cause of action under a statute, the court may use "any available remedy," *Barnes*, 536 U.S. at 189, to compensate that plaintiff, and emotional distress damages have always been available to ensure that plaintiffs are fully compensated for their injuries. The decision of the court below, which held that courts could not use emotional distress damages to remedy discriminatory conduct that is illegal under Title VI and related statutes, should be reversed.

ARGUMENT

I. The Principle that Where There Is a Right, There Is a Remedy Has Deep Roots in American Legal Thought and Has Been Repeatedly Recognized by this Court.

The presumption that the invasion of legal rights should lead to a "remedy to make good the wrong done," *Barnes*, 536 U.S. at 189 (internal quotation marks omitted), has deep roots in the Anglo-American

legal system and is well established in this Court's modern jurisprudence.

A. As early as 1642, English law recognized the principle that where there is a right, there is a remedy. As Sir Edward Coke explained, "every Subject of this Realme, for injury done to him" may "take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any [denial], and speedily without delay." Edward Coke, *The Second Part of the Institutes of the Laws of England: A Commentary upon Littleton* 55-56 (1642). William Blackstone described a similar principle, which was "settled and invariable . . . in the laws of England," that "every right when withheld must have a remedy, and every injury its proper redress." 3 Blackstone, *supra*, at 109; *id.* at 23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."). "[I]n vain would rights be declared," Blackstone explained, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 William Blackstone, *Commentaries on the Laws of England* 55-56 (1765).

For Blackstone, the presumption of an effective remedy was central to his view that the government was "bound to [provide] redress in the ordinary forms of law." 3 Blackstone, *supra*, at 115-16. The "right to a law of redress" was a structural right, "no different in kind from the right to the institutions of representative government." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 559 (2005). It obliged the government to establish courts that would redress violations of individual

rights, including the right to "legal and uninterrupted enjoyment of his life, his limbs, [and] his body," 1 Blackstone, *supra*, at 125, by providing a legal remedy, *id.* at 137 (describing the "right of every Englishman . . . [to] apply[] to the courts of justice for the redress of injuries").

Legal thinkers in the early Republic embraced this aspect of Blackstone's philosophy and were similarly committed to the presumption of effective redress. The Framers of many state constitutions included the right to a judicial remedy in those documents, often paraphrasing Lord Coke. *See, e.g.*, Md. Declaration of Rights and Const. of 1776, art. XVII ("[E]very freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land."); Del. Declaration of Rights and Fundamental Rules of 1776, § 12 (same); Mass. Const. of 1780, art. XI ("Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries . . . ."); N.H. Const. of 1784, art. 14 (same); Pa. Const. of 1776, § 26 ("All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay . . . ."); Vt. Const. of 1786, ch. 2, § IV ("Courts of justice . . . shall be open for the trial of all causes proper for their cognizance, and justice shall be therein impartially administered, without corruption, or unnecessary delay."); Ky. Const. of 1792, art. XII, § 13 ("[A]ll courts shall be open, and every person for an injury done him . . . shall have remedy by the due course of law; and right and justice administered, without sale, denial, or delay."); *see generally* Hon. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1310 (2003) (citing

Revolutionary-era and modern state constitutions). Indeed, even the Declaration of Independence framed independence from Britain as necessary to redress various "injuries and usurpations." Declaration of Independence para. 1 (U.S. 1776); *see also* Danielle Allen, *Our Declaration* 265 (2014) (arguing that the Declaration stands for a notion of equality "in which, when one person does injury to another, the other person can push back and achieve redress"); *accord* John C. P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* 35 (2020).

The Framers of the Constitution incorporated the principle that rights should lead to remedies into our national charter. By providing in Article III of the Constitution that federal courts could hear "all Cases, in Law and Equity," U.S. Const. art. III, § 2, the Framers incorporated Blackstone's beliefs about the importance of "proper redress," 3 Blackstone, *supra*, at 109, establishing a judicial system that would enable "the pursuit of remedial justice," including the remedies available in "Law and Equity," *see* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1639, at 506 (1833) (noting that in Article III, "the constitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union").

The inclusion of equity cases within the jurisdiction of the federal courts is particularly significant, as the Framers were no doubt familiar with the principle that "equity will not suffer a wrong without a remedy." 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 423, at 464 (1881). Indeed, this principle was "the source of the entire equitable jurisdiction." *Id.*; George Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in*

Courts of Chancery 46 (1878) (describing the principle as a "maxim" of equity jurisprudence); *The Federalist No. 80*, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the "necessity of an equitable jurisdiction in the federal courts" and listing examples of situations "which a court of equity would not tolerate").

B. After the Constitution was ratified, the principle that rights should lead to remedies remained central to American legal thought. Indeed, early state court decisions, informed by English authorities including William Blackstone and Edward Coke, emphasized that whenever the law "recognizes or creates a private right, it also gives a remedy for the wilful violation of it." *Yates v. Joyce*, 11 Johns. 136, 140 (N.Y. Sup. Ct. 1814). Courts emphasized that this presumption—or its Latin equivalent, *ubi jus ibi remedium*, which is commonly translated to mean "where there's a right, there's a remedy," Goldberg & Zipursky, *supra*, at 15—was the "pride of the common law," *Yates*, 11 Johns. at 140.

Because this presumption of effective redress underlies "[t]he very essence of civil liberty," *Marbury*, 5 U.S. at 163, it allowed courts to provide effective remedies to plaintiffs with statutory or common-law causes of action. *Id.* One district court relied on the principle to allow a case to proceed when a plaintiff had only demonstrated an entitlement to nominal damages, explaining that it was "laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507 (C.C.D. Me. 1838) (Story, J.); *see id.* (explaining that nominal damages were appropriate when the plaintiff established a legal injury, but "no other damage is established"); *see also Blanchard v. Baker*, 8 Me. 253, 268-70 (1832)

(allowing nominal damages for trespass, although the plaintiffs could not yet show "actual damage" from the defendant's diversion of a co-owned stream, because "[t]he plaintiffs have sustained an injury; and are therefore entitled to a legal remedy").

In *Marbury v. Madison*, Chief Justice Marshall recognized that the presumption of effective redress requires courts to issue appropriate remedies to plaintiffs whose rights have been violated. William Marbury brought a mandamus action to compel the Secretary of State to deliver a commission that had been signed by the President. Chief Justice Marshall invoked Blackstone in his decision, explaining that "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 163 (quoting 3 Blackstone, *supra*, at 109).

Because Marbury had a "vested legal right" to his commission, *id.* at 162, he was entitled to a writ of mandamus—the "proper remedy" in the case—to redress his injury, *id.* at 169; *see id.* at 166 (noting that "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy"). As this Court observed, a broad understanding of the individual's right to go to court to redress violations of personal rights was "the very essence of civil liberty" and necessary to ensure the Constitution's promise of a "government of laws, and not of men." *Id.* at 163.

In 1838, this Court again affirmed the need to provide a "fit and appropriate remedy" for the violation of an "irreversibly established" right. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 614, 620 (1838). In *Kendall*, the Court considered an act of Congress that directed the Solicitor of the Treasury to assess, and the

Postmaster General to credit, several mail contractors' claims for repayment. *Id.* at 608-09. After determining that the contractor had a "just and established" right under the act, the Court held that a writ of mandamus directing the Postmaster to credit the contractors for their services was the "appropriate remedy." *Id.* at 614. The Court noted that the other option—namely, awarding damages—would be a "remedy in name only, and not in substance" because the Postmaster would be unable to pay. *Id.* at 615. According to the Court, if Congress had the "power to command that act to be done," the power to enforce it effectively "must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized [government], that there should be no remedy, although a clear and undeniable right should be shown to exist." *Id.* at 624.

Nineteenth-century state courts, too, reiterated this principle, interpreting their states' statutes with the presumption that "the remedy is intended to be coextensive with the injuries that may be caused." *Schuylkill Navigation Co. v. Loose*, 19 Pa. 15, 18 (1852); *see id.* ("It is impossible, in the face of principles of justice . . . to suppose that the Legislature, when providing a remedy for an acknowledged injury, mean to take it away unless the injury arise in one specified form."); *Jetter v. N.Y. & Harlem R.R. Co.*, 2 Abb. Ct. App. 458, 464 (N.Y. 1865) ("[E]very innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury . . . .").

C. More recently, this Court has continued to affirm the principle of effective redress. In *Bell v. Hood*, the plaintiffs sought damages for a violation by federal officers of their rights under the Fourth and Fifth Amendments. 327 U.S. at 680. Invoking *Marbury*,

this Court explained that "where federally protected rights have been invaded, . . . and a federal statute provides for a general right to sue for such invasion, . . . it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 684. After determining that the plaintiffs had a cause of action, this Court approved of the damages award, noting that "federal courts may use any available remedy to make good the wrong done." *Id.*

This Court reached a similar conclusion in *Franklin v. Gwinnett County Public Schools*, in which the Court considered whether monetary damages are generally available for intentional violations of Title IX, the federal law that prohibits sex discrimination by educational programs receiving federal funding. 503 U.S. at 65-66. After explaining that the question of remedies available under a statute is "analytically distinct" from the issue of whether the statute provides a cause of action, *id.* at 65 (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)), this Court held that monetary damages are generally available for intentional violations of Title IX—violations which Congress had "[u]nquestionably" prohibited, *id.* at 75. Expanding on *Bell*, this Court explained that the "power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 68 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964)). Thus, even though Title IX did not specify the remedies available, the Court concluded that monetary damages were appropriate because otherwise the plaintiff would be left "remediless," *id.* at 76, and the statute rendered "inutile," *id.* at 74.

In *Barnes v. Gorman*, this Court vindicated the principle of effective redress once again. 536 U.S. 181 (2002). There, the plaintiff sought relief under the Americans with Disabilities Act and the Rehabilitation Act from police officers who had seriously injured him while transporting him in a police vehicle without securing his wheelchair. *Id.* at 184. In holding that the plaintiffs were entitled to compensation, this Court invoked the "'well settled' rule that 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Id.* at 189 (quoting *Bell*, 327 U.S. at 684). While the Court concluded that punitive damages were not available, that was because such damages were designed to punish the wrongdoing, not compensate the victim, and thus they did not fall under the "rule" requiring compensation. *Id.*

D. One important manifestation of the presumption of effective redress is the principle that courts can use any appropriate relief to compensate injured parties for their losses. As Blackstone noted, compensation is often key to the presumption of effective redress. After a legal injury, the court must "redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent," 4 William Blackstone, *Commentaries on the Laws of England* 7 (1769), which would be "a pecuniary satisfaction in damages," 3 Blackstone, *supra*, at 116.

When Blackstone spoke of "pecuniary satisfaction," he meant that parties should be fairly compensated for their legal injuries. 2 William Blackstone, *Commentaries on the Laws of England* 438 (1766) (noting that damages provide "compensation and satisfaction for some injury sustained"). Damages, in the words of Lord Coke, have "a special signification for

the recompence that is given by the jury to the [plaintiff], . . . for the wrong the Defendant hath done unto him." Edward Coke, *The First Part of the Institutes of the Laws of England: A Commentary upon Littleton* § 431, at 257 (1628).

Once again, many jurists in early America heeded the guidance of Blackstone and Coke. In 1825, Justice Story described "[t]he general rule of law . . . that whoever does an injury to another is liable in damages to the extent of that injury." *Dexter v. Spear*, 7 F. Cas. 624, 624 (C.C.D.R.I. 1825) (holding that the plaintiff was entitled to "damages for the consequences" of a libel because "[c]ivil society could not exist upon any other terms); *see Bussy v. Donaldson*, 4 Dall. 206, 207 (Pa. 1800) (describing the "rational, and . . . legal, principle" that "compensation should be equivalent to the injury"); *Rockwood v. Allen*, 7 Mass. 254, 256 (1811) (noting that the plaintiff was entitled to an award "commensurate to the injury sustained"). State courts relied on this principle to interpret statutes so that they provided compensation "coextensive with the injuries that may be caused." *Loose*, 19 Pa. at 18; *see id.* (statute that permitted recovery for landowners injured by the defendant's erection of a dam should provide compensation for injuries caused by the defendant's diversion of a river); *Blackburn v. Baker*, 7 Port. 284, 290 (Ala. 1838) (although statute required individuals who cut another's trees to pay a fixed sum, a landowner who brought a cause of action under that statute was entitled to compensation "proportioned to the injury done").

Early American legal commentators similarly insisted that "whenever loss is coupled with legal injury, the law [should] give[] compensation." Theodore Sedgwick, *Measure of Damage* 29 (3d. ed. 1858); Greenleaf, *supra*, § 253, at 251 n.2 ("By damage, we understand

every loss or diminution of *what is a man's own*, occasioned by the fault of another." (quoting 1 Thomas Rutherford, *Institutes of Natural Law* 385 (1799))); Sutherland, *supra*, § 12, at 27 (describing the "universal and cardinal principle [that] the person injured shall receive a compensation commensurate with his loss or injury"). As these commentators explained, the principle of compensation was unique to the common law, which was "generally remedial in character," Sedgwick, *supra*, at 8. Unlike other legal systems, which set damages "either by fixing on an arbitrary valuation . . . applicable to all cases, or by leaving the whole matter largely to the discretion of the tribunal which has cognizance of the subject," *id.* at 26, courts acting in the common-law tradition relied on the jury to determine a remedy "commensurate to the injury," *id.* at 27 (internal quotation marks omitted); *see Fisher v. Patterson*, 14 Ohio 418, 426 (1846) (refusing to set aside damage award in libel case because "every person, for an injury done him in his reputation, shall have remedy by due course of law, and right and justice administered without denial or delay"). Furthermore, the common law was unique in conferring on juries a broad discretion to redress injuries in the form of compensation. *See* 3 Blackstone, *supra*, at 397 (if "damages are to be recovered, a jury must . . . assess them").

Generally, common-law courts remedied a wrong by providing compensation for the "natural and proximate" results of the injury. Sutherland, *supra*, § 50, at 103; *see* Sedgwick, *supra*, at 116 (asserting that "the law refuses to take into consideration any damages remotely resulting from the act complained of"); *Randel v. President, Dirs. & Chesapeake & Del. Canal*, 1 Del. 233, 316 (Del. Super. Ct. 1833) (reproducing jury instruction explaining that "whatever loss or damage

naturally and immediately results from the wrong complained of, the wrong-doer is bound to compensate"). In a contract action, the "natural and proximate causes" of a breach of contract aligned with the rule of liability, so "that the party in default [was to] be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into." Sedgwick, *supra*, at 116 (citing *Hadley v. Baxendale*, 36 Eng. L. & E. 898 (1854)).

In sum, commentators and courts alike recognized that the principle of effective redress should ensure that individuals with a cause of action under a statute received "appropriate relief"—that is, compensation sufficient to redress the natural and proximate results of that injury. This compensation often involved damages for emotional distress, as the next Section explains.

II. Emotional Distress Damages Have Long Been Viewed as an Important Means of Providing Redress for Victims of Legal Wrongs.

Emotional distress damages have always been an important means of vindicating the principles that where there is a right, there is a remedy and that individuals should be compensated when they have been the victims of legal wrongs. More specifically, courts have long awarded damages to compensate plaintiffs for emotional harms or "mental sufferings," *Chamberlain v. Chandler*, 5 F. Cas. 413, 415 (C.C.D. Mass. 1823) (Story, J.), especially in cases involving insult, discrimination, and exclusion.

A. Nineteenth century legal commentators recognized that emotional distress can be a component of an injury caused by intentional wrongdoing, and

therefore a proper subject of compensation. When Judge Sedgwick described compensation for an "[i]njury resulting from the acts or omissions of others," he noted that it "consists [o]f the actual pecuniary loss directly sustained . . . [and] [o]f the mental suffering produced by the act or omission in question; vexation[, and] anxiety." Sedgwick, *supra*, at 33. In his treatise on evidence, Simon Greenleaf similarly explained that the "indignity and insult" experienced by a plaintiff should "be given in evidence, to show the whole extent and degree of the injury." Greenleaf, *supra*, § 272, at 277. In other words, "mental" suffering was "actual and not metaphysical damage, and deserve[d] compensation." Sutherland, *supra*, § 399, at 859 (citations omitted).

As these treatises make clear, juries have long considered the entirety of a legal violation, including, naturally, any circumstances that led to mental distress, when determining how to compensate a victim. As one court put it, "[t]he party is to be indemnified, for what he has actually suffered; and then all those circumstances, which give character to the transaction, are to be weighed and considered." *Bateman v. Goodyear*, 12 Conn. 575, 580 (1838); *see Vogel v. McAuliffe*, 18 R.I. 791, 793 (1895) (court below did not err in admitting testimony that defendant's negligence made his child sick, although the child recovered, because "the plaintiff was annoyed, and subjected to more or less mental suffering and anxiety, by reason thereof"); Greenleaf, *supra*, § 253 n.2, at 250-51 (noting that "those circumstances, which give character to the transaction, are to be weighed and considered").

Courts did not stray from this rule in actions concerning breaches of contract, where the plaintiffs' feelings could be considered consequences of the breaches, provided that those feelings were contemplated by the

parties, and thus the natural and proximate result of the wrongful conduct. Sedgwick, *supra*, at 116; *see* Sutherland, *supra*, § 92, at 194-95 ("[T]o the extent that a contract is made to secure relief from a particular inconvenience or annoyance or to confer a special enjoyment, the breach, so far as it disappoints in respect of that purpose, may give right to damages appropriate to the objects of the contract." (referencing *Hobbs v. London & Sw. Ry. Co.*, 10 Eng. Rep. 111 (Q.B. 1875), and *Coppin v. Braithwaite*, 8 Jur. 875 (Exch. 1845)); Hale, *supra*, § 39-40, at 102 ("[N]ot all contracts are made for pecuniary benefits; and, 'where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach.'" (quoting *Wadsworth v. W. Union Tel. Co.*, 86 Tenn. 695 (1888)); *Coppin*, 8 Jur. at 876, 877 (in breach of contract action, jury could consider "insulting language" and "disgrace" suffered by the plaintiff in assessing damages because "defendants are liable for every thing done in breach of the contract"); *see also Lewis v. Holmes*, 109 La. 1030, 1034 (1903) (in breach of contract action, the plaintiffs could recover for "disappointment" at the defendant's failure to timely deliver wedding trousseau, because the defendant should have known that "if the dresses were not finished by that day, the bride would be keenly disappointed").

Significantly, courts have allowed defendants to recover for the emotional distress caused by a breach of a common carrier's promise not to exclude or mistreat passengers. In *Chamberlain*, Justice Story, as circuit justice, permitted several passengers to receive compensation for the "mental sufferings" they experienced at the hands of a "tyrannical" ship captain. 5 F. Cas. at 414. Justice Story noted that the plaintiffs' contract with the ship captain encompassed "comforts,

necessaries, and kindness," and after the contract was "in substance violated . . . the wrong is to be redressed as a cause of damage," which included damages for emotional distress. *Id*. at 415.

Cases like *Chamberlain* make clear that breaches of express or implied contracts to serve the public could result in damages for mental harms. As Justice Story recognized, common carriers like the ship's captain were subject to an express or implied contract to treat passengers or customers courteously. *See also* 3 Blackstone, *supra*, at 164 (describing an "implied contract with a common inn-keeper" as including the "implied engagement to entertain all persons who travel that way," and noting that the breach of that duty gives rise to a cause of action in assumpsit); *Commonwealth v. Power*, 48 Mass. 596, 601 (1844) ("An owner of a steamboat or rail road, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests . . . [and] he is bound, so to regulate his house, . . . with regard to the peace and comfort of his guests . . . ."). Because contracts with common carriers implicitly included a right to fair treatment, *Power,* 48 Mass. at 601, plaintiffs could recover damages for emotional distress—the "proximate result" of the "infraction of contractual obligation," *Thomas*, 248 F. at 234—after proven breaches of these contracts. *See, e.g.*, *id.* at 235 (the plaintiff could recover emotional distress damages from common carrier who accused her of passing a bad check); *Craker v. Chi. & N.W. Ry. Co.*, 36 Wis. 657, 679 (1875) (after being harassed by train conductor, the plaintiff was entitled to compensatory damages for her "terror and anxiety, her outraged feeling and insulted virtue, for all her mental humiliation and suffering"); *Laffitte v. New Orleans City & L.R. Co.*, 43 La. Ann. 34, 36 (1890) (the plaintiff could recover for "damages to feelings" that resulted

when a common carrier accused him of "passing counterfeit money").

In these cases, nineteenth-century courts recognized that the provision of emotional distress damages was the only way to fairly compensate plaintiffs for the contractual breaches that had occurred. As one court explained when holding a railway company liable for the emotional distress that resulted from a conductor's "boisterous [and] insulting" language, mistreatment could "hurt[] more than a mere physical blow," and pecuniary damages would be "no antidote" for these harms. *McGinnis v. Mo. Pac. Ry. Co.*, 21 Mo. App. 399, 401, 411, 412 (1886). The passenger's rights were of no avail "if, as contended[,] the only penalty be compensation for actual, tangible loss." *Id.* at 410; *see Chi. & N.W. Ry. Co. v. Williams*, 55 Ill. 185, 190 (1870) ("If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all.").

In common carrier cases, courts also awarded damages for emotional harms caused by discriminatory treatment. As these courts recognized, the common-law duties of innkeepers prevented them from admitting some travelers and excluding others. *See, e.g.*, *Markham v. Brown*, 8 N.H. 523, 529-30 (1837) (noting that an innkeeper had no "power to discriminate [between guests] . . . so long as each . . . comes in a like suitable condition"); *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 150 (1873) (noting that "all persons, unobjectionable in character and deportment, who observe all reasonable rules and regulations of the common carrier, who pay or offer to pay first-class fare, are entitled, irrespective of race or color, to receive . . . accommodations"); *Sawyer v. Dulany*, 30 Tex. 479, 488 (1867) (explaining that "carriers do not undertake to carry those of the stronger sex only, or those of such

robust constitutions or mental conditions as are less liable than others to receive injuries"). Because of this duty, breach of contract actions involving common carriers often involved compensation for the emotional distress occasioned by discrimination by public carriers. *See, e.g.*, *Coger*, 37 Iowa at 149, 160 (upholding damage award against steamboat company when officers used "coarse language" to remove the plaintiff, because "[h]aving obtained the ticket . . . [the plaintiff] was entitled thereby to all the rights which it would have conferred upon a white person"); *Williams*, 55 Ill. at 186, 190 (awarding damages to the plaintiff, a "colored woman," for the "delay, vexation and indignity to which [she] was exposed" when she was excluded from a train car because of her race); *Gray v. Cincinnati S. R.R. Co.*, 11 F. 683, 687 (C.C.S.D. Ohio 1882) (awarding damages to a plaintiff who was barred from a First Class car due to her race, "as will make her whole," including for non-pecuniary considerations like the "inconvenience she was put to"); *Aaron v. Ward*, 203 N.Y. 351, 357, 355 (1911) (a plaintiff who was excluded from bathhouse due to her religion was entitled to "the same measure of damages . . . in actions against carriers or innkeepers when brought for breach of . . . contract[]," including "damages for the indignity inflicted").

When twentieth century courts began to recognize separate tort actions for the intentional infliction of emotional distress (IIED), they too compensated plaintiffs for the emotional distress caused by discrimination. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338 (1952) (noting that IIED actions grew out of the long history of awarding damages for mental suffering when "a cause of action [wa]s otherwise established"); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*,

47 Wash. & Lee L. Rev. 123, 126 (1990) (describing the growth of the IIED action and collecting cases). These courts, like the courts that had long awarded emotional distress damages in common carrier cases, recognized that compensation for emotional suffering is often necessary to redress the harms of discrimination, exclusion, and harassment. Significantly, many IIED cases, including *Siliznoff*, involved the breach of an agreement between two parties, as courts recognized that a preexisting agreement may create a context in which emotional distress can result. *See, e.g.*, *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 499 (1970) (employer liable for terminating and insulting the plaintiff using racial epithets); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014) (employers liable for permitting a "hate-ridden and menacing environment to persist for more than three years").

B. Respondent argues that emotional distress damages should not be available here because they are "indeterminate" and therefore similar to the punitive damages this Court said were unavailable in *Barnes*. Resp. Supp. Opp. Br. 10-11. This is wrong. Damages for emotional distress are entirely distinct from punitive damages and have long been viewed as such. *See, e.g.*, Sedgwick, *supra*, at 632 n.1 (noting that "[t]he mental sufferings, the dismay and consequent shock to the feelings, enter into the actual injury, and may be considered in awarding damages[, which] may be done independent of the question of vindictive damages"); Sutherland, *supra*, § 390, at 835-36 (describing "exemplary damages" as relevant only for "wrongs done with bad motive," but noting that the wantonness of an act could separately "render additional damages necessary to adequate compensation").

Importantly, the two remedies serve completely different purposes. Compensatory damages "are

intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (internal citations omitted), no matter whether that loss stems from physical or mental injuries. Punitive damages, by contrast, "serve a broader function" than their compensatory counterparts. *Id.* They are aimed at "deterrence and retribution" against a defendant, rather than making a plaintiff whole. *Id.* Because they aim to deter, punitive damages have always been tied to the "reprehensibility of the defendant's conduct." *Id.* at 419 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

Furthermore, courts have always assessed punitive damages and those that compensate emotional distress using different standards. When imposing compensatory damages for the "mental suffering, vexation and anxiety" caused by common carriers, courts focused on the plaintiff's suffering, rather than the defendant's "malicious intent," which was required for the award of punitive damages. *Craker*, 36 Wis. at 678 (noting that "[t]he appearance of malicious intent may indeed add to the sense of wrong[,] . . . [b]ut that goes to mental suffering, and mental suffering to compensation"). In many cases involving common carrier discrimination, courts permitted emotional distress damages, but declined to award punitive damages for the same conduct, *see id.*; *Hamilton v. Third Ave. R.R. Co.*, 53 N.Y. 25, 28 (1873) (holding that the plaintiff was entitled to "compensation for . . . the injury done to his feelings" after being ejected from a train car, but not for exemplary damages, which go "beyond actual compensation to the plaintiff"); *Shepard v. Chi., R.I. & P. Ry. Co.*, 77 Iowa 54, 59 (1889) (citing jury instructions and confirming that the charge "confined the jury to

an allowance for compensatory damages"); *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 359 (1904) (noting that "[d]amages given on the footing of humiliation, mortification mental suffering, etc., are compensatory, and not exemplary damages" and collecting cases (internal quotation marks omitted)), often reasoning that the defendant—the corporation that owned the common carrier—did not have the requisite malicious intent, *see Emmke v. De Silva*, 293 F. 17, 22 (8th Cir. 1923) (noting the lack of evidence that "the company, or any other officer of it, knew what [the offensive innkeeper] was about to do or of his intentions," and remitting punitive damage award); *Craker*, 36 Wis. at 675 (in breach of contract action regarding acts of a conductor, the "plaintiff . . . is not entitled to exemplary damages against the principal, for the malicious act of the agent").

This distinction between punitive and compensatory damages is no less relevant under the statutes at issue in this case than in other contexts. While liability for compensatory damages depends on the defendant's intentionality, *Franklin*, 503 U.S. at 75, the *extent* of the compensation is tied to the "loss caused" by that intentional act, *Barnes*, 536 U.S. at 189.

Respondent's suggestion that emotional distress damages are "indeterminate" is wrong as well. Such damages are subject to the careful consideration of juries and judges. 3 Blackstone, *supra*, at 377 (it is the province of the jury to "assess the damages . . . sustained by the plaintiff, in consequence of the injury"); Sutherland, *supra*, § 459, at 947 (describing the "peculiar province of the jury"); Greenleaf, *supra*, § 255, at 257. When reviewing evidence of "injured feelings, . . . wounded pride, mental suffering, and the like," *Shepard*, 77 Iowa at 58 (citing jury instructions), jurors assumed their traditional function as authorities on

every matter of fact, and particularly on the question of damages. Jurors were to "weigh[] and consider[]" the "circumstances, which give character to the transaction," *Bateman*, 12 Conn. at 580, but could not "take into consideration any damages remotely resulting from the act complained of," Sedgwick, *supra*, at 57; *see also Craker*, 36 Wis. at 678-79 (noting that the jury considered only the "mental suffering directly consequent" to the wrong to determine compensation for the plaintiff's "terror and anxiety"); *Louisville & N. R.R. Co. v. Donaldson*, 19 Ky. L. Rptr. 1384, 439 (1897) (upholding damage award against common carrier because "the injury to his feelings and the mortification which he suffered were alleged in the petition" and supplemented by testimony).

In this way, emotional distress damages have always been like other forms of jury-determined redress. As one commentator noted, "mental suffering is no more vague, fluctuating, or difficult to estimate than physical suffering which is always a subject for compensation." Hale, *supra*, § 39-40, at 93; *see id.* (adding that "[w]here the law recognizes a right to compensation for an injury, difficulty in estimating the extent of the injury has never been regarded as a ground for withholding all damages"). Regardless of the type of damages, jurors often must make difficult factual assessments and carefully consider "competent evidence" as well as the attendant circumstances. *See Ins. Co. v. Mosley*, 75 U.S. 397, 404-05 (1869) (describing the jury's assessment of "bodily or mental feelings," and noting that statements "made to a medical attendant [are] of more weight than if made to another person"). There is no reason to doubt a jury's ability to assess emotional distress damages simply because the facts relate to feelings, rather than to physical pain, pecuniary harms, or other losses.

Furthermore, courts carefully review damage awards, especially in cases concerning emotional distress damages. Among other things, courts will assess the evidence that the jury relied on and compare the jury's determination to awards in similar cases. *See*, *e.g.*, *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 210 (1904) (reviewing evidence of "mental suffering" and noting that it was "meager"). And, as Cummings notes, this is no less true today than it was historically. Pet'r Br. 29; *see Turley*, 774 F.3d at163 (summarizing evidence relied upon by jury in IIED case concerning prolonged racial discrimination).

* * *

Both common-law thinkers and the Constitution's Framers recognized that every individual should have "the right . . . to claim the protection of the laws, whenever he receives an injury," *Marbury*, 5 U.S. at 163. As this Court has made clear, federal courts must provide a "fit and appropriate remedy"—a remedy in "substance" rather than in "name only"—after the violation of a right "established" by an act of Congress. *Kendall*, 37 U.S. at 613-15. In the statutes at issue in this case, Congress prohibited discrimination by federal funding recipients. Emotional distress damages, which have long been awarded in the American legal system, are both appropriate and necessary to compensate individuals who have been injured by violations of this prohibition. Without such awards, these statutes would provide a remedy in "name only," *id.* at 615, rendering Congress's action "inutile," *Franklin*, 503 U.S. at 74, and leaving individuals like Cummings without "compensation and satisfaction for [the] injury sustained," 2 Blackstone, *supra*, at 438.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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