No. 20-219

In the Supreme Court of the United States

JANE CUMMINGS, PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether damages for emotional distress are available in the implied right of action to enforce Section 504 of the Rehabilitation Act of 1973 or Section 1557 of the Patient Protection and Affordable Care Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Premier Rehab Keller, P.L.L.C., has no parent corporation, and no publicly held company holds 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 948 F.3d 673. The opinion of the district court (Pet. App. 15a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. A petition for rehearing was denied on March 24, 2020 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on August 21, 2020, and was granted on July 2, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Code are reproduced in an appendix to this brief.

STATEMENT

Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Patient Protection and Affordable Care Act (ACA) invoke Congress's power under the Spending Clause to condition the receipt of federal funding on the recipient's agreement not to engage in discrimination on certain grounds. A private party aggrieved by a violation of those conditions may file suit against the recipient under the implied right of action recognized in Title VI of the Civil Rights Act of 1964, another Spending Clause statute.

Because Title VI contains no express right of action, it unsurprisingly does not say what particular remedies are available under the implied right of action to enforce its provisions. But this Court has held that, because Spending Clause legislation is "much in the nature of a contract," the only remedies available are those for which "the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes* v. *Gorman*, 536 U.S. 181, 186, 187 (2002) (citation omitted). The Court has further concluded that funding recipients are "generally on notice" of the availability of any remedies "explicitly provided in the relevant legislation" and, as is relevant here, those remedies "traditionally available in suits for breach of contract." *Id.* at 187. The question presented here is whether damages for emotional distress are available in the implied right of action to enforce Section 504 of the Rehabilitation Act or Section 1557 of the ACA.

Respondent is a small business that provides physical therapy and receives federal funding; petitioner is a deaf and visually impaired individual who sought respondent's

services and requested that respondent provide a sign-language interpreter at her appointments. Respondent offered alternative accommodations but declined petitioner's request absent further consultation.

After obtaining physical therapy from another provider, petitioner filed suit against respondent in federal court, alleging, as is relevant here, that respondent had discriminated on the basis of her disability in violation of the funding conditions in the Rehabilitation Act and the ACA. Petitioner sought injunctive relief, declaratory relief, and damages for emotional distress. The district court dismissed the case. After concluding that petitioner lacked standing to seek injunctive relief, the court held that damages for emotional distress are not available under the implied right of action to enforce the Rehabilitation Act or the ACA.

On appeal, petitioner challenged only the district court's holding on emotional-distress damages, and the court of appeals affirmed. It reasoned that funding recipients lacked notice of potential liability for damages for emotional distress, given the general common-law rule prohibiting that remedy for breach of contract. The court rejected petitioner's argument that a narrow exception to for contracts involving personal matters, the breach of which would be particularly likely to result in serious emotional distress, provided the requisite notice. The court also rejected petitioner's other arguments, including her invocation of the presumption that a federal court may award any appropriate relief where a federal cause of action exists.

The court of appeals' decision is correct. Damages for emotional distress are not traditionally available in pure contract cases, and the narrow and murky exception for so-called "personal contracts" does not provide funding recipients with notice that damages for emotional distress

are available in the implied right of action to enforce the spending conditions in the Rehabilitation Act or the ACA. Nor is petitioner's argument based on the presumptive power of federal courts to award "appropriate relief" any more persuasive, because the notice requirement articulated by this Court serves as a constraint on that power. The court of appeals correctly held that emotional-distress damages are not available, and its judgment should be affirmed.

A. Background

1. Enacted pursuant to the Spending Clause, U.S. Const. Art. I, § 8, cl. 1, Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funding from discriminating on the basis of disability in "any program or activity receiving [f]ederal financial assistance." 29 U.S.C. 794(a). Section 505, added by amendment in 1978, makes available to any "person aggrieved" by a violation of that funding condition the "remedies, procedures, and rights set forth in [T]itle VI of the Civil Rights Act of 1964." 29 U.S.C. 794a(a)(2).

Also enacted pursuant to the Spending Clause, Title VI forbids recipients of federal funding from discriminating on the basis of "race, color, or national origin" in any federally funded program. 42 U.S.C. 2000d. Title VI does not contain an express right of action and, *a fortiori*, is silent regarding any private remedies available. In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the Court recognized an implied right of action under Title VI—a decision, the Court later held, that Congress subsequently ratified. See *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001). Through Section 505 of the Rehabilitation Act, that implied right of action is thus available to enforce Section 504. See *Barnes*, 536 U.S. at 185.

In 2010, as part of the Patient Protection and Affordable Care Act, Congress imposed a similar condition applicable to "any health program or activity," any part of which receives federal funding. 42 U.S.C. 18116(a). Specifically, as to such programs or activities, Section 1557 of the ACA prohibits discrimination on any basis prohibited by Section 504 of the Rehabilitation Act, Title VI, or other similar Spending Clause legislation. See *ibid.* Similar to Section 505, Section 1557 provides that the "enforcement mechanisms provided for and available under" Title VI (and other statutes) are available to enforce the funding condition. *Ibid.*

In addition to Section 504 of the Rehabilitation Act and Section 1557 of the ACA, the same implied right of action and remedies are available under Title II of the Americans with Disabilities Act of 1990 (ADA), the prohibition on disability discrimination in services provided by state and local governments. See 42 U.S.C. 12133. A coextensive implied right of action is available under Title IX of the Education Amendments of 1972, the prohibition on sex discrimination in federally funded education programs. See 20 U.S.C. 1681(a).

2. In two previous cases, the Court has addressed the particular remedies available in actions invoking the implied right of action to enforce these Spending Clause statutes (and the other statutes incorporating their remedies).

a. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that compensatory damages were available under the implied right of action to enforce Title IX. See *id.* at 76. The Court acknowledged that Congress "said nothing about the applicable remedies for an implied right of action" in the text of Title IX, but the Court viewed that fact as "hardly surprising" given that Title IX "supported no express right of action."

Id. at 71. Because the right of action was implied, the Court turned to the presumption from *Bell* v. *Hood*, 327 U.S. 678 (1946), that federal courts have the power to award any "appropriate relief" to remedy the invasion of a federal right as long as the plaintiff has a cause of action under federal law. *Franklin*, 503 U.S. at 66. Relying on that principle—and rejecting the positions of the defendants and the United States—the Court concluded that compensatory damages were available. See *id.* at 68-73.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, concurred in the judgment. See 503 U.S. at 76-78. In Justice Scalia's view, the Court's reliance on the *Bell* presumption was "question begging," because, in a statute that contains no express right of action to begin with, one cannot properly infer Congress's acquiescence in the presumption from its silence. *Id.* at 77. Justice Scalia would instead have held that, "when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well." *Ibid.* Justice Scalia nevertheless concurred in the judgment because he interpreted subsequent legislation both as validating the implied right of action and as "implicit[ly] acknowledg[ing] that damages are available." *Ibid.*

b. A decade later, in *Barnes*, *supra*, the Court clarified the "scope" of "appropriate relief" under *Franklin*, holding that punitive damages were unavailable in actions to enforce Section 504 of the Rehabilitation Act and Title II of the ADA. *Barnes*, 536 U.S. at 185, 189-190. With Justice Scalia this time writing the majority opinion, the Court began from the proposition that Spending Clause legislation is "much in the nature of a *contract*": "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Id.* at 186 (alteration in original; citation omitted). As a result, "[t]he legitimacy of Congress' power to legislate under the spending power

rests on whether the recipient voluntarily and knowingly accepts" the conditions placed on the funding. *Ibid.* (alterations and citation omitted). Based on that "contract-law analogy," the Court concluded that a remedy constitutes "appropriate relief" under *Franklin* "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187.

Applying that rule, the Court held that punitive damages were unavailable. See 536 U.S. at 189. The Court explained that funding recipients are "generally on notice" that they are subject to any remedies "explicitly provided in the relevant legislation" and, as is relevant here, those remedies "traditionally available in suits for breach of contract." *Id.* at 187. Unlike compensatory damages and injunctive relief, the Court concluded, punitive damages are "generally not available for breach of contract." *Ibid.*

B. Facts And Procedural History

1. Respondent is a small business that provides physical therapy to patients in the Dallas-Fort Worth area. See D. Ct. Dkt. 11, at 2. Because respondent receives reimbursement through Medicare and Medicaid for the provision of some of its services, it qualifies as a recipient of federal "financial assistance" for purposes of the Rehabilitation Act and the ACA. See 29 U.S.C. 794a; 42 U.S.C. 18116.

Petitioner is a deaf and visually impaired individual who contacted respondent in 2016 and 2017 to seek physical therapy for back pain. Under regulations implementing the Rehabilitation Act and the ACA, funding recipients are required to provide "appropriate auxiliary aids" to persons with hearing impairment where it is "neces-

sary to afford such persons an equal opportunity to benefit from the service in question." 45 C.F.R. 84.52(d)(1); see 45 C.F.R. 92.102(b). Petitioner requested that respondent provide a sign-language interpreter at her appointments; respondent declined that request absent further consultation, but offered to communicate with petitioner through an interpreter of her providing or through written notes, lip reading, and gesturing. Petitioner did not schedule an appointment with respondent and instead obtained care from another provider. See Pet. App. 2a; D. Ct. Dkt. 11, at 3-4.

2. On August 7, 2018, petitioner filed suit against respondent in the Northern District of Texas, alleging that respondent's failure to provide a sign-language interpreter constituted discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act and Section 1557 of the ACA, as well as Title III of the ADA and Chapter 121 of the Texas Human Resources Code. See Pet. App. 3a. Petitioner sought injunctive relief, declaratory relief, and damages for "humiliation, frustration, and emotional distress." D. Ct. Dkt. 11, at 5, 12-13 (operative complaint).

Respondent moved to dismiss the complaint. Respondent argued, *inter alia*, that petitioner had not alleged a sufficiently concrete intention to seek respondent's services in the future, as is required to demonstrate standing to seek injunctive relief. Respondent also argued that petitioner was not entitled to sue because she did not attempt to use the alternative accommodations offered. See Pet. App. 17a-21a; D. Ct. Dkt. 14, at 3-12. In response to the motion, petitioner withdrew her state-law claim. Pet. App. 3a n.1.

The district court granted the motion to dismiss. Pet. App. 15a-27a. The court first held that petitioner lacked standing to seek injunctive relief because the complaint

did not allege that respondent was "currently harming [petitioner] in any way," nor did it show that petitioner was "likely to return" to respondent for physical therapy. *Id.* at 21a.

Of particular relevance here, the district court then held that petitioner failed to state a claim for damages. The court noted that the "only compensable injuries" that petitioner had alleged were "humiliation, frustration, and emotional distress." Pet. App. 24a-25a (citation omitted). Citing *Barnes*, the court concluded that damages under the Rehabilitation Act and the ACA were "restrict[ed]" to "actual compensation for pecuniary damages." *Id.* at 24a (citation omitted). Damages for a purely emotional injury, the court reasoned, are "unforeseeable at the time recipients accept federal funds"; expose funding recipients to "unlimited liability"; and are designed to "punish defendants for the outrageousness of their conduct." *Ibid.* (citation omitted). The court further held that Title III of the ADA provided no right of action for damages. *Id.* at 25a.

3. Petitioner appealed, challenging only the district court's holding that damages for emotional distress are not available in actions to enforce Section 504 of the Rehabilitation Act and Section 1557 of the ACA.

The court of appeals affirmed in a unanimous opinion. Pet. App. 1a-14a. Under the "contract-law analogy" employed in *Barnes*, the court explained, the "fundamental question" in determining whether a particular remedy is available for violating a condition in Spending Clause legislation is whether recipients of federal funding had notice of their exposure to that form of liability. *Id.* at 8a (citation omitted). The court concluded that notice of exposure to damages for emotional distress was lacking, because the "general rule" in contract law is that such damages "are not available for breach of contract." *Id.* at 9a.

The court of appeals acknowledged that contract law recognizes a "rare exception[]" to that general rule for cases in which "the contract or breach is such that the plaintiff's 'serious emotional disturbance was a *particularly likely* result.'" Pet. App. 9a (quoting Restatement (Second) of Contracts § 353 (1981)). But the court reasoned that such a narrow exception failed to provide notice to funding recipients of the availability of emotional-distress damages. *Id.* at 10a. The court noted that "contract law also has exceptions for awarding punitive damages," but that this Court nevertheless rejected the availability of punitive damages in *Barnes*. *Ibid.*

Finally, the court of appeals rejected two other bases for notice: the rule of contract law that a nonbreaching party may recover losses from the breach which were foreseeable when the contract was made, and the *Bell* v. *Hood* presumption that federal courts have the power to award any "appropriate relief" to remedy the invasion of a federal right. Pet. App. 11a-14a. Citing this Court's decision in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), the court of appeals explained that the "contract-law analogy" is a "limitation on liability" and thus acts as a "constraint on the *Bell* v. *Hood* presumption." Pet. App. 13a-14a (citations omitted).

4. The court of appeals denied a petition for rehearing without recorded dissent. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

Damages for emotional distress are not available in the implied right of action to enforce the antidiscrimination spending conditions in Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act.

A. In *Barnes* v. *Gorman*, 536 U.S. 181 (2002), this Court relied on the contractual nature of Spending Clause legislation to hold that a recipient of federal funding may

be subject to a particular remedy in a private action to enforce Spending Clause legislation only when it is "*on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187. The Court further explained that funding recipients are "generally on notice" of the availability of any remedies expressly provided in the relevant statute and any remedies "traditionally available in suits for breach of contract." *Ibid.*

Under that framework, damages for emotional distress alone are not available in the implied right of action to enforce Section 504 or Section 1557. Because the right of action to enforce those spending conditions is implied, those statutes *a fortiori* do not expressly provide for any particular remedies. And damages for emotional distress are not traditionally available in actions for breach of contract. It has long been a general rule of contract law that damages for emotional distress are unavailable for breach. That rule dates back more than a century and is reflected in modern common-law decisions and treatises. As a matter of federal common law, moreover, this Court declined to permit any award of damages for emotional distress in the absence of any accompanying physical injury. Accordingly, damages for emotional distress alone are not traditionally available for breach of contract, and recipients of federal funding thus lack notice of the availability of that remedy in the implied right of action to enforce Section 504 or Section 1557.

B. Despite the general unavailability of emotional-distress damages in contract law, petitioner and the government contend that funding recipients are on notice of the availability of that remedy because of the existence of a narrow exception for the breach of so-called "personal contracts." The history, contours, and acceptance of that exception are far too murky to provide the requisite "clear notice" to funding recipients.

The "personal contracts" exception arose out of the confluence of tort and contract principles during the time before courts recognized the tort of intentional infliction of emotional distress. In an exceedingly narrow class of cases—mostly involving common carriers, innkeepers, funeral-related services, and marriage contracts—some courts began to permit the recovery of damages for emotional distress under contract law by combining tort and contract principles in various ways. Courts only sporadically applied the doctrine outside of those narrow contexts and in cases where tort principles were not involved. Many courts did not endorse the doctrine at all, instead permitting the recovery of emotional-distress damages only where the breach itself constituted a tort.

Petitioner and the government argue that courts broadly permitted recovery of emotional-distress damages whenever emotional distress was a particularly likely result of the breach. But the historical cases they cite almost uniformly involve the narrow class of defendants mentioned above and rely on tort principles—which the government admits have little relevance to Spending Clause legislation. And modern case law indicates that the doctrine remains unsettled and varied across jurisdictions. In light of both the historical and the current state of the law, there is no plausible basis to conclude that the "personal contract" exception places recipients of federal funding on notice that damages for emotional distress are available in the implied right of action to enforce Section 504 or Section 1557.

In addition, the Court has not employed the contract-law analogy to extend the implied remedies available to enforce Spending Clause statutes beyond the remedies available under non-Spending Clause statutes. But petitioner's application of the personal-contracts exception

would have precisely that result, because Congress imposed limits on damages for emotional distress when it first authorized compensatory damages under Title VII in 1991.

C. Petitioner separately argues that damages for emotional distress should be available under the presumption from *Bell* v. *Hood*, 327 U.S. 678 (1946), that a federal court has the power to award appropriate relief for the violation of a federal right when federal law provides a cause of action. But as the government recognizes, the notice principle articulated in *Barnes* provides the governing rule here. That principle plainly qualifies the *Bell* presumption and acts as a limitation on liability in the context of Spending Clause legislation.

The implied nature of the right of action at issue here provides further reason not to place undue emphasis on the *Bell* presumption. As Justice Scalia has explained, where (as here) a right of action is implied, there is no basis to interpret Congress's silence as to the particular remedies available under a statute as endorsing the *Bell* presumption and thus authorizing the broadest array of remedies possible.

Petitioner contends that reliance on the *Bell* presumption is warranted because of its foundation in the historical principle that every legal right comes with a legal remedy. But federal courts often conclude that there is no judicial remedy in federal court for the violation of a legal right. As petitioner recognizes, federal courts are not common-law courts, and the separation of powers requires courts to defer to Congress's judgment as to the particular remedies available for the violation of a particular right. Petitioner's reliance on the availability of damages for emotional distress under other federal civil-rights statutes provides no additional help: none of the

statutes cited by petitioner is Spending Clause legislation governed by the notice principle articulated in *Barnes*.

D. The government suggests that prior precedent from this Court and the lower courts provides funding recipients of sufficient notice of the availability of damages for emotional distress, standing alone, under the Rehabilitation Act and the ACA. That argument lacks merit. It is entirely unsurprising that the Court did not question the availability of emotional-distress damages in prior cases seeking that remedy under the implied right of action in Title VI and related statutes; those cases presented unrelated questions and thus provided no reason for the Court to address the issue. As for the lower-court cases cited by the government, they too mostly assumed that damages for emotional distress were available without analyzing the question. Those decisions cannot provide "clear notice" that the law affirmatively authorizes the imposition of a particular form of liability.

E. Permitting damages for emotional distress would subject funding recipients to significant and unpredictable liability for unverifiable harms. Awards for emotional distress can be significant, and courts have held that the testimony of the plaintiff alone can substantiate such an award even in the absence of medical or other expert evidence. The risk of significant and unpredictable liability provides further reason to hold that damages for emotional distress are not available under the Rehabilitation Act and the ACA.

F. Contrary to petitioner's and the government's suggestions, meaningful remedies for discrimination in federal programs would exist in the absence of damages for emotional distress. The federal government always has the option of withholding funds from a party who fails to comply with those antidiscrimination provisions. Parties can also seek damages for other harms, nominal damages,

and injunctive and declaratory relief under the implied right of action to enforce Section 504 or Section 1557. State law will often provide additional remedies, either through tort law or by statute. And to the extent that there remain some cases where the unavailability of emotional-distress damages would leave an injured party entirely without redress, Congress is best positioned to determine what relief should be available.

ARGUMENT

DAMAGES FOR EMOTIONAL DISTRESS ARE NOT AVAILABLE IN THE IMPLIED RIGHT OF ACTION TO ENFORCE THE REHABILITATION ACT OR THE AFFORDABLE CARE ACT

As Spending Clause legislation, Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and Section 1557 of the Affordable Care Act, 42 U.S.C. 18116, condition the receipt of federal funding on the agreement of the recipient not to discriminate on certain grounds in the administration of federal programs. Congress did not create express rights of action for private individuals to enforce those conditions, but instead incorporated the rights and remedies available under Title VI of the Civil Rights Act of 1964. Title VI also provides no express right of action, but the Court has recognized an implied right of action under the statute. See *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001). Private parties thus have an implied right of action to enforce the funding conditions in the Rehabilitation Act and the ACA, but those statutes (like Title VI) are silent as to the particular remedies available.

The question presented in this case is whether damages for emotional distress are available in actions to enforce the funding conditions in those two statutes. The answer is no. Under this Court's precedents, a funding

recipient may be subject to a particular remedy in a private action to enforce Spending Clause legislation only when it is "*on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002) (citation omitted). As the court of appeals correctly held, funding recipients lack notice that damages for emotional distress are available under the Rehabilitation Act or the ACA. Petitioner and the government offer a number of contrary arguments, but each lacks merit. The judgment of the court of appeals should be affirmed.

A. Recipients Of Federal Funding Lack Notice That They May Be Subject To Damages For Emotional Distress Because That Remedy Is Not Traditionally Available In Actions For Breach Of Contract

1. As this Court has explained, "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981); see, *e.g.*, *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 332 (2015). "[I]n return for federal funds," a funding recipient "agree[s] to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. As a result, "[t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.* And for that reason, Congress must make funding conditions "unambiguous," so that a funding recipient has "clear notice" of "the conditions that go along with the acceptance of [federal] funds." *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291, 296, 304 (2006).

In *Barnes*, *supra*, this Court relied on that contract-law analogy to hold that punitive damages are not available in the implied right of action to enforce the Rehabilitation Act or Title II of the ADA. The Court noted that,

in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), it had held that compensatory damages are available in the similar implied right of action to enforce Title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1688, based on "the traditional presumption in favor of any *appropriate* relief for violation of a federal right." *Barnes*, 536 U.S. at 185 (quoting *Franklin*, 503 U.S. at 73). Interpreting *Franklin*, the Court held in *Barnes* that the "scope of 'appropriate relief' " was governed by the "contract-law analogy," such that "a remedy is 'appropriate relief' only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 185, 187 (citation omitted). According to the Court, "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* at 187.

Applying that principle, the Court held that punitive damages were unavailable in actions to enforce the funding conditions in the Rehabilitation Act and the ADA. *Barnes*, 536 U.S. at 187-188. The Court noted that both statutes borrowed their remedies from Title VI, yet "Title VI mentions no remedies—indeed, it fails to mention even a private right of action (hence th[e] Court's decision finding an *implied* right of action in *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)])." *Barnes*, 536 U.S. at 187. And because "punitive damages" are "generally not available for breach of contract," contract law provided no basis for awarding them under Title VI (and thus under the Rehabilitation Act or the ADA). *Ibid.*

As the decision in *Barnes* demonstrates, the Court has used the contract analogy "only as a potential *limitation* on liability" in implied rights of action to enforce funding conditions. *Sossamon* v. *Texas*, 563 U.S. 277, 290 (2011).

The Court has "not relied on [that] analogy to expand liability beyond what would exist under nonspending statutes." *Ibid.* And the Court has long been wary of "allowing unlimited recovery of damages" in implied rights of action to enforce funding conditions, because "Congress has not spoken on the subject of either the right or the remedy." *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274, 286 (1998).

2. Recipients of federal funding lack notice of the availability of damages for emotional distress in actions to enforce the Rehabilitation Act and the ACA, because that remedy is not "traditionally" or "generally" available for breach of contract. See *Barnes*, 536 U.S. at 187.

Historically, a plaintiff normally could not recover for emotional distress in actions for breach of contract. As many courts explained, the "general rule" was that "damages for mental suffering occasioned by the breach are not recoverable." *Robinson* v. *Western Union Telegraph Co.*, 68 S.W. 656, 657 (Ky. 1902); see, *e.g.*, *Boyce* v. *Greeley Square Hotel Co.*, 126 N.E. 647, 649 (N.Y. 1920); *Western Union Telegraph Co.* v. *Arnold*, 73 S.W. 1043, 1044 (Tex. 1903); *West* v. *Western Union Telegraph Co.*, 17 P. 807, 811 (Kan. 1888). Leading treatises confirm that damages for breach of contract generally did not include "the mental suffering produced by the act or omission in question." 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 37, at 33-34 (3d ed. 1858) (emphases omitted); accord 3 Samuel Williston, *The Law of Contracts* § 1338, at 2396 (1924) (Williston 1st); 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 45, at 58-59 (8th ed. 1891) (Sedgwick 8th); see also 1 J.G. Sutherland, *A Treatise on the Law of Damages* 156-157 (1883) (noting that contract actions in which damages for mental suffering were available were "often referred to as exceptional").

The same general rule remained in force at the time Title VI was enacted in 1964. For example, the First Restatement of Contracts made clear that "damages will not be given as compensation for mental suffering" in "breach of contract" actions, aside from certain exceptional cases. Restatement (First) of Contracts § 341 (1932). When the Second Restatement was finalized, it similarly left no doubt that "[d]amages for emotional disturbance are not ordinarily allowed" in breach-of-contract cases. Restatement (Second) of Contracts § 353 cmt. a (1981).

Contemporary treatises reflected the same understanding, explaining that "[m]ental suffering may be a real injury" but "is not generally allowed as a basis for compensation in contractual actions." 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1341, at 214 (3d ed. 1968) (Williston 3d); see Dan Dobbs, *Handbook on the Law of Remedies* § 12.4, at 819 (1973) (Dobbs); 5 Arthur Corbin, *Corbin on Contracts* § 1076, at 426 (1964). Predictably, that hornbook rule was a restatement of the laws of many States at the time. See, *e.g.*, *Sanford* v. *Western Life Insurance Co.*, 368 So. 2d 260, 264 (Ala. 1979); *Lawton* v. *Great Southwest Fire Insurance Co.*, 392 A.2d 576, 581 (N.H. 1978); *Seidenbach's, Inc.* v. *Williams*, 361 P.2d 185, 187 (Okla. 1961).

Notably, this Court also adhered to the rule that damages were unavailable under federal common law for a "claim for mental suffering only." *Southern Express Co.* v. *Byers*, 240 U.S. 612, 614-615 (1916). Damages for emotional distress were thus unavailable in contract cases filed in federal court and governed by federal common law, regardless of whether "the common law of the state where the question arises" would otherwise permit that remedy. 11 Williston 3d § 1341, at 218-219. That principle has persisted where federal common law still applies in the wake of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64

(1938). See *Kaufman* v. *Western Union Telegraph Co.*, 224 F.2d 723, 727-728 (5th Cir. 1955), cert. denied, 350 U.S. 947 (1956); *Chesapeake & Potomac Telephone Co.* v. *Clay*, 194 F.2d 888, 890-891 (D.C. Cir. 1952); see also *In re Coast Guard Vessel CG-95321*, 418 F.2d 264, 268 (1st Cir. 1969) (admiralty).

In sum, damages for emotional distress are not "traditionally" or "generally" "available for breach of contract." *Barnes*, 536 U.S. at 187. And because it is undisputed that neither the Rehabilitation Act nor the ACA expressly permits the recovery of emotional-distress damages, a funding recipient lacks "clear notice" of exposure to that form of liability. *Murphy*, 548 U.S. at 296. Damages for emotional distress thus do not qualify as "appropriate relief" under either statute. *Barnes*, 536 U.S. at 187 (citation omitted).

B. The 'Personal Contracts' Exception To The General Rule Against The Award Of Emotional-Distress Damages For Breach Of Contract Does Not Provide The Requisite Notice

Petitioner and the government argue that the common law of contracts authorized damages for emotional distress under a narrow exception for the breach of so-called "personal contracts." See Pet. Br. 30-35; U.S. Br. 13-20. Specifically, they contend that damages for emotional distress are available where serious emotional distress is particularly likely to result from a breach of the contract. Petitioner and the government further contend that, because discrimination is particularly likely to cause serious emotional distress, funding recipients are on notice that emotional-distress damages are available in the implied right of action at issue here.

That argument fails. The personal-contracts exception arose to explain the controversial practice of award-

ing damages for emotional distress alone in an exceedingly narrow class of cases where liability was based on a blend of tort and contract principles. Even today, acceptance of the personal-contracts exception remains far too varied, and the doctrine's contours far too murky, to provide the requisite clear notice to funding recipients.

1. Damages for emotional distress have long been available as a remedy for certain torts where the only injury suffered is emotional in nature. See, *e.g.*, *I. de S. et ux.* v. *W. de S.*, Y.B. 22 Edw. III, f. 99, pl. 60 (1348) (assault). But despite such "early recognition," courts were reluctant to "accept the interest in peace of mind as entitled to independent legal protection." William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 874 (1939) (Prosser). In the late nineteenth and early twentieth centuries, hesitancy to recognize a new tort for the infliction of emotional distress led some courts to "find some other foundation" for such an action, "however strained," and to "disguise the real basis of recovery under some other name." *Id.* at 880.

Of particular relevance here, courts began to award damages for emotional distress for breach of some contractual duties, mostly involving "contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." Restatement (Second) of Contracts § 353 cmt. a; see also Restatement (First) of Contracts § 341 cmt. a; 11 *Corbin on Contracts* § 59.1, at 538 (rev. ed. 2005) (Corbin); Charles T. McCormick, *Handbook on the Law of Damages* § 145, at 592-593 (1935) (McCormick). Marriage contracts were also included in this category, see, *e.g.*, 11 Corbin § 59.1, at 1053; *Coolidge* v. *Neat*, 129 Mass. 146, 150 (1880), as occasionally were tickets to places of public

amusement, see, *e.g.*, *Interstate Amusement Co.* v. *Martin*, 62 So. 404, 405 (Ala. Ct. App. 1913).

While those cases may seem like a motley collection, they share two common qualities. *First*, the defendants were usually "bound by certain duties that are independent of contract," but had also "made a contract for the performance of the duty." 11 Corbin § 59.1, at 538; see Prosser 881-882; *Austro-American Steamship Co.* v. *Thomas*, 248 F. 231, 234 (2d Cir. 1917); *Smith* v. *Sanborn State Bank*, 126 N.W. 779, 780 (Iowa 1910); Samantha Barbas, *The Social Origins of the Personality Torts*, 67 Rutgers U. L. Rev. 393, 420-421 (2015). *Second*, those contracts often involved "interests of personality and family relationships," such that emotional distress was particularly likely to result from their breach. McCormick § 145, at 597.

In those cases, courts often did not draw a "clear line of distinction between tort and contract with respect to damages for mental distress." 11 Corbin § 59.1, at 538. For example, courts recognized legal duties under "implied" contracts on the part of common carriers and innkeepers to provide proper treatment of their guests, based in part on their common-law duties outside of contract, see, *e.g.*, *De Wolf* v. *Ford*, 86 N.E. 527, 529-530 (N.Y. 1908); *Knoxville Traction Co.* v. *Lane*, 53 S.W. 557, 559 (Tenn. 1899); *Dalzell* v. *Dean Hotel Co.*, 186 S.W. 41, 45 (Mo. App. 1916). The violation of those implied contractual duties was an "infraction of [a] contractual obligation [that] was also a tort," *Austro-American*, 248 F. at 234; see 11 Corbin § 59.1, at 538, 544, and courts frequently relied on both tort and contract principles when awarding damages for emotional distress for guests' mistreatment, see, *e.g.*, *Head* v. *Georgia Pacific Railway Co.*, 7 S.E. 217, 218 (Ga. 1887); *Craker* v. *Chicago & Northwestern Railway Co.*, 36 Wis. 657, 670-674 (1875); see also, *e.g.*, *Wright*

v. *Beardsley*, 89 P. 172, 173 (Wash. 1907) (applying tort and contract principles in an action for mistreatment of a corpse); *Mentzer* v. *Western Union Telegraph Co.*, 62 N.W. 1, 3-6 (Iowa 1895) (similar in an action for failure to deliver a death message).

The "dividing line between breaches of contract and torts" was thus "often dim and uncertain," *Aaron* v. *Ward*, 136 A.D. 818, 823 (N.Y. App. Div. 1910) (citation omitted), aff'd 96 N.E. 736 (N.Y. 1911), and, as the government concedes, courts "sometimes disagreed over the precise contours of the principle permitting the award of compensatory damages for mental suffering." Br. 16. But as one court explained, awards of damages for emotional distress were "to be found almost entirely in that class of contracts upon breach of which the injured party may, if he so elect, bring an action sounding in tort." *Smith* v. *Sanborn State Bank*, 126 N.W. 779, 780 (Iowa 1910).

Further drawing from concepts of tort law, courts often awarded damages for emotional distress only for breaches of contract that were "willful and malicious" or "wanton or reckless." Restatement (First) of Contracts § 341 & cmt. a; see, *e.g.*, *Beaulieu* v. *Great Northern Railway Co.*, 114 N.W. 353, 354 (Minn. 1907). Courts sometimes even permitted the award of punitive damages in those cases. See, *e.g.*, *Knoxville Traction*, 53 S.W. at 560. In fact, the overlap between punitive damages and emotional-distress damages was sufficiently significant for a leading treatise to state that "the circumstances of aggravation, such as give rise to exemplary damages, are frequently, if not generally, of a nature to cause additional loss to the plaintiff of an intangible sort, such as mental suffering." 1 Sedgwick 8th § 356, at 519.

Justice Story's circuit-riding opinion in *Chamberlain* v. *Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823)—cited ap-

provingly by petitioner (Br. 20)—demonstrates the confluence of tort and contract principles in the early cases. In *Chamberlain*, the plaintiffs alleged that, while they were passengers on a ship, the captain subjected them to "continued, wanton cruelty, and ill treatment." 5 F. Cas. at 414. Justice Story began by determining that jurisdiction was present, both because the contract between the passengers and the ship's master was a "maritime contract" and because admiralty courts had long exercised jurisdiction over "torts[] committed *in personam* on the high seas." *Id.* at 413. Noting that "the case of the master is one of peculiar responsibility and delicacy" to his passengers, he concluded that "compensation for mental sufferings occasioned by acts of wanton injustice" was available because "the contract of the passengers for the voyage is in substance violated" with respect to its "implied stipulation against general obscenity." *Id.* at 414-415. As did other jurists, Justice Story thus combined tort and contract principles to permit recovery from a common carrier. In fact, at one point, he even suggested that the award of damages constituted a "punishment" for the captain's "oppressive and malicious" behavior. *Id.* at 415.

Notably, jurisdictions across the Nation were not uniform in allowing emotional-distress damages in contract actions. One leading treatise noted that "the federal courts" and a "substantial number of state courts" declined to recognize any exception for "breach of contracts which involve interests of personality and family relations," while an "almost equal number" of state courts took the opposite position. McCormick § 145, at 592. And when this Court surveyed the state of the law in 1916, it concluded that the number of States forbidding the recovery of damages for emotional distress in telegram cases was twice that of States permitting recovery. See *South-*

ern Express, 240 U.S. at 616. Given the division in authority, petitioner is simply incorrect to suggest that, "[b]y the turn of the century," the availability of damages for emotional distress in pure contract cases was "too well settled * * * to admit of question." Br. 21 (citation omitted).

2. Petitioner and the government cite a number of historical authorities to support their argument that damages for emotional distress were traditionally available even in "pure contract cases." Pet. Br. 40; see *id.* at 30-32; U.S. Br. 14-17. But the cases allowing such damages are largely confined to the narrow classes of defendants discussed above, and nearly every case cited relies on both tort and contract principles when awarding damages for emotional distress. See, *e.g.*, *Carmichael* v. *Bell Telephone Co.*, 72 S.E. 619, 620-621 (N.C. 1911); *Head*, 7 S.E. at 218; *Chicago & Northwestern Railway Co.* v. *Williams*, 55 Ill. 185, 188-190 (1870); see also pp. 21-24, *supra* (discussing additional cases).

As petitioner and the government admit, contract remedies "based on tort principles" are "not instructive when determining the contours of the damages remedy for violations of Title VI and related statutes." U.S. Br. 31 n.5; see Pet. Br. 39-40. Indeed, in *Barnes*, this Court declined to permit the award of punitive damages under the Rehabilitation Act even though those damages may be available for breach of contract based on a combination of tort and contract principles, such as in "actions against public service companies also for breach of duty" where "the defendant's conduct was wanton." 3 Williston 1st § 1340, at 2395; see, *e.g.*, Restatement (Second) of Contracts § 355; 1 Sedgwick 8th § 351, at 508-510; *Knoxville Traction*, 53 S.W. at 559-560. So too here, the availability of emotional-distress damages for breach of contract arose from a blend of tort and contract principles. See pp.

22-24, *supra*; see also AAJ Br. 22-26 (discussing the prevalence of emotional-distress damages in tort actions).

That fact, combined with the narrow circumstances in which courts allowed emotional-distress damages, demonstrates that recipients of federal funding are not on notice of potential liability for such damages under the Rehabilitation Act and the ACA.

3. The government contends (Br. 17) that funding recipients should nevertheless be deemed on notice of potential liability for emotional-distress damages because the personal-contracts exception has become more widely recognized in modern times. The law is far murkier than the government acknowledges.

Focusing first on the time of Title VI's enactment in 1964, the government argues that the "award of damages for mental distress and suffering" was "commonplace" for the breach of a contract concerned with "matters of mental concern and solicitude." Br. 17 (citation omitted). But the two cases the government cites demonstrate just the opposite: they say that the law was in a "state of flux," *Lamm* v. *Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949), or "a state of marked transition and fluidity," *Stewart* v. *Rudner*, 84 N.W.2d 816, 822 (Mich. 1957). Contemporaneous treatises are in accord. See, *e.g.*, Williston 3d § 1341, at 220 (stating that "the law as to liability for mental anguish alone is in a stage of development" (citation omitted)); Dobbs § 12.4, at 819 (explaining, that the exception "probably has not reached its ultimate form and * * * is expressed in various ways").

The law is no clearer today. It is true that a number of jurisdictions permit the recovery of damages for emotional distress based on the personal-contracts exception. But others hold that damages for emotional distress alone are never available in contract. See *Contreraz* v. *Michelotti-Sawyers*, 896 P.2d 1118, 1123 (Mont. 1995);

Brown v. *Matthews Mortuary, Inc.*, 801 P.2d 37, 45-46 (Idaho 1990); *Keltner* v. *Washington County*, 800 P.2d 752, 754-758 (Or. 1990); *Tompkins* v. *Eckerd*, Civ. No. 09-2369, 2012 WL 1110069, at *4 (D.S.C. Apr. 3, 2012) (discussing South Carolina law). And still others permit the award of damages for emotional distress only where the defendant acted willfully or wantonly; the breach constituted an independent tort; or some combination of the two. See *Giampapa* v. *American Family Mutual Insurance Co.*, 64 P.3d 230, 239-241 & n.9 (Colo. 2003); *Lickteig* v. *Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561 (Minn. 1996).

As for those jurisdictions that recognize the personal-contracts exception, many "do not seem to be inclined to enlarge the kinds of cases in which damages for mental distress are given." Joseph M. Perillo, *Calamari and Perillo on Contracts* § 14.5, at 572 (6th ed. 2009). For example, petitioner and the government cite several New York cases that allowed emotional-distress damages for breach of a duty by innkeepers and operators of public facilities. See Pet. Br. 21 n.3, 32; U.S. Br. 16, 18. But New York courts have refused to extend the exception beyond those narrow traditional categories, so as to include contracts for the health care of family members. See, *e.g.*, *Johnson* v. *Jamaica Hospital*, 467 N.E.2d 502, 528-530 (N.Y. 1984); *Oresky* v. *Scharf*, 126 A.D.2d 614, 616 (N.Y. App. Div. 1987). Other jurisdictions differ in how they classify contracts as commercial or personal, especially when a contract involves both types of interests. See, *e.g.*, *Kishmarton* v. *William Bailey Construction, Inc.*, 754 N.E.2d 785, 788 (Ohio 2001) (joining the "minority of courts that allow emotional distress damages in contract cases" involving construction).

In short, as one commentator has aptly noted, "[s]urveying all of the cases dealing with emotional distress recovery in contract actions, one comes to the uncomfortable result that a majority rule does not exist." Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 Suffolk U. L. Rev. 935, 946 (1992).

4. In light of both the historical and the current state of the law as to emotional-distress damages for breach of contract, there is no valid basis to conclude that recipients of federal funding are on notice that damages for emotional distress are available in the implied right of action to enforce Section 504 of the Rehabilitation Act or Section 1557 of the ACA. The availability of emotional-distress damages rests heavily on tort law, which has limited relevance to Spending Clause legislation and the contract-law analogy used to interpret it. See pp. 22-25, *supra*. And the validity and scope of the personal-contracts exception today are not sufficiently clear to demonstrate "unambiguously" that damages for emotional distress are available under the Rehabilitation Act and the ACA. See *Pennhurst*, 451 U.S. at 17.

In addition, federal contracts rarely, if ever, involve an interest in personality or mental solicitude as the "essence" of the contract—"the sole reason for its being." *Stewart*, 84 N.W.2d at 825. Instead, the predominant purpose of federal contracts is to promote "the general welfare" by funding "particular national projects or programs." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (citations omitted). Here, for example, the "contract" at issue is between the federal government and respondent for the provision of medical services under Medicare and Medicaid. See D. Ct. Dkt. 11, at 2-3. Given that the funding conditions in the Rehabilitation Act and the ACA are only a small part of any "contract" for federal funding, it

is hard to charge funding recipients with notice that their contracts were sufficiently "personal" to permit the recovery of damages for emotional distress.

Finally on this point, this Court has "not relied on the Spending Clause contract analogy to expand liability beyond what would exist under nonspending statutes." *Sossamon*, 563 U.S. at 290. But petitioner's and the government's argument would have precisely that result. As originally enacted, Title VII of the Civil Rights Act did not "provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief." *Gebser*, 524 U.S. at 285. In 1991, Congress amended Title VII to provide for a damages remedy. See 42 U.S.C. 1981a(b). But in so doing, "Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer." *Gebser*, 524 U.S. at 286; see 42 U.S.C. 1981a(b)(3) (setting damages limits between $50,000 and $300,000). Among the types of compensatory damages limited under Title VII are damages for "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life." 42 U.S.C. 1981a (b)(3). Adopting petitioner's position on the applicability of the personal-contracts exception "would amount * * * to allowing unlimited recovery of [emotional-distress] damages" under the Rehabilitation Act and the ACA "where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Gebser*, 524 U.S. at 286.

C. The Power Of Federal Courts To Award 'Appropriate Relief' Under A Federal Cause Of Action Does Not Require The Availability Of Damages For Emotional Distress

In arguing that damages for emotional distress are available, petitioner heavily relies (Br. 16-30) on the presumption, most closely associated with *Bell* v. *Hood*, 327 U.S. 678 (1946), that a federal court has the power to award "appropriate relief" when a "cause of action exist[s]" under federal law. *Franklin*, 503 U.S. at 66. For its part, the government treats the *Bell* presumption as an afterthought, relegating it to a short discussion toward the back of its brief. See Br. 27-28. The government's approach is more prudent, because the *Bell* presumption carries little force here.

1. As the government recognizes (Br. 12-13), the notice principles articulated in *Barnes* provide the governing rule in this context. In *Franklin*, the Court held that compensatory damages qualified as "appropriate relief" presumptively available under the implied right of action in Title IX. But *Franklin* "did not describe the scope of 'appropriate relief'" under the *Bell* presumption, and the Court squarely "t[ook] up this question" in *Barnes*. 536 U.S. at 185. There, the Court held that the contract-law analogy applies in "determining the *scope* of damages remedies" under Spending Clause legislation, such that recipients of federal funding are subject only to remedies of which they had "notice." *Id.* at 187. That includes not only express statutory remedies, but also those remedies "traditionally available in suits for breach of contract." *Ibid.*

The decision in *Barnes* plainly qualifies the *Bell* presumption in the context of Spending Clause legislation. This Court confirmed that understanding in *Sossamon*, *supra*, explaining that it had "discussed the Spending

Clause context" in *Franklin* and *Barnes* "only as a potential *limitation* on liability." 563 U.S. at 290. Even before *Sossamon*, the only court of appeals to have squarely addressed the question presented here interpreted this Court's "concern with notice in awarding remedies for violations of Spending Clause legislation" to "operate[] as a constraint on the *Bell* v. *Hood* presumption." *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173, 1204 (11th Cir. 2007). The court of appeals in this case correctly did the same. See Pet. App. 13a-14a.

To be sure, the Court stated in *Barnes* that its decision to preclude punitive damages under the Spending Clause legislation at issue was "consistent" with the *Bell* presumption. See 536 U.S. at 189. That was so, the Court explained, because the appropriate remedy for the breach of a spending condition, as a "contractual obligation," is to "*compensate*[] the [f]ederal [g]overnment or a third-party beneficiary" for the loss caused by the "wrong done." *Ibid.* "Punitive damages are not compensatory," the Court continued, "and are therefore not embraced within the rule described in *Bell*." *Ibid.*

It simply does not follow, however, that the *Bell* presumption permits the recovery of compensatory damages for any harm traceable to the violation of a spending provision. The Court's reliance on contract principles makes clear that the contract-law analogy constrains the *Bell* presumption. Indeed, petitioner acknowledges (Br. 34, 37-38) that relief in this context is limited by contract rules, such as the rule that damages for breach of contract are limited to harms that were foreseeable at the time of contracting.

Even if *Barnes* is set aside, the implied nature of the right of action at issue here provides good reason not to place undue weight on the *Bell* presumption. As Justice

Scalia explained in his separate opinion in *Franklin*, reliance on the *Bell* presumption is "question begging" where (as here) the right of action is implied, because Congress's silence regarding the available remedies does not constitute acquiescence in the *Bell* presumption. 503 U.S. at 77. "To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable." *Id.* at 78. Notably, in *Franklin*, the government agreed that, "[w]hat ever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." U.S. Br. at 12-13, *Franklin* (No. 90-918).

2. Arguing that the *Bell* presumption has "deep historical roots," petitioner attempts to bolster the presumption by noting that it rests on the common-law principle that, "where there is a legal right, there is a legal remedy." Br. 16-17 (citation omitted). But *Barnes* still provides the governing rule. And the right-remedy principle is hardly an inexorable command in any event. To the contrary, "courts often conclude that there is no remedy to vindicate the violation of a right." *Oneida Indian Nation of New York* v. *Madison County*, 605 F.3d 149, 159 n.8 (2d Cir. 2010), vacated on other grounds, 562 U.S. 42 (2011) (per curiam).

That makes eminent sense, because "a lawmaking body that enacts a provision that creates a right" nevertheless "may not wish to pursue the provision's purpose to the extent of authorizing" all possible remedies. *Hernandez* v. *Mesa*, 140 S. Ct. 735, 742 (2020). Accordingly, the Court has made clear that, when determining whether to permit private enforcement of a federal statute, "[t]he judicial task is to interpret the statute Congress has

passed to determine whether it displays an intent to create not just a private right but also a private remedy"; "courts may not create" a right of action for damages that is not supported by the statute, "no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286-287. And where the injured party lacks standing to obtain prospective relief, cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983), the absence of a damages remedy may effectively leave the party with no available relief under federal law. See also, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) (qualified immunity); *Alden* v. *Maine*, 527 U.S. 706, 754 (1999) (sovereign immunity).

Petitioner admits that "federal courts are not common-law courts" and that "Congress sometimes enacts statutes while withholding any means of private enforcement." Br. 18. But, petitioner notes, the Court stated in *Franklin* that "the question whether a private right of action exists at all" is "analytically distinct and prior" to the question "whether a particular remedy is available." *Ibid.*

Fair enough. But it does not follow that, once a right of action exists to enforce federal law, all remedies are necessarily available. To give one common example, a party may have a cause of action to obtain injunctive relief against an official who is violating the party's constitutional rights, while at the same time lacking the ability to seek damages for such a violation. See, *e.g.*, *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001).

To the extent that such an approach is in tension with the principle that there is a legal remedy for the violation of every legal right, the Court has made clear that it does not view that principle as controlling in all circumstances. For example, in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court relied on the *Bell* presumption to imply a damages remedy against federal officials for the violation of a constitutional right. See

id. at 392, 396. But "for the past 30 years," the Court "has refused" to recognize new claims under *Bivens*. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017). Similarly here, *Barnes* imposes limits on the *Bell* presumption in the context of Spending Clause legislation: namely, that the scope of "appropriate relief" in an implied right of action to enforce such legislation is limited to express statutory remedies and remedies traditionally available for breach of contract. See pp. 17-18, *supra*.

3. Petitioner further contends that damages for emotional distress constitute appropriate relief for the violation of the funding conditions in the Rehabilitation Act and the ACA because that remedy is "regularly awarded for violations of other antidiscrimination statutes." Br. 22. But the statutes petitioner cites differ from Section 504 of the Rehabilitation Act and Section 1557 of the ACA in an obvious way: they were not enacted pursuant to the Spending Clause. See *Ngiraingas* v. *Sanchez*, 495 U.S. 182, 187 (1990) (42 U.S.C. 1983); *Steelworkers* v. *Weber*, 443 U.S. 193, 206 (1979) (Title VII); *Seniors Civil Liberties Association, Inc.* v. *Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (Fair Housing Act); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (same), cert. denied, 422 U.S. 1042 (1975).

The "contractual framework" applicable to Spending Clause legislation "distinguishes" the statutes at issue here from those cited by petitioner. *Gebser*, 524 U.S. at 286. And the text of the statutes demonstrates the distinction: the statutes at issue here "focus[] more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds," whereas the statutes cited by petitioner "aim[] centrally to *compensate* victims of discrimination." *Id.* at 286-287 (emphasis added) (comparing Title IX with Title VII); see 42 U.S.C. 1983, 2000e-2, 3604. For that reason, the availability of damages for

emotional distress under those statutes is not relevant to the availability of the same remedy under the Rehabilitation Act and the ACA. See *Gebser*, 524 U.S. at 286-287. It is the "contractual nature" of Spending Clause legislation that governs "the scope of available remedies." *Id.* at 287; see *Barnes*, 536 U.S. at 187.

D. Prior Precedent Does Not Provide Recipients Of Federal Funding With Notice Of The Availability Of Damages For Emotional Distress

The government suggests that funding recipients should be aware of the availability of damages for emotional distress, standing alone, under the Rehabilitation Act and the ACA, because "courts have awarded or affirmed such awards for over thirty years" in cases under Title VI and related statutes. Br. 20. But petitioner and the government can cite only one appellate decision that squarely held that emotional-distress damages were available: namely, the sole decision on the other side of the circuit conflict that triggered this Court's review. See *Sheely*, *supra*. That hardly suffices to provide notice to funding recipients of the availability of damages for emotional distress.

1. The government begins by citing four cases "considered" by this Court "in which a plaintiff sought compensatory damages for emotional distress" under relevant Spending Clause legislation. Br. 21; see Pet. Br. 2-3 (citing the same cases). But there is a good reason that the Court did not "suggest[] that an award of compensation for emotional distress might be foreclosed," U.S. Br. 21: none of the cases presented that question. *Franklin*, *supra*, presented the question whether *any* compensatory damages were available under Title IX. See 503 U.S. at 62-63. *Barnes* concerned the availability of punitive damages under the Rehabilitation Act and Title II of the ADA.

536 U.S. at 183. *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), presented the question whether Title IX permits an action for damages against a school board for student-on-student harassment. See *id.* at 633. And *Fry* v. *Napoleon Community Schools*, 137 S. Ct. 743 (2017), involved administrative exhaustion under the Rehabilitation Act and Title II of the ADA. See *id.* at 748, 751. The Court can hardly have been expected to reach out and decide whether damages for emotional distress were available where that question was not presented and where there was no briefing on the issue.

Worse still, petitioner's and the government's citation of *Franklin*, *Davis*, and *Barnes* demonstrates their failure to recognize the legal distinction between "pain and suffering" and "emotional distress." But cf. Pet. Br. 28-29 (implicitly recognizing that distinction). On the one hand, "emotional distress is mental or emotional injury" that is "not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994). On the other hand, "pain and suffering"—which also "technically are mental harms"—"describe[s] sensations stemming directly from a physical injury or condition." *Ibid.* (citation omitted). "[P]ain and suffering associated with, or 'parasitic' on, a physical injury are traditionally compensable," but that harm is distinct from "[s]tand-alone emotional distress * * * not provoked by any physical injury." *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135, 147-148 (2003).

Franklin, *Davis*, and *Barnes* appear to have involved damages for pain and suffering, not for emotional distress alone, because each of those cases involved physical injury or touching. See *Franklin*, 503 U.S. at 63 (coercive intercourse and kissing); *Davis*, 526 U.S. at 633-634 (unwanted sexual touching); *Barnes*, 536 U.S. at 183-184 (physical

harm from failure properly to transport a wheelchair-bound arrestee). While the availability of pain-and-suffering damages under the Rehabilitation Act and the ACA is not at issue here, the potential availability of that remedy does not put funding recipients on notice of damages for emotional distress alone.

2. The cases from lower courts cited by the government (Br. 21-22) and petitioner (Br. 3 n.1) do not provide any clearer notice. Aside from the decision below, the Eleventh Circuit is "the only circuit court to squarely address the issue of emotional distress damages under [the Rehabilitation Act] since *Barnes*." *K.G.* v. *Santa Fe Public School District*, Civ. No. 12-1209, 2014 WL 12785160, at *21 (D.N.M. Nov. 17, 2014); see Pet. 11-15. The only other case cited by the government or petitioner that comes close is *Schultz* v. *YMCA*, 139 F.3d 286 (1998), in which the First Circuit opined that this Court "might well allow damages for emotional distress under Section 504 in some circumstances." *Id.* at 290. The remainder of the appellate cases simply do not address the question at all. And while certain district courts have concluded in recent years that damages for emotional distress are available, see Pet. Br. 3-4 n.2, some simply relied on the Eleventh Circuit's holding, see, *e.g.*, *Roohbakhsh* v. *Board of Trustees*, 409 F. Supp. 3d 719, 735 (D. Neb. 2019), and others noted that the question was "unsettled" or that courts were divided over the issue, see, *e.g.*, *Luciano* v. *East Central Board of Cooperative Education Services*, 885 F. Supp. 2d 1063, 1075 (D. Colo. 2012).

3. The foregoing cases do not provide "clear notice" to funding recipients of their potential liability for emotional-distress damages under the Rehabilitation Act or the ACA. *Murphy*, 548 U.S. at 296. The only appellate case that squarely addressed the question presented here was the one from which the court below departed to create

a circuit conflict. If that sufficed to provide notice of the availability of damages for emotional distress, it would create a bizarre regime under which one judicial decision authorizing a remedy (or others countenancing it) would effectively codify that remedy in a statute that is itself silent on the remedial question. But normally, a statute is not deemed to incorporate judicial interpretations of its language unless the statute is reenacted after the development of a "broad and unquestioned" judicial consensus, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1541 (2021) (citation omitted), consisting of cases that actually "speak to the question" at issue, *Lightfoot* v. *Cendant Mortgage Corp.*, 137 S. Ct. 553, 563 (2017). The government's approach would create a ratification rule on steroids in a context that demands the opposite.

Nor does the Justice Department's interpretation of related Spending Clause legislation in its administrative manual provide the requisite notice. See U.S. Br. 22-23. The government does not contend that the interpretation warrants deference. And it is unclear how it could, given that the text of both the Rehabilitation Act and the ACA are silent on the availability of a private right of action and any attendant remedies. Cf. *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 229 (1994). Lacking any legal force, the government's position in the Justice Department manual cannot even begin to render the potential liability of funding recipients under the statutes at issue "unambiguous." *Murphy*, 548 U.S. at 301.

E. Permitting Damages For Emotional Distress Would Subject Funding Recipients To Significant And Unpredictable Liability For Unverifiable Harms

In *Barnes*, the Court declined to recognize an "*implied* punitive damages provision" "(if such an interpre-

tive technique were available)," reasoning that it was unlikely a funding recipient would have agreed to accept the "indeterminate liability" created by the availability of punitive damages. 536 U.S. at 188. Damages for emotional distress raise similar concerns, counseling against their availability here.

Courts have identified several concerns with the unbounded availability of damages for emotional distress, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 557 (1994). Where damages for emotional distress caused by discrimination are clearly available under federal civil rights law—such as Title VII and 42 U.S.C. 1983—awards for emotional distress can be significant. See, *e.g.*, *Tuli* v. *Brigham & Women's Hospital*, 656 F.3d 33, 45 (1st Cir. 2011) (affirming award of $1.6 million, seemingly for emotional distress); *Fischer* v. *United Parcel Service, Inc.*, 390 Fed. Appx. 465, 472 (6th Cir. 2010) (affirming award of $650,000); *Brady* v. *Wal-Mart Stores, Inc.*, 531 F.3d 127, 132-133 (2d Cir. 2008) (affirming remittitur of $2.5 million award to $600,000); *Bogle* v. *McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003) (remitting award of $1 million per plaintiff to $500,000); *Peyton* v. *DiMario*, 287 F.3d 1121, 1126-1128 (D.C. Cir. 2002) (affirming award at statutory cap of $300,000 where the jury awarded $482,000); *Passantino* v. *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 504, 513-514 (9th Cir. 2000) (affirming award of $1 million).

To be sure, some of those cases involve awards under state law, because Congress imposed limits on damages for emotional distress under Title VII. See p. 29, *supra*. But the statutes at issue here contain no such limits.

In addition, while awards of damages for emotional distress "must be supported by competent evidence concerning the injury," *Carey* v. *Piphus*, 435 U.S. 247, 264 n.20 (1978), "medical or other expert evidence is not required." Pet. Br. 22 n.4 (alteration and citation omitted). Indeed, many courts of appeals have held that "[t]he testimony of the plaintiff alone can substantiate a jury's award of emotional distress damages." *Harper* v. *City of Los Angeles*, 533 F.3d 1010, 1029 (9th Cir. 2008); see, *e.g.*, *EEOC* v. *Convergys Customer Management Group, Inc.*, 491 F.3d 790, 797 (8th Cir. 2007); *Akouri* v. *Florida Department of Transportation*, 408 F.3d 1338, 1345 (11th Cir. 2005); *Bolden* v. *Southeastern Pennsylvania Transportation Authority*, 21 F.3d 29, 34 n.3 (3d Cir. 1994). While exceptional awards may typically be supported by additional evidence, see Pet. Br. 22 n.4; U.S. Br. 26, that is not a legal requirement. See, *e.g.*, *Vega* v. *Chicago Park District*, 954 F.3d 996, 1008 (7th Cir. 2020) (Barrett, J.) (award of $750,000 based on plaintiff's testimony, reduced to statutory maximum of $300,000); *Davis* v. *Florida Agency for Health Care Administration*, 612 Fed. Appx. 983, 984 (11th Cir. 2015) (per curiam) (award of $240,000); *Convergys*, 491 F.3d at 797 (award of $100,000).

It is true that courts can order remittitur of the most exorbitant awards. See U.S. Br. 26. But the standard for remittitur is stringent and subjective: the award must generally be "so large as to shock the [court's] conscience." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2815, at 211 (3d ed. 2012). Given the risk of significant and unpredictable liability, the better course is to hold, in accordance with the contract-law analogy that applies to Spending Clause legislation, that damages for emotional distress alone are not available under the Rehabilitation Act and the ACA.

F. Meaningful Remedies For Discrimination In Federal Programs Would Exist In The Absence Of Damages For Emotional Distress

Petitioner and the government contend that, without emotional-distress damages, "many victims of discrimination" would be left without a remedy. Pet. Br. 41; see U.S. Br. 28. That concern is overstated.

1. To begin with, the Rehabilitation Act contains an express remedy that serves as a significant "financial deterrent" for federally funded entities not to discriminate. Pet. Br. 41 n.8. One of the "remedies, procedures, and rights set forth in Title VI," and thus available under the Rehabilitation Act and the ACA, is for the government to terminate the recipient's funding. 29 U.S.C. 794a(a)(2); see 42 U.S.C. 2000d-1, 18116(a); *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 590 n.4 (1999). The implementing regulations for both statutes allow victims to notify the government of incidents of discrimination, which can lead to funding termination. See, *e.g.*, 28 C.F.R. 42.107(b), 42.110(f) (Department of Justice); 34 C.F.R. 100.7(b), 100.8(c), 104.61 (Department of Education); 45 C.F.R. 92.5 (Department of Health and Human Services).

The availability of that remedy is unsurprising given that Congress enacted Title VI and similar legislation pursuant to its spending power. See *Pennhurst*, 451 U.S. at 28. In fact, "termination was envisioned as the primary means of enforcement under Title VI," *National Black Police Association, Inc.* v. *Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983), cert. denied, 712 U.S. 569 (1984), and the federal government has invoked it in the past, see, *e.g.*, *Grove City College* v. *Bell*, 465 U.S. 555, 561 (1984); Congressional Research Service, R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, at 19 n.154 (2019) (CRS Report) (noting that termi-

nation was "aggressively used" to "enforce the desegregation of southern schools"). Even if formal invocation of the termination remedy is relatively rare, it looms as a sword of Damocles over any recipient of federal funding. Cf. *Gebser*, 524 U.S. at 289 (noting that Title IX requires "notice to the recipient and an opportunity to come into voluntary compliance" before funding is terminated); 42 U.S.C. 2000d-1 (Title VI; similar).

2. Aside from the express administrative remedy created by Congress, it is undisputed that victims of discrimination may invoke the implied right of action in the Rehabilitation Act and the ACA to obtain compensatory damages for non-emotional harms, see *Barnes*, 503 U.S. at 187; injunctive relief, see *Cannon*, 441 U.S. at 711-712; and declaratory relief, see 28 U.S.C. 2201; Fed. R. Civ. P. 57. Indeed, petitioner sought both injunctive and declaratory relief below. See D. Ct. Dkt. 11, at 12. To be sure, the district court held that petitioner did not sufficiently allege ongoing or future harm to obtain injunctive relief, see Pet. App. 20a-21a, and the court denied the request for declaratory relief without further analysis. But petitioner did not appeal those holdings, see *id.* at 4a n.3, and the potential unavailability of equitable relief in this case is not a byproduct of the applicable statutory scheme.

In addition, victims of discrimination may obtain nominal damages. The traditional rule is that, "[i]f the plaintiff proves a breach of the contract[,] he is entitled at least to a recovery of nominal damages." Dobbs § 12.4, at 817; accord Restatement (Second) of Contracts § 346(2); Restatement (First) of Contracts § 328. "[A] successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." *Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion).

Finally in this regard, damages for emotional distress may also be available against state actors under Section 1983 in some cases of discrimination. See, *e.g.*, *Carey*, 435 U.S. at 264 n.20; U.S. Const. Amend. XIV, § 1.

3. Even in the absence of a private remedy under federal law for emotional distress, state law will provide effective remedies in many cases. Cf. *Minneci* v. *Pollard*, 565 U.S. 118, 126-131 (2012) (denying a *Bivens* remedy where state-law remedies were available, even if they were not "perfectly congruent").

State tort law provides one course of relief. Discrimination by federal-funding recipients on the basis of race, sex, or another protected class may give rise to a number of different tort claims. For example, sexual harassment or assault may be actionable as negligence, invasion of privacy, assault and battery, or intentional infliction of emotional distress. See, *e.g.*, *Williams* v. *Utica College of Syracuse University*, 453 F.3d 112, 116-119 (2d Cir. 2006); *Kanzler* v. *Renner*, 937 P.2d 1337, 1342 (Wyo. 1997); *Phillips* v. *Smalley Maintenance Services*, 435 So. 2d 705, 706-708, 711 (Ala. 1983); *Skousen* v. *Nidy*, 367 P.2d 248, 249, 250 (Ariz. 1961). Similarly, racial or ethnic discrimination—which this Court has "likened" to "defamation or intentional infliction of mental distress," *Curtis* v. *Loether*, 415 U.S. 189, 196 n.10 (1974)—may also give rise to tort liability. See, *e.g.*, *Ledsinger* v. *Burmeister*, 318 N.W.2d 558, 562 (Mich. 1982); *Gomez* v. *Hug*, 645 P.2d 916, 918, 920-922 (Kan. App. 1982); *Dominguez* v. *Stone*, 638 P.2d 423, 424, 427 (N.M. 1981); see also Professors Br. 21-22.

In addition, damages for emotional distress may be available under state antidiscrimination statutes. See, *e.g.*, *Cuevas* v. *Wentworth Group*, 144 A.3d 890, 901 (N.J. 2016); *Windsor Clothing Store* v. *Castro*, 41 N.E.3d 983, 992 (Ill. App. 2015); *Campbell-Crane & Associates, Inc.* v.

Stamenkovic, 44 A.3d 924, 932 (D.C. 2012); *Borne* v. *Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 914 (Mass. Ct. App. 2003); *Human Rights Commission* v. *LaBrie, Inc.*, 668 A.2d 659, 668 (Vt. 1995); *Dobson* v. *Eastern Associated Coal Corp.*, 422 S.E.2d 494, 497, 501 (W. Va. 1992); *Hy-Vee Food Stores, Inc.* v. *Iowa Civil Rights Commission*, 453 N.W.2d 512, 526 (Iowa 1990); *Dean* v. *Municipality of Metropolitan Seattle-Metro*, 708 P.2d 393, 400 (Wash. 1985); *Cullen* v. *Nassau County Civil Service Commission*, 425 N.E.2d 858, 860 (N.Y. 1981); see also *Boemio* v. *Love's Restaurant*, 954 F. Supp. 204, 208, (S.D. Cal. 1997) (construing California's Unruh Civil Rights Act). While state law may limit the maximum recovery of damages for emotional distress in some instances, that simply reflects the same legislative judgment that Congress made with respect to the availability of that remedy under Title VII. See p. 29, *supra*. Notably, in this case, petitioner initially brought a claim under the Texas Human Resources Code, before voluntarily dismissing that claim because she was not denied "physical access" to respondent's facilities. See Pet. App. 17a; D. Ct. Dkt. 15, at 5 & n.3.

4. Petitioner next suggests (Br. 41) that victims will stop reporting discrimination if damages for emotional distress are not available. But history suggests otherwise.

Notably, some major federal civil-rights laws do not allow for compensatory damages at all. For example, Title II of the Civil Rights Act provides only for injunctive relief and not compensatory damages, see 42 U.S.C. 2000a-3(a); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), which means that the statutes incorporating its remedies—including Title III of the ADA, 42 U.S.C. 12188(a), which petitioner invoked below, see Pet.

App. 18a-19a—also do not allow for compensatory damages. Yet plaintiffs have been reporting discriminatory conduct and seeking injunctive relief for half a century. See, *e.g.*, *Houston* v. *Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013) (Title III of the ADA); *Scherr* v. *Marriott International, Inc.*, 703 F.3d 1069, 1072 (7th Cir. 2013) (same); *Newman* v. *Piggie Park Enterprises, Inc.*, 377 F.2d 433, 434 (4th Cir. 1967), aff'd, 390 U.S. 400 (1968) (Title II of the Civil Rights Act of 1964); *Dilworth* v. *Riner*, 343 F.2d 226, 228 (5th Cir. 1965) (same).

5. Finally, to the extent petitioner suggests that the foregoing remedies are nevertheless inadequate (Br. 5), Congress is best positioned to determine whether to provide emotional-distress damages in the first instance. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725-1726 (2017). In this case, however, Congress has decided not to use its spending power to make the monetary remedies available under the Rehabilitation Act or the ACA comparable to those under Title VII.

As discussed above, this Court has declined to interpret Congress's silence in Spending Clause legislation as a license to "expand liability beyond what would exist under nonspending statutes." *Sossamon*, 563 U.S. at 290. Yet that is precisely what petitioner and the government are asking this Court to do: to enlarge the remedies available in the Rehabilitation Act and the ACA to be more expansive than those that are expressly available under Title VII, a non-Spending Clause statute. "Until Congress speaks directly on the subject," *Gebser*, 524 U.S. at 292-293, this Court should decline to hold recipients of federal funding liable under the Rehabilitation Act and the ACA for damages for emotional distress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), provides in relevant part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *

2. Section 505(a)(2) of the Rehabilitation Act of 1973, 29 U.S.C. 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

3. Section 1557(a) of the Patient Protection and Affordable Care Act, 42 U.S.C. 18116(a), provides in relevant part:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under 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.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C.

794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.