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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Court should imply a remedy for emotional distress under Section 504 of the Rehabilitation Act of 1973.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

STATEMENT 2

I. STATUTORY FRAMEWORK 2

II. FACTS AND PROCEDURAL HISTORY 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. STATE-LAW TORT REMEDIES ALLOW INDIVIDUALS TO RECOVER FOR EMOTIONAL DISTRESS 6

A. Plaintiffs Can Sue For Intentional Infliction Of Emotional Distress 7

B. The Court Often Considers Alternative Remedies For Aggrieved Parties 11

TABLE OF CONTENTS
(*continued*)

Page

II. EMOTIONAL-DISTRESS DAMAGES FOR SECTION 504 VIOLATIONS IGNORES SEPARATION-OF-POWERS PRINCIPLES 14

A. Even When Congress Provides For A Cause Of Action, Remedies Are Limited To Those Congress Authorized 14

B. More Restraint Is Warranted When Considering Remedies For Implied Causes Of Action 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001).....17

AMG Cap. Mgmt., LLC v. FTC,
141 S. Ct. 1341 (2021).....1, 15, 16, 19

Appleton v. Bd. of Educ.,
757 A.2d 1059 (Conn. 2000) 7

Bain v. Wells,
936 S.W.2d 618 (Tenn. 1997).....8

Barnes v. Gorman,
536 U.S. 181 (2002).....3

Bennett v. Jones, *Waldo, Holbrook & McDonough*,
70 P.3d 17 (Utah 2003).....8

Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971).....12

Blockum v. Fieldale Farms Corp.,
573 S.E.2d 36 (Ga. 2002) 7

Buckley v. Trenton Saving Fund Soc'y,
544 A.2d 857 (N.J. 1988) 8

Bush v. Lucas,
462 U.S. 367 (1983).....12

Cannon v. Univ. of Chi.,
441 U.S. 677 (1979).....14

Champlin v. Wash. Tr. Co.,
478 A.2d 985 (R.I. 1984) 8

Childers v. Geile,
367 S.W.3d 576 (Ky. 2012) 7

TABLE OF AUTHORITIES
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Page(s)

Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).....17

Computer Publ'ns, Inc. v. Welton, 49 P.3d 732 (Okla. 2002) 8

Crump v. P & C Food Mkts, Inc., 576 A.2d 441 (Vt. 1990) 8

Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877 (Colo. 1994) 7

Dale v. Thomas Funeral Home, Inc., 466 N.W.2d 805 (Neb. 1991).....8

Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019).....2

Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020).....2

Doe v. Methodist Hosp., 690 N.E.2d 681 (Ind. 1997).....7

Edmondson v. Shearer Lumber Prods., 75 P.3d 733 (Idaho 2003).....7

Faulkner v. Ark. Child.'s Hosp., 69 S.W.3d 393 (Ark. 2002).....7

Fischer v. Maloney, 373 N.E.2d 1215 (N.Y. 1978).....8

Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981) 8

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(*continued*)

Page(s)

Ford v. Revlon, Inc.,
734 P.2d 580 (Ariz. 1987) 7

Franklin v. Gwinnett Cnty. Pub. Sch.,
503 U.S. 60 (1992).....18, 19

GTE Sw., Inc. v. Bruce,
998 S.W.2d 605 (Tex. 1999) 10

Hac v. Univ. of Haw.,
73 P.3d 46 (Haw. 2003).....7

Harris v. City of Santa Monica,
294 P.3d 49 (Cal. 2013).....7

Harris v. Jones,
380 A.2d 611 (Md. 1977).....7

Heart of Atlanta Motel,
Inc. v. United States,
379 U.S. 241 (1964).....10

Henry v. Henry,
604 N.W.2d 285 (S.D. 2000) 8

Hersh v. Tatum,
526 S.W.3d 462 (Tex. 2017) 9

Howard Univ. v. Best,
484 A.2d 958 (D.C. 1984).....7

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330 N.W.2d 428 (Minn. 1983).....7

Hui v. Castaneda,
559 U.S. 799 (2010).....12

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Hunt ex rel. DeSombre v. State, Dep't of Safety & Homeland Sec., Div. of Del. State Police, 69 A.3d 360 (Del. 2013) 7

Jaynes v. Strong-Thorne Mortuary, Inc., 954 P.2d 45 (N.M. 1997) 8

Jeremy H. by Hunter v. Mount Lebanon Sch. Dist., 95 F.3d 272 (3d Cir. 1996) 13, 14

Johnson v. Ford Motor Co., 113 P.3d 82 (Cal. 2005).....1

Jordan v. Shands, 500 S.E.2d 215 (Va. 1998) 8

Kroger Tex. Ltd. P'ship v. Suberu, 216 S.W.3d 788 (Tex. 2006) 10

Little v. Barreme, 6 U.S. 170 (1804).....13

Marbury v. Madison, 5 U.S. 137 (1803).....16

McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995) 8

McGrath v. Fahey, 533 N.E.2d 806 (Ill. 1994).....7

Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman, 978 P.2d 922 (Kan. 1999) 7

Morancy v. Morancy, 593 A.2d 1158 (N.H. 1991) 8

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Page(s)

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Nazeri v. Mo. Valley Coll., 860 S.W.2d 303 (Mo. 1993).....8

Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).....18

Northrup v. Farmland Indus., Inc., 372 N.W.2d 193 (Iowa 1985).....7

Papieves v. Lawrence, 263 A.2d 118 (Pa. 1970).....8

Phung v. Waste Mgmt., Inc., 644 N.E.2d 286 (Ohio 1994).....8

Polay v. McMahon, 10 N.E.3d 1122 (Mass. 2014).....7

R.J. v. Humana of Fla., Inc., 652 So. 2d 360 (Fla. 1995).....7

Rabideau v. City of Racine, 627 N.W.2d 795 (Wis. 2001).....8

Reid v. Pierce Cnty., 961 P.2d 333 (Wash. 1998).....8

Richardson v. Fairbanks N. Star Borough, 705 P.2d 454 (Alaska 1985).....7

Roberts v. Auto-Owners Ins. Co., 374 N.W.2d 905 (Mich. 1985).....7

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(*continued*)

Page(s)

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Schweiker v. Chilicky, 487 U.S. 412 (1988).....12

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Snyder v. Phelps, 562 U.S. 443 (2011).....8

Speed v. Scott, 787 So. 2d 626 (Miss. 2001).....8

Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62 (Tex. 1998).....9

Star v. Rabello, 625 P.2d 90 (Nev. 1981).....8

Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148 (2008).....18

Subbe-Hirt v. Baccigalupi, 94 F.3d 111 (3d Cir. 1996).....10

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Trabing v. Kinko's, Inc., 57 P.3d 1248 (Wyo. 2002).....8

Travis v. Alcon Labs., Inc., 504 S.E.2d 419 (W. Va. 1998).....8

TABLE OF AUTHORITIES
(*continued*)

Page(s)

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401 A.2d 148 (Me. 1979) 7

Waddle v. Sparks,
414 S.E.2d 22 (N.C. 1992) 8

Washington v. Knight,
887 S.W.2d 211 (Tex. App. 1994) 11

Wheeldin v. Wheeler,
373 U.S. 647 (1963).....12, 13

White v. Monsanto Co.,
585 So. 2d 1205 (La. 1991) 7

Wilkie v. Robbins,
551 U.S. 537 (2007).....12

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017).....17

Zuger v. State,
673 N.W.2d 615 (N.D. 2004).....8

Constitutional Provisions

U.S. Const. art. I, § 1.....18

U.S. Const. art. III, § 1.....18

Statutes

15 U.S.C. § 53(b).....14

28 U.S.C. § 1331 14

28 U.S.C. § 1367(a).....14

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42 U.S.C. § 18116(a).....2

TABLE OF AUTHORITIES
(*continued*)

Page(s)

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Webster's New International Dictionary (2d ed. 1949).....2

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many with disabilities. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important cases about available remedies. *See, e.g.*, *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005).

INTRODUCTION

Cummings and the United States resort to emotional appeals. They claim that if this Court affirms the Fifth Circuit's correct interpretation of Section 504 of the Rehabilitation Act of 1973, plaintiffs will be unable to recover for breaches of nondiscrimination statutes. *See* Pet'r's Br. 40-43, U.S.'s Br. 27-28. They tug on heartstrings to argue that because discrimination is illegal and immoral, the Court should not allow such conduct to go unpunished.

There are many problems with this argument. Among them, state-law remedies are available for emotional distress resulting from violations of Section 504 and other nondiscrimination statutes. These state-law torts can protect individuals from unlawful discrimination that cause only emotional distress.

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[1] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. All parties consented to WLF's filing this brief.

Section 504 and other Spending Clause legislation allow plaintiffs to sue for damages available at common law for breach of contract. Emotional-distress damages were generally unavailable for breach of contract. Cummings tries to avoid this straightforward application of settled law by appealing to the Court's emotions. The United States also gets in on the act.

Not only does Cummings seek to distract from the real question in this case, she also asks the Court to return to a repudiated practice of implying remedies that Congress never authorized. The Court should decline this invitation to ignore Section 504's plain language and well-settled precedents in two areas of law to allow for emotional-distress damages under Section 504.

STATEMENT

I. LEGAL BACKGROUND

The Patient Protection and Affordable Care Act (ACA) provides a cause of action for discrimination "on the ground prohibited under" several nondiscrimination statutes. 42 U.S.C. § 18116(a). This language shows that the ACA does not create a new cause of action. As used in the ACA, "ground" means "[t]he basis on which anything rests." *Webster's New International Dictionary* 1106 (2d ed. 1949). The ACA thus incorporates the discrimination bars in those individual statutes. *See Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1209-10 (9th Cir. 2020) (citing *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 238-39 (6th Cir. 2019)). It does not

combine those nondiscrimination statutes. Nor does it bar a different type of discrimination.

So although Cummings sued under both the ACA and Section 504 of the Rehabilitation Act, this case turns on Section 504's interpretation. If Section 504 allows emotional-distress damages, then plaintiffs can recover those damages in an ACA suit alleging disability discrimination. But if Section 504 bars emotional-distress damages, so too does the ACA.

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * 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." 29 U.S.C. § 794(a). The "remedies, procedures, and rights" available under Title VI of the Civil Rights Act of 1964 are "available to any person aggrieved" by a Section 504 violation. *Id.* § 794a(a)(2).

The remedies available under Title VI to private parties are those "traditionally available in suits for breach of contract." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). This includes "compensatory damages" and injunctive relief but excludes "punitive damages." *Id.* at 187-88 (citations omitted). So the question presented turns on a simple question: Are compensatory emotional-distress damages available at common law for breach of contract?

II. FACTS AND PROCEDURAL HISTORY

Cummings is deaf and legally blind. Pet. App. 2a. So she communicates using American Sign

Language. *Id.* Two doctors referred her to Premier for a work injury and back pain. When scheduling her appointment, she requested an ASL interpreter. *Id.* Premier sought other accommodations before using an ASL interpreter. *See id.* But Cummings wanted to use only an ASL interpreter.

Cummings sued Premier for violating the ACA's bar on disability discrimination. The District Court held that emotional-distress damages are unavailable for Section 504 violations. Pet. App. 23a. The Fifth Circuit affirmed because emotional-distress damages are not ordinarily available for breach of contract. *Id.* at 8a-14a. This Court granted certiorari to resolve a circuit split on the issue, the Eleventh Circuit alone having held that emotional-distress damages are available under Section 504. *Cf.* Pet. 11-12 (arguing the Fifth Circuit's decision split only from the Eleventh Circuit).

SUMMARY OF ARGUMENT

I.A. Cummings and the United States try to persuade this Court to imply an emotional-distress remedy for Section 504 violations so unlawful discrimination does not go unpunished. This argument, however, fails to acknowledge the elephant in the room. Every State and the District of Columbia already allows plaintiffs to recover for intentional infliction of emotional distress.

Texas uses the Restatement's four-part test for the tort of intentional infliction of emotional distress. Under that test, those who suffer severe emotional distress caused by unlawful discrimination must pay damages. In fact, the elements are easier to satisfy

than those required to obtain emotional-distress damages under common law for breach of contract. And because Cummings relies on emotional-distress damages for breach of contract to support her argument, this means that it is easier for her to recover under the tort.

B. Since the earliest days of our republic, this Court has declined to imply a federal cause of action when other remedies are available to plaintiffs. Recently, many of these cases have addressed alternative federal remedies. But other cases have relied on state-law causes of action when declining to find a federal cause of action. The same holds true for remedies. Because the tort of intentional infliction of emotional distress is available nationwide, the Court should decline to imply a remedy for emotional distress caused by unlawful discrimination.

II.A. The Court is careful not to overstep its bounds and make laws; that is Congress's job. Last term, this Court held that it could not imply a remedy under a federal statute because Congress did not provide for that remedy. It should do the same here. Congress did not provide for emotional-distress damages under Section 504. The Court should not imply that remedy.

B. Congress did not provide for a private right of action under Section 504. The Court should be even more circumspect of implying broad remedies for causes of action that the Court implied during the brief period when separation-of-powers principles were disregarded. Allowing broad remedies for actions that Congress did not create would mean that the most dubious private rights would have the

broadest remedies. This is the opposite of what the Constitution requires.

ARGUMENT

I. STATE-LAW TORT REMEDIES ALLOW INDIVIDUALS TO RECOVER FOR EMOTIONAL DISTRESS.

Cummings concedes that, at common law, emotional-distress damages are available only when "the contract or the breach is of such a kind that serious emotional disturbance [i]s a particularly likely result." Pet'r's Br. 14 (quoting Restatement (Second) of Contracts § 353 (1981)). Even if Cummings's Restatement interpretation is correct, the inquiry must be done case-by-case. Otherwise, it's impossible to tell whether conduct is so egregious to cause serious emotional disturbance as a likely result.

But Cummings tries to avoid this common-sense understanding of available remedies for breach of contract. She contends that all discrimination on the basis of race, sex, or disability meets the standard. This painting with a broad brush makes no sense. Cummings essentially ignores the Restatement's rule and replaces it with one that says "emotional-distress damages are available for violating Title VI, Title IX, or Section 504." In other words, it's a rule that she made out of whole cloth for use only in this case.

Under Cummings's broadest reasonable reading of the Restatement (Second) of Contracts, emotional-distress damages are available only for conduct that is particularly likely to cause serious emotional disturbance. As anytime this requirement

is satisfied a state-law claim is available, Cummings's and the United States's cries about the inability of victims of disability discrimination to recover damages lack any basis in reality.

A. Plaintiffs Can Sue For Intentional Infliction Of Emotional Distress.

If a party intentionally discriminates because of a person's disability in a manner that is very likely to cause serious emotional disturbance, that person can recover for intentional infliction of emotional distress. Every State recognizes the tort.[2] With slight

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[2] *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041, 1043 (Ala. 1993); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985); *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987); *Faulkner v. Ark. Child.'s Hosp.*, 69 S.W.3d 393, 403-04 (Ark. 2002); *Harris v. City of Santa Monica*, 294 P.3d 49, 67 (Cal. 2013); *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994); *Appleton v. Bd. of Educ.*, 757 A.2d 1059, 1062 (Conn. 2000); *Hunt ex rel. DeSombre v. State, Dep't of Safety & Homeland Sec., Div. of Del. State Police*, 69 A.3d 360, 367 (Del. 2013); *Howard Univ. v. Best*, 484 A.2d 958, 985 (D.C. 1984); *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995); *Blockum v. Fieldale Farms Corp.*, 573 S.E.2d 36, 39 (Ga. 2002); *Hac v. Univ. of Haw.*, 73 P.3d 46,60-61 (Haw. 2003); *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 740 (Idaho 2003); *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1994); *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 691 (Ind. 1997); *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985); *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 978 P.2d 922, 930 (Kan. 1999); *Childers v. Geile*, 367 S.W.3d 576, 581 (Ky. 2012); *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979); *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977); *Polay v. McMahon*, 10 N.E.3d 1122, 1128 (Mass. 2014); *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905, 908 (Mich. 1985); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983);

variations from State to State, a plaintiff may generally recover damages if a "defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (citation omitted).

Again, Cummings concedes that emotional-distress damages are unavailable for a humdrum assumpsit case. Pet'r's Br. 14. Rather, to recover emotional-distress damages for a breach of contract under common law, she must show that "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." *Id.* But

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Speed v. Scott, 787 So. 2d 626, 630 (Miss. 2001); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 316 (Mo. 1993); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418 (Mont. 1995); *Dale v. Thomas Funeral Home, Inc.*, 466 N.W.2d 805, 807-08 (Neb. 1991); *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981); *Morancy v. Morancy*, 593 A.2d 1158, 1158-59 (N.H. 1991); *Buckley v. Trenton Saving Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988); *Jaynes v. Strong-Thorne Mortuary, Inc.*, 954 P.2d 45, 50 (N.M. 1997); *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978); *Waddle v. Sparks*, 414 S.E.2d 22, 27 (N.C. 1992); *Zuger v. State*, 673 N.W.2d 615, 621 (N.D. 2004); *Phung v. Waste Mgmt., Inc.*, 644 N.E.2d 286, 289 (Ohio 1994); *Computer Publ'ns, Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002); *McGanty v. Staudenraus*, 901 P.2d 841, 849 (Or. 1995); *Papieves v. Lawrence*, 263 A.2d 118, 121 (Pa. 1970); *Champlin v. Wash. Tr. Co.*, 478 A.2d 985, 989 (R.I. 1984); *Ford v. Hutson*, 276 S.E.2d 776, 778 (S.C. 1981); *Henry v. Henry*, 604 N.W.2d 285, 288 (S.D. 2000); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 30 (Utah 2003); *Crump v. P & C Food Mkts, Inc.*, 576 A.2d 441, 448 (Vt. 1990); *Jordan v. Shands*, 500 S.E.2d 215, 218-19 (Va. 1998); *Reid v. Pierce Cnty.*, 961 P.2d 333, 337 (Wash. 1998); *Travis v. Alcon Labs., Inc.*, 504 S.E.2d 419, 425 (W. Va. 1998); *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001); *Trabing v. Kinko's, Inc.*, 57 P.3d 1248, 1256 (Wyo. 2002).

if these requirements are satisfied, Cummings could recover for intentional infliction of emotional distress. And so too could future victims of unlawful discrimination.

Because Cummings sued over alleged discrimination in Texas, a closer look at Texas law on intentional infliction of emotional distress shows why Cummings's and the United States's assertions about lacking other remedies for discriminatory conduct ring hollow.

In Texas, intentional infliction of emotional distress "has four elements: (1) the defendant acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused the plaintiff emotional distress; and (4) the emotional distress was severe." *Hersh v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017) (citation omitted).

When the defendant "anticipated that the plaintiff would suffer severe emotional distress" caused by its actions, the first element of the tort is satisfied. *See Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 67 (Tex. 1998) (citing Restatement (Second) of Torts § 46 cmt. b (1965)). Again, Cummings concedes that emotional-distress damages are available for a breach of contract only if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Pet'r's Br. 14. The standard for intentional infliction of emotion distress is therefore laxer than that for recovery of emotional damages in breach of contract actions under common law. Rather than having to show that emotional distress was a "particularly likely" outcome, the plaintiff need only

show that emotional distress was an anticipated result.

The second element is satisfied if the conduct "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006) (cleaned up).

Cummings argues that discrimination causes victims "humiliation, frustration, and embarrassment." Pet'r's Br. 25 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring)). The Supreme Court of Texas's decision in *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 614 (Tex. 1999) shows why conduct that causes embarrassment satisfies the second element.

Despite having a janitorial service, a supervisor made certain employees vacuum the offices daily. *Bruce*, 998 S.W.2d at 614. This was done to humiliate the employees. *See id.* The Supreme Court of Texas held that these intentional acts to embarrass the employees satisfied the second element of the tort. *See id.* at 615 (citing *Subbe-Hirt v. Baccigalupi*, 94 F.3d 111, 114-15 (3d Cir. 1996)).

Discrimination based on race, sex, and disability is insidious. And as Justice Goldberg said in *Heart of Atlanta*, it causes embarrassment. Because the Supreme Court of Texas has held that outrageous conduct meant to embarrass satisfies the second element, victims of discrimination in Texas may sue for intentional infliction of emotional distress.

Texas courts have also held that the third element is satisfied when grief occurs because it is a type of emotional distress. *Washington v. Knight*, 887 S.W.2d 211, 216 (Tex. App. 1994). Because Cummings argues that discrimination causes grief, Pet'r's Br. 23 (citation omitted), she and similar plaintiffs could also clear this hurdle.

The final element of intentional infliction of emotional distress is showing that the distress was severe. Emotional distress is severe when it is of the type that "no reasonable person could be expected to endure." *Washington*, 887 S.W.2d at 216 (citation omitted). The worst examples of discrimination that Cummings argues will spread quickly unless this Court reverses cause the type of severe emotional distress that no one should have to endure.

So all four elements of intentional infliction of emotional distress are satisfied in the extreme examples that Cummings and the United States say will become prevalent without an emotional-distress remedy under Section 504. This means that Cummings and the United States are just trying to scare this Court into implying a damages remedy for emotional distress. The Court should not scare so easily.

B. The Court Often Looks To Alternative Remedies For Aggrieved Parties.

The availability of alternative remedies shows why Cummings's and the United States's emotional cries about discrimination going unpunished if this Court affirms should carry no weight. But the

alternative remedies are also relevant when addressing the remaining arguments for reversal.

For instance, when deciding whether a plaintiff can sue under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Court considers whether plaintiffs have an alternative remedy. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). At least three times over the past four decades, the Court declined to allow a *Bivens* suit given the availability of alternative remedies. In *Hui v. Castaneda*, this Court held that a detained immigrant could not use *Bivens* to sue a U.S. Public Health Service doctor for ignoring his medical needs because he could sue under the Federal Tort Claims Act. 559 U.S. 799, 805-07 (2010).

Although for slightly different reasons, the result was the same in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). There, a claimant sued Social Security officials for improperly revoking her benefits. This Court held that she could not sue under *Bivens* because the Social Security statute allowed her to pursue remedies through the administrative process and federal appeal. *See id.* at 424-29. Similarly, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held a subordinate could not sue a supervisor for a First Amendment violation. As the Court recognized, an extensive administrative process already protected the subordinate's rights. *Id.* at 380-90.

These three cases focused on federal causes of action. But the Court has also relied on state causes of action when denying plaintiffs recovery under federal law. For example, in *Wheeldin v. Wheeler*, the Court held that "[w]hen it comes to suits for damages for abuse of power, federal officials are usually

governed by local law." 373 U.S. 647, 652 (1963) (citing *Slocum v. Mayberry*, 15 U.S. 1, 10, 12 (1817)). So the Court declined to create a separate federal cause of action. *See id.* at 649-50.

Wheeldin did not break new ground in relying on a state cause of action when denying plaintiffs the ability to recover under federal law. In *Little v. Barreme*, 6 U.S. 170 (1804), a naval officer illegally seized a Danish ship. The Court held that the ship's owner could sue the officer for trespass. *See id.* at 179. It did not create a separate federal cause of action.

As explained in § 2, *infra*, Section 504 does not explicitly recognize the right to recover emotional-distress damages. So Cummings resorts to cries of passion when asking the Court to reverse. But she ignores the well-settled precedent in all fifty States and the District of Columbia allowing her to recover for intentional infliction of emotional distress.

She also ignores the Court's long-standing practice of declining to infer a federal cause of action when state-law remedies are available. True, here she is asking the Court to imply only a remedy under federal law rather than a cause of action. But as explained below, the Court should consider the same separation-of-powers principles when implying remedies as it does when implying causes of action.

If Cummings's and the United States's argument is that the right to a federal forum is key to eliminating discrimination, that argument also fails. Plaintiffs can always sue to seek injunctive relief under Section 504. *See, e.g.*, *Jeremy H. by Hunter v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir.

1996) (citation omitted). Because district courts have jurisdiction over suits for injunctive relief under Section 504, 28 U.S.C. § 1331, they have supplemental jurisdiction over the intentional infliction of emotional distress claims. *Id.* § 1367(a). Thus, this Court should disregard Cummings's and the United States's pleas and decide this case based on law—not emotion.

II. RECOGNIZING A RIGHT TO RECOVER EMOTIONAL-DISTRESS DAMAGES FOR SECTION 504 VIOLATIONS IGNORES SEPARATION-OF-POWERS PRINCIPLES.

Section 504 does not explicitly provide for a private cause of action; the Court implied such an action. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979). Because Congress did not consider a private right of action under Section 504, it similarly did not consider whether emotional-distress damages were available in those private suits. But this Court's recent decisions show why implying such a remedy violates core separation-of-powers principles.

A. Even When Congress Provides For A Cause Of Action, Remedies Are Limited To Those Congress Authorized.

Just last term, this Court soundly rejected the argument that the United States makes here. The Federal Trade Commission Act allows the FTC to get a permanent injunction for violating laws that it enforces. *See* 15 U.S.C. § 53(b). Seven courts of appeals held that this statute allowed courts to grant equitable monetary relief, including disgorgement.

The Seventh Circuit alone rejected that approach and held that the FTC could not seek disgorgement under the FTC Act.

The Court rejected the consensus view and adopted the Seventh Circuit's view. In reaching this conclusion, the Court focused on what Congress authorized. *See AMG Cap.*, 141 S. Ct. at 1346. In other words, "[d]id *Congress*" authorize the FTC "to obtain monetary relief directly from courts." *Id.* at 1347 (emphasis added).

The Court then examined the statutory language and context to determine if Congress authorized the FTC to seek disgorgement in court. Based on this extensive review of the FTC Act, the Court held that the statute barred courts from granting the FTC equitable monetary relief. *AMG Cap.*, 141 S. Ct. at 1347-49.

As here, the FTC and its *amici* argued that the Court should still recognize the disgorgement remedy for policy reasons. *See AMG Cap.*, 141 S. Ct. at 1351-52. The Court rejected that argument because it found that the FTC had another option for obtaining disgorgement. It could use two other sections of the FTC Act "to obtain restitution on behalf of consumers." *Id.* at 1352.

As described in § 1, *supra*, the same scenario is present here. Cummings and those like her can get emotional-distress damages by suing for intentional infliction of emotional distress. This alternative remedy is like the alternative remedy that led the Court to reject the FTC's argument for disgorgement in *AMG Capital*. So for the same reasons, the Court

should reject Cummings's and the United States's emotional pleas to reverse the Fifth Circuit's decision.

The FTC also argued that the Court should allow it to pursue disgorgement in district courts because Congress ratified that interpretation of the FTC Act. *See AMG Cap.*, 141 S. Ct. at 1351. The Court rejected that argument too. As it explained, the purported ratification did not address whether disgorgement was available in district courts. *See id.*

The same is true here. The United States spills much ink (at 23-27) trying to persuade this Court that Congress ratified emotional-distress damages when it amended Section 504 and related statutes. But not once does the United States discuss *AMG Capital*. And for good reason. The United States knows that the Court rejected the FTC's argument there. That argument was much like the one the United States now employs. The Court should reject the argument the same way it did in *AMG Capital* by pointing out that the so-called ratification did not touch on the availability of damages for emotional distress.

AMG Capital therefore shows that even when Congress provides for a cause of action, courts must consider separation-of-powers principles when deciding whether to imply a remedy for that cause of action. This is because what matters is Congress's intent—not the intent of an unelected judiciary. When Congress creates a cause of action but declines to provide for a specific remedy, courts cannot add that remedy to make the statute "better." Rather, courts are constrained "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

B. More Restraint Is Warranted When Considering Remedies For Implied Causes Of Action.

1. The "Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59 (2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

But for a brief time last century, the Court assumed it was "a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (cleaned up). "[T]he Court would imply causes of action not explicit in the statutory text itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citation omitted).

The Court has since abandoned that "*ancien regime*[] and ha[s] not returned to it since." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Now the Court charts a "far more cautious course before finding implied causes of action." *Abbasi*, 137 S. Ct. at 1855.

This change is grounded in the Constitution. "When a party seeks to assert an implied cause of action * * * separation-of-powers principles" must "be central to the analysis." *Abbasi*, 137 S. Ct. at 1857. The Court's old practice of recognizing implied causes

of action created "tension" with "the Constitution's separation of legislative and judicial power." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (plurality) (quotation omitted).

The Constitution vests "All legislative Powers" with Congress. U.S. Const. art. I, § 1; *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). The Judiciary, on the other hand, exercises judicial power. U.S. Const. art. III, § 1. The distinction between the legislative power and the judicial power disappears when courts imply causes of action that Congress did not create.

2. *Cannon*, in which this Court recognized the private right of action under Section 504, is part of the old practice that the Court has since rejected. *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 164 (2008). That the private right of action under Section 504 was implied by the Court is important when deciding the proper scope of available remedies.

Cummings leans heavily on the Court's decision in *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992). *Cf.* Pet'r's Br. vi (*Franklin* cited "*passim*"). But only one of those citations mentions the three-justice concurrence discussing the scope of remedies available after *Cannon*. *See id.* at 8. That concurring opinion explains why restraint is needed when defining remedies for implied causes of action.

"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." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring). For this reason, "causes of action that came into existence under the *ancien regime* should be limited by the same logic that gave them birth." *Id.* In other words, courts must strictly limit the remedies under implied causes of action so as to not infringe further on Congress's power to make laws.

The United States formerly agreed with this position. *See* Br. *Amicus Curiae* of United States at 12-13, *Franklin*, 503 U.S. 60 (No. 90-918), 1991 WL 11009216. But in what has become a trend, the United States now abandons that correct legal position because it doesn't like the result that follows from applying that rule. The Court, however, should not be so results oriented. Rather, it should apply the correct legal principles in each case when deciding the proper outcome. Many times that will lead to a just result. But even when the outcome may not seem just, the right way to fix it is to ask Congress to change the law. *See AMG Cap.*, 141 S. Ct. at 1352 (parties should "ask Congress to grant" more remedies if unhappy with current statutory scheme).

Allowing unlimited remedies for private causes of action under Section 504 infringes on Congress's lawmaking authority. Not only would the Court have implied a private cause of action that Congress never created, it would also need to expand possible remedies far beyond what is available at common law. For breach of contract, a party can always seek injunctive relief or damages for pecuniary losses. As the old practice of implying causes of action relied on the common law, that is as far as the remedies should go. The Court should not also imply remedies not

available at common law—like emotional-distress damages for a normal breach of contract.

But that is what Cummings, and now the United States, ask this Court to do. They want the Court to imply a remedy for emotional distress despite Congress's silence on the issue and its unavailability at common law. The Court should decline the invitation to get involved in the lawmaking business and should stick to saying what the law is. Those laws, the ACA and Section 504, do not permit emotional-distress damages for Section 504 violations.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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