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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A straightforward application of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), demonstrates that emotional-distress damages are available here. *Franklin* holds that victims of intentional discrimination may recover compensatory damages under Spending Clause statutes prohibiting such discrimination, and respondent does not dispute that emotional-distress damages are compensatory. *Barnes* confirms that federal funding recipients are on notice of remedies traditionally available in analogous breach-of-contract cases. And the Restatement and leading treatises recognize that emotional-distress damages are available for breach of contract when such distress is a "particularly likely result" of the breach. Restatement (Second) of Contracts § 353 (1981); Petr. Br. 31 (treatises). Intentional discrimination plainly meets this test.

That leaves respondent urging this Court to disregard the Restatement's and the treatises' summaries of contract law. But this argument rests on a selective and misleading portrait of common-law precedent, framing it as allowing emotional-distress damages only for breaches of what respondent calls "personal contracts" or when tort principles are also implicated. In fact, emotional-distress damages are traditionally available on pure contract grounds in a variety of settings. Most pertinent here, courts have long agreed that such damages are recoverable in cases involving discrimination and other improper exclusions from public accommodations.

Respondent also portrays emotional-distress awards as potentially large and unpredictable. But

the reality—established by more than three decades of accepted practice prior to the Fifth Circuit's decision here—is that such awards are consistently modest, predictable, and cabined by procedural safeguards. Respondent accordingly offers no good reason to eliminate this entire category of compensatory damages, which provides the only meaningful relief available to many victims of discrimination.

I. Emotional-distress damages are a presumptively appropriate remedy for discrimination.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that compensatory damages are available for intentional discrimination. The Court grounded this holding in the "longstanding" presumption—articulated in *Bell v. Hood*, 327 U.S. 678, 684 (1946)—that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*." *Franklin*, 503 U.S. at 66 (emphasis added) (citation omitted); *see also* Amicus Br. of Law Profs. 5-16. Respondent does not dispute that emotional-distress damages are compensatory and therefore fall squarely within this holding. Indeed, such damages are a standard compensatory remedy under other federal and state statutes that forbid discrimination. *See* Petr. Br. 22-25; Resp. Br. 29.

Respondent nonetheless argues, for two reasons, that the presumption of effective relief has "little force" here. Resp. Br. 30. Neither argument is availing.

1. Respondent first suggests that the Court should not put "undue weight" on the *Bell* presumption because of the "implied nature of the right of action at issue here." Resp. Br. 31. But the origin of Title VI's private right of action does not limit the force of the presumption of effective relief. *Franklin* deemed the presumption fully applicable to Title VI's "implied right of action," *Franklin*, 503 U.S. at 65-66, and *Barnes v. Gorman*, 536 U.S. 181 (2002), confirmed that "this presumption applies," *id.* at 185. As the Court has explained, "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin*, 503 U.S. at 65-66 (citation omitted). Once such a right of action has been recognized, "the prevailing traditional rule" regarding remedies governs. *Id.* at 73.

At any rate, Congress has repeatedly ratified the rights of action here. In 1986, Congress abrogated states' Eleventh Amendment immunity under the Rehabilitation Act (as well as Title VI and Title IX). *See* 42 U.S.C. § 2000d-7(a)(1)-(2). The Eleventh Amendment protects states against damages liability, so this abrogation "must be read . . . as an implicit acknowledgment that damages are available." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). Indeed, this abrogation "leav[es] it 'beyond dispute that private individuals may sue to enforce' Title VI." *Barnes*, 536 U.S. at 185 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)). Moreover, Congress expressly incorporated the remedies available under Title VI into the Affordable Care Act. 42 U.S.C. § 18116(a). Against the backdrop of this Court's decisions in *Franklin* and

Barnes, that enactment can be understood only as providing a private right of action for compensatory damages. *See* Petr. Br. 6-7.

2. Respondent also contends that the reasoning in *Barnes* sidelines the presumption of effective relief here. Resp. Br. 30-31. But, as just noted, *Barnes* readily accepted the "well settled" presumption that federal courts may award any damages necessary to "make good the wrong done"—that is, to compensate plaintiffs "for the loss caused" by discrimination. *Barnes*, 536 U.S. at 189 (citation omitted). The Court simply held that punitive damages fall outside of that ambit because they "are not compensatory." *Id.* at 189; *see also Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001). Emotional-distress damages, by contrast, unquestionably compensate plaintiffs for the wrong done.

To be sure, *Barnes* "qualifies" how the presumption of effective relief applies to the statutes here. Resp. Br. 30. Because Spending Clause legislation is "in the nature of a *contract*," *Barnes* holds that remedies are not "appropriate" unless they are "traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. Respondent assumes this "contract-law analogy," *id.*, requires individualized assessments—beyond *Franklin*'s "compensatory damages" holding and its reaffirmance in *Barnes*—of whether particular categories of compensatory relief are recoverable. Resp. Br. 30. Even if it does, the *Barnes* qualification poses no problem here: As explained in the next Part, damages specifically for emotional distress are among the forms of compensatory relief traditionally available for breaching a promise not to discriminate.

II. Contract law confirms the propriety of emotional-distress damages here.

A. Traditional contract principles put funding recipients on notice that intentional discrimination may lead to emotional-distress damages.

Barnes v. Gorman, 536 U.S. 181 (2002), "provide[s] the governing rule," Resp. Br. 30, for determining whether a form of relief is "traditionally available in suits for breach of contract," 536 U.S. at 187. There, the Court looked to the Restatement (Second) of Contracts and leading treatises to ascertain such traditional principles. *Id.* at 187-88. Because those sources indicated that punitive damages are "not available for breach of contract," the Court held that they are not an appropriate remedy under the Title VI family of statutes. *Id.* at 187.

The same sources upon which the *Barnes* Court relied establish that federal funding recipients are on notice of potential liability for emotional-distress damages. By accepting federal funds, a recipient "agree[s] not to engage in discrimination on certain grounds." Resp. Br. 2. The Restatement instructs that if a contract's "breach is of such a kind that serious emotional disturbance was a particularly likely result," then "recovery for emotional disturbance" is allowed. Restatement (Second) of Contracts § 353 (1981); *see also* Petr. Br. 31 (canvassing other authorities cited in *Barnes*). And respondent does not dispute that emotional distress is a "particularly likely result" of invidious discrimination. As this Court has consistently recognized, discrimination "deprives persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S.

609, 625 (1984), and can inflict "profound personal humiliation," *Powers v. Ohio*, 499 U.S. 400, 413-14 (1991). *See also* Amicus Br. of Civil Rights Orgs. 6-7, 16-17.[1]

Respondent protests that a promise not to discriminate is "only a small part of any 'contract' for federal funding," not the "predominant purpose" of such a contract. Resp. Br. 28. But even if true, this makes no difference. Neither the Restatement nor the treatises cited in *Barnes* contain any "predominant purpose" requirement. To the contrary, courts across the centuries have awarded emotional-distress damages for breaches of provisions protecting interests in mental solicitude, even when those interests were hardly the parties' "predominant purpose" in contracting. *See, e.g.*, *McGinniss v. Mo. Pac. Ry. Co.*, 21 Mo. App. 399, 407 (Mo. Ct. App. 1886) (allowing emotional-distress damages on the basis of a "contract evidenced by the [railroad] ticket," the predominant purpose of which was surely transit from point A to point B); *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 962 (Ala. 1995)

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[1] Respondent's amici characterize this case as involving "a failure to accommodate" a person with a disability, and question whether such a claim can rise to "the sort of intentional discriminatory conduct that will support an award of monetary damages." Amicus Br. of Chamber of Commerce 13. Respondent, however, does not challenge petitioner's contention that refusing to provide an ASL interpreter can constitute intentional discrimination, and neither of the lower courts has addressed that issue. The district court and Fifth Circuit held instead that the statutes here categorically foreclose any recovery of emotional-distress damages, no matter how obviously intentional the discrimination. The only question before this Court is whether that holding is correct.

(breach of "contract to lend money," the primary purpose of which was to fund the construction of a residence). In other words, only the *provision* that is breached need protect a nonpecuniary or dignitary interest. A provision forbidding discrimination protects such an interest.

B. Respondent's attempts to muddy the governing contract principles fail.

Respondent does not dispute that the Restatement's "particularly likely result" rule is satisfied here. Instead, respondent asks this Court to disregard the rule. According to respondent, the legal rule recounted in the Restatement and leading treatises lacks sufficient grounding in actual case law to provide notice under *Barnes*'s contract-law analogy. Resp. Br. 20-29. This argument is unpersuasive.

1. When this Court has previously inquired into traditional common-law principles, it has consistently relied—as it did in *Barnes*—on restatements and leading treatises. Recent examples include another case applying the "contract-law analogy" to Spending Clause statutes, as well as a variety of other cases. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (referencing Richard A. Lord, *Williston on Contracts* (4th ed. 2013), and John E. Murray, Jr. & Timothy Murray, *Corbin on Contracts* (rev. ed. 2007)); *see also, e.g.*, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1089 (2020) (consulting the Restatement (Second) of Contracts and *Williston on Contracts* for guidance on the rules of strict liability in contract law); *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) ("[W]e turn to standard treatises on equity, which establish the 'basic contours' of what

equitable relief was typically available in premerger equity courts."); *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 148 (2015) ("The Court, therefore, regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion."); *Vance v. Ball State Univ.*, 570 U.S. 421, 428 (2013) ("[I]n identifying the situations in which such vicarious liability is appropriate, we looked to the Restatement of Agency for guidance.").

This practice makes good sense. Selective citations in briefs to outlier common-law cases can make settled principles appear contested or even inchoate. Meanwhile, the very purpose of restatements and treatises is to undertake the work of objectively and comprehensively reporting the law. Absent good reason to think such sources misstate generally accepted principles, they should be presumed to be reliable.

2. Case law undergirding the Restatement and contract-law treatises confirms the availability of emotional-distress damages for breaches of promises not to discriminate. Respondent tries in three ways to depict this case law as "murky." Resp. Br. 21. But each of these arguments conflicts with the overwhelming sweep of the law.

a. *"Personal contracts."* Respondent maintains that cases allowing emotional-distress damages are largely limited to breaches of contracts relating to "interests of personality and family relationships," such as marriages and funerals. Resp. Br. 22 (citation omitted). But state courts have widely adopted the "particularly likely result" rule. *See* U.S. Br. 17 (citing cases). And cases allowing for emotional-distress damages extend beyond the narrow

categories that respondent characterizes as "personal contracts," Resp. Br. 20.

Most relevant here, courts have long allowed plaintiffs to recover emotional-distress damages in "actions for breach of contract for expulsion of guests from hotels, or passengers from trains, or expulsion or refusal of admission to ticket holders in places of public resort or entertainment." Charles T. McCormick, *Handbook on the Law of Damages* § 145, at 593 (1935). Indeed, "practically *all* courts" in cases involving such improper exclusions "will give damages for mental distress and humiliation." *Id.* (emphasis added); *see also id.* at 592 (stating this rule); Petr. Br. 31 (other sources). And cases involving breaches of promises not to discriminate fall within this rule. *See Aaron v. Ward*, 121 N.Y.S. 673, 673-74 (App. Div. 1910) (bathhouse refused entry to Jewish ticketholder), *aff'd*, 96 N.E. 736 (N.Y. 1911); *Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312, 316 (N.Y. Sup. Ct. 1942) (hotel restaurant refused to serve Black guests of the hotel).[2]

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[2] Cases arising specifically from discriminatory conduct are limited in number. But respondent cites no case holding that emotional-distress damages are unavailable for breach of a pledge not to discriminate. And historical context explains the relative rarity of cases involving such claims. Under the shadow of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the menace of Jim Crow, individuals were unlikely to seek monetary redress for discrimination. When society began to recognize the true harms of discrimination, *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), state and federal statutes like those at issue here obviated any need to bring breach-of-contract lawsuits to obtain remedies for such mistreatment. *See, e.g.*, *Madison v. Cinema I*, 454 N.Y.S.2d 226, 228 (N.Y. Civ. Ct. 1982) (noting

Instead of engaging with the topic of discrimination, respondent references various decisions involving late telegrams and other disparate fact patterns. Resp. Br. 18-20. Most notably, respondent cites *Southern Express Co. v. Byers*, 240 U.S. 612 (1916), in which this Court—applying (now-defunct) federal common law—held that plaintiffs could not recover damages "for mental suffering only" for the late delivery of shipments. Resp. Br. 19. But a delayed delivery is a far cry from intentional discrimination. Moreover, the Court in *Southern Express* did not even render its decision based on contract law. Instead, the Court cited a treatise on *torts* for the principle that damages for emotional distress may not be recovered "where no injury is done to person, property, health, or reputation." *Southern Express*, 240 U.S. at 615 (quoting Thomas Cooley, *A Treatise on the Law of Torts: Or the Wrongs Which Arise Independent of Contract* 94 (3d ed. 1906)).

In any event, the contract-law analogy here turns on assessing the state of the law when Title VI was enacted in 1964 (or, later, when the statutes here were enacted), not a half-century earlier when *Southern Express* was decided. By 1964, the availability of emotional-distress damages under the test reflected in Section 353 of the Restatement had become broadly accepted. *See* U.S. Br. 17. There may have been some "fluidity" and continuing "development" around the edges of the rule—it is, after all, a common-law doctrine. Resp. Br. 26

"parallel and overlapping remedies" available in this situation) (citation omitted).

(citations omitted); *see also, e.g.*, *Hancock v. Northcutt*, 808 P.2d 251, 258-59 (Alaska 1991) (noting ongoing disagreement over whether "breach of a house construction contract" falls within the rule). But as the very sources respondent cites demonstrate, the "particularly likely result" concept itself has long been a "definite" fixture of the law. *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949); *see also Stewart v. Rudner*, 84 N.W.2d 816, 823 (Mich. 1957) ("[O]bjections to recovery for mental disturbance . . . have been so thoroughly demolished in recent years that we will not take the time for review."). And no court has expressed hesitancy over its application to contexts like discrimination.

It is true, as respondent notes, that a few states even today continue to hold that emotional-distress damages are "never available in contract." Resp. Br. 26-27. But the question here is whether the remedy is "generally" or "traditionally" available in suits for breach of contract. *Barnes*, 536 U.S. at 187. Under this test, it does not matter whether a few states take an aberrant approach. *Cf. Taylor v. United States*, 495 U.S. 575, 598 (1990) (state-law concepts that illuminate meaning of federal sentencing statutes depend on the law of "most States"). Anyhow, even these aberrant jurisdictions sometimes allow plaintiffs bringing breach-of-contract claims to recover non-pecuniary damages. Unlike most states, Idaho and South Carolina allow plaintiffs bringing such claims to recover punitive damages in cases involving egregious conduct. *See Brown v. Matthews Mortuary, Inc.*, 801 P.2d 37, 46 (Idaho 1990); *see also Tomkins v. Eckerd*, 2012 WL 1110069, at *4 (D.S.C. Apr. 3, 2012).

b. *Relevance of tort law.* Respondent is wrong (Br. 22) that the availability of emotional-distress damages for breach of contract in public-accommodations-related settings depends on tort law.

Common carrier grievances that generated early emotional-distress awards often sounded in contract. Most involved seat assignments or failures to stop trains at requested stations—contractual terms of railroad tickets. Although many of these cases reinforced rather than redressed segregation, courts held that "it was proper to consider any humiliation suffered in measuring the damages" for a "breach of the contract of carriage." *Chi., R.I. & P. Ry. Co. v. Allison*, 178 S.W. 401, 403 (Ark. 1915) (seat assignment); *see also St. Louis-S.F. Ry. Co. v. Talley*, 34 S.W.2d 463, 463-64 (Ark. 1931) (missed stop); *Mo., Kan. & Tex. Ry. Co. v. Ball*, 61 S.W. 327, 329 (Tex. App. 1901) (seat assignment); *Tex. & P. Ry. Co. v. Hartnett*, 34 S.W. 1057, 1059 (Tex. App. 1896) (missed stop). Even where "boisterous and insulting" treatment gave rise to the action, courts were clear that the plaintiffs' claims turned entirely upon the "contract evidenced by the ticket." *McGinniss*, 21 Mo. App. at 401, 407; *see also Aaron*, 121 N.Y.S. at 674 (complaint was "not based upon a tort, but state[d] fully a cause of action for a breach of contract").

Respondent notes that in *Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823), Justice Story implied a breach of contract in a tort suit to permit recovery for emotional distress. Resp. Br. 24. But this does not undermine the point that courts could award emotional-distress damages in pure contract cases. To the contrary, Justice Story's invocation of contract principles to justify an emotional-distress award in a tort case confirms that

such damages were appropriate in contractual contexts. *See* Amicus Br. of Am. Ass'n of Justice 22-26. If recovery for emotional distress were disallowed in contract cases, then likening the wrong in *Chamberlain* to a breach of contract would have undercut, not supported, the holding in that case.

Nor was the permissibility of recovering emotional-distress damages in contract cases limited to the "nineteenth and early twentieth centuries," before the emergence of the tort of intentional infliction of emotional distress. Resp. Br. 21. Courts have continued after the emergence of that tort to allow such damages based purely on contract law. *See, e.g.*, *Univ. of So. Miss. v. Williams*, 891 So.2d 160, 172 (Miss. 2004) ("It is now undisputed that under Mississippi law a plaintiff can assert a claim for mental anguish and emotional distress in a breach of contract action."); *Allen v. Jones*, 163 Cal. Rptr. 445, 448 (Cal. Ct. App. 1980) ("[O]ur courts have recognized that damages for mental distress may be recovered for breach of a contract."); *Stewart*, 84 N.W.2d at 823 ("award of damages for mental distress and suffering is a commonplace" remedy in contract cases). Indeed, the Restatement and modern treatises themselves recognize the persistence of the rule. *See supra* at 5.

c. *"Willful and malicious."* Respondent finally suggests that emotional-distress damages in contract cases might sometimes be limited to instances of "willful and malicious" conduct. Resp. Br. 23. This too misses the mark. Respondent cites the first Restatement of Contracts, published in 1932, for this proposition. *Id.* But another treatise published at the same time clarified that this element was not "essential." McCormick, § 145, at 594. In any event,

this Court follows the later-published Second Restatement when applying the contract-law analogy to the statutes at issue here. *See Barnes*, 536 U.S. at 187-88. Any willfulness requirement dropped out of the law between the first and Second Restatements.

Even if there were a continuing "willful and malicious" requirement, that would not change things. Discrimination must be intentional—rather than inadvertent—to give rise to compensatory damages. *See Franklin*, 501 U.S. at 74-75. Intentional conduct is akin to willful conduct. *See, e.g.*, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). And intentional discrimination on the basis of race, sex, or disability is—by its very nature—malicious.

III. Emotional-distress awards under the Title VI family of statutes are consistently modest and cabined by procedural safeguards.

Respondent acknowledges that, "for over thirty years," courts across the country have allowed awards for emotional distress under the Title VI family of statutes. Resp. Br. 35 (quoting U.S. Br. 20); *see also* U.S. Br. 22-23 (longstanding federal guidance to same effect). No real problems have emerged; indeed, defendants generally have not even objected to the availability of such damages. Nor is petitioner aware of any entity that has ever declined federal funding upon learning that such awards are available in its jurisdiction—say, after the Eleventh Circuit's decision fourteen years ago in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). Respondent nevertheless attempts to justify the Fifth Circuit's categorical bar on emotional-distress damages by provoking concerns about this form of relief. These provocations fall flat.

1. Respondent does not claim that any award under the statutes here has been too high or otherwise arbitrary. Instead, respondent cites a handful of cases under Title VII and 42 U.S.C. § 1983, contending that awards for emotional distress in general can be "significant." Resp. Br. 39. But even these cases fail to provide any reason for concern.

The few Title VII and Section 1983 awards that respondent cites involved circumstances unlikely to arise in the legal context here. For example, two of respondent's cases involved particularly long-running conduct. *See Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33, 39-40 (1st Cir. 2011) (six years of demeaning and discriminatory practices); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 499-503 (9th Cir. 2000) (four years of sex discrimination and retaliation). Other cases involved wrongful conduct following "decades" of personal investment in employment relationships. *Bogle v. McClure*, 332 F.3d 1347, 1354 (11th Cir. 2003); *see also Fischer v. United Parcel Serv., Inc.*, 390 Fed. Appx. 465, 472 (6th Cir. 2010) (eighteen years of service). In the context of the Title VI family of statutes, cases typically involve one-off incidents or other limited timeframes, as when respondent refused to provide Ms. Cummings an ASL interpreter.

Respondent also notes that Title VII imposes a $300,000 cap on emotional-distress damages. Quoting *Sossamon v. Texas*, 563 U.S. 277, 290 (2011), respondent then asserts that because Title VI contains no such cap, allowing individuals under the statutes here to seek such damages would improperly "expand liability beyond what would exist under nonspending statutes." Resp. Br. 29. However, respondent misreads *Sossamon*. The Court in that

case noted merely that Spending Clause statutes should not be construed to allow *categories* of remedies not allowed under nonspending statutes. The Court was not commenting on the amount recoverable for a specific category of damages. *See Sossamon*, 563 U.S. at 289-90.

At any rate, respondent has not pointed to a single case under the family of statutes here in which an emotional-distress award exceeded Title VII's cap. Indeed, such awards tend to be far smaller. *See* Amicus Br. of Disability Orgs. 16-22. If such awards ever became inflated, Congress could step in and implement caps. But the theoretical possibility of emotional-distress damages exceeding those allowed under Title VII provides no reason to foreclose the entire category of relief.[3]

2. Respondent also suggests that insufficient procedural protections exist to regularize emotional-distress awards. Resp. Br. 40. Once again, respondent is unable to marshal any meaningful evidence to support its suggestions.

As the Government notes (Br. 26-27), remittitur is one safeguard that courts employ to cabin recovery to a level supported by the evidence. Respondent

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[3] Respondent's contention that emotional-distress damages are unavailable here because Title VII caps such damages would also foreclose recovery of some forms of pecuniary damages, as well as monetary relief for pain and suffering. Title VII also caps those other types of damages. *See* 42 U.S.C. § 1981a(b)(3). Yet respondent offers no indication that it believes those types of damages are unavailable here. To the contrary, it appears to agree that plaintiffs may obtain redress at least for pain and suffering. Resp. Br. 36-37.

derides this procedure. Resp. Br. 40. But the concept has deep roots in the law of remedies. *See, e.g.*, 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2815 (3d ed. 2021); *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822) (Story, J.). And courts have shown themselves willing and able to remit emotional-distress awards in cases arising under Title VI and related statutes—sometimes in rather fine-grained assessments of the harm suffered. *See, e.g.*, *Thomas v. Tex. Dep't of Crim. Justice*, 297 F.3d 361, 367 (5th Cir. 2002) (directing district court to remit emotional-distress damages from $100,000 to $75,000); *Burns v. Nielsen*, 506 F. Supp. 3d 448, 487-88 (W.D. Tex. 2020) (remitting noneconomic damages including emotional distress from $125,000 to $90,000); *Fink v. City of New York*, 129 F. Supp. 2d 511, 538 (E.D.N.Y. 2001) (remitting emotional-distress damages from $300,000 to $175,000). If remittiturs under the statutes here are relatively rare, it is simply because large awards are unusual. *See* Amicus Br. of Disability Orgs. 18-19.

The evidentiary standards for proving emotional distress also cabin awards for emotional-distress damages. Although respondent suggests these standards may be too permissive, Resp. Br. 40, it ignores that a plaintiff's testimony alone is unlikely to support a substantial recovery, Petr. Br. 22 n.4. Indeed, courts "scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony," *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996), and require such awards to be "sufficiently comparable to those made in similar cases," *Vega v. Chi. Park Dist.*, 954 F.3d 996, 1008 (7th Cir. 2020) (Barrett, J.).

Even if these safeguards were sometimes unevenly applied, the "better course" (Resp. Br. 40) would be to address those safeguards. Any marginal shortcomings of that nature would not justify abolishing the entire category of emotional-distress damages under the statutes here—no matter how outrageous the defendant's conduct, severe the mental harm, or definitive the evidence demonstrating that injury.

IV. Emotional-distress damages are frequently necessary to provide full redress for discrimination.

Respondent points to a variety of potential remedies for violations of the statutes here. Resp. Br. 41-45. But none of these remedies obviates the necessity, in a substantial class of cases, of awarding emotional-distress damages "to make good the wrong done." *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (citation omitted).

1. Respondent first notes that the government may "terminate the recipient's funding" in response to discrimination. Resp. Br. 41-42. Yet such action is not just "relatively rare," *id.* at 42; federal agencies "virtually never" terminate funds in response to violations of anti-discrimination conditions. Samuel R. Bagenstos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 Mich. L. Rev. 1053, 1061 (2020); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 705 n.38 (1979) (termination of funding is a "last resort"). More fundamentally, the private cause of action here is designed to compensate the individual victim of discrimination "for the loss caused." *Barnes*, 536 U.S. at 189. Cutting off a recipient's funding does nothing to carry out that objective.

2. Contrary to respondent's other suggestions, private relief besides emotional-distress damages is often incapable of making plaintiffs whole.

Respondent says that plaintiffs can sometimes obtain injunctions under the statutes here. Resp. Br. 42. Yet respondent does not dispute that such equitable relief is unavailable when—as is often the case—"the plaintiff is unlikely to interact with the defendant again." Petr. Br. 41 n.8. Indeed, injunctive relief is all the less likely to be available in the most severe cases of discrimination, where the victim would be especially motivated to avoid any further contact with the bad actor. Finally, even when an injunction is available, it cannot compensate an individual for past harm she has suffered.

Nor do nominal damages compensate victims of discrimination "for the loss caused," *Barnes*, 536 U.S. at 189. Nominal damages can confer "important social benefits." Resp. Br. 42 (citation omitted). But they are not designed to make plaintiffs whole for their actual harm. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) (distinguishing nominal from compensatory damages).

Respondent additionally intimates that victims of discrimination might "potential[ly]" be able to recover "pain and suffering" damages. Resp. Br. 36-37. But such damages are generally allowed only when they "stem[] directly from a physical injury or condition." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (citation omitted). Many cases involving intentional discrimination—even those with outrageous facts—will not satisfy that physical injury test. Imagine, for example, if a medical clinic had a sign proclaiming, "Deaf people are not welcome here," and its manager mocked someone like Ms.

Cummings, in front of a room full of patients, for nevertheless requesting treatment. Under the Fifth Circuit's categorical bar, that individual could not seek any compensation for her resulting mental anguish and humiliation. Nor could any individual who suffered similar treatment (or even worse) on account of race or sex. That cannot be right.

3. Lastly, respondent observes that individuals like Ms. Cummings can sometimes sue under state law. Resp. Br. 43-44. Federal protections against discrimination, however, do not fall away simply because the discriminatory acts are also "forbidden by [a] State's statutes or Constitution or are torts under the State's common law." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). Where a federal right exists, "[i]t is no answer that the State has a law which if enforced would give relief." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 183 (1961)). Ms. Cummings is entitled to appropriate relief under the federal statutes Congress enacted to protect her against discriminatory treatment.

CONCLUSION

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

Respectfully submitted,

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