No. ___

IN THE

Supreme Court of the United States

TRACY NIX,

Petitioner,

v.

ADVANCED UROLOGY INSTITUTE OF GEORGIA, P.C.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Tracy Nix, who is deaf, scheduled an appointment with Advanced Urology after discovering blood in her urine. Although she requested an American Sign Language interpreter, Advanced Urology ultimately hired someone who took three years of sign language in high school and never interpreted in a professional setting, thereby causing significant communication difficulties. The Eleventh Circuit "assume[d] without deciding that Advanced Urology violated Nix's right to effective communication" under the Rehabilitation Act and the Affordable Care Act. Yet Nix received no relief whatsoever because, according to the Eleventh Circuit, she failed to establish intentional discrimination. But "intentional discrimination is not an element of a prima case" of a civil rights claim under the applicable statutes. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999).

The question presented is:

Whether a discrimination plaintiff who can prove a legal violation is entitled to an award of nominal damages under Spending Clause legislation.

RELATED PROCEEDINGS

Nix v. Advanced Urology Institute of Georgia, P.C., No. 18-cv-04656 (N.D. Ga. Dec. 14, 2020).

Nix v. Advanced Urology Institute of Georgia, P.C., No. 21-10106 (11th Cir. Aug. 17, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tracy Nix respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-7a) is available at 2021 WL 3626763. The district court's memorandum opinion and order (Pet. App. 8a-36a) is unpublished but is available at 2020 WL 7352559.

JURISDICTION

The court of appeals entered its judgment on August 17, 2021. Pet. App. 1a. The court denied a timely petition for rehearing en banc on October 14, 2021. *Id.* 39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this petition reproduces the relevant provisions of the Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the Affordable Care Act, 42 U.S.C. § 18116. Pet. App. 40a-47a.

INTRODUCTION

Beginning with Title VI of the Civil Rights Act of 1964, Congress has exercised its authority under the Spending Clause to prohibit federal fund recipients from discriminating based on race, sex, and disability. This case presents the question whether nominal damages can be awarded to a discrimination plaintiff who can prove a legal violation under Spending Clause legislation.

The Second Circuit answered in the affirmative, finding in a Title VI case that "a plaintiff who has proven a civil rights violation, but has not proven actual compensable injury, is entitled as a matter of law to an award of nominal damages." *Tolbert v. Queens Coll.*, 242 F.3d 58, 74 (2d Cir. 2001).

To the contrary, the Eleventh Circuit here categorically denied nominal damages to Tracy Nix even "assum[ing] without deciding that Advanced Urology violated Nix's right to effective communication under both" the Rehabilitation Act ("RA") and Affordable Care Act ("ACA"). Pet. App. 4a. The Eleventh Circuit reasoned that Ms. Nix did not show intentional discrimination. *Id.* 7a. However, intentional discrimination is not required to establish a violation of the RA and ACA. Nor is intentional discrimination required to recover nominal damages under the RA and ACA. Thus, a discrimination plaintiff who can prove a legal violation under Spending Clause legislation is entitled to nominal damages for two separate reasons.

First, nominal damages are available under longstanding contract-law principles. This Court has "regularly applied the contract-law analogy" in

"determining the *scope* of damages remedies" available under Spending Clause statutes. *Barnes v. Gorman*, 536 U.S. 181, 186-87 (2002) (emphasis in original). As a result, "[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. According to the Second Restatement, "a breach of contract by a party against whom it is enforceable always gives rise to a claim for damages." Restatement (Second) of Contracts § 346 cmt. b (1981). Even in cases where "loss is caused but recovery for that loss is precluded because [of unforeseeability and lack of fair notice, among] other limitations . . . *the injured party will nevertheless get judgment for nominal damages*." *Id.* (emphasis added and internal citations omitted); *see also* Restatement (First) of Contracts § 328 (1943); Dan Dobbs, *Handbook on the Law of Remedies* § 12.4, at 817 (1973) ("If the plaintiff proves a breach of the contract[,] he is entitled at least to a recovery of nominal damages."); Arthur Corbin, *Corbin on Contracts* § 55.10 (Rev. ed. 2013). Thus, applying this contract-law principle, nominal damages should be available to a plaintiff who proves a legal violation of Spending Clause legislation.

Second, even without a contract-law analogy, nominal damages are available under this Court's precedent. "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 153 (1803). And in a recent case reversing the Eleventh Circuit, the Court made clear that "[w]hen a right is violated . . . the

party injured is entitled to a verdict for nominal damages" by default. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) (citation and quotation marks omitted). In other words, "every violation of a right imports damage," and "nominal damages can redress [such an] injury even if [a plaintiff] cannot or chooses not to quantify that harm in economic terms." *Id.* at 802. Despite its reversal in *Uzuegbunam*, the Eleventh Circuit again failed to follow this Court's directive. To be sure, the Spending Clause statutes at issue contain no "express remedies," *Barnes*, 536 U.S. at 187, and so the remedies are governed by the "longstanding rule" articulated in *Bell v. Hood*, 327 U.S. 678 (1946), that when "a federal statute provides for a general right to sue" for a violation of legal rights without express remedies, "federal courts may use any available remedy to make good the wrong done." *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 66 (1992). Thus, according to this Court's precedent, nominal damages should be available to a plaintiff who proves a legal violation of Spending Clause legislation.

Without addressing either the contract-law analogy or *Uzuegbunam*, the Eleventh Circuit concluded that without intentional discrimination, nominal damages are categorically unavailable for violations of the RA and ACA claims. This legal question is squarely and cleanly presented here because the facts are not disputed as to Respondent's liability under the RA and ACA; the Eleventh Circuit "assume[d] without deciding that Advanced Urology violated Nix's right to effective communication under both the ACA and the Rehabilitation Act." Pet. App. 4a. Thus, this case is an ideal vehicle to address the purely legal issue.

This Court should grant certiorari and reverse the Eleventh Circuit's wrong decision.

STATEMENT OF THE CASE

A. Legal background

This case arises under the RA and the antidiscrimination provision of the ACA, both of which incorporate the private right of action available to victims of discrimination under Title VI.

1. Title VI prohibits "any program or activity receiving Federal financial assistance" from discriminating based on "race, color, or national origin." 42 U.S.C. § 2000d. Courts uniformly interpreted Title VI "as creating a private remedy" for victims of discrimination. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979).

Congress enacted Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in federally funded education programs. 20 U.S.C. § 1681(a). Title IX "was patterned after Title VI," and this Court confirmed that both statutes create "a private cause of action for victims of the prohibited discrimination." *Cannon*, 441 U.S. at 694, 703.

Incorporating that private right of action, Congress enacted the Rehabilitation Act in 1978 to prohibit federal funding recipients from discriminating based on disability. 29 U.S.C. § 794. Congress took the "remedies, procedures, and rights" available under Title VI to "be available to any person aggrieved" by discrimination under this statute. *Id.* § 794a(a)(2).

Congress again incorporated that right of action into Title II of the Americans with Disabilities Act in

1990, to prohibit disability discrimination by state and local governments. 42 U.S.C. § 12132. Congress specified that "[t]he remedies, procedures, and rights set forth" in the RA are available "to any person alleging discrimination on the basis of disability" under Title II. *Id.* § 12133.

Most recently, Congress included a provision in the Affordable Care Act prohibiting discrimination by federally funded health programs on the grounds covered by Title VI, Title IX, and the RA. 42 U.S.C. § 18116(a). Congress again incorporated "[t]he enforcement mechanisms provided for and available under" those statutes. *Id.*

2. This case concerns the types of relief available in those private suits. This Court's precedent provides the relevant legal framework.

In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court rejected the argument that the RA "proscribes only intentional discrimination against the handicapped." *Id.* at 294. The Court reasoned that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect." *Id.* at 295. In so doing, the Court distinguished the RA from Title VI, which "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court reiterated that it has regularly "applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation." *Id.* at 187. The Court applied the same analogy "in determining the scope of damages

remedies." *Id.* This Court looked to the Restatement and other leading treatises to define the scope of contract damages. 536 U.S. at 187-88.

In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the Court considered "whether an award of nominal damages by itself can redress a past injury" and "h[e]ld that it can." *Id.* at 796. In so doing, the Court observed that "the prevailing rule, 'well established' at common law, was 'that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.'" *Id.* at 800 (citations omitted). The Court then found that "every violation of a right imports damage," and "nominal damages can redress [such an] injury even if [a plaintiff] cannot or chooses not to quantify that harm in economic terms." *Id.* at 802. Put differently, "[w]hen a right is violated . . . the party injured is entitled to a verdict for nominal damages." *Id.* at 800 (citation and quotation marks omitted).

B. The present controversy

1. Petitioner Tracy Nix has been deaf from birth and communicates primarily through her native language, American Sign Language ("ASL"). Pet. App. 2a. Respondent Advanced Urology ("AU") is a medical practice in Georgia specializing in urology and receives federal financial assistance. *Id.* Ms. Nix scheduled an appointment with AU after discovering blood in her urine. *Id.* She requested a sign language interpreter for her appointment, and Missy Sherling, AU's Vice President of Clinical Strategy, confirmed that AU had found an interpreter. *Id.* Sherling informed Ms. Nix that the interpreter would be male and that he is "certified." *Id.*

That so-called "interpreter" was a 23-year-old Dalton Belew. *Id.* Belew, however, had never been certified in ASL interpretation, had never worked as a formal interpreter before, and had never interpreted in a medical setting. *Id.* 2a, 10a. His only sign language experience came from three years of high school classes and he described his skills as "intermediate." *Id.* 2a. Belew held odd jobs, none of which involved interpreting: a video editor, a floor manager, an administrative staff, and a sterilizer. *Id.* 10a. AU hired Belew after a call center employee mentioned that she had a friend who knew ASL. *Id.* 2a-3a. Sherling did not conduct any investigation into Belew's background or qualifications as an interpreter. *Id.* 10a.

At her appointment, Ms. Nix quickly realized that Belew could not interpret for her. *Id.* 3a. She had severe difficulty communicating with him because of his low skill level in ASL. *Id.* She began to believe Belew was a nurse instead of an interpreter because he was wearing AU scrubs. *Id.* Eventually, Ms. Nix resorted to writing on a piece of paper to communicate with the doctor and staff. *Id.*

2. Ms. Nix sued AU in the United States District Court for the Northern District of Georgia. *Id.* As relevant here, she argued that AU violated the RA, both directly and as incorporated by the ACA. *Id.*; *see* 45 C.F.R. § 84.52(d)(1) and (3) (the RA requires covered service providers to furnish "interpreters" for "persons with impaired hearing" when "necessary to afford such persons an equal opportunity to benefit from the service"). Ms. Nix initially sought injunctive relief and monetary damages, including nominal damages, but later withdrew her injunctive relief

claims. Pet. App. 3a. Both parties moved for summary judgment, and the district court granted AU's motion on all of Ms. Nix's claims. *Id.*

Pertinently, the district court granted summary judgment in favor of AU on Ms. Nix's ACA and RA claims. *Id.* 8a. On the liability analysis, the district court found that there were genuine issues of material fact as to whether Ms. Nix was provided effective communication. *Id.* 20a-21a. At the same time, however, the district court concluded that "the evidence is undisputed that Nix and Belew experienced significant difficulties communicating with each other through ASL." *Id.* 11a. Nevertheless, the district court found that "there is no evidence that Advanced Urology knew it would be substantially likely Nix could not effectively communicate with her medical providers . . . yet did nothing about it." *Id.* 25a. Without proof of deliberate indifference, Ms. Nix was not entitled to compensatory damages. *Id.* Overall, the district court did "not take the seriousness of Nix's medical conditions lightly, nor d[id] it discount the frustration and hardship she endured during her medical appointment." *Id.* 35a. But the district court concluded that even if Ms. Nix established legal violations, proof of intentional discrimination is required for nominal damages—without addressing this Court and the circuit court's precedent relevant to the issue. *See id.* 27a-28a. Thus, the district court found that "Nix is not entitled to pursue an award of only nominal damages in this case." *Id.* 28a.

3. The Eleventh Circuit affirmed. *Id.* 2a. On the liability analysis, the panel "assume[d] without deciding that Advanced Urology violated Nix's right

to effective communication under" the ACA and RA. *Id.* 4a. On the damages analysis, after observing that the intentional discrimination element of a Rehabilitation Act claim is proven by deliberate indifference, the court found no deliberate indifference: "The most that Nix has established is negligence in selecting an interpreter, not deliberate indifferent to Nix's rights." *Id.* 5a. Accordingly, the court found that "Nix cannot recover compensatory damages." *Id.* 6a.

Finally, the Eleventh Circuit rejected Ms. Nix's argument "that she is entitled to a jury trial on nominal damages even in the absence of intentional discrimination." *Id.* 7a. The Eleventh Circuit acknowledged the Second Circuit's finding in *Tolbert v. Queens College*, 242 F.3d 58, 74 (2d Cir. 2001) that "a plaintiff who has proven a civil rights violation, but has not proven actual compensable injury, is entitled as a matter of law to an award of nominal damages." *Id.* But the Eleventh Circuit stated that "[t]he court in *Tolbert* was reinstating the verdict of a jury that had *already* found intentional discrimination." *Id.* (emphasis in original). After finding that "Nix cannot prove a necessary element of her civil rights claim—intentional discrimination," the court concluded that "[b]ecause Nix cannot prove deliberate indifference, she cannot recover any monetary damages—either compensatory or nominal." *Id.*

4. The Eleventh Circuit denied Ms. Nix's petition for rehearing en banc. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

This case satisfies all of this Court's traditional certiorari criteria. The courts of appeals are now split on the availability of nominal damages for legal violations of Spending Clause legislation. Resolving that dispute and defining the available relief is critical for five frequently litigated antidiscrimination laws. The question is also squarely and cleanly presented here, which makes this case an ideal vehicle for resolving the split. Furthermore, the Eleventh Circuit's decision directly conflicts with this Court's precedent and the longstanding principles of contract law. Lastly, barring nominal damages for a discrimination plaintiff who can prove a legal violation will significantly undermine federal antidiscrimination laws by denying any meaningful remedy to many victims of discrimination. Review is warranted.

I. The Eleventh Circuit's decision creates a square circuit split and upsets settled practice.

1. The Eleventh Circuit's decision squarely conflicts with the Second Circuit's decision in *Tolbert v. Queens Coll.*, 242 F.3d 58 (2d Cir. 2001). In *Tolbert*, the plaintiff sued the defendant college under Title VI because it denied him a Master's degree by applying standards based on students' race and/or ethnic origin. *Id.* at 61, 66. Finding that the plaintiff was the victim of racial discrimination, the jury awarded $50,000 in punitive damage but no nominal or compensatory damages. *Id.* at 67. Following the jury verdict, the district court entered judgment in favor of the defendants pursuant to Fed. R. Civ. P. 50(b). *Id.* at 67-68.

On appeal, the Second Circuit reversed the judgment and remanded the matter "for entry of an amended judgment reinstating the jury's verdict awarding Tolbert $50,000 in punitive damages, and awarding him $1 in nominal damages." *Id.* at 78. Pertinently, although the plaintiff failed to prove compensatory damages, the Second Circuit awarded him nominal damages because "a plaintiff who has proven a civil rights violation, but has not proven actual compensable injury, is entitled as a matter of law to an award of nominal damages." *Id.* at 74. The Second Circuit further noted that "[e]ven if the plaintiff fails to persuade the jury that the proven violation caused him an injury that is compensable, the defendant who committed the violation is not entitled to judgment as a matter of law." *Id.*

2. Just like the plaintiff in *Tolbert* whose right was violated under a Spending Clause statute (Title VI), the Eleventh Circuit here also "assume[d] without deciding that Advanced Urology *violated* Nix's right to effective communication under" Spending Clause statutes (the RA and ACA). Pet. App. 4a (emphasis added). And like the *Tolbert* court that found the plaintiff could not recover compensatory damages, the Eleventh Circuit also found that Ms. Nix cannot recover compensatory damages. *Id.* 6a. However, unlike the *Tolbert* court that awarded nominal damages to the plaintiff, the Eleventh Circuit here rejected Ms. Nix's nominal damages claim. *Id.* 7a. Therefore, the Eleventh Circuit's categorical denial of nominal damages to "a plaintiff who has proven a civil rights violation, but has not proven actual compensable injury" directly conflicts with the Second Circuit's decision in *Tolbert*. *Id.* at 74.

In denying Ms. Nix's nominal damages claim, the Eleventh Circuit reasoned that "Nix cannot prove a necessary element of her civil rights claim—intentional discrimination" and "[b]ecause Nix cannot prove deliberate indifference, she cannot recover any monetary damages—either compensatory or nominal." Pet. App. 7a. In doing so, the Eleventh Circuit addressed *Tolbert*, stating that "[t]he court in *Tolbert* was reinstating the verdict of a jury that had *already* found intentional discrimination." Pet. App. 7a. (emphasis in original). However, *Tolbert* does not stand for the proposition that intentional discrimination is required to recover nominal damages under all Spending Clause legislation. That is because intentional discrimination was a required element to establish a *violation* of Title VI in *Tolbert*: "In order to establish a claim based on [Title VI], the plaintiff must show, inter alia, that the defendant discriminated against him on the basis of race, that that *discrimination was intentional*, and that the discrimination was a 'substantial' or 'motivating factor' for the defendant's actions." *Tolbert*, 242 F.3d at 69-70 (internal citations omitted); *see also Alexander v. Sandoval*, 532 U.S. 275, 28 (2001) ("[I]t is similarly beyond dispute . . . that [Title VI] prohibits only intentional discrimination."). That is, the *Tolbert* court awarded the plaintiff nominal damages because he "ha[d] proven a civil rights violation [under Title VI], but ha[d] not proven actual compensable injury," *Tolbert*, 242 F.3d at 74, not because of a finding of intentional discrimination itself.

And unlike Title VI, intentional discrimination is not required to establish a violation of the RA and ACA, as explained below. As such, that intentional

discrimination was found in *Tolbert*'s Title VI claim does not mean that intentional discrimination is required to recover nominal damages under the RA and ACA, which have different elements for proving liability. Applying the Eleventh Circuit's logic of choosing one of the liability elements of Title VI's as a prerequisite for nominal damages under the RA and ACA, there is no reason not to require other elements—such as "discrimination based on race" or that the discrimination be "substantial" or "motivating factor" for the defendant's actions—as prerequisites for nominal damages under the RA and ACA. That cannot be the law.

2. The Eleventh Circuit's decision also upsets settled practice. Again, the Eleventh Circuit found that "Nix cannot prove a necessary element of her civil rights claim—intentional discrimination" and "[b]ecause Nix cannot prove deliberate indifference, she cannot recover any monetary damages—either compensatory or nominal." Pet. App. 7a. However, intentional discrimination is not required to establish a *violation* of the RA and ACA.

By way of background, Section 504 of the RA 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). Federal regulations and relevant cases have long recognized that refusing a sign-language interpreter to a deaf person is a violation of the RA, at least where the interpreter is necessary for effective communication, and where the provision of

an interpreter does not pose an undue burden. *See* 45 C.F.R. §§ 84.4, 84.52(d), 92.102 (2019); 45 C.F.R. § 92.202 (2017); *Liese* v. *Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) (collecting cases).

Returning to the issue of intentional discrimination, it is "beyond dispute" that Title VI "prohibits only intentional discrimination." *Sandoval*, 532 U.S. at 281. As to the RA, however, this Court specifically rejected the argument that the RA "proscribes only intentional discrimination against the handicapped." *Alexander v. Choate*, 469 U.S. 287, 294 (1985). That is because "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect." *Id.* at 295. Observing that "discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus[,]" the Court emphasized that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. Thus, none of the courts of appeals require intentional discrimination, or deliberate indifference, to establish a violation of the RA.[1] This includes the Eleventh Circuit as well.

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[1] *See e.g.*, *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999) ("[I]ntentional discrimination is not an element of the plaintiff's prima facie case [under the RA]."); *Washington v. Indiana High Sch. Ath. Ass'n*, 181 F.3d 840, 846 (7th Cir. 1999) ("[P]laintiff making a claim under the Rehabilitation Act need not prove an impermissible intent.");

McCullum v. Orlando Reg'l Healthcare Sys., 768 F.3d 1135, 1147 n.8 (11th Cir. 2014) ("Where a plaintiff is not seeking compensatory damages, discriminatory intent is not required. In that situation, a showing that the auxiliary aids [is ineffective] . . . is enough by itself to establish a violation of [] the RA").

Nor is intentional discrimination required to recover nominal damages under the RA and ACA. While the courts of appeals uniformly agree that intentional discrimination is required for compensatory damages, *see S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 261 (3d Cir. 2013) ("All courts of appeals that have considered this issue have held that compensatory damages are not available under § 504 of the RA . . . absent intentional discrimination.") (collecting cases), none has held that intentional discrimination, or deliberate indifference, is required to recover nominal damages. In sum, intentional discrimination is required only

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Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454–55 (5th Cir. 2005) ("Where a defendant fails to meet this affirmative obligation [to make reasonable accommodations for disabled individuals under the RA], the cause of that failure is irrelevant."); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 (D.C. 2008) (observing that "section 504 does not require proof of discriminatory intent") (discussing *Choate*, 469 U.S. at 295); *Lesley v. Hee Man Chie*, 250 F.3d 47, 52-53 (1st Cir. 2001); *Bryant v. New York State Educ. Dep't*, 692 F.3d 202, 216 (2d Cir. 2012); *Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005); *Landefeld v. Marion Gen. Hosp. Inc.*, 994 F.2d 1178, 1180-81 (6th Cir. 1993); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

for compensatory damages and is *not* required for liability or nominal damages under the RA and ACA.

The Eleventh Circuit panel thus not only created a square split with the Second Circuit, but also departed from the well-settled practices of this Court and all other courts of appeals, even including the Eleventh Circuit as well.

II. The Eleventh Circuit's decision is wrong.

A discrimination plaintiff who can prove a legal violation under the RA and ACA is entitled to an award of nominal damages for two separate reasons.

A. Contract law confirms that nominal damages are available.

Applying traditional contract-law principles, nominal damages are available for legal violations under Spending Clause statutes like the RA and ACA. That is because "[t]he victim of a breach of contract is always entitled to nominal damages if he proves a breach but no damages." *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1372 (7th Cir. 1990).

In interpreting Spending Clause legislation, this Court has "regularly applied the contract-law analogy" including, like here, in "private suits under Spending Clause legislation" and in "determining the *scope* of damages remedies." *Barnes*, 536 U.S. at 186-87 (emphasis in original). That is because the relationship between Congress and federal-funding recipients is more or less contractual: "[I]n return for federal funds, the recipients agree to comply with federally imposed conditions" and thus refrain from violating congressional objectives. *Id.* at 186 (brackets omitted). As a result, "[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.

In its inquiries into traditional common-law principles, this Court has regularly turned to the Restatement and leading treatises. *See e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015); *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1089 (2020); *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."). Pertinently, this Court has relied on the Restatement and treatises to define the scope of traditional contract damages. *See Barnes*, 536 U.S. at 187-88.

According to the Second Restatement, "[i]f the breach caused no loss or if the amount of the loss is not proved . . . a small sum fixed without regard to the amount of loss will be awarded as nominal damages." Restatement (Second) of Contracts § 346(2) (1981). That is, "a breach of contract by a party against whom it is enforceable *always* gives rise to a claim for damages." *Id.* § 346 cmt. b (emphasis added). Significantly, even in cases where "loss is caused but recovery for that loss is precluded because [of unforeseeability and lack of fair notice, among] other limitations . . . *the injured party will nevertheless get judgment for nominal damages*." *Id.* (emphasis added and internal citations omitted); *see also* Restatement (First) of Contracts § 328 (1932).

Other leading treatises are in accord. *See* Dan Dobbs, *Handbook on the Law of Remedies* § 12.4, at

817 (1973) ("If the plaintiff proves a breach of the contract[,] he is entitled at least to a recovery of nominal damages."); Arthur Corbin, *Corbin on Contracts* § 55.10 (Rev. ed. 2013) ("[F]or every breach of contract, a cause of action exists. . . . If the aggrieved party has suffered no compensable damages, a judgment for nominal damages will be entered."); E. Allan Farnsworth, *Contracts* § 12.08 (4th ed. 2020) ("Thus, even if the breach caused no loss or if the amount of loss is not proved with sufficient certainty, the injured party can recover as damages as a nominal sum, commonly six cents or a dollar, fixed without regard to loss."); 24 Samuel Williston, *Williston on Contracts* § 64:6 (4th ed.) ("An unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury. Nominal damages may then be awarded."); *see also Chronister Oil Co. v. Unocal Ref. & Mktg.*, 34 F.3d 462, 466 (7th Cir. 1994) (Posner, C.J.) ("[F]or reasons we do not understand every victim of a breach of contract, unlike a tort victim, is entitled" to nominal damages).

Applying this contract-law principle, nominal damages should be available to a plaintiff who proves legal violations of Spending Clause statutes. This is especially the case here. Although the district court did not expressly rule that Ms. Nix's federally protected rights under the RA or ACA were violated, the district court concluded that "the evidence is undisputed that Nix and Belew experienced significant difficulties communicating with each other through ASL." Pet. App. 11a. On appeal, the Eleventh Circuit "assume[d] without deciding that Advanced Urology violated Nix's right to effective communication under both the ACA and the

Rehabilitation Act." *Id.* 4a. Yet Ms. Nix received no relief whatsoever because the Eleventh Circuit categorically denied recovery for nominal damages absent a showing of intentional discrimination—which again, is not required for liability or nominal damages under the RA and ACA.

Thus, based on the Restatement's clear expression, the Court should find that a plaintiff who proves legal violations, but not compensatory damages, under Spending Clause statutes should "nevertheless get judgment for nominal damages." Restatement (Second) of Contracts § 346 cmt. b (1981).

B. Even without a contract-law analogy, nominal damages are available under this Court's precedent

There is an independent reason to award nominal damages under this Court's precedent. Even without a contract-law analogy, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 153 (1803); *see also Uzuegbunam*, 141 S. Ct. at 800 ("[A] plaintiff who proved a legal violation could always obtain some form of damages").

This Court has recently overturned the Eleventh Circuit's erroneous decision on nominal damages. In *Uzuegbunam*, students challenged a college's free-speech policies, seeking nominal damages and injunctive relief. *Id.* at 796–97. But after the college rescinded the challenged policies, the students abandoned their requests for injunctive relief. *Id.* at 797. The district court dismissed the case, holding that the students' nominal damages claim cannot

establish standing. *Id.* The Eleventh Circuit affirmed, holding that "because the students did not request compensatory damages, their plea for nominal damages could not by itself establish standing." *Id.*

This Court reversed that judgment. *Id.* at 796. The Court considered "whether an award of nominal damages by itself can redress a past injury" and "h[e]ld that it can." *Id.* at 796. Analyzing the history of nominal damages, the Court observed that "the prevailing rule, 'well established' at common law, was 'that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.'" *Id.* at 800 (citations omitted). In rejecting "[t]he argument that a claim for compensatory damages is a prerequisite for an award of nominal damages," the Court stressed that nominal damages are "the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." *Id.* (citations omitted). The Court then found that "every violation of a right imports damage," and "nominal damages can redress [such an] injury even if [a plaintiff] cannot or chooses not to quantify that harm in economic terms." *Id.* at 802. In other words, "[w]hen a right is violated . . . the party injured is entitled to a verdict for nominal damages." *Id.* at 800 (citation and quotation marks omitted).

Without even addressing *Uzuegbunam*—despite its prominence in the underlying briefing and a notice of supplemental authority—the Eleventh Circuit concluded that, without deliberate indifference or intentional discrimination, Ms. Nix "cannot recover any monetary damages—either

compensatory or nominal." Pet. App. 7a. The Eleventh Circuit got it wrong again.

To begin, compensatory damages "redress[] a compensable harm," and "[n]ominal damages are damages in name only." *Uzuegbunam*, 141 S. Ct. at 807 (Roberts, C.J., dissenting) (cleaned up). But more importantly, intentional discrimination is not required to establish a violation or recover nominal damages under the RA and ACA. *See* pp. 14-16, *supra*. Instead, intentional discrimination is required only for proving compensatory damages under those statutes. *Id.* The Eleventh Circuit "thus g[o]t the relationship between nominal damages and [intentional discrimination which is required only for] compensatory damages backwards." *Uzuegbunam*, 141 S. Ct. at 800. That is, nominal damages are "the damages awarded by default until the plaintiff [suing under the RA and ACA] establishes entitlement to some other form of damages, such as compensatory [] damages" by proving intentional discrimination. *Id.*

Further, "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74-75 (1992) (citing *Pennhurst State Sch. & Hosl v. Halderman*, 451 U.S. 1, 17 (1981)). But nominal damages do not invoke the same concerns about notice. "The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated." Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935).

Moreover, the Spending Clause statutes at issue contain no "express remedies." *Barnes*, 536 U.S. at 187; *see also* 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 18116(a). Accordingly, the remedies available here are governed by the "longstanding rule" articulated in *Bell v. Hood*, 327 U.S. 678 (1946), that when "a federal statute provides for a general right to sue" for a violation of legal rights without express remedies, "federal courts may use any available remedy to make good the wrong done.'" *Franklin*, 503 U.S. at 66 (quoting *Bell*, 327 U.S. at 684).[2]

Absent nominal damages, if an entity like Respondent violated the RA or ACA, there would be no repercussions when the plaintiff "cannot or chooses not to quantify [his or her] harm in economic terms." *Uzuegbunam*, 141 S. Ct. at 802. That cannot be the law. Thus, according to this Court's unambiguous precent, when a discrimination plaintiff's "right is violated" under the RA and ACA, she "is entitled to a verdict for nominal damages." *Id.* at 800.

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[2] Title VI authorizes injunctive relief. *Barnes*, 536 U.S. at 187. But injunctive relief is often "clearly inadequate." *Franklin*, 503 U.S. at 76. It is not available at all where the plaintiff is unlikely to interact with the defendant again. *See id.* Indeed, Ms. Nix withdrew her injunctive relief claim. Pet. App. 3a. And even where injunctive relief is available, it does nothing to remedy the harms inflicted by past discrimination.

III. This case is an excellent vehicle for resolving the issue of nominal damages under Spending Clause legislation.

This case is an excellent vehicle to decide whether a discrimination plaintiff who can prove a legal violation can recover nominal damages under Spending Clause legislation.

First, the record squarely and cleanly presents the question that has divided the courts of appeals. Both the district court and the Eleventh Circuit rejected Ms. Nix's nominal damages claim based solely on their conclusions that nominal damages are categorically unavailable in the absence of intentional discrimination. Pet. App. 7a, 27a-28a. Further, the Eleventh Circuit "assume[d] without deciding that Advanced Urology violated Nix's right to effective communication under both the ACA and the Rehabilitation Act." *Id.* 4a. So there are no factual disputes as to AU's liability under the RA and ACA. Further, any potential issue of whether injunctive relief would be sufficient remedy is not present here because Ms. Nix withdrew that claim. Pet. App. 3a. Thus, this case is an ideal vehicle to address the purely legal question of whether nominal damages are available to plaintiffs proving legal violations under Spending Clause legislation.

Second, the acknowledged circuit split is ripe for this Court's resolution. The Eleventh Circuit panel deliberately created a circuit split, and the full court has now cemented the conflict by denying rehearing en banc. *Id.* 39a. Thus, this disagreement will not resolve itself.

Third, this Court's intervention is imperative because the Eleventh Circuit's decision directly

contradicts with this Court's precedent. This Court clearly held that intentional discrimination is not required to prove a violation of the RA and ACA. All courts of appeals, even the Eleventh Circuit, agree. Further, this Court left no doubt that contract-law principles—according to which nominal damages are always available for a breach of contract—apply to Spending Clause legislation. This Court also clearly found in cases like *Uzuegbunam* that when a right is violated, the injured party is entitled to nominal damages. Because this Court has spoken so clearly about these issues, there can be no further deliberation from the lower courts. Thus, this Court's intervention is necessary.

Finally, there is no question that the outcome would have been different in the Second Circuit: *Tolbert* held that nominal damages are available for legal violations in a suit brought under the Spending Clause where the plaintiff—like Ms. Nix—could not prove compensatory damages. *Tolbert*, 242 F.3d at 74. If Ms. Nix had sued in New York instead of Georgia, she would have been entitled to a jury trial to determine nominal damages.

IV. The Eleventh Circuit's decision would undermine federal antidiscrimination laws.

The Eleventh Circuit's limit on nominal damages would significantly undermine this Nations' antidiscrimination laws. The remedies available under Title IX, the RA, Title II of the ADA, and the ACA are "coextensive with the remedies available in a private cause of action brought under Title VI." *Barnes*, 536 U.S. at 185; *see* 29 U.S.C. § 794a(a)(2); 42 U.S.C. §§ 18116(a), & 12133. These are important

civil rights statutes that prohibit discrimination based on race, sex, and disability.

Denying recovery for nominal damages for legal violations of these antidiscrimination statues will have a detrimental effect on this country's commitment to preventing and redressing discrimination, by denying many victims of discrimination any effective remedy. In many cases covered by these statues, nominal damages may be the only available remedy to make good the wrong done. This is especially true today because courts have recently been significantly limiting available relief for civil rights litigants under those antidiscrimination statutes. *See e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020) (holding that emotional-distress damages are categorically unavailable under Title VI and the statutes that incorporate its remedies).

Again, without this Court's intervention, a discrimination plaintiff who proves a legal violation of the RA and ACA will have no remedy if the plaintiff "cannot or chooses not to quantify [his or her] harm in economic terms." *Uzuegbunam*, 141 S. Ct. at 802. Needless to say, such absurd consequences directly contradict with Congress's judgment that "[the] effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 94-1558, at 1 (1976).

The relief available under those important antidiscrimination statutes should not depend on where a plaintiff lives. Plaintiffs in Alabama, Florida, and Georgia should receive recognition when their civil rights have been violated. This Court should grant this petition and confirm the availability of

nominal damages for discrimination plaintiffs who prove a legal violation under Spending Clause legislation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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