No. 21-1010

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

REPLY BRIEF FOR PETITIONER

Andrew Rozynski
Counsel of Record
David John Hommel
William Juhn
EISENBERG & BAUM, LLP
24 Union Square East,
Penthouse
New York, NY 10003
(212) 969-8938
arozynski@eandblaw.com

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REPLY BRIEF FOR PETITIONER

Despite "assum[ing] without deciding" that a civil rights violation occurred, the Eleventh Circuit declined to award nominal damages or at least remand for further proceedings. Pet. App. 4a. In so doing, the Eleventh Circuit disagreed with the Second Circuit, which held that "a plaintiff who has proven a civil rights violation . . . 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). It also contradicted this Court's precedent, which held that "nominal damages provide the necessary redress for a completed violation of a legal right" because "*every* violation of a right imports damage." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (cleaned up).

This Court should resolve this square conflict on a recurring and important question of federal law. Unwilling to confront the compelling case for this Court's review, Respondent emphasizes trivial distinctions in *Tolbert* and cites only one other case from the Second Circuit, which has no precedential effect and, in any event, does not disturb the holding in *Tolbert*, let alone mention it. Contrary to the Eleventh Circuit's holding and the Respondent's position, a plaintiff who can prove a civil rights violation is entitled to an award of nominal damages under Spending Clause legislation.

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

1. The decision below squarely conflicts with the Second Circuit's decision in *Tolbert*. According to the Second Circuit, "a plaintiff who has proven a civil

rights violation," like the one assumed by the Eleventh Circuit, "is entitled as a matter of law to an award of nominal damages." *Tolbert*, 242 F.3d at 74. Yet the Eleventh Circuit declined to award nominal damages, and Respondent endorses the Eleventh Circuit's erroneous conclusion that "a necessary element of [Nix's] civil rights claim" is "intentional discrimination." Pet. App. 7a. Unwilling to confront the square conflict, Respondent emphasizes a trivial distinction between this case and *Tolbert*. Yes, "Mr. Tolbert had evidence of intentional discrimination" under Title VI. BIO 6. But a civil rights violation under that statute requires intentional discrimination; the statutes at issue here (the Rehabilitation Act and the ACA) do not. *Compare Tolbert*, 242 F.3d at 69–70 ("In order to establish a claim based on [Title VI], the plaintiff must show, inter alia, . . . that *discrimination was intentional* . . . .") (emphasis added and internal citations omitted) *with Alexander v. Choate*, 469 U.S. 287, 294 (1985) (rejecting the argument that the Rehabilitation Act "proscribes only intentional discrimination against the handicapped"). To explain, hospitals must provide "appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities," and the failure to do so amounts to discrimination. 28 C.F.R. § 36.303. Every circuit court, including the Eleventh Circuit, has concluded that a violation of federal law requires only "a showing that the auxiliary aids [someone] received to assist [her] in communicating" were ineffective. *See, e.g.*, *McCullum v. Orlando Reg'l Healthcare Sys.*, 768 F.3d 1135, 1149 n.8 (11th Cir. 2014). "[D]iscriminatory intent is [only] required" if a plaintiff is "seeking compensatory damages." *Id.* Thus, a violation of "Nix's right to

effective communication" merits nominal damages. Pet. App. 4a.

Tolbert's rule makes sense. "[I]n a civil trial, the liability determination comes first, and only if a jury finds liability should it consider damages." *Cotts v. Osafo*, 692 F.3d 564, 569 (7th Cir. 2012). To determine liability under the Rehabilitation Act and the ACA, a plaintiff need only show ineffective communication (or unequal access) because of a failure to provide appropriate auxiliary aids and services. At trial, a jury would first be asked whether ineffective communication occurred. If so, then—and only then—would the jury proceed to damages, including the availability of compensatory damages based on evidence of deliberate indifference. *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 312 (7th Cir. 2009) ("A verdict form should not ask a jury to assess damages before liability."). But after a liability finding, a plaintiff would automatically be entitled to nominal damages. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (concluding that a trial court must instruct a jury to award nominal damages if the jury finds a civil rights violation).

Respondent does not—and cannot—dispute that *Tolbert*'s holding, which required only a civil rights violation to award nominal damages, directly conflicts with the Eleventh Circuit's. This straightforward issue is fully ventilated, and the split will only deepen in the years that follow. For example, following the Fifth Circuit's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), which held that emotional-distress damages are not available under Spending Clause legislation, district courts have concluded that

"plaintiffs could recover nominal damages if they proved intentional discrimination," and the Fifth Circuit has not disturbed that conclusion. *Lockwood v. Our Lady of the Lake Hosp., Inc.*, 467 F. Supp. 3d 435, 438 (M.D. La. 2020); *Francois v. Our Lady of the Lake Found.*, No. 17-393-SDD-SDJ, 2020 U.S. Dist. LEXIS 190019, at *4–5 (M.D. La. Oct. 14, 2020), *aff'd by Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 379 & 381 (5th Cir. 2021) ("Francois has made no attempt to argue in this appeal or in district court that his nominal-damage claims, if any exist, are not subject to the same intentional-discrimination standard."). On the other hand, some district courts have awarded summary judgment on liability without considering damages. *Perez v. Camden Mun. Court*, No. 14-7473 (RBK/JS), 2016 U.S. Dist. LEXIS 174711, at *10 (D.N.J. Dec. 19, 2016) ("Because there are no genuine disputes of material fact and Defendants violated Title II as a matter of law, the Court grants Plaintiff partial summary judgment on liability."), *appeal dismissed by*, 714 F. App'x 134, 135 (3d Cir. 2017); *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 430, 441 (D. Md. 2016) (granting the plaintiff's "motion for partial summary judgment on the issue of liability under [federal law], leaving the issue of damages to be resolved at trial").

Respondent's best case—and only case—to distinguish *Tolbert* is *Forziano v. Independent Group Home Living Program*, 613 F. App'x 15, 18 (2d Cir. 2015) (summary order) ("Plaintiffs' reasonable accommodation damages claims must be dismissed because it is well-settled that injunctive relief is the only relief available for non-intentional violations of these statutes."), *cited by* BIO 5. But *Forziano* is

unavailing for two reasons. First and foremost, it is a "[r]uling[] by summary order," which does "not have precedential effect." 2d Cir. Local R. 32.1.1(a). Second, *Forziano* did not reject *Tolbert*, let alone discuss it or any of the cases that formed its holding. In fact, in another summary order issued three years after *Forziano*, the Second Circuit observed that "the question of nominal damages" is different from compensatory damages. *See Berry-Mayes v. N.Y.C. Health & Hosps. Corp.*, 712 F. App'x 111, 112 n.1 (2d Cir. 2018) (summary order). The court ultimately "deem[ed] such an argument forfeited and consider[ed] only whether [the plaintiff] sufficiently demonstrated the deliberate indifference necessary for compensatory damages." *Id.* But the court did not say, as Respondent asserts through *Forziano*, that the distinction between nominal and compensatory damages was irrelevant because deliberate indifference was required for both.

2. Furthermore, Respondent's citations to injunctive and declaratory relief are of no moment. BIO 9. A "plaintiff seeking declaratory or injunctive relief must allege and ultimately prove a real and immediate—as opposed to a merely hypothetical or conjectural—threat of future injury." *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) (cleaned up). Put another way, injunctive and declaratory relief are considered in tandem. Thus, when a plaintiff withdraws claims for injunctive relief because she is unlikely to interact with the defendant again (or simply chooses not to return to the place where she was discriminated—as was the case here), declaratory relief is unavailable, and so a plaintiff cannot receive "a judicial declaration of rights" without nominal damages. BIO 9.

II. The Eleventh Circuit's decision is wrong.

1. Respondent's core argument, BIO 6–7, is based on a part of *Guardians*: "[A]bsent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief" for "past unintentional violations." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983). "That interpretation," however, "has never garnered a majority of the Court." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1414 (10th Cir. 1997) (Jenkins, J., dissenting), and more importantly, we have clear congressional intent to the contrary. In 1986, Congress amended the Rehabilitation Act to abrogate the states' Eleventh Amendment immunity from suit under Spending Clause legislation, providing that the states should be subject to remedies "both at law and in equity" "to the same extent" as other federal-funding recipients. 42 U.S.C. § 2000d-7(a)(2). Accordingly, this 1986 amendment demonstrated Congress' understanding that "damages are available" in actions under Title VI and the statutes that incorporate its remedies. *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 78 (1992) (Scalia, J., concurring in the judgment). Relatedly, *Guardians* pre-dates *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002), in which this Court looked to the Restatement, along with leading treatises, to define the scope of contract damages.[1]

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[1] At the risk of repetition, this Court has explained that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). That is because Spending Clause legislation "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts

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" even if monetary damages are precluded because of the absence of fair notice (and thus deliberate indifference). Restatement (Second) of Contracts § 346 cmt. b (1981) (emphasis added); *Uzuegbunam*, 141 S. Ct. at 798 (citing authority about how "the fact of breach of contract by itself justified nominal damages"). Despite this unequivocal language, Respondent tries to treat "nominal damages in contract cases as an equivalent substitute for compensatory damages." BIO 11. Yet this Court has explained that nominal damages are "awarded by default until the plaintiff establishes entitlement to some other form of damages," including compensatory damages. *Uzuegbunam*, 141 S. Ct. at 800. Here, the Eleventh Circuit "assume[d] without deciding" that Respondent breached its commitment to refrain from discriminating based on disability, Pet. App. 4a, and nominal damages are available for this completed legal violation. Restatement (Second) of Contracts § 346 cmt. a ("Every breach of contract gives the injured party a right to damages against the party in breach . . . .").

Respondent then makes a passing reference to *Barnes*'s exclusion of punitive damages, suggesting that nominal damages are likewise excluded. But *Barnes* excluded punitive damages not because

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essentially to a contract between the Government and the recipient" with potential victims of discrimination as third-party beneficiaries. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

contract law was irrelevant but because contract law did not allow punitive damages under the circumstances there. *Barnes*, 536 U.S. at 187 ("[P]unitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract."). Specifically, punitive damages are unavailable in contract cases unless they are also based on the law of "tort." Restatement (Second) of Contracts § 355, cmt. a. Not so with nominal damages, which are available in all contract cases. *Id.* § 346 cmt. b; *see also* 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.").

2. The very last paragraph of Respondent's brief addresses *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), which overruled the Eleventh Circuit on another remedies issue. There, the Court held that "nominal damages provide the necessary redress for a completed violation of a legal right." *Id.* at 802. "Applying this principle here is straightforward" because at the summary-judgment stage, the Eleventh Circuit assumed "that [Nix] experienced a completed violation of [her civil] rights." *See id.* In essence, the issue here is one of standing: whether any form of relief could provide redressability for a civil rights violation, and this Court has concluded that even without injunctive relief or compensatory damages, nominal damages would provide relief. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (2d Cir. 1999) (describing how a nominal-damages award holds an "entity responsible for its actions and inactions").

Although *Uzuegbunaum* involved a constitutional right, the Second Circuit has not treated constitutional and civil rights violations differently. *Robinson v. Cattaraugus Cty.*, 147 F.3d 153, 162 (2d Cir. 1998) ("If a jury finds that a constitutional violation has been proven . . . the plaintiff is entitled to an award of at least nominal damages as a matter of law."); *LeBlanc-Sternberg*, 67 F.3d at 431 ("A plaintiff who has proven a civil rights violation . . . is entitled to an award of nominal damages."). Likewise, this Court left no room for distinctions when it reaffirmed that "*every* violation of a right imports damage." *Uzuegbunam*, 141 S. Ct. at 802 (cleaned up). It bears emphasizing that a violation of federal law requires only "a showing that the auxiliary aids [someone] received to assist [her] in communicating" were ineffective. *McCullum*, 768 F.3d at 1149 n.8.

3. Finally, the Eleventh Circuit misconstrued nominal damages as monetary damages, and Respondent repeats that refrain. Pet. App. 7a ("Because Nix cannot prove deliberate indifference, she cannot recover any monetary damages—either compensatory or nominal."); *see* BIO 5. That is wrong. "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001)). "In contrast, nominal damages are divorced from any compensatory purpose." *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 872 (9th Cir. 2017). "Instead, nominal damages, which are damages 'in name only' and by nature minimal in amount, serve two distinct

purposes." *Id.* Nominal damages "vindicate rights" and "clarify the identity of the prevailing party for the purposes of awarding attorney's fees and costs in appropriate cases." *Id.* (cleaned up). "Particularly when a statute provides for the award of court costs to the prevailing party, a court may award nominal damages to avoid ordering the plaintiff to pay court costs and ensure the cost burden is on the defendant." *Id.* Such a result would be meaningful here because the district court taxed $24,495.71 in costs against Nix because neither the district court nor the Eleventh Circuit ruled on liability. ECF No. 118, *Nix v. Advanced Urology Institute of Georgia, P.C.*, No. 18-cv-04656 (Jan. 24, 2022).

In short, compensatory damages "redress[] a compensable harm," and "[n]ominal damages are damages in name only"—"a legal fiction with no existence in point of quantity." *Uzuegbunam*, 141 S. Ct. at 807 (Roberts, C.J., dissenting) (cleaned up). "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera*, 477 U.S. 561, 574 (1986). In that same vein, "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest importance." *Id.* at 575. In other words, nominal damages change the legal relationship between the parties. *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992). Thus, nominal damages should be available in cases like this one because "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266.

CONCLUSION

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

Respectfully submitted,

Andrew Rozynski
Counsel of Record
David John Hommel
William Juhn
EISENBERG & BAUM, LLP
24 Union Square East,
Penthouse
New York, NY 10003
(212) 969-8938
arozynski@eandblaw.com

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