No. 24-

In The

Supreme Court of the United States

A.W. BY AND THROUGH J.W.;
E.M. BY AND THROUGH B.M.;
M.F. BY AND THROUGH J.C.; AND
D.G. BY AND THROUGH D.G.,
Petitioners,

v.

COWETA COUNTY SCHOOL SYSTEM,
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

Whether Title II of the Americans with Disabilities Act allows victims of intentional discrimination to recover compensatory damages for emotional distress.

RELATED PROCEEDINGS

A.W. et al v. Coweta County School District, et al., No. 3:21-cv-218-TCB (N.D.Ga. Nov. 16, 2022)

A.W. et al v. Coweta County School District, et al., No. 22-14234 (11th Cir. Aug. 7, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners A.W., E.M., M.F., and D.G., students with disabilities, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported at 110 F4th 309. The District Court's opinion and order is available at 2022 WL 18107097. (Pet App. 17a.)

JURISDICTION

The Court of Appeals entered its judgment on August 7, 2024. This Court has jurisdiction over this case under 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

The appendix to this petition reproduces the relevant provisions of 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 Title II of the Americans with Disability Act ("ADA"), 42 U.S.C. § 12100 *et seq.*

STATEMENT OF THE CASE

The question before the Court is whether Congress, in enacting the Americans with Disabilities

Act in 1990, intended for victims who suffered intentional discrimination at the hands of a public entity to be able to recover emotional distress damages. In *Cummings v. Premier Rehab Keller, P.L.L.C.,* 142 S.Ct. 1562 (2022), this Court held emotional distress damages are unavailable under the Patient Protection and Affordable Care Act ("ACA"), Section 504 of the Rehabilitation Act of 1973, and other Spending Clause enactments. Since the Court issued this opinion two years ago, lower courts have applied *Cummings* to also bar emotional distress damages for litigants pursuing claims under Title II of the ADA, even though that legislation was not passed under the Spending Clause but instead is rooted in Congress's powers to enforce the Fourteenth Amendment's guarantees. Petitioners respectfully contend this is legal error that misapplies this Court's precedent, contradicts the will of Congress, and severely undermines civil rights protections for the some of the most vulnerable Americans.

A. Legal background

1. When Congress passed the Americans with Disabilities Act ("ADA") it "invoke[d] the sweep of congressional authority, including the power to enforce the Fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101. Title II of the ADA prohibits disability discrimination by public entities. 42 U.S.C. § 12132. It permits private causes of action for injunctive relief, damages, and attorney's fees and costs. *Fry v. Napoleon Cnty. Schs.*, 580 U.S. 154, 160

(2017); *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019).[1] Title II of the ADA was enacted with the goal of providing victims of disability discrimination with a "full panoply of remedies." H.R. Rep. No. 101-485, pt. 2, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381; H.R. Rep. No. 101-485, pt. 3, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475.

2. Unsatisfied with the scope of protection afforded to the disabled under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), which targeted discrimination by entities receiving federal funding, Congress enacted Title II to make "any public entity liable for prohibited acts of discrimination, regardless of the funding source." *Shotz v. City of Plantation*, 344 F.3d 1161, 1173 (11th Cir. 2003) (citing 42 U.S.C. § 12132).

3. Title II's enforcement section incorporates the "remedies, procedures, and rights" set forth in Section 504, and by extension, Title VI of the Civil Rights Act of 1964, which is silent as to the scope of available relief under that statute. 42 U.S.C. § 12133;

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[1] To establish a claim under Title II, a private plaintiff must show "(1) that [they are] a qualified individual with a disability; (2) that [they were] either excluded from participation in or denied the benefits of a public entity's services, programs, activities, or were otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of [their] disability." *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007). Any plaintiff seeking compensatory damages under Title II must also show that the discrimination was intentional or deliberately indifferent to their statutory rights. *Silberman,* 927 F.3d at 1134.

42 U.S.C. § 794a; 42 U.S.C. § 2000d *et. seq*. (Pet. App. 35a).

4. Congress is presumed to have enacted the ADA with full knowledge of this Court's precedent as it stood in 1990, including its decisions applying a "well-settled" presumption in favor of any appropriate relief to make good the wrong done for violations of a federal right. *See Cannon v. University of Chicago,* 441 U.S. 677 (1979)*; Bell v. Hood*, 327 U.S. 678, 684 (1946). Petitioners contend Congress, fully aware of this Court's holdings in *Bell* and *Cannon*, was silent as to Title II's remedies because it knew the law would presume the existence of the full panoply of remedies necessary to remedy the ill-effects of discrimination by public entities, including providing the victims with compensatory damages for their emotional distress.

5. Twelve years after the ADA was enacted, this Court held in *Barnes v. Gorman,* 536 U.S. 181 (2002) that punitive damages are unavailable under both Section 504 and Title II. Justice Scalia, the opinion's author, relying upon *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981), applied a contract law analogy and found punitive damages are unavailable in private suits brought under both Section 504 and Title II as the remedies are "co-extensive" with those found under Title VI. *Barnes*, 536 U.S. at 189. Justices Souter and O'Connor joined the opinion with the caveat that the Court's opinion acknowledged the "contract law analogy may fail to give helpfully clear answers to others questions that may be raised by actions for private recovery under

Spending Clause legislation, such as the proper measure of compensatory damages." *Id.* at 191.

6. In 2022, this Court held in *Cummings v. Premier Rehab Keller* that emotional distress damages are unavailable under Section 504 and the ACA. The Court was not presented with the question of whether emotional distress damages are available under Title II. The Court also declined to address the issue in a recent Title II ADA case, *Perez v. Sturgis Public Schools*, 143 S.Ct. 859 (2023).[2]

B. The present controversy

1. Petitioners A.W., E.M., M.F., and D.G. were students at Elm Street Elementary School in Coweta County, Georgia in 2019. Petitioners have profound cognitive and physical disabilities. Respondent Coweta County School System is a public entity under Title II, 42 U.S.C. § 1213(2). (Pet. App. 2a.)

2. The Petitioners filed a complaint in the Newnan Division for the Northern District of Georgia on December 17, 2021 alleging they were subjected to outrageous physical, verbal, and emotional abuse at the hands of their classroom teacher and that the school's principal received repeated reports from the classroom's paraprofessional that this abuse was taking place and elected to take no action in response

[2] In that case, the Court found plaintiffs seeking compensatory damages from a public entity under Title II are not required to first exhaust their remedies under the Individuals with Disabilities Education Act ("IDEA") because compensatory damages are not afforded under the IDEA.

to those reports in violation of Georgia's Mandatory Reporter Law. They further allege this abuse was directed at them on account of their disabilities. The complaint sought, *inter alia*, "damages for mental pain and suffering" and special damages under Title II, Section 504, and Section 1983, as well as punitive damages under Section 1983. (Pet. App. 5a.)

3. While Petitioners' case was pending in the District Court, on April 28, 2022, this Court held in *Cummings* that emotional distress damages are not recoverable under Section 504. On May 17, 2022, Respondent and the defendant principal moved to dismiss all of Students' claims under Fed. R. Civ. Proc. 12(b)(6). Petitioners responded to the motion to dismiss and moved to amend their complaint to remove their Section 504 claim and bolster their other claims. (Pet. App. 6a.)

4. On November 16, 2022, before any discovery took place, the district court dismissed Petitioners' claims with prejudice, declining jurisdiction over the state law tort claim. The court also denied Petitioners leave to amend their complaint, concluding that amendment would be futile. (Pet. App. 7a.)

5. The United States Court of Appeals for the Eleventh Circuit held that *Cummings* bars emotional distress damages under Title II of the ADA because this Court has stated the remedies in Title II are "coextensive" with those available under Section 504. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). The Court of Appeals read *Barnes* as requiring courts to impose *Cummings*' limitation excluding emotional

distress from the basket of compensatory damages available under Section 504 upon relief provided under Title II.[3] The Court of Appeals noted that similar logic previously prompted it to split from other circuits in finding vicarious liability is not available under Title II of the ADA. *Ingram v. Kubik*, 30 F.4th 1241, 1259 (11th Cir. 2022).[4]

6. The Court of Appeals, however, found the District Court erred in summarily dismissing all of Petitioners' compensatory damage claims under Title II of the ADA and remanded the case to the District Court to consider whether Petitioners had claims for damages unrelated to emotional distress consistent with *Cummings,* including damages for physical harm, compensation for lost educational benefits, remediation, and nominal damages. (Pet. App. 9a.)

7. Petitioners elected to forgo submitting a petition for rehearing to the Court of Appeals and instead file this petition.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because the Eleventh Circuit's ruling involves an important question of federal law that has not been, but should

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[3] In doing so, it followed the lead of the United States Court of Appeals for Second Circuit. *Doherty v. Brice*, 101 F.4th 169 (2024).

[4] The Court of Appeals also rejected Petitioners' constitutional claims under Section 1983. Petitioners do not seek review of that decision.

be, settled by this Court. Lower courts and the general public need instruction on whether *Cummings* applies to civil rights laws enacted pursuant to the Fourteenth Amendment despite that decision drawing clear distinctions between Spending Clause legislation, "which operates based on consent," and "ordinary legislation," which "'imposes Congressional policy' on regulated parties 'involuntarily.'" *Cummings,* 142 S.Ct. at 1570. Moreover, the Eleventh Circuit's ruling must be reconciled with this Court's decisions in *Tennessee v. Lane*, 541 U.S. 509 (2004) and *United States v. Georgia*, 546 U.S. 151, 158-59 (2006) (Scalia, J.), which suggest money damages for emotional distress are available under Title II for intentional discrimination that implicates constitutional rights. If the Court does not act, the practical consequence will be that victims of intentional disability discrimination at the hands of a public entity, such as these young petitioners, will be denied access to the "full panoply of remedies" that Congress intended to provide in enacting the ADA in 1990.

I. Whether emotional distress damages are generally available under Title II of the ADA is an important question of federal law that should be settled by this Court.

1. Emotional distress damages are an essential means of redressing the injuries suffered by victims of disability discrimination. In fact, there is often no other remedy available to properly compensate a person for the

diminishment of their basic human dignity. Non-economic harm is "inherent in discrimination, encompassing the humiliation, frustration, and embarrassment that a person must surely feel…" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (Goldberg, J.) (1964).

2. Congress recognized this reality and, pursuant to the authority vested in the legislature by the Fourteenth Amendment, enacted Title II of the ADA with the intention of affording victims of discrimination the full panoply of remedies, including the ability to receive compensation for damages related to emotional disturbance. Congress attempted to achieve this result because, knowing the law, it understood courts would apply this Court's precedent from *Bell v. Hood* and would presume the statute afforded litigants all appropriate remedies to make right the wrongs of discrimination. Indeed, this Court did exactly that in the context of other civil rights legislation enacted pursuant to the Fourteenth Amendment. *See Memphis v. Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (internal citations omitted) (humiliation, mental anguish and suffering are compensable injuries under Section 1983); *Carey v. Piphus*, 435 U.S. 247, 264 (1978) (mental and emotional distress caused by the denial of procedural due process itself is

compensable under Section 1983).[5] And Congress specifically rejected a proposal to limit remedies under Title II to those available under Title VII of the Civil Rights Act, which did not allow for compensatory damages at the time of the proposed amendment. *See* H. Amdt. 454 to Americans with Disabilities Act, H.R. 2273, 101st Congress (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). And Title II's implementing regulations acknowledge "the full range of remedies (including compensatory damages)" are available under Title II. 28 C.F.R. Pt. 35, App. A; *see also* 28 C.F.R. § 35.172(c)(2) (providing for compensatory damages where appropriate).

3. The decisions of the Eleventh Circuit in this case and the Second Circuit in *Doherty v. Brice*, 101 F.4th 169 (2024) gut this important protection for disabled Americans and effectively rewrite this landmark civil rights law in a way that renders Title II unrecognizable from the legislation Congress passed in 1990. Petitioners respectfully contend these decisions misapply *Barnes* and *Cummings*.

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[5] While Congress was also aware of this Court's decision in *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981), Congress could not have known in 1990 this Court would extend a contract law analogy to constrain the scope of available remedies under Section 504 twelve years later in *Barnes v. Gorman*.

4. *Cummings* is limited to Section 504 and the ACA, and has no bearing on the available remedies under Title II. *Cummings*, 142 S. Ct. at 1576 ("emotional distress damages are not recoverable *under the Spending Clause antidiscrimination statutes we consider here*.") (emphasis added). The Court's analysis hinged on Section 504's identity as a "Spending Clause" statute that conditions the provision of federal funds on compliance with statutory terms. *Id*. at 1570. Analogizing this arrangement to a contract between the federal government and the funds recipient, the Court explained Congress' authority to legislate under the Spending Clause "rests not on its sovereign authority to enact binding laws, but on 'whether the [funds recipient] voluntarily and knowingly accepts the terms of th[at] contract.'" *Id*. (citing *Barnes v. Gorman*, 536 U.S. at 186 (2002) (further citations omitted)). Voluntary and knowing acceptance requires "clear notice" of potential liability. *Cummings*, 142 S. Ct. at 1570. Thus, where Spending Clause enactments are silent as to available relief, this "clear notice" requirement constrains available remedies to those generally available in contract – remedies for which a funds recipient is presumed to have "clear notice." *Id*. at 1565, 1571. The Court found that because emotional distress damages are not generally compensable in contract actions, they are not available under Section 504 or the ACA. *Id*. at 1576.

5. But this "notice" requirement is irrelevant in analyzing Title II of the ADA, which is authorized under Congress's enforcement powers under the Fourteenth Amendment and not its spending powers. *Cummings* drew clear distinctions between Spending Clause legislation, "which operates based on consent," and "ordinary legislation," which "'imposes Congressional policy' on regulated parties 'involuntarily.'" *Id.* at 1570. And it carefully characterized its constraint on available remedies under Section 504 and the ACA as only a "potential limitation on liability *compared to that which would exist under non-spending statutes*." *Id.* at 1573 (emphasis added). Title II is a non-spending statute, rooted in Congress' Commerce Clause and its power to enforce the promises of the Fourteenth Amendment. 42 U.S.C. § 12101 (b)(4) (invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment... to address the major areas of discrimination faced day-to-day by people with disabilities."); *see also Tennessee v. Lane*, 541 U.S. 509 (2004) ("Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees"); *United States v. Georgia*, 546 U.S. 151, 158-59 (2006) (Scalia, J.) ("No one doubts that § 5 grants Congress the power to "enforce… the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions"). Unlike Section

504 and the ACA, Title II does not operate on consent or condition funding on compliance with its terms. It is instead ordinary legislation that imposes an outright prohibition on discrimination by public entities regardless whether they are willing to comply. *See* 42 U.S.C. § 12101(b)(1) (articulating the ADA's purpose as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *see also Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1174 (2003) (noting that an "integral purpose" of Title II was to expand the prohibition against disability discrimination to public entities "regardless of whether or not such entities receive Federal financial assistance") (quoting H.R.Rep. No. 101–485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366–6)).

6. Because Title II, via its cross-references, is ultimately silent as to the scope of available remedies, and the decision in *Cummings* does not settle the question, courts must apply the general rule: that any appropriate relief is available to "make good the wrong done" for violations of a federal right. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. at 684). This presumption only yields to "clear direction" from Congress. *Id.* at 70-71.

7. Although the Court of Appeals is correct that *Barnes* analyzed Section 504 and Title II together and limited available damages under both statutes based on their coextensive remedies, 536 U.S. at 189, *Barnes* should properly be read as a categorical bar on punitive damages as being appropriate relief under the *Bell* presumption and should not be read for the proposition that remedies of Title II are merely superfluous to those of Section 504. In *Barnes*, rather than employing a "potential limitation" on compensatory remedies under Section 504, the Court found *punitive damages* to be categorically outside the scope of the presumption in favor of all appropriate relief. *Barnes*, 536 U.S. at 189. And while the *Barnes* referenced Title II's incorporation of Section 504's remedies, its rejection of punitive damages under Title II is supported by the longstanding rule establishing immunity of governmental entities from punitive damages in common law, to avoid punishing taxpayers for the wrongdoing of municipalities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981) ("In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens whose benefit the wrongdoer was being chastised."). This rationale for prohibiting punitive damages against public entities under Title II does not apply to emotional distress damages, which operate to compensate plaintiffs for the

damage caused by the government's violation of their rights, rather than as a punishment levied against the government. *See Id*. (distinguishing between liability to compensate for injuries inflicted by a municipality and vindictive damages appropriate as punishment and recognizing that compensation is an obligation properly shared by a municipality). Indeed, although Section 504 borrows its remedies from Title VI, this Court has cautioned against applying categorical limitations under Title VI to Section 504. *See Alexander v. Choate*, 469 U.S. 287, 294 (1985) (finding that "there are reasons to pause" before extending a judicial interpretation limiting liability under Title VI to Section 504, despite the statutes' coextensive rights and remedies); *see also Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-36 (1984) (finding that even though Section 504 expressly incorporated Title VI's cause of action, a limitation on the cause of action set out in Title VI did not carry over to Section 504). Likewise, to import a constraint into Title II's remedial scheme based on Congressional authority under the Spending Clause would be inappropriate. Without independent cause to similarly constrain remedies under Title II, which does not "operate based on consent" and under which notice of liability is irrelevant, courts should presume all available compensatory remedies.

8. If the Court does not correct the Eleventh Circuit's error in applying *Cummings* to the ADA, victims of intentional disability discrimination will presumably still have the ability to recover some damages, including those related to lost educational benefits (as in this case), remediation, attorney fees, and nominal damages. But these victims will have no way to achieve compensation from public entities for psychological injury or the loss of their dignity. The stakes of this appeal are thus high for disabled Americans and their advocates.

II. The Court should confirm the availability of emotional distress damages for intentional discrimination that implicate constitutional rights.

1. Even if *Cummings* can be applied to restrict compensatory remedies under Title II, that constraint does not apply here, as Petitioners allege Title II violations that also implicate constitutional rights. This Court has recognized that Congress' enforcement powers are at their height when legislating to address disability discrimination implicating constitutional rights, as opposed to that which is only a statutory violation. *Compare Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (Congress did not validly abrogate states' Eleventh Amendment immunity to suits in federal court for money damages under Title I of the ADA) with *Tennessee*, 541 U.S. 509, 533–34 (2004)

(Congress validly abrogated states' Eleventh Amendment immunity to suits in federal court for money damages under Title II "as it applies to the class of cases implicating the fundamental right of access to the courts") and *United States v. Georgia*, 546 U.S. at 157-59 (Congress validly abrogated states' Eleventh Amendment immunity to suits in federal court for money damages under Title II which target behavior that also violates the Fourteenth Amendment). Although dealing with a separate issue—that of Congress' power to abrogate states' Eleventh Amendment immunity under Title II—the Court in *United States v. Georgia* recognized Congress' "prophylactic" power to enforce Title II violations that also constitute violations of the Fourteenth Amendment—including by permitting monetary damages against state actors.

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to "enforce ... the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions. "Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights." This enforcement power includes the power to abrogate state sovereign immunity by authorizing

> private suits for damages against the States.

United States. v. Georgia, 546 U.S. at 158–59 (emphasis in original).

2. Much like the discrimination alleged in *Georgia* and *Tennessee*, Petitioners' case involves violations of fundamental Constitutional rights by a public entity. In this way, Petitioners' case factually differs from *Cummings*, which involved the refusal of a private physical therapy provider to furnish the plaintiff with an American Sign Language interpreter. *Cummings*, 142 S. Ct. at 1565. Petitioners alleged they were subjected to discrimination under Title II based upon the repeated emotional and physical abuse they experienced at the hands of their teacher in their public school classroom. This discrimination under Title II also constitutes violations of the Fourteenth Amendment, which prohibits the deliberate infliction of physical pain and restraints of public school students as well as excessive corporal punishment with no rational basis. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

3. Expanding *Cummings*' holding here would leave Petitioners and similarly situated litigants without a federal remedy for the primary form of damage caused by those violations - emotional distress.[6] In cases such as this, involving Fourteenth

[6] In this particular case, Petitioners do have other available damages, including but not limited to other damages, including

Amendment violations, Congressional power to create an enforceable right is at its strongest. The Court should not infer a limitation on damages—based on a rationale that does not apply to Title II—which leaves those violated with little to no remedy and which substantially frustrates enforcement. Emotional distress damages must, at the very least, be available for violations of Title II that implicate constitutional rights.

CONCLUSION

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

Respectfully submitted,

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November 5, 2024

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lost educational benefit, damages for physical harm, remediation, and nominal damages.