No. 20-219

IN THE

Supreme Court of the United States

JANE CUMMINGS,

Petitioner,

v.

PREMIER REHAB KELLER, P.L.L.C.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating based on race. Congress has expressly incorporated Title VI's remedies for victims of discrimination into other anti-discrimination laws, including the Rehabilitation Act, 29 U.S.C. § 794a(a)(2), and the Affordable Care Act, 42 U.S.C. § 18116(a). Those remedies include a right to recover "compensatory damages." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). The question presented is:

Whether the compensatory damages available under Title VI and the statutes that incorporate its remedies include compensation for emotional distress.

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BRIEF FOR PETITIONER

Petitioner Jane Cummings respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-14a) is reported at 948 F.3d 673. The district court's opinion and order (Pet. App. 15a-27a) is available at 2019 WL 227411.

JURISDICTION

The court of appeals entered its judgment on January 24, 2020. Pet. App. 1a. The court denied a timely petition for rehearing on March 24, 2020. *Id.* 29a. On March 19, 2020, this Court entered a standing order that extended the time within which to file a petition for a writ of certiorari in this case to August 21, 2020. The petition was filed on August 21, 2020 and granted on July 2, 2021. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to the petition for certiorari 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 the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18116. Pet. App. 31a-39a.

INTRODUCTION

In a series of statutes beginning with Title VI of the Civil Rights Act of 1964, Congress has exercised its authority under the Spending Clause to prohibit those who accept federal funds from discriminating based on race, sex, or disability. When a funding recipient intentionally violates one of those prohibitions, the victim is entitled to recover "compensatory damages." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). This case presents the question whether those damages may include compensation for one of discrimination's paradigmatic harms: the humiliation, anguish, and other noneconomic injuries known to the law as emotional distress.

In several previous cases, this Court has suggested or assumed that the answer is yes. First, in a case where the plaintiff sought to recover for the "psychological and emotional harm" she suffered after one of her high school teachers sexually harassed and raped her, the Court held that Title IX authorizes awards of monetary damages. Petr. Br. 20, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992) (No. 90-918). In a disability-discrimination case where the plaintiff recovered such damages in part "for pain and suffering as well as for emotional anguish," the Court reaffirmed that compensatory damages are recoverable. U.S. Br. 13 n.3, *Barnes v. Gorman*, 536 U.S. 181 (2002) (No. 01-682). The Court also enabled a Title IX case to proceed where a student who experienced severe sexual harassment sought to recover for the "extreme emotional damage" she had suffered. Pet. App. 100a-01a, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843). Finally, and most recently, the Court

unanimously held that a student seeking "money damages" for "emotional injury" under the Rehabilitation Act and Title II of the ADA was not required to exhaust the administrative procedures in the Individuals with Disabilities Education Act. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 n.8 (2017).

Before the Fifth Circuit's decision in this case, the courts of appeals also uniformly allowed victims of the sorts of intentional discrimination at issue here to recover emotional-distress damages—sometimes expressly approving them, and other times implicitly accepting their availability.[1] District courts around the country likewise have overwhelmingly held that emotional-distress damages are recoverable under Title VI and statutes that incorporate its remedies.[2]

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[1] *See, e.g.*, *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 18 (1st Cir. 2019) (Rehabilitation Act claim based on a school's failure to allow a student to use his service animal); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 672 (2d Cir. 2012) (Title VI claim based on racial harassment); *Johnson v. City of Saline*, 151 F.3d 564, 572-74 (6th Cir. 1998) (ADA claim based on refusal to enable physical access to second floor of public building); *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015) (Rehabilitation Act claim based on hospital's disability discrimination); *Mark H. v. Lemahieu*, 513 F.3d 922, 930 & n.6 (9th Cir. 2008) (Rehabilitation Act claim based on a school's failure to accommodate a disability); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1190-1204 (11th Cir. 2007) (Rehabilitation Act claim based on medical facility's refusal to allow a patient to use her service animal).

[2] *See, e.g.*, *Toth v. Barstow Unified Sch. Dist.*, 2014 WL 7339210, at *4 (C.D. Cal. Dec. 22, 2014); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1115 n.5 (N.D. Cal. 2013); *Luciano v. E. Cent. Bd. of Coop. Educ. Servs.*, 885 F. Supp. 2d 1063, 1075 (D. Colo. 2012); *Wiles v. Dep't of Educ.*, 2007 WL

Breaking from the indications in this Court's case law and the years of settled practice in the lower courts, the Fifth Circuit held here that emotional-distress damages are categorically unavailable under Title VI and the statutes that incorporate its remedies. The Fifth Circuit was wrong. There is a centuries-old presumption that plaintiffs may recover any form of compensatory damages necessary to make them whole. And there is no basis for departing from that presumption here. To the contrary, this Court has held that funding recipients are subject to the "remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. The common law of contracts traditionally authorized emotional-distress damages if the nature of the contract made emotional distress an especially likely result of a breach—if, for example, the contract

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9710792, at *7 (D. Haw. Nov. 13, 2007); *Reed v. Illinois*, 2016 WL 2622312, at *4-5 (N.D. Ill. May 9, 2016); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 673 (S.D. Ind. 2015); *Scarlett v. Sch. of the Ozarks, Inc.*, 780 F. Supp. 2d 924, 934 (W.D. Mo. 2011); *Roohbakhsh v. Bd. of Trs.*, 409 F. Supp. 3d 719, 735 (D. Neb. 2019); *K.G. v. Santa Fe Pub. Sch. Dist.*, 2014 WL 12785160, at *20-21 (D.N.M. Nov. 17, 2014); *N.T. v. Espanola Pub. Sch.*, 2005 WL 6168483, at *14-15 (D.N.M. June 21, 2005); *Stamm v. N.Y.C. Transit Auth.*, 2013 WL 244793, at *4-7 (E.D.N.Y. Jan. 22, 2013); *Beardsley v. City of N. Las Vegas*, 2007 WL 9728715, at *7 (D. Nev. Nov. 7, 2007); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 383-84 (W.D. Pa. 2008); *Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth.*, 2011 WL 1655810, at *8-9 (W.D. Va. May 3, 2011). It appears that only a few district judges have disagreed. *See Humood v. City of Aurora*, 2014 WL 4345410, at *13 n.9 (D. Colo. Aug. 28, 2014) (dicta); *Bell v. Bd. of Educ.*, 652 F. Supp. 2d 1211, 1212-16 (D.N.M. 2008) (citing an earlier decision by the same judge).

protected personal or dignitary interests rather than purely economic concerns. That traditional standard perfectly describes a funding recipient's pledge to the federal government that it will refrain from race, sex, or disability discrimination.

The Fifth Circuit recognized the presumption of complete relief and the traditional availability of emotional-distress damages in appropriate cases. But it refused to follow those guideposts here. In so doing, the Fifth Circuit deviated from the governing legal framework and adopted a categorical rule that would leave many victims—including the plaintiffs in *Davis*, *Franklin*, and *Fry*—with no meaningful remedy at all. This Court should reject the Fifth Circuit's holding and restore the traditional availability of emotional-distress damages to this important set of federal statutes.

STATEMENT OF THE CASE

A. Legal background

This case arises under the Rehabilitation Act and the antidiscrimination provision of the Affordable Care Act. Like several other antidiscrimination laws, those statutes expressly incorporate the private right of action available to victims of discrimination under Title VI. The contours of that right of action have been defined through judicial decisions that Congress has ratified and extended over several decades.

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. In the years after its enactment, 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).

Acting against that backdrop, 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's decision in *Cannon* confirmed that both statutes establish a "private cause of action for victims of the prohibited discrimination." 441 U.S. at 694, 703.

In 1978, Congress incorporated that private right of action into the Rehabilitation Act, which prohibits funding recipients from discriminating based on disability. 29 U.S.C. § 794. Congress directed that the "remedies, procedures, and rights" available under Title VI "shall be available to any person aggrieved" by a violation of Section 794's proscription. *Id.* § 794a(a)(2).

In 1990, Congress incorporated the same right of action into Title II of the Americans with Disabilities Act (ADA), which prohibits 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 Rehabilitation Act are also available "to any person alleging discrimination on the basis of disability" under Title II. *Id.* § 12133. Years later, this Court explained that this provision "allows private citizens to bring suits for money damages." *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

Most recently, Congress included a provision in the Affordable Care Act prohibiting federally funded health programs from discriminating on the grounds covered by Title VI, Title IX, and the Rehabilitation

Act. 42 U.S.C. § 18116(a). Congress then incorporated "[t]he enforcement mechanisms provided for and available under" those statutes. *Id.*

2. Beyond extending Title VI's private right of action to additional statutes, Congress has also ratified that right of action in other ways. In 1972 and 1976, Congress authorized awards of attorney's fees using language that "explicitly presumes the availability of private suits." *Cannon*, 441 U.S. at 699; *see* Pub. L. No. 92-318, § 718, 86 Stat. 369 (1972); Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976). And in 1986, Congress abrogated the states' immunity from suit under Title VI, Title IX, and the Rehabilitation Act, providing that "remedies both at law and in equity" are available in suits against states "to the same extent as such remedies are available" in suits against private entities. 42 U.S.C. § 2000d-7(a)(2).

Individually and collectively, those enactments used express statutory text to "ratif[y]" the cause of action this Court had previously recognized in Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Thus, although this Court in recent years has adopted a more restrained approach to implying private rights of action than the one that "held sway . . . when Title VI was enacted," *id.* at 287, the Court has also recognized that Congress's repeated ratification of its earlier holdings leaves it (in the words of Justice Scalia) "'beyond dispute that private individuals may sue to enforce' Title VI" and the statutes that incorporate its remedies, *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (quoting *Sandoval*, 532 U.S. at 280).

3. This case concerns the types of relief available in those private suits. It follows two cases in which

this Court considered closely related questions and established the governing legal framework.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that victims of intentional violations of Title IX may recover "monetary damages." *Id.* at 63. The Court rested that holding on the longstanding presumption 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." *Id.* at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Concurring Justices also found congressional reinforcement of that presumption in amendments to Title IX and the Rehabilitation Act providing that "remedies (including remedies both at law and in equity) are available" against States that intentionally discriminate against covered individuals. *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment) (quoting 42 U.S.C. § 2000d-7(a)(2)); *see also* 42 U.S.C. § 2000d-7(a)(1).

The Court acknowledged that it had previously declined to authorize monetary relief for *unintentional* violations of Spending Clause statutes. *Franklin*, 503 U.S. at 74. But the Court explained that "[t]he point of not permitting monetary damages for an unintentional violation" is that the funding recipient "lacks notice that it will be liable for a monetary award" for engaging in the relevant conduct. *Id.* The Court emphasized that there is no similar concern in cases of "intentional discrimination" because Title IX "[u]nquestionably" gives notice of the "duty not to discriminate." *Id.* at 75.

In *Barnes*, this Court held that the monetary relief authorized in *Franklin* does not include punitive damages. *Barnes*, 536 U.S. at 187. Writing for the Court, Justice Scalia noted that *Bell*'s "well settled" presumption allows "any available remedy to make good the wrong done." *Id.* at 189 (quoting *Bell*, 327 U.S. at 684). The Court explained that the "wrong done" by a funding recipient's unlawful discrimination is "'made good' when the recipient *compensates*" the victim for the resulting harm. *Id.* Because punitive damages are "not compensatory," they are "not embraced within the rule described in *Bell*." *Id.*

The Court also emphasized that a Spending Clause statute is "much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Barnes*, 536 U.S. at 186 (brackets, emphasis, and citation omitted). Based on the contractual nature of the statute, the Court concluded that a given remedy is appropriate only if the funding recipient is "on notice that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis omitted). And for the same reason, the Court held that "[a] funding recipient is generally on notice" that it is subject to the "remedies traditionally available in suits for breach of contract." *Id.*

Applying that principle, the Court reaffirmed that Title VI authorizes the traditional contract remedies of "compensatory damages and injunction." *Barnes*, 536 U.S. at 187. But the Court held that punitive damages are not permitted under Title VI because they were not traditionally available for a breach of contract. *Id.* at 187-88.

B. The present controversy

1. Petitioner Jane Cummings has been deaf since birth and is legally blind. Pet. App. 2a. Because those disabilities make it difficult for Ms. Cummings to speak, read, and write in English, she communicates primarily in American Sign Language (ASL). *Id.* Without translation into ASL—a language with its own distinct rules of grammar and the like—she cannot "meaningful[ly] access" services that are otherwise publicly available. *United States v. Bd. of Trs. for the Univ. of Ala.*, 908 F.2d 740, 748 (11th Cir. 1990); *see also EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1105 (9th Cir. 2010).

Respondent Premier Rehab is a physical therapy provider that receives federal funds. Pet. App. 1a-2a. In 2016, Ms. Cummings's doctor referred her to Premier to treat her for a work injury and chronic back pain because Premier runs the "best rehabilitation clinic in the area." Am. Compl. ¶ 14, ECF No. 11. When Ms. Cummings contacted Premier to schedule an appointment, she requested an ASL interpreter. Pet. App. 2a. Although Ms. Cummings explained that her disabilities prevent her from communicating through other methods like notes, lipreading, or gestures, Premier refused to provide an interpreter. *Id.* As a result, Ms. Cummings could not obtain treatment from Premier. *Id.* Without an interpreter, she could not describe the sources of her physical infirmities, ask questions, identify her pain level, or otherwise assist in rehabilitative services.

Ms. Cummings later saw a second doctor, who again sent her to Premier because it "provides the best physical therapy services in the area." Am. Compl. ¶ 18. Ms. Cummings contacted Premier twice

more over the next few months, each time reiterating that she needed an ASL interpreter because of her disabilities. Pet. App. 2a. Premier still refused to provide that accommodation, and Ms. Cummings was ultimately forced to seek care elsewhere. *Id.*

2. Ms. Cummings sued Premier in the U.S. District Court for the Northern District of Texas. As relevant here, she alleged that Premier intentionally discriminated against her in violation of the Rehabilitation Act, both directly and as incorporated by the Affordable Care Act. Pet. App. 16a-17a; *see* 45 C.F.R. § 84.52(d)(1) and (3) (the Rehabilitation Act 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" and it would not impose significant difficulty or expense). Ms. Cummings sought injunctive relief, as well as damages for the "humiliation, frustration, and emotional distress" she suffered because of Premier's actions. Pet. App. 16a.

As an initial matter, the district court dismissed Ms. Cummings's claim for injunctive relief. Because the district court believed that Ms. Cummings was not "likely to return to Premier" and was not suffering "ongoing harm" from the alleged discrimination," the district court held that she lacked standing to seek prospective relief. Pet. App. 18a-21a.

Premier also moved to dismiss Ms. Cummings's claim for compensatory damages, arguing that Ms. Cummings had not adequately established her need for an interpreter. Mot. to Dismiss at 9-11, ECF No. 14. Premier did not challenge the availability of

emotional-distress damages. Yet the district court held sua sponte that "[d]amages for emotional distress are unrecoverable." Pet. App. 23a. The court then dismissed Ms. Cummings's claim because she sought no other form of compensatory relief. *Id.* 25a.

3. Ms. Cummings appealed the dismissal of her emotional-distress claim, and the Fifth Circuit affirmed. It recognized the longstanding presumption that "where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Pet. App. 13a (quoting *Bell*, 327 U.S. at 684). The Fifth Circuit also acknowledged that recipients of federal funds expose themselves to "those remedies traditionally available in suits for breach of contract." *Id.* 7a (quoting *Barnes*, 536 U.S. at 187).

Turning to the common law of contracts, the court of appeals further recognized that emotional-distress damages are traditionally available if the nature of the contract made "serious emotional disturbance" a "particularly likely result" of a breach. Pet. App. 9a (quoting Restatement (Second) of Contracts § 353 (1981) (emphasis omitted)). And the court of appeals did not dispute that serious emotional disturbance is a particularly likely result of a breach of a promise to refrain from race, sex, or disability discrimination. *Id.* 9a-10a.

But the Fifth Circuit declined to apply the directly applicable contract rule here. Characterizing that rule as an "exception," it focused instead on what it called a more "general rule" that "emotional distress damages are not available for breach of contract." Pet. App. 8a-9a (citing Restatement

(Second) of Contracts § 353). And noting that "the contract-law analogy is only a metaphor," the court of appeals asserted that funding recipients like Premier are "unlikely to be aware that [the relevant contract-law] exception exists, let alone think they might be liable under it." *Id.* 9a-10a.

4. The Fifth Circuit denied Ms. Cummings's petition for rehearing en banc. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

Compensation for emotional distress is among the monetary relief available for intentional discrimination under the statutes that incorporate the remedies allowed under Title VI.

I. "[S]o long as a cause of action exist[s] under the Constitution or laws of the United States," the "longstanding rule" is that "'federal courts may use any available remedy to make good the wrong done.'" *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This presumption, which has deep historical roots, applies with full force here. The two federal statutes directly at issue—the anti-discrimination provisions of the Rehabilitation Act and the Affordable Care Act—contain private causes of action and allow for the recovery of compensatory damages. Nothing in the statutes indicates that compensation for mental suffering is inappropriate.

On the contrary, emotional-distress damages are a standard form of compensation under federal and state anti-discrimination statues. Such damages can be necessary to make victims whole because intentional discrimination inflicts dignitary harm, reinvokes a painful history of exclusion, and can

cause extreme mental trauma—say, when a high school student is repeatedly sexually assaulted by her teacher or a person with a disability is required to undergo, but denied the ability to understand, an invasive medical procedure.

II. That the statutes here rest upon Congress's Spending Clause authority confirms the availability of emotional-distress damages. "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." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). And "[r]ecovery for emotional disturbance" is allowed where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 (1981). That rule encapsulates intentional breaches of commitments to refrain from discriminating based on race, sex, or disability.

The Fifth Circuit had no warrant to disregard the governing contract rule here on the ground that some have called it an "exception" to a more general bar in contracts cases on the recovery of emotional-distress damages. The governing rule here is not really an exception at all, but rather just a particular application of basic foreseeability principles. In any event, neither courts nor funding recipients may take a line-item-veto approach to traditional contract-law rules, whether or not they are exceptions. Those who accept federal funds have fair notice of *all* such rules. Indeed, courts across the country have awarded emotional-distress damages in cases like this for years, and defendants have rarely argued they were

unaware they could be sued for such compensation—as Premier itself never objected in the trial court.

Any other outcome would hobble the family of statutes at issue here. Prospective relief is often unavailable in cases like this, and intentional discrimination does not necessarily inflict pecuniary harm. Allowing victims of such egregious treatment to recover for their humiliation and mental anguish ensures that they are made whole and that Congress's mechanism for private enforcement remains effective.

ARGUMENT

The Fifth Circuit was wrong to reject the longstanding practice of allowing the recovery of emotional-distress damages for intentional discrimination under the statutes that incorporate the remedies allowed under Title VI. Under the traditional presumption that federal courts may award complete relief to make good the harm done, monetary damages under these statutes can include compensation for the array of harms the law calls "emotional distress." Contract law, which provides the central analogy in these circumstances, reinforces the point: Parties who promise, in exchange for monetary or other benefits, not to discriminate have long been subject to emotional-distress damages when they breach such commitments.

I. Emotional-distress damages are appropriate relief for intentional discrimination under the Rehabilitation and Affordable Care Acts.

Federal courts have the power under the Rehabilitation and Affordable Care Acts to award compensatory damages in cases involving intentional

discrimination. Emotional-distress damages fall squarely within this authority.

A. Compensatory damages are available to rectify intentional discrimination.

1. "[S]o long as a cause of action exist[s] under the Constitution or laws of the United States," the "longstanding rule" is that "'federal courts may use any available remedy to make good the wrong done.'" *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see also Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (reaffirming this "well settled" presumption). This is because the power of federal courts "to enforce" a federal statute through a cause of action carries with it "the power to make the right of recovery effective." *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 288 (1940). And the power to make the right of recovery "effective" presumes "the existence of *all* necessary and appropriate remedies." *Franklin*, 503 U.S. at 69 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)).

This "traditional presumption" of effective relief, *Franklin*, 503 U.S. at 67, has deep historical roots. Nearly one hundred years before the Founding, the Lord Holt famously declared that "if a statute gives a right, the common law will give a remedy to maintain that right," even if the only injury was "personal" and not pecuniary. *Ashby v. White*, 91 Eng. Rep. 19, 20, 1 Salk. 19, 21 (Q.B. 1702) (Holt, C.J., dissenting). While this statement was made in dissent, the House of Lords overturned the majority's decision, "thus validating Lord Holt's position" and establishing the principle for subsequent cases. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799 (2021). By the time

Blackstone penned his landmark *Commentaries*, he took it as "a general and indisputable rule" that "where there is a legal right, there is a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23 (1783). The legal remedy available was "proper redress" for the "injury" involved. *Id.* at *109.

This Court also recognized this principle "[f]rom the earliest years of the Republic." *Franklin*, 503 U.S. at 66. Holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that a writ of mandamus was available to require Marbury's judicial commission, Chief Justice Marshall stressed that "[t]he very essence of civil liberty" requires federal courts to issue a remedy "whenever [a litigant] receives an injury" to a "vested legal right." *Id.* at 163.

This presumption of effective relief is especially powerful where denying the remedy at issue would leave a plaintiff with no remedy whatsoever. Also in *Marbury*, the Court observed that our government would "certainly cease to deserve its high appellation" of "a government of laws, not men . . . if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163. Years later, the Court declared it would be "a monstrous absurdity" to afford "no remedy" where "a clear and undeniable right should be shown to exist." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838); *see also Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507 (C.C.D. Me. 1838) (Story, J.) ("I have considered it laid up among the very elements of the common law, that, whenever there is a wrong, there is a remedy to redress it.").

To be sure, federal courts are not common-law courts, and Congress sometimes enacts statutes while withholding any means of private enforcement. In such a scenario, federal courts should not "ventur[e] beyond Congress's intent" and create a cause of action where none exists. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *see also Jesner v. Arab Bank*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

But the question whether a private right of action exists at all is "analytically distinct and prior" from the question whether a particular remedy is available. *Franklin*, 503 U.S. at 69 (citation omitted). And where, as here, it is "beyond dispute that private individuals may sue to enforce" a federal statutory right, *Barnes*, 536 U.S. at 185 (quoting *Alexander*, 532 U.S. at 280), the Court "presume[s] Congress enacted th[e] statute with the prevailing traditional rule in mind." *Franklin*, 503 U.S. at 73; *see also supra* at 5-7. And that rule—once again—"is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71; *see also Sossamon v. Texas*, 563 U.S. 277, 289 (2011) (a remedy is available unless "Congress has given clear direction that it intends to *exclude* [the] remedy").

2. In *Franklin*, the Court applied the traditional rule of effective relief to Title IX—one of the statutes that, just like those directly implicated here, expressly incorporates the remedies available under Title VI. The plaintiff in that case was a high school student at a school that received federal funds. She

alleged that a sports coach and teacher at the school had subjected her to severe sexual harassment, "ask[ing] her," among other things, "about sexual experiences" and "whether she would consider having sexual intercourse with an older man." *Franklin*, 503 U.S. at 63. The coach then began to physically assault her. He "forcibly kissed her on the mouth in the school parking lot," and later pulled her out of another teacher's class "and took her to a private office where he subjected her to coercive intercourse." *Id.* Even though school administrators were aware of this conduct and similar actions towards other female students, the administrators "took no action to halt it and discouraged Franklin from pressing charges" against the coach. *Id.* at 64.

Invoking the traditional presumption of effective relief, the Court allowed Franklin's claim for compensatory damages to proceed. *Franklin*, 503 U.S. at 66-68. Because the coach had left the school, "prospective relief" would have afforded her "no remedy at all." *Id.* at 76. Nor was any other form of equitable relief, such as "backpay," available. *Id.* at 75. Only by awarding compensatory damages to redress Franklin's suffering could she be made whole and the right Congress created to protect persons like her be vindicated. *Id.* at 76.

B. Emotional-distress damages are a standard form of compensatory damages for intentional discrimination.

1. Damages for emotional distress fall comfortably within the power to award compensatory relief. This Court has repeatedly recognized that "compensatory damages may include not only out-of-pocket loss and other monetary harms," but also

"mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("Of course, emotional upset is a relevant consideration in a damages action.").

Indeed, "[d]istress is a personal injury familiar to the law," *Carey v. Piphus*, 435 U.S. 247, 263-64, 264 n.20 (1978), with a deep pedigree. Not long after the Founding, Justice Story recognized the propriety, in appropriate cases, of compensating plaintiffs for their "mental sufferings." *Chamberlain v. Chandler*, 5 F. Cas. 413, 415 (C.C.D. Mass. 1823). By the mid-nineteenth century, Greenleaf's influential treatise likewise explained that a jury could award damages "not only [for] the direct expenses incurred by the plaintiff, but also the loss of his time, his bodily sufferings, *and, if the injury was willful, his mental agony also.*" Simon Greenleaf, *A Treatise on the Law of Evidence* Ch. IV § 267, at 273 (3d ed. 1850) (emphasis added). Sedgwick likewise recognized the right to recover damages for "the *mental suffering* produced by the act or omission in question." Theodore Sedgwick, *A Treatise on the Measure of Damages* 33 (3d ed. 1858).

Of particular relevance here, common law dating back to this period—almost a century before any of the statutes at issue here was enacted—provided that innkeepers, common carriers, and other establishments open to the public could be held liable for inflicting insult, humiliation, and mental distress on would-be customers. In 1887, the Georgia Supreme Court explained in direct terms that "[w]ounding a man's feelings is as much actual

damages as breaking his limbs." *Head v. Ga. Pac. Ry. Co.*, 7 S.E. 217, 218 (Ga. 1887). By the turn of the century, a court in Texas called the issue "too well settled . . . to admit of question." *Mo., Kan. & Tex. Ry. Co. v. Ball*, 61 S.W. 327, 329 (Tex. Civ. App. 1901). Similar decisions in other states are legion.[3] And the "indignity, vexation, and disgrace" arising from intentional discrimination in this context was among the harm for which plaintiffs could recover damages beyond any "actual pecuniary damages sustained." *Chi. & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 190 (1870).

Over the years, courts have developed time-tested standards for pleading, proving, and reviewing awards for emotional injuries. *Carey*, 435 U.S. at 263-64, 264 n.20. Among other things, emotional-distress awards "must be supported by competent evidence concerning the injury," which often includes a person's conduct "observed by others." *Id.* at 264 n.20. Significant awards also tend to be supported by medical or other expert testimony, as well as "evidence of treatment by a healthcare professional and/or medication." *Duarte v. St. Barnabas Hosp.*,

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[3] For a sampling, see *Chi., St. Louis & Pittsburgh R.R. Co. v. Holdridge*, 20 N.E. 837, 839 (Ind. 1889) (compiling cases allowing recovery for "humiliation and degradation" of wrongful denial of carriage by a common carrier) (citation omitted); *Craker v. Chi. & Nw. Ry. Co.*, 36 Wis. 657, 678 (1875); *McGinnis v. Mo. Pac. Ry. Co.*, 21 Mo. App. 399, 410 (1886); *DeWolf v. Ford*, 86 N.E. 527, 530 (N.Y. 1908); *Birmingham Ry., Light & Power Co. v. Glenn*, 60 So. 111, 112 (Ala. 1912).

341 F. Supp. 3d 306, 320 (S.D.N.Y. 2018) (citation omitted) (summarizing law in Second Circuit).[4]

2. Emotional-distress damages are also regularly awarded for violations of other anti-discrimination statutes. Take, for example, the Fair Housing Act, which originated in Title VIII of the Civil Rights Act. The statute allows compensation for a person's "actual" damages. 42 U.S.C. § 3613(c)(1). Although the statute does not expressly reference emotional harm, this Court has noted that a claim of intentional discrimination in this context may be "likened to an action for . . . intentional infliction of mental distress." *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974). In fact, "many victims" of housing discrimination "rely on their emotional harm claim as their primary basis for economic compensation." Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 Ford. Urb. L.J. 1143, 1157 (2003); *see also id.* at 1152-56.

It is not hard to see why. "[I]n most instances, the economic losses, or the out-of-pocket expenses that result from housing discrimination, are not typically extensive." Goode & Johnson, *supra,* at

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[4] To be sure, "[m]edical or other expert evidence is not required to prove emotional distress." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997); *accord Mendez-Matos v. Mun. of Guaynabo*, 557 F.3d 36, 47 (1st Cir. 2009) (noting agreement across the circuits on this issue). But a plaintiff's testimony alone is unlikely to support a substantial award. *See, e.g.*, *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 205-06 (3d Cir. 1996) (upholding remittitur of award of $300,000 to $5,000 where the award rested solely on plaintiff's testimony).

1157. "By the time the issues are litigated, the plaintiff will likely have found alternative housing." *Id.* Yet the shock and emotional pain of being denied access to an available residence based solely on one's race—of being told, in effect, "your kind is not welcome here"—can be severe. The resulting mix of anger, shame, and resentment can inflict significant "psychological trauma." *Id.*

Title VII, which forbids discrimination in employment on the basis of race, sex, or other characteristics, is in accord. When Congress amended the statute to allow compensatory damages, it also made clear that, in cases of intentional discrimination, plaintiffs may recover for their "emotional pain, suffering," and "mental anguish." 42 U.S.C. §§ 1981a(a)(1), (b)(3); *see also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) (noting that this amendment was intended to bring Title VII "into alignment" with other statutes prohibiting intentional discrimination). Examples of such "[e]motional harm" include "sleeplessness, anxiety, stress, depression," or even a "nervous breakdown." EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991* (July 14, 1992).

42 U.S.C. § 1983 likewise allows individuals to recover compensatory damages for violations of their constitutional rights, including violations of the Equal Protection Clause's prohibition against intentional discrimination. *See, e.g.*, *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 47-50, 55 (2d Cir. 2002). That statute does not specify the types of compensatory relief available. But the

Court has held that such relief "may include not only out-of-pocket loss and other monetary harms, but also such injuries as . . . mental anguish and suffering." *Memphis Cmty. Sch. Dist.*, 477 U.S. at 307; *see also Carey*, 435 U.S. at 264; *Patrolmen's Benevolent Ass'n*, 310 F.3d at 55-56.[5]

3. State public accommodation laws are in accord. With only a few exceptions, these laws permit recovery of emotional-distress damages for intentional discrimination by common carriers, restaurants, theaters, hotels, and other service providers. *See* Ronald F. Chase, Annotation, *Recovery of Damages for Emotional Distress Resulting From Racial, Ethnic, or Religious Abuse or Discrimination*, 40 A.L.R.3d 1290, § 2(a) (1971 & 2021 Supp.) (collecting authorities). In an early case under such a statute, a theater owner argued that its insistence upon racially segregated seating inflicted "no personal injury" on a Black man denied a seat on the floor, and thus that there could be no recovery beyond damages for the cost of the plaintiff's ticket in a "white" section of the theater. *Anderson v. Pantages Theater Co.*, 194 P. 813, 816 (Wash. 1921). The Washington Supreme Court responded: "[T]his is not

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[5] Some federal statutes foreclose compensatory relief altogether. *See, e.g.*, 42 U.S.C. § 12188(a) (Title III of ADA). But where statutes allow such damages and Congress has wished to restrict recovery for emotional distress, it has done so expressly. The Prison Litigation Reform Act (PLRA), for example, provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997(e).

the rule. The act alleged in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering are elements of actual damages for which a compensatory award may be made." *Id.*

C. Emotional-distress damages are equally appropriate under the statutes here.

Just as under other anti-discrimination laws, emotional-distress damages are an appropriate remedy for intentional violations of the anti-discrimination provisions of the statutes that track the remedies available under Title VI.

1. Intentional discrimination of the sorts at issue here can inflict severe mental harms. First and foremost, discrimination on the basis of race, sex, or disability in the commercial marketplace "deprives persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and inflicts a "profound personal humiliation," *Powers v. Ohio*, 499 U.S. 400, 413 (1991); *see also J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994). Put another way, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment a person surely must feel when he is told he is unacceptable as a member of the public." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg. J., concurring) (citation omitted).

The situation in schools and other places of public accommodation is no different. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court explained that segregating Black students in school

based solely on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way that is unlikely ever to be undone." *Id.* at 494. The same is true of more modern, though no less intentional, forms of discrimination. In recent decades, for instance, persons with significant physical disabilities (including visual and auditory impairments) have sometimes been reflexively prohibited from serving on juries. *See* Br. for Amici Curiae Paralyzed Veterans of Am. et al. 10-11, *Tennessee v. Lane*, 541 U.S. 509 (2004) (No. 02-1667). The import of such actions is to brand persons with disabilities as less worthy of participation in civic affairs—in essence, as less worthy of citizenship. That sort of gut punch can produce intense mental anguish.

Intentional discrimination of the sort at issue here also "reinvokes a history of exclusion." *J.E.B.*, 511 U.S. at 142. For far too long, governmental and private commercial actors directly segregated the races and subjugated people based on sex. These actions caused "immeasurable human suffering"—suffering that can manifest as emotional distress when a fresh episode of intentional discrimination is experienced. *Adarand Const. Co. v. Pena*, 515 U.S. 220, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment). "[H]istorically, society has [also] tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101 (congressional finding in ADA). Therefore, when a would-be patron like Ms. Cummings is denied an interpreter or is otherwise prevented from obtaining a service ostensibly available to the public at large, it is not a mere inconvenience or forgettable slight. It stirs up feelings of officialized marginalization or worse.

Discrimination covered by the statutes at issue can also be carried out by physical acts. Recall, for example, that the student in *Franklin* endured repeated sexual assaults—first, unwanted kissing on the mouth and then forced intercourse. *See* 503 U.S. at 63. The plaintiff in *Tennessee v. Lane*, 541 U.S. 509, 513-14 (2004), a case brought under Title II of the ADA, had to crawl up two flights of stairs inside a public building because the building lacked proper wheelchair access. Other individuals with disabilities have been made to endure other traumas. *See, e.g.*, *Williams v. City of New York*, No. 1:12-cv-06805-VEC, 2015 Jury Verdicts LEXIS 55071 (S.D.N.Y. Oct. 27, 2015) (baseless arrest and injection of medication); Compl. ¶¶ 13, 16-17, *Blum v. St. Elizabeth Hosp.*, No. 1:95 cv-00170 (E.D. Tex. Mar. 29, 1995), ECF No. 1 (painful medical treatment without understanding or consent). Such indignities may not result in hospital bills or missed days from the office (though they sometimes do). But the physical aspects of some discriminatory harm can amplify the violation of individual integrity all the more.

Indeed, emotional-distress damages are "particularly appropriate" where, as here, the discrimination causes significant mental suffering but does *not* cause some pecuniary harm that can be measured by tallying up receipts or hours on time cards. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1203 (11th Cir. 2007). In cases such as this one, emotional-distress damages are often not just appropriate, but "the *only* 'available remedy to make good the wrong done.'" *Id.* (quoting *Franklin*, 503 U.S. at 66).

2. Asserting that emotional-distress damages "share many of the same characteristics of punitive damages," Premier argues that *Barnes* bars the recovery of emotional-distress damages in this context. Supp. BIO 10. *Barnes*, however, does not support the Fifth Circuit's decision. It confirms that the Fifth Circuit's reasoning is erroneous.

Barnes reaffirmed the "well settled" presumption that "where 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." 536 U.S. at 189 (quoting *Bell*, 327 U.S. at 684). And *Barnes* reiterated that Title VI allows victims of discrimination to recover "compensatory damages." *Id.* at 187. The Court simply barred punitive damages because they "are not compensatory, and are therefore not embraced within the rule described in *Bell*." *Id.* at 189.

Damages for emotional distress, in contrast, are "plainly a form of compensatory damages designed 'to make good the wrong done.'" *Sheely*, 505 F.3d at 1198 (quoting *Barnes*, 536 U.S. at 189). In fact, such damages will often be necessary to make a victim of discrimination whole. Emotional-distress damages thus fall squarely within the traditional presumption of effective relief when a funding recipient intentionally violates its commitment to refrain from discriminating based on race, sex, or disability.

It does not matter that mental harm is not perfectly quantifiable. *Contra* Supp. BIO 11. There is no set price for the pain and suffering that comes with a broken arm or the death of a loved one, either. Yet the law has long allowed recovery for that

undeniable aspect of such injuries. By the same token, it may be impossible to calibrate the damage to a person's reputation that defamatory statements cause. But monetary relief for the "actual harm" of "impairment of reputation and standing in the community" is a "customary" form of compensatory damages for defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). (So too is compensation for "personal humiliation[] and mental anguish and suffering." *Id.*) Such recovery is appropriate even where this Court has held that punitive damages are too "unpredictable" or indeterminate to be allowed. *Id.*; *see also McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in denial of certiorari) (citing historical materials allowing "special damages" for "injury to reputation").

So too here. Juries can be instructed regarding how to measure emotional-distress damages. *See, e.g.*, *Barker v. Niles Bolton Assocs., Inc.*, 316 Fed. Appx. 933, 939-40 (11th Cir. 2009). And subject to Seventh Amendment constraints, courts may employ guideposts or benchmarks to regularize such awards. *See, e.g.*, *Setty v. Synergy Fitness*, 2019 WL 1292431, at *4-5 (E.D.N.Y. Mar. 21, 2019) (outlining the "continuum" of emotional-distress awards within the Second Circuit, depending on severity of harm and type of proof, and noting that awards in "typical or 'garden-variety'" cases range from $5,000 to $35,000); *Joseph v. HDMJ Rest., Inc.*, 970 F. Supp. 2d 131, 153-54 (E.D.N.Y. 2013) (remitting award from $50,000 to $30,000 to bring it in line with "awards to plaintiffs [in other cases] who suffered similar injuries"). But courts may not deny such damages altogether just because their measurement can be inexact.

II. Contract law confirms the propriety of emotional-distress damages in this context.

The Fifth Circuit did not dispute that "a funding recipient can foresee that an [individual] might suffer an emotional injury as a result of" intentional discrimination. Pet. App. 12a. It nevertheless held that emotional-distress damages are not an appropriate remedy in this context because violations of Spending Clause legislation are like breaches of contracts, and emotional-distress damages are "generally unavailable under contract law." *Id.* 13a. In truth, however, contract law points in exactly the opposite direction: It confirms that emotional-distress damages are available.

A. Damages for emotional distress are traditionally available for breaches of anti-discrimination contract provisions.

1. 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). Title VI, for example, "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts 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).

Based on the "contractual nature" of Title VI and other statutes incorporating its remedies, this Court held in *Barnes v. Gorman*, 536 U.S. 181 (2002), that contract law dictates "the *scope* of damages remedies" when those statutes are violated. *Id.* at 187. Specifically, the Court reasoned that because Title VI

and related statutes are akin to voluntary contracts with the government, "a remedy is 'appropriate relief' only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* (emphasis and citation omitted). The Court again invoked contract law to define the *extent* of funding recipients' notice, instructing that "[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.*

2. Those traditional contract remedies include damages for emotional distress. In *Barnes*, this Court looked to the Restatement and three leading treatises to define the scope of contract damages. 536 U.S. at 187-88. All four of those sources recognize that "[r]ecovery for emotional disturbance" is allowed if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 (1981); *see also* E. Allan Farnsworth, *Contracts* § 12.17, at 895 & n.18 (1982) (collecting cases). Or, put differently, "where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach." 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 45, at 61 (8th ed. 1891) (citation omitted); *see also* 3 Samuel Williston, *The Law of Contracts* § 1340, at 2396 (1920) (similar).

Those traditional common-law standards aptly describe a funding recipient's intentional breach of its promise to refrain from discrimination. *See supra* at

25-27. Indeed, courts adjudicating common-law cases involving breaches of promises along these lines have regularly approved awards of emotional-distress damages. Over one hundred years ago, the New York Court of Appeals affirmed the award of such damages where a person with a ticket to use a bathhouse was denied entry and turned away with a derogatory term for a person with Jewish ancestry. *Aaron v. Ward*, 121 N.Y.S. 673, 673-74 (N.Y. App. Div. 1910), *aff'd*, 96 N.E. 736 (N.Y. 1911); *see also Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312, 316 (N.Y. Sup. Ct. 1942) (emotional-distress damages where hotel restaurant refused to serve patron because of his race). Even before that, the Tennessee Supreme Court upheld damages for "injuries to [the] feelings and sensibilities" of a passenger who had been verbally harassed by the operator of a streetcar, in violation of a contractual duty to "guarant[ee] to its passengers respectful and courteous treatment." *Knoxville Traction Co. v. Lane*, 53 S.W. 557, 559-60 (1899).

It is likewise undeniable that when Congress insisted that recipients of federal funds pledge to refrain from discrimination, it was contracting for "other than pecuniary benefits." *Sedgwick* § 45, at 61. The Congress that enacted Title VI understood that "the affronts and denials" that that legislation targeted "are intensely human and personal." S. Rep. No. 88-872, at 15 (1964) (citation omitted). "[T]hey strike at the root of the human spirit, at the very core of human dignity." *Id.* And in prohibiting disability discrimination, Congress likewise sought in part to protect "non-economic" interests by eliminating "arbitrary, confining, and humiliating treatment." H.R. Rep. No. 101-485, pt. 2, at 47 (1990).

B. The Fifth Circuit had no warrant to brush aside the traditional rule.

The Fifth Circuit did not dispute that contract law traditionally allows emotional-distress damages for breaches of anti-discrimination provisions or the like. It nevertheless held, for two reasons, that such damages are inappropriate here. Pet. App. 9a. First, the Fifth Circuit characterized the allowance of emotional-distress damages in the discrimination or mistreatment context as a "narrow exception" to a more general rule that such damages are not recoverable for breaches of contract. *Id.* 10a. Second, the Fifth Circuit asserted that "the contract-law analogy is only a metaphor" for what the court viewed as a more impressionistic fair-notice inquiry, which it concluded was not satisfied here. *Id.* 9a. Neither of these rationales withstands scrutiny.

1. It is true that emotional-distress damages are not available for a breach of an "ordinary commercial contract," where "[p]ecuniary interests are paramount." *Stewart v. Rudner*, 84 N.W.2d 816, 823 (Mich. 1957). "Yet not all contracts are purely commercial in their nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal." *Id.* And in cases involving the breach of contracts protecting such personal or dignitary interests, "the award of damages for mental distress and suffering is a commonplace." *Id.*; *see also* Richard A. Lord, 24 *Williston on Contracts* § 64:11 (2021) (noting that "[n]umerous cases allowing the recovery of emotional distress damages for breach of contract exist").

Indeed, while some courts and commentators have called the more fine-grained rule that applies in

cases like this an "exception," *Stewart*, 84 N.W.2d at 824, others have explained that "there is no general rule barring [emotional-distress damages] in actions for breach of contract" at all, *Sullivan v. O'Connor*, 296 N.E.2d 183, 188-89 (Mass. 1973). "It is all a question of the subject matter and background of the contract." *Id.* Where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result," emotional-distress damages are available. Restatement (Second) of Contracts § 353; *see also supra* at 31.[6]

Yes, such contracts or breaches—viewed against the entire universe of potential controversies—might be relatively "rare." Pet. App. 9a-10a. But that is just another way of saying that the general foreseeability test that governs in this situation is satisfied only in particular settings. This is one of those settings—indeed, a paradigmatic one.

At any rate, it makes no difference whether the governing contract rule here is an "exception" or merely a particular application of a more general principle. At common law, for example, an injunction

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[6] Over one hundred years ago, a leading treatise made the same basic point: "The doctrine that damages for mental suffering are not recoverable in actions on contract is only maintainable as a general proposition in so far as it is usually true that mental suffering is not a natural and proximate cause of a breach of contract. . . . Where . . . distress of mind is a natural and proximate consequence of a breach of contract, it should be considered by the jury as a legitimate element of damages, as where the circumstances attending and matter of breach are such as would ordinarily cause mental suffering." Archibald Robinson Watson, *A Treatise on the Law of Damages for Personal Injuries* § 415, at 529 (1901).

was available for a breach of contract only if damages were inadequate. Restatement (Second) of Contracts § 359 cmt. a (1981). Despite that exceptional status, this Court made clear in *Barnes* that Title VI authorizes "injunction[s]." 536 U.S. at 187. Similarly, the general common-law rule was that only the parties to a contract could enforce it; suits by third-party beneficiaries were the exception. Restatement (Second) of Contracts § 302 (1981). But as *Barnes* explained, the whole premise of allowing suits by victims of discrimination under statutes that incorporate Title VI's remedies is that a funding recipient "may be held liable to third-party beneficiaries." 536 U.S. at 187.

In short, the governing rule in the specific context here is that emotional-distress damages are available in cases involving breaches of contractual anti-discrimination provisions. And the governing rule is just that: the governing rule. That reality makes emotional-distress damages a "form[] of relief traditionally available" in suits for breaches of the type of contractual commitments at issue here. *Barnes*, 536 U.S. at 187. The Fifth Circuit had no warrant to apply one contract-law rule (emotional-distress damages are generally unavailable) yet ignore another, more directly applicable one (such damages are available where mental suffering is a particularly likely result of breach). By taking a line-item-veto approach to contract law, the Fifth Circuit imposed a limit of its own creation, with no foundation in the common law or in this Court's decisions.

2. The Fifth Circuit's demotion of contract law to "only a metaphor" for a more impressionistic inquiry

regarding the likely expectations of funding recipients, Pet. App. 9a, fundamentally misapprehended *Barnes*'s reliance on contract law. *Barnes* adopted a simple rule: Because a funding recipient is effectively entering into a contract with the government, it is deemed to be "on notice" that it is subject to "those remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. The Court never asked, as the Fifth Circuit did, whether funding recipients are "[]likely to be aware" of the remedies traditionally available in an analogous contract case. Pet. App. 10a; *see Barnes*, 536 U.S. at 187.

The Court had good reason to eschew any such inquiry. In all sorts of contexts, courts rely on the venerable principle that "[e]very citizen is presumed to know the law." *Georgia v. Public.Resource.Org*, 140 S. Ct. 1498, 1507 (2020) (citation omitted). That means *all* of the law—not just the rules that meet some ill-defined threshold of notoriety. For instance, criminal law must give "fair notice of the conduct it punishes." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). Yet no defendant may evade punishment on the ground that the statutory provision under which he was charged is an obscure or rarely invoked one, or an exception to some more general rule. *See, e.g.*, 18 U.S.C. § 922(g) (criminalizing exceptions to the general rule that persons may lawfully possess firearms). Nor can any individual defeat criminal charges by saying the general populace is unaware of pertinent wrinkles in applicable common law. *See, e.g.*, *Stokeling v. United States*, 139 S. Ct. 544, 550-52 (2019); *Rogers v. Tennessee*, 532 U.S. 451, 459-67 (2001).

Any other approach would be wholly unmanageable. Here, for example, courts would have no dependable way to determine what tens of thousands of federal funding recipients actually know about traditional contract remedies or when they "think that they might be liable" for a breach, Pet. App. 10a. Nor would any purportedly objective approach to the question of awareness be workable. Different judges are bound to have vastly different guesstimates regarding the legal expectations of the array of enterprises that receive federal funds. By instead relying directly on the common law, *Barnes* adopted a principled, readily identifiable, and administrable yardstick grounded in the legal tradition of fair notice.

Finally, even if funding recipients' likely knowledge of contract law were somehow relevant, the Fifth Circuit's assessment in that regard would still be puzzling. The Fifth Circuit assumed that funding recipients like Premier are aware that Section 353 of the Restatement generally excludes emotional-distress damages from the range of remedies for breach of contract. Pet. App. 9a. Yet the Fifth Circuit simultaneously posited that funding recipients are likely ignorant of the rule—described in the very same section of the Restatement—that emotional-distress damages *are* allowed where mental anguish is particularly likely to result. *See* Pet. App. 10a. And the Fifth Circuit never mentioned that both components of the Restatement provision trace back to the more general rule—memorialized in the celebrated case of *Hadley v. Baxendale*, 156 Eng. Rep. 145, 9 Exch. 341 (1854)—that damages "should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual

course of things, from such breach of contract itself, or such as may reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Id.* at 151; *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 596 n.20 (1981) (Stevens, J., dissenting) (noting that "[e]very first-year law student is familiar with th[e] rule" as described in this case).

There is no reason why someone would have such selective knowledge of an interlocking set of principles, all based on the same overall concept of foreseeability. On the contrary, private businesses and governmental entities that enter into multi-million-dollar contracts with the federal government are sophisticated parties that are deeply familiar with contract law, as well as with the common-sense reality that intentional discrimination is likely to cause mental anguish. Such funding recipients should not be able to evade remedies that have been available for over a century for the specific sort of breach at issue here.

What is more, decades of experience refute the Fifth Circuit's speculation that funding recipients are unaware of their potential liability. Victims of discrimination have long sought and recovered emotional-distress damages under Title VI and the statutes that incorporate its remedies. *See supra* at 2-3. If funding recipients truly lacked notice of their exposure to such damages, they would surely object. Yet for the most part, they have not. In this very case, Premier said not a word on the subject until the district court raised it sua sponte. Nor have funding recipients objected to longstanding administrative

guidance—recently updated to incorporate the ACA—expressly advising that compensatory damages available under the family of statutes at issue here include monetary relief for "emotional distress."[7] Given that experience, it strains credulity to suppose that funding recipients like Premier are taken by surprise when victims seek to recover for the mental injuries they predictably suffer because of invidious discrimination.

3. Attempting to justify its rejection of the common law of contracts, the Fifth Circuit also invoked two other aspects of *Barnes.* Neither supports the Fifth Circuit's holding.

First, the Fifth Circuit referenced this Court's statement that "contract-law principles" do not apply to "all issues" raised by Title VI. *Barnes*, 536 U.S. at 188 n.2; *see* Pet. App. 8a. But *Barnes* could not have been clearer in holding that contract principles *do* inform the issue here: "the *scope* of damages remedies." 536 U.S. at 187.

Second, the Fifth Circuit noted that *Barnes* disapproved punitive damages even though "contract law" has "exceptions for awarding punitive damages." Pet. App. 10a. The Fifth Circuit thus suggested that *Barnes* itself departed from the common law. *Id.* But

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[7] DOJ, *Title VI Legal Manual* § 9, at 5 (2017), https://perma.cc/D46X-5FLE; *see also* DOJ, *Americans with Disability Act, Title II Technical Assistance Manual* § II-9.2000 (1994 Supp.), https://perma.cc/359G-7UHQ; *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160, 37,202 (June 19, 2020) (damages available under the Affordable Care Act "should conform to [DOJ's] Title VI manual").

the very source the Fifth Circuit cited explains that 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 emotional-distress damages, which are available even in pure contract cases. *Id.* § 353.

All in all, *Barnes* held that punitive damages are unavailable under the statutes at issue here not because contract law was irrelevant or even merely an optional touchpoint, but rather because contract law did not allow punitive damages under the circumstances there. Contract law points in precisely the opposite direction here.

C. Barring emotional-distress damages would hobble the family of anti-discrimination laws at issue here.

The consequences that the Fifth Circuit's newly minted limit on compensatory relief would produce "underscore[] the implausibility" of its holding. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). In particular, the Fifth Circuit's rule would severely undercut private rights of action that Congress has repeatedly deemed essential to the enforcement of the Nation's anti-discrimination laws.

1. Congress has repeatedly reinforced and extended Title VI's private right of action to new contexts, incorporating it—as directly relevant here—into the Rehabilitation Act and the Affordable Care Act, as well as into Title IX and Title II of the ADA. *See supra* at 6-7. Today, the remedies available under all of these statutes 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.

This family of statutes embodies the Nation's commitment to deterring and redressing invidious discrimination. These statutes also reflect Congress's judgment that the federal government cannot, and should not, shoulder the burden of enforcing those laws by itself. Instead, "[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). And Congress's repeated decision to authorize private enforcement by incorporating Title VI's remedies reflects a considered judgment that those remedies are the most appropriate method of deterring discrimination and compensating victims.

2. Categorically denying recovery for emotional distress would frustrate those congressional judgments. In many cases covered by Title VI and the statutes that incorporate its remedies, "emotional distress is the only alleged damage to the victim and the *only* available remedy to make good the wrong done." *Sheely*, 505 F.3d at 1199 (internal quotation marks omitted). Taking away that remedy would leave many victims of discrimination with little reason to report their injuries or ability to enforce their rights in court.[8]

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[8] Title VI also authorizes injunctive relief. *Barnes*, 536 U.S. at 187. But as this Court has explained, injunctive relief is often "clearly inadequate." *Franklin*, 503 U.S. at 76. It is not available at all where, as in *Franklin* and in this case, the plaintiff is unlikely to interact with the defendant again. *See id.*; Pet. App. 20a-21a. And even where injunctive relief is available, it provides no financial deterrent and does nothing to remedy the harms inflicted by past discrimination.

Cases of sexual and racial harassment in schools are an obvious example. We have already discussed the *Franklin* case and why any remedy emotional-distress damages were essential to address the harm the student suffered. *See supra* at 18-19. Similarly, the plaintiff in *Davis* was an elementary school student whose school was deliberately indifferent to a "prolonged pattern of sexual harassment" and abuse by another student. 526 U.S. at 633. She suffered severe emotional trauma, including thoughts of "suicide." *Id.* at 634. But like the plaintiff in *Franklin*, she had no economic damages to assert. *See* Pet. App. at 100a-01a, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843). Denying recovery for emotional distress would have left those victims—and many others—with "no remedy" under federal anti-discrimination law to redress their injuries. *Franklin*, 503 U.S. at 76.

The same is true in many cases of disability discrimination. In *Fry*, for example, an elementary school's refusal to accommodate a student's service dog inflicted "emotional distress," "embarrassment," and "mental anguish," but no economic loss. *Fry*, 137 S. Ct. at 752 (citation omitted). The same thing often happens when a medical provider refuses to accommodate a potential patient's disability. If, as in this case, the refusal forces the victim to seek treatment elsewhere, it inflicts frustration and humiliation from the discriminatory exclusion—but typically no pecuniary loss.

More acute psychological trauma can result when an emergency compels a patient to accept treatment despite a medical provider's refusal to accommodate her disability. For example, in *Liese v.*

Indian River County Hospital District, 701 F.3d 334 (11th Cir. 2012), a deaf patient who needed emergency gallbladder surgery did not understand what was happening to her for more than a day because the hospital refused to provide an ASL interpreter. *Id.* at 338-41; *see, e.g.*, *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 272 (2d Cir. 2009) (hospital failed to provide interpreter for deaf patient who suffered a stroke).

These harassment and failure-to-accommodate cases are paradigmatic violations of Title VI, Title IX, and the Rehabilitation Act. Congress has deliberately and repeatedly conferred a private right of action to deter intentional violations of those statutes and to allow victims to recover compensation for the resulting harms. *See, e.g.*, *Barnes*, 536 U.S. at 185. Yet in whole categories of cases, denying emotional-distress damages would leave victims with "no remedy at all" under federal law to compensate for their injuries. *Franklin*, 503 U.S. at 76. In the process, it would also stymie Congress's considered decision to rely on private enforcement by removing any realistic prospect of private suits.

CONCLUSION

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

Respectfully submitted,

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