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 OF *AMICI CURIAE* THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF TEXAS, AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL*
CARA MCCLELLAN
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
40 RECTOR STREET, 5TH FLOOR
NEW YORK, NY 10006
212-965-2200
SSPITAL@NAACPLDF.ORG

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15TH STREET NW
WASHINGTON, DC 20005

* COUNSEL OF RECORD

AUGUST 30, 2021

CONTINUES ON INSIDE COVER

JIN HEE LEE
MAHOGANE D. REED
NAACP LEGAL DEFENSE
AND EDUCATIONAL
FUND, INC.
700 14TH STREET NW,
SUITE 600
WASHINGTON, DC 20005

EMILY MARTIN
SHIWALI G. PATEL
ELIZABETH TANG
NATIONAL WOMEN'S LAW
CENTER
11 DUPONT CIRCLE NW,
SUITE 800
WASHINGTON, DC 20036

JENNESA CALVO-
FRIEDMAN
ALEXANDRA
BORNSTEIN
SANDRA S. PARK
ALEXIS
AGATHOCLEOUS
AMERICAN CIVIL
LIBERTIES
UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004

SAVANNAH KUMAR
ANDRE SEGURA
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
TEXAS
5225 KATY FWY., STE.
350
HOUSTON, TX 77007

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Race Discrimination Causes Serious Non-Economic Injuries That Have Long Been Redressable Through Emotional Distress Damages. 6

i. Courts have long awarded emotional distress damages as a compensatory remedy in race discrimination cases. 8

ii. The Civil Rights Act of 1964 was passed to address the dignitary harm associated with race discrimination, and courts have since properly permitted private litigants to recover damages for emotional and other non-economic harm. 10

II. Sex Discrimination Prohibited by Title IX Foreseeably Inflicts Emotional Harms That Can Only be Remedied with Non-Pecuniary Damages. 15

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. Choate,
469 U.S. 287 (1985) 1

Alexander v. Sandoval,
532 U.S. 275 (2001) 1

Allen v. Wright,
468 U.S. 737 (1984) 6, 7

Alston v. Va. High Sch. League, Inc.,
176 F.R.D. 220 (W.D. Va. 1997) 19, 20

Amos v. Prom, Inc.,
115 F. Supp. 127 (N.D. Iowa 1953)....................... 9

Anderson v. Pantages Theater Co.,
194 P. 813 (Wash. 1921)...................................... 10

Barnes v. Gorman,
536 U.S. 181 (2002) 2, 5

Bazemore v. Friday,
478 U.S. 385 (1986) 1

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 7, 10

Browning v. Slenderella Sys. of Seattle,
341 P.2d 859 (Wash. 1959).................................... 9

Cannon v. Univ. of Chi.,
441 U.S. 677 (1979) 5, 6, 16

Carnell Construction Corp. v. Danville Redevelopment & Hous. Auth.,
No. 4:10CV00007, 2011 WL 1655810 (W.D. Va. May 3, 2011) 13

Chi. & Nw. Ry. Co. v. Williams,
55 Ill. 185 (Ill. 1870) 8

Comcast Corp. v. National Ass'n of African American-Owned Media,
140 S. Ct. 1009 (2020) 1

Communities for Equity v. Mich. High Sch. Athletic Ass'n,
178 F.Supp.2d 805 (2001).................................... 18

Daniel v. Paul,
395 U.S. 298 (1969) 3, 12

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999) 5, 21

Dawn L. v. Greater Johnstown Sch. Dist.,
586 F. Supp. 2d 332 (W.D. Pa. 2008)............. 22, 23

DJ v. Sch. Bd. of Henrico Cty.,
488 F. Supp. 3d 307 (E.D. Va. 2020).................... 14

Franklin v. Gwinnett Cty. Pub. Schs.,
503 U.S. 60 (1992) 5, 16, 22, 25

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998) 16, 21, 24

Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania,
458 U.S. 375 (1982) 7

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 6, 12

Heckler v. Mathews,
465 U.S. 728 (1984) 4, 17

Jacques v. Adelphi Univ.,
No. CV 10–3076, 2011 WL 6709443
(E.D.N.Y. Dec. 19, 2011) 12

Lyons v. Ill. Greyhound Lines,
192 F.2d 533 (7th Cir. 1951) 8

Monteiro v. Tempe Union High Sch. Dist.,
158 F.3d 1022 (9th Cir. 1998) 13, 14

Odom v. East Avenue Corp.,
34 N.Y.S.2d 312 (N.Y. Sup. Ct. 1942).................... 9

Pederson v. La. State Univ.,
213 F.3d 858 (5th Cir. 2000) 19

Peters v. Sch. Bd. of City of Va. Beach,
No. 2:01CV120, 2007 WL 295618
(E.D. Va. Jan. 26, 2007) 13

Powell v. Utz,
87 F. Supp. 811 (E.D. Wash. 1949)........................ 9

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 16

Rose v. Mitchell,
443 U.S. 545 (1979) 3

Scarlett v. School of Ozarks, Inc.,
780 F. Supp. 2d 924 (W.D. Mo. 2011) 12

Sheely v. MRI Radiology Network, P.A.,
505 F.3d 1173 (11th Cir. 2007) 15

Solomon v. Pa. R.R. Co.,
96 F. Supp. 709 (S.D.N.Y. 1951) 8

Stinson v. Maye,
824 F. App'x 849 (11th Cir. 2020) 23, 24

Zeno v. Pine Plains Cent. Sch. Dist.,
702 F.3d 655 (2d Cir. 2012)................................. 14

Other Authorities

Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* 46 (2015)............................... 17

Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L. J. 1 (1981) 11

David R. Williams & Ruth Williams-Morris, *Racism and Mental Health: The African American Experience*, 5 ETHNICITY & HEALTH 243 (2000) 7

Emily R. Dworkin et al., *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis,* CLIN. PSYCH. REV. 65 (2017) 17

Louise F. Fitzgerald, et. al, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model,* 82(4) J. APPLIED PSYCH. 578 (1997) 17

Matter of Simple Justice: The Report of the President's Task Force on Women's Right and Responsibilities, 7 (1970) 18

The Morning of the March, THE NEW YORKER:DOUBLE TAKE (August 10, 2017)... 11

NAT'L PARK SERV., *March on Washington for Jobs and Freedom* (Aug. 10, 2017)................. 11

NiCole T. Buchanan, et. al., *Effects of Racial and Sexual Harassment on Work and the Psychological Well-Being of African American Women,* 13(2) J. OCCUPATIONAL HEALTH PSYCH. 137 (2008).. 17

PRESIDENT'S COMM. ON CIVIL RIGHTS, *To Secure These Rights: The Report of the President's Committee on Civil Rights*, VIII (1947).. 11

U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Nondiscrimination of the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 85 FED. REG. 30026, 30056 (May 19, 2020) 20

U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034 (1997) 20

INTERESTS OF *AMICI CURIAE*[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*. The **ACLU of Texas** is one of its statewide affiliates.

The **NAACP Legal Defense and Educational Fund, Inc. (LDF)** is the nation's first and foremost civil rights organization. Since its founding in 1940, LDF has fought to secure the promise of equality and due process for all Americans. LDF has litigated many cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Alexander v. Choate*, 469 U.S. 287 (1985). LDF has also served as *amicus curiae* in cases involving Title VI and other antidiscrimination statutes. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020). LDF has a substantial interest in the outcome of this case, which will affect LDF's continued ability to ensure victims of discriminatory

---

[1] Pursuant to Supreme Court Rule 37.3, counsel for the Petitioner has consented to the filing of this brief, and counsel for the Respondent has granted blanket consent for the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

acts by federal financial recipients are fully compensated for their harms.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of importance to women and girls, including education, income security, child care, workplace justice, and reproductive rights and health, with an emphasis on the needs of low-income women, women of color, and others who face multiple and intersecting forms of discrimination. NWLC has specifically worked to secure equal opportunity in education for women and girls through enforcement of Title IX of the Education Amendments of 1972 and other laws prohibiting sex discrimination. NWLC is committed to eradicating sexual harassment, which includes sexual assault, as a barrier to educational access.

SUMMARY OF ARGUMENT

Beginning with Title VI of the Civil Rights Act of 1964, Congress has repeatedly invoked its authority under the Spending Clause to prohibit recipients of federal financial assistance from discriminating in the provision of goods and services on the basis of race, sex and disability. Each of these antidiscrimination provisions expressly incorporates the rights, enforcement mechanisms, and remedies available under Title VI. As a result, the remedies available under this family of statutes are "coextensive with the remedies available in a private cause of action brought under Title VI." *Barnes v. Gorman*, 536 U.S. 181, 185

(2002). Although this case concerns whether emotional distress damages are available under the Rehabilitation Act and the antidiscrimination provision of the Affordable Care Act, the Court's answer to the question presented will necessarily determine the availability of emotional distress damages in cases of race discrimination under Title VI and sex discrimination under Title IX of the Education Amendments of 1972.

Intentional race discrimination has long been recognized as one of the gravest harms in our society. "[O]dious in all aspects," intentional race discrimination relegates Black people and other people of color to second-class citizenship and often inflicts extreme emotional and stigmatic injury. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). For more than a century, state and federal courts across the country have permitted victims of intentional race discrimination to recover for the emotional, mental, and stigmatic injuries they suffered because of racially discriminatory treatment. Confronting and remedying the non-economic effects of intentional discrimination also animated the passage of Title VI. Congress's "overriding purpose" in passing the Civil Rights Act of 1964 was to address the "affront[s] and humiliation involved in discriminatory denials" of equal treatment on the basis of race. *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (quoting H.R. Rep. No. 88-914, at 18 (1963)).

In the half century since Title VI's enactment, courts have properly and routinely permitted private plaintiffs to recover emotional distress damages where federal financial recipients have intentionally discriminated in violation of the Act. Given the widespread understanding then and now that

discrimination inflicts dignitary, stigmatic, and emotional harm, federal financial recipients are on notice that Title VI authorizes victims of racial discrimination to recover emotional distress damages. A contrary ruling would not only contradict longstanding understanding and practice, but also thwart Congress's intent in passing the Civil Rights Act.

Sex discrimination, too, often causes "serious non-economic injuries," *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). As countless cases illustrate, such emotional and dignitary injuries may stem from differential treatment that sends a message of inferiority, or from a school's deliberate indifference to sexual assaults or harassment. Title IX, which was modeled after Title VI, prohibits sex discrimination in federally-funded education programs, and, like Title VI, allows individuals to seek damages for harm suffered because of intentional discrimination. Like the harm from race discrimination, the harm that stems from Title IX violations primarily—and often exclusively—consists of emotional distress and other stigmatic injuries. That is particularly true among students who, given their youth, may not be able to demonstrate significant pecuniary damages, but who suffer real and lasting emotional harm from sex discrimination.

The Fifth Circuit's categorical rule barring all emotional distress damages would leave many Title IX beneficiaries without a remedy for the serious harms they have suffered. Properly construed, the family of statutes at issue—protecting against discrimination based on disability, race, and sex—affords courts the authority to make plaintiffs whole, compensating for

all their foreseeable injuries, both pecuniary and emotional.

Amici curiae submit this brief to highlight the critical importance and longstanding acceptance of emotional distress damages for victims of intentional race and sex discrimination under Title VI and Title IX. Upholding the decision below would deny victims of race, sex, and disability discrimination compensable "make whole" remedies for some of the most pernicious and consequential injuries inflicted by race or sex discrimination. Recipients of federal funds under these statutes are properly on notice that if they violate their conditional agreement to not discriminate, they will be liable for the emotional distress injuries they cause.

ARGUMENT

Title VI, which prohibits federal financial recipients from discriminating on the basis of "race, color, and national origin," and Title IX, which imposes similar prohibitions on sex discrimination, have both long provided private rights of action for intentional discrimination and permitted private litigants to recover money damages. *See Barnes*, 536 U.S. at 185–89; *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992). One of Congress's primary goals in passing both statutes was "to provide individual citizens effective protection against [discriminatory] practices." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). To achieve that goal, "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Id.* at 705–06.

Emotional distress damages are a traditional remedy for victims of intentional race and sex discrimination. Victims of such discrimination suffer not only economic injuries, but also humiliation and mental anguish that can last long after the act of discrimination is completed. This non-economic harm is inherent in the nature of discrimination: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel . . . ." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16(1964)). Compensation for emotional distress is the only remedy that redresses the unique dignitary harms caused by intentional discrimination, and sometimes the only remedy available at all. Thus, where compensatory damages are available for a recipient's intentional discrimination under Title VI, Title IX, and the other antidiscrimination provisions that incorporate Title VI remedies, courts have understood—and recipients have been on notice—that the relief available to plaintiffs includes emotional distress damages.

I. Race Discrimination Causes Serious Non-Economic Injuries That Have Long Been Redressable Through Emotional Distress Damages.

For decades, this Court has recognized that intentional race discrimination is not only an invidious societal blight but is also one of the most serious individual harms a person can suffer. *See, e.g., Allen v. Wright*, 468 U.S. 737, 755 (1984). The "stigmatizing injury often caused by racial discrimination," a

"noneconomic injury," "is one of the most serious consequences of discriminatory . . . action." *Id.*; *cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing irreparable dignitary harms that flow from intentional race discrimination); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 413 (1982) (Marshall, J., dissenting) ("Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims.") (internal quotation marks and citation omitted).

Intentional race discrimination has historically deprived its victims full and equal access to employment, educational, and housing opportunities. But even in the absence of any pecuniary consequences, intentional race discrimination relegates its targets to second-class status, inflicting dignitary harms and lasting damage to emotional and mental well-being.[2]

In recognition of this fact, courts have routinely held that victims of intentional race discrimination are entitled to recover for emotional distress damages. And Congress's primary purpose in passing the Civil Rights Act of 1964 was to address the humiliation and degradation borne from discriminatory treatment. Federal financial recipients—who receive federal funds on the condition that they not discriminate

---

[2] *See, e.g.*, David R. Williams & Ruth Williams-Morris, *Racism and Mental Health: The African American Experience*, 5 ETHNICITY & HEALTH 243 (2000), https://www.tandfonline.com/doi/pdf/10.1080/713667453?needAccess=true (explaining that "experiences of discrimination can induce physiological and psychological reactions that can lead to adverse changes in mental health status").

based on race—have therefore long been on notice that Congress intended to authorize such damages as a remedy for Title VI violations. To declare, more than a half-century after Title VI was passed, that emotional distress compensation is no longer an available remedy would contravene the statute's purpose and thwart an important aspect of Title VI's enforcement scheme.

i. Courts have long awarded emotional distress damages as a compensatory remedy in race discrimination cases.

Long before the passage of Title VI, state and federal courts recognized emotional distress damages as an appropriate remedy for intentional race discrimination. Cases dating back to the late 19th Century have held common carriers liable for damages for emotional distress caused by racial abuse or discrimination by their agents and employees. In *Chicago & Northwest Railway Co. v. Williams*, a Black woman who was excluded from the "ladies' car" on the defendant's railroad because of her race was entitled to recover damages for both her pecuniary losses and the "indignity, vexation and disgrace to which the [plaintiff] has been subjected." 55 Ill. 185, 190 (Ill. 1870). Similarly, in *Solomon v. Pennsylvania Railroad Co.*, the court held that a Black woman was entitled to a $500 damages award for the "public humiliation" she experienced when the rail company forced her to move from her reserved seat to another seat four cars away, "which caused her to become upset." 96 F. Supp. 709, 712 (S.D.N.Y. 1951); *see also Lyons v. Ill. Greyhound Lines*, 192 F.2d 533, 534 (7th Cir. 1951) (Black woman forced to "give up [her] seat[] for white persons and to move closer to the rear of the bus where there were

insufficient seats" could bring case in federal court for "physical and mental pain").

Courts have also permitted recovery for emotional harms that flow from intentional race discrimination in other contexts and under other civil rights statutes, even where the statutes did not specifically provide for such damages. In *Browning v. Slenderella Systems of Seattle*, the court permitted a Black woman who was refused service by a beauty salon on account of her race to recover for the "embarrassment" she experienced, even in the absence of any physical injury, where the cause of action arose from a criminal statute that prohibited places of public accommodation from discriminating on the basis of race. 341 P.2d 859, 862, 866 (Wash. 1959).

Similarly, in *Powell v. Utz*, the court denied a restaurant's motion to dismiss a discrimination claim under Washington's civil rights statute. 87 F. Supp. 811, 812 (E.D. Wash. 1949). The plaintiff, a Black woman, was refused service by the restaurant and suffered "shame, humiliation and mental distress," for which she could pursue money damages. *Id*. And in *Odom v. East Avenue Corp.*, the court permitted Black hotel patrons who were refused service at the hotel restaurant to recover "compensation for humiliation and indignity." 34 N.Y.S.2d 312, 314–16 (N.Y. Sup. Ct. 1942); *see also Amos v. Prom, Inc.*, 115 F. Supp. 127, 133 (N.D. Iowa 1953) (concluding that plaintiff, a Black woman, could recover compensatory damages for the emotional distress she suffered as a result of defendant's intentional refusal to admit plaintiff into its ballroom solely because of her race); *Anderson v. Pantages Theater Co.*, 194 P. 813, 814 (Wash. 1921) (upholding $300 award for Black man who was denied

admission to his box seat because of his race for "for the indignity and humiliation to which he was subjected" and for "injury to his feelings" under state antidiscrimination law).

There is thus a longstanding recognition that intentional race discrimination causes humiliation, distress, and other emotional and dignitary harms. As this Court explained in *Brown v. Board of Education*, "[t]o separate [Black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. In keeping with that recognition, courts routinely permitted recovery for emotional harms caused by intentional race discrimination before 1964.

ii. The Civil Rights Act of 1964 was passed to address the dignitary harm associated with race discrimination, and courts have since properly permitted private litigants to recover damages for emotional and other non-economic harm.

Congress passed the Civil Rights Act of 1964 at the height of the civil rights movement and in the midst of entrenched racial discrimination and massive resistance to desegregation. Confronted with federal court decisions and Jim Crow laws that codified racial segregation and the vestiges of racial discrimination, in 1947, President Harry Truman created a Committee on Civil Rights that released a comprehensive report on steps the federal government could take to safeguard the civil rights of American

people, particularly people of color.[3] Noting the burdens faced by America's minority communities, including lynchings, police violence, and racial discrimination in voting, housing, employment and education, the Committee urged Congress to use its "taxing and spending powers" to pass legislation that would condition "all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination and segregation based on race, color, creed, or national origin."[4] The notion of banning federally funded programs from discriminating also took hold among supporters of the Civil Rights Movement. Protest signs with the words "No U.S. Dough to Help Jim Crow Grow" were common during the March on Washington for Jobs and Freedom in August 1963.[5] After extensive debate, Congress passed the Civil Rights Act, including Title VI, in 1964.

One of the "overriding purpose[s]" of the Civil Rights Act of 1964 was to provide redress for the

---

[3] *See* PRESIDENT'S COMM. ON CIVIL RIGHTS, *To Secure These Rights: The Report of the President's Committee on Civil Rights*, VIII (1947), https://www.trumanlibrary.gov/library/to-secure-these-rights#VII.

[4] *Id.* at 109, 166; *see also* Charles F. Abernathy, *Title VI and the Constitution*: *A Regulatory Model for Defining "Discrimination,"* 70 GEO. L. J. 1, 5–6 (1981) (stating President Truman's Committee on Civil Rights report presaged Title VI).

[5] *See* NAT'L PARK SERV., *March on Washington for Jobs and Freedom* (Aug. 10, 2017), https://www.nps.gov/articles/march-on-washington.htm; *See also*, *The Morning of the March*, THE NEW YORKER: DOUBLE TAKE (Aug. 27, 2013), https://www.newyorker.com/books/double-take/the-morning-of-the-march.

"affront and humiliation involved in discriminatory denials" of equal treatment on the basis of race. *Daniel,* 395 U.S. at 307–08 (quoting H.R. Rep. No. 88-914, at 18 (1963)). Concerned with more than "mere economics," Congress sought to address "the deprivation of personal dignity that surely accompanies denials of equal access" on the basis of race, and to achieve "the vindication of human dignity." *Heart of Atlanta Motel*, 379 U.S. at 291–92 (Goldberg, J., concurring) (citation and quotation omitted).

Consistent with this aim, where intentional discrimination proven, federal courts have allowed victims to recover emotional distress and other non-pecuniary damages for discriminatory actions by federal financial recipients. For example, in *Scarlett v. School of Ozarks, Inc.*, the district court held that a student stated a Title VI claim against his former college, when it refused to let him stay in dorms on campus because of his race. 780 F. Supp. 2d 924 (W.D. Mo. 2011). The court expressly held that the student could recover damages for the mental anguish and emotional distress he endured if proved at trial. *Id.* at 934; *see also Jacques v. Adelphi Univ.*, No. CV 10–3076, 2011 WL 6709443, at *1 (E.D.N.Y. Dec. 19, 2011) (Haitian student who was dismissed provided sufficient evidence that dismissal was based on her race and that she was subjected to a racially segregated classroom, therefore allowing for recovery for "emotional injury attributable to Defendants' conduct").

Similarly, in *Peters v. School Board of City of Virginia Beach*, the district court sustained a jury's award of $50,000 in emotional distress damages where

the plaintiff was retaliated against for complaining about the school's exclusion of minority students from the gifted-and-talented program. No. 2:01CV120, 2007 WL 295618, at *1 (E.D. Va. Jan. 26, 2007); *cf. Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, No. 4:10CV00007, 2011 WL 1655810, at *1, *8 (W.D. Va. May 3, 2011) (a jury awarding money damages to a Black-owned-and-operated construction company for "reputation, good will, [and] integrity" stemming from the defendant's race discrimination in violation of Title VI, but court granting new trial based on false testimony).

Courts have been particularly cognizant of the emotional harm suffered by students who experience racial discrimination in educational settings, as emotional and psychological abuse can impede a student's ability to access their education. In *Monteiro v. Tempe Union High School District*, high school students began referring to Black students using the n-word and other derogatory slurs after reading *A Rose for Emily* and *Huckleberry Finn*. 158 F.3d 1022 (9th Cir. 1998). In concluding that the school district could be liable under Title VI for deliberate indifference to the hostile racial educational environment caused by peer-to-peer harassment, the court of appeals emphasized the serious emotional toll such discrimination exacts:

> It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school

> authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.

Id. at 1034.

Similarly, in *Zeno v. Pine Plains Central School District,* a Black high school student in a predominantly white school was repeatedly called the n-word and other racial names, taunted with threats of lynching, told to go back to where he came from, brutally attacked to the point he lost consciousness, and subjected to additional assault and harassment for more than three years. 702 F.3d 655, 660–63 (2d Cir. 2012). In a Title VI suit against the school for failing to respond to multiple reports of racial harassment, the Second Circuit upheld a jury's award of emotional distress damages based, in part, on the "frustration, loneliness, and other emotional anguish" the student experienced, and the long-term impact the school's failure to remedy the "racist, demeaning, threatening, and violent conduct" had on the student's ability to learn and enter the workplace. *Id.* at 672–73; *see also* Pl.'s Brief in Opposition at 23, *Zeno v. Pine Plains Cent. Sch. Dist.*, No. 07-cv-06508 (May 3, 2010), ECF 76; *see also DJ v. Sch. Bd. of Henrico Cty.*, 488 F. Supp. 3d 307, 318–20, 335–36 (E.D. Va. 2020) (Black student who was repeatedly harassed and physically assaulted by white peers stated a plausible Title VI claim against the school, whose failure to remedy racial harassment caused a disruptive and racially hostile learning environment and caused serious "psychological problems" that affected the student's grades and ability to learn).

These and other cases reflect the widely recognized fact that psychological harm and emotional distress are an obvious and integral part of the injury that racial discrimination inflicts. "As a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1199 (11th Cir. 2007) (collecting cases where courts found violations of antidiscrimination statutes resulted in emotional distress to the victims).

Emotional distress damages continue to be an essential—and sometimes the only—means of redressing the injuries suffered by victims of intentional race discrimination. Categorically rejecting emotional distress damages as a remedy for such violations, like the court below, would deny relief for the most significant harms inflicted by discrimination. It would also undermine an enforcement scheme that depends, in no small part, on private litigation to seek redress from the discrimination and deter future discriminatory conduct.

II. Sex Discrimination Prohibited by Title IX Foreseeably Inflicts Emotional Harms That Can Only be Remedied with Non-Pecuniary Damages.

Sex discrimination, like race discrimination, can inflict lasting emotional, stigmatic, and dignitary harms. Its redress therefore similarly requires compensation for emotional distress where proven. Because Congress incorporated the Title VI remedial scheme under Title IX, emotional distress damages are also available under the latter statute.

"Title IX was patterned after Title VI[.]" *Cannon,* 441 U.S. at 694 & n.16; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). Title IX protects individuals against sex discrimination in federally-funded education programs. The scope of the Act is "broad" and prohibits a wide swath of discriminatory conduct, *Gebser*, 524 U.S. at 296, ranging from the blatant denial of admission into an educational or training program because of sex, to deliberate indifference to peer-to-peer sex-based harassment and assault that effectively limits a student's ability to equally benefit from a program or activity. Like Title VI, Title IX allows students who have experienced intentional sex discrimination to seek damages "to make good the wrong done." *Franklin*, 503 U.S. at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). As emotional distress damages are properly available under Title VI, they are also available under Title IX, as "Congress intended to create Title IX remedies comparable to those available under Title VI[.]" *Cannon*, 441 U.S. at 703.

The emotional and dignitary toll of intentional sex discrimination is undeniable. Sex discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Analogizing sex discrimination to race discrimination, the Court noted in *Roberts* that the "fundamental object" of the Civil Rights Act of 1964 "was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* (quoting *Heart of Atlanta Motel*, 379 U.S. at 250). "That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as

strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Id*.

To the same effect, the Court has explained that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries" to members of the "disfavored group." *Heckler*, 465 U.S. at 739–40 (internal quotation marks and citation omitted). Social science research confirms the deeply harmful psychological, emotional, and health effects of sex discrimination.[6]

The emotional consequences of sex discrimination are felt acutely in the school context. Depriving students of equal access to educational or other

---

[6] *See, e.g.*, Emily R. Dworkin et al., *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLIN. PSYCH. REV. 65 (2017); Louise F. Fitzgerald, *et. al.*, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82(4) J. APPLIED PSYCH. 578 (1997), https://pubmed.ncbi.nlm.nih.gov/9378685/; NiCole T. Buchanan, *et. al.*, *Effects of Racial and Sexual Harassment on Work and the Psychological Well-Being of African American Women,* 13(2) J. OCCUPATIONAL HEALTH PSYCH. 137 (2008), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.548.454&rep=rep1&type=pdf; Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* 46 (2015) ("The stress hormones of traumatized people . . . take much longer to return to the baseline and spike quickly and disproportionately in response to mildly stressful stimuli. The insidious effects of constantly elevated stress hormones . . . contribute to many long-term health issues, depending on which body system is most vulnerable in a particular individual.").

opportunities because of their sex sends a message of inferiority. President Nixon's Task Force on Women's Rights and Responsibilities, which advocated for what eventually become Title IX, described "[d]iscrimination in education [as] one of the most damaging injustices women suffer," not only because "[i]t denies [women] equal education and equal employment opportunity," but also because that denial "contribut[es] to a second class self image."[7]

Cases confirm that these harms are inherent in intentional sex discrimination that violates Title IX. In *Communities for Equity v. Michigan High School Athletic Association*, the court found a Title IX violation where an athletic association scheduled "only girls' sports, but not boys' sports, in disadvantageous and/or non-traditional seasons," including scheduling girls "to play basketball in the fall to avoid inconveniencing the boys' basketball team." 178 F. Supp. 2d 805, 818, 836 (W.D. Mich. 2001), *aff'd.*, 377 F.3d 504 (6th Cir. 2004), *cert. granted, judgment vacated*, 544 U.S. 1012 (2005), *and aff'd*, 459 F.3d 676 (6th Cir. 2006). The court recognized that the policy "sends the clear message that female athletes are subordinate to their male counterparts, and that girls' sports take a backseat to boys' sports." *Id.* at 818, 836. "When girls are treated unequally as compared to boys, girls receive the psychological message that they are 'second-class' or that their athletic role is of less

---

[7] PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS & RESPONSIBILITIES, *A Matter of Simple Justice: The Report of the President's Task Force on Women's Right and Responsibilities* 7 (1970), https://www.archives.gov/files/research/women/images/task-force-report-1970.pdf.

value than that of boys." *Id.* at 837; *see also Pederson v. La. State Univ.*, 213 F.3d 858, 876, 881 (5th Cir. 2000) (finding monetary damages available where school "perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system."); *Alston v. Virginia High School League, Inc.*, 176 F.R.D. 220, 221 (W.D. Va. 1997) (allowing damages under Title IX for "emotional distress arising from the claimed unequal treatment" arising from discriminatory scheduling of boys' and girls' sports seasons).

In *Varlesi v. Wayne State University*, a jury awarded money damages for a Title IX violation when a pregnant social work student who had excelled in both her classroom and placement work was given an "unsubstantiated" failing evaluation for her final placement because of her sex. 643 F. App'x 507, 509–510, 512 (6th Cir. 2016). Her supervisor complained that men at the facility were being "turned on by her pregnancy," that she rubbed her belly, and that her maternity clothes were too tight. *Id.* at 510–11 & n.3. Varlesi had several meetings with school personnel to discuss ongoing pregnancy discrimination at her placement, at which she was told that "she could or should drop out of the program because of her pregnancy" and was "instructed [] that she was not to talk" about pregnancy discrimination. *Id.* The Sixth Circuit upheld a damages award that included compensation for both economic and non-economic harms, finding that "[t]he evidence here demonstrates that the defendants' discrimination and retaliation deprived Varlesi of the opportunity for employment in her chosen field by denying her a graduate degree and denying her the ability to obtain that degree elsewhere, thus causing actual damages *and*

foreseeable emotional harm." *Id.* at 516 (emphasis added).

The emotional and psychological harms of sex discrimination are often compounded in cases of sexual assault and harassment when fear for safety and trauma is added to the message that one is lesser because of one's sex. The Department of Education recognized more than two decades ago that the "elimination of sexual harassment of students in federally assisted educational programs [as] a high priority" because "sexual harassment can interfere with a student's" "emotional [] well-being" and "[h]ostile environment sexual harassment" can cause "mental or emotional distress."[8] This emotional toll may in turn result in withdrawal from academic and

---

[8] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12034, 12041 (1997); *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Nondiscrimination of the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 85 FED. REG. 30026, 30056 (May 19, 2020) (describing public comments related to the "negative consequences [students] experienced in the aftermath of sexual assault, including nightmares, emotional breakdowns, lack of sleep, inability to focus or concentrate, changed eating habits, loss of confidence and self-esteem, stress, immense shame, lack of trust, and loneliness"; "drug and alcohol abuse"; "hav[ing] trust issues for long periods of time, sometimes for life"; and "carrying the pain of victimization with them for life, even after more than half a century"); *see id. at* 30080 (describing data provided in comments indicating that "at least 89 percent of victims face emotional and physical consequences" and "[a]pproximately 70 percent of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime").

social life, depression, anxiety, other negative health outcomes, and even suicidal thoughts and behavior.

This Court has accordingly held that damages are available under Title IX when a school official with "authority to institute corrective measures on the [school's] behalf" has actual notice of and is deliberately indifferent to "severe, pervasive, and objectively offensive" sexual harassment by an employee or student that detracts from the victim's educational experience and "effectively denie[s] equal access" to the school's resources. *Davis*, 526 U.S. at 650–651; *Gebser*, 524 U.S. at 277. To provide a meaningful remedy in such cases, damages must include compensation for emotional harm properly attributable to the school, and not only for pecuniary losses, which will often be minimal or nonexistent. In these cases, the school has "effectively 'cause[d]' the discrimination," *Davis*, 526 U.S. at 642–43, and the foreseeability of emotional harm is incontrovertible. Damages for emotional distress can be the most important, and in some cases only, remedy available.

Courts have repeatedly recognized that a school's deliberate indifference to sexual harassment of its students by school personnel, or by other students, can cause severe emotional harms. In *Franklin*, a high school student who had been sexually abused by her teacher brought a Title IX case after an Office for Civil Rights investigation had led to the teacher's resignation and the district had been brought "into compliance with Title IX." 503 U.S. at 65, n.3. The student argued that damages were necessary because there cannot be "any question that the sexual abuse . . . involves the kind of discrimination that causes substantial, lasting harm to its victims. . . . The

psychological and emotional harm resulting from sexual abuse by a teacher of a student is well documented." Brief for Petitioner, *Franklin,* 503 U.S. 60 (1992), 1991 WL 526268, at *20. This Court held that compensatory damages are allowed under Title IX. *Franklin*, 503 U.S. at 76.

In *Dawn L. v. Greater Johnstown School District*, the court found that the school was deliberately indifferent in failing to investigate for almost four weeks a complaint that an older student sexually assaulted an 11–year–old girl, M.L, including by digital penetration of her vagina. 586 F. Supp. 2d 332, 385 (W.D. Pa. 2008). The district court awarded damages, including emotional distress damages, from the school to M.L. for the resulting harm. *Id.* The court explained that the school district was liable under Title IX after it received actual notice of the harassment: if the school had "responded in a reasonable fashion to that initial notice[,] M.L. would not [] have been subjected to sexual assault by A.M. in the middle school bathroom . . . or the lewdly harassing notes." *Id.* The judge recognized that although some of M.L.'s emotional injury would "have occurred even if the District had acted reasonably from the time of its initial notice of the harassment," her injuries were "exacerbated by the District's unreasonable action of providing M.L.'s parents with no alternative but to remove her from the middle school and place her on homebound instruction," where she was "was actually locking down, she was without any friends," and "rotting away inside herself." *Id.* (internal quotation marks omitted).

In another deeply disturbing example, K.R., a middle school student, who alleged that her school was

deliberately indifferent when notified that she had been gang-raped by three classmates, was found to have suffered profound emotional distress attributable to the school. *Stinson v. Maye*, 824 F. App'x 849 (11th Cir. 2020). When a group of three boys raped her, her step-sister alerted the assistant principal who did nothing to stop the boys and told the step-sister to "go on about her business." *Id.* at 853. Following the gang rape, K.R. reported the violence to her principal, who told her "that she needed to 'love her body' and that K.R. had more of an adult's body, similar to [his] girlfriend." *Id.* He did not speak to the boys involved and conducted no investigation. *Id*. at 859.

"K.R. fell into a deep depression" and "did not want to leave her home" or return to the discriminatory school environment. *Id.* at 853. She missed school for seven or eight days, during which time no one from the school contacted her, nor offered counseling or any assistance. *Id.* at 853–54. When her mother went to the school to pick up K.R.'s schoolwork the principal suggested that her mother not "permit K.R. to return to [the school] because all the students were saying that the three boys had 'run a train' on K.R." *Id.* at 854. Per the principal's suggestion, K.R. ultimately transferred schools, forcing her to "deal with the stress of starting at a new school in the middle of the school year." *Id.* K.R.'s grades dropped, her social life declined, she became reluctant to leave her house, and had violent outbursts towards her younger siblings. *Id.*

In reversing the lower court's dismissal of K.R.'s case, the Eleventh Circuit recognized that the school's clearly inadequate response had caused K.R. significant emotional harm. To deny K.R. any emotional distress damages would be to disregard the

devastating impact that a school's indifference can have on a child. Without being able to claim emotional distress, students may not be able to bring suit, and society would lose the important value of deterring a federal financial recipient from such inadequate responses.

As these and countless other examples illustrate, sex discrimination by schools receiving federal funding, can cause significant and lasting emotional and dignitary harms. Without emotional distress damages, in many cases, there would be no compensation available for the most consequential harm that results from intentional sex discrimination. Categorically denying damages for emotional distress would undermine Congress's objective in enacting Title IX "to provide individual citizens effective protection against [discriminatory] practices." *Gebser*, 524 U.S. at 286 (quoting *Cannon*, 441 U.S. at 704). The "wrong done" by many forms of sex-based discrimination that violate Title IX cannot be made "good" without remedying the emotional harm associated with them. *Franklin*, 503 U.S. at 66.

This is particularly true for younger students, who often do not experience quantifiable, immediate, or recoverable economic harms as a result of sex discrimination. Federal financial recipients that receive support on the condition that they not discriminate on the basis of sex are on notice that if they do discriminate, they will be liable for the foreseeable injuries sustained, including emotional distress. To exclude emotional distress as a categorical matter would rob Title IX of its central purpose in preventing and remedying sex discrimination in educational settings.

***

Title VI, Title IX, the Rehabilitation Act and the Affordable Care Act afford courts and juries authority to make plaintiffs whole, compensating for *all* their injuries, pecuniary and emotional. *Cf. Franklin*, 503 U.S. at 76. The Fifth Circuit erred in holding otherwise.

CONCLUSION

Amici curiae respectfully request that the Court reverse the decision of the Fifth Circuit.

Respectfully submitted,

SHERRILYN A. IFILL
DIRECTOR-COUNSEL
JANAI S. NELSON
SAMUEL SPITAL*
CARA MCCLELLAN
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
40 RECTOR STREET, 5TH FLOOR
NEW YORK, NY 10006
212-965-2200
SSPITAL@NAACPLDF.ORG

JIN HEE LEE
MAHOGANE D. REED
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14TH STREET NW, SUITE 600
WASHINGTON, DC 20005

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15TH STREET NW
WASHINGTON, DC 20005

JENNESA CALVO-FRIEDMAN
ALEXANDRA BORNSTEIN
SANDRA S. PARK
ALEXIS AGATHOCLEOUS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004

* Counsel of Record

EMILY MARTIN
SHIWALI G. PATEL
ELIZABETH TANG
NATIONAL WOMEN'S LAW
CENTER
11 DUPONT CIRCLE NW,
SUITE 800
WASHINGTON, DC 20036

SAVANNAH KUMAR
ANDRE SEGURA
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
TEXAS
5225 KATY FWY., STE. 350
HOUSTON, TX 77007

August 30, 2021