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 NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Richard A. Simpson and Elizabeth E. Fisher represented Respondent in connection with preparing a supplemental brief in opposition to the petition for a writ of certiorari, but that representation ended once the petition was granted.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors ("USCM") is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for

public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

SUMMARY OF ARGUMENT

Every year, state and local governments receive billions of federal dollars to help fund public services and programs. This Court has held that Congress must provide clear notice of any conditions placed on acceptance of federal funding. The notice requirement is particularly important for state and local governments because they participate in so many federally funded programs.

1. Neither the Rehabilitation Act nor the Affordable Care Act (the "ACA")—nor Title VI, which those Acts incorporate—puts recipients of federal funding on unambiguous notice that they may be liable for emotional distress damages. None of those statutes authorize emotional distress damages, and under traditional contract law, which this Court has held applicable here, the general rule is that emotional distress damages are not recoverable.

To be sure, there are exceptions to this general rule, but those exceptions are rare and narrow and their scope is unclear. The debate between the parties regarding esoteric and unclear points of contract law shows that recipients of federal funds are not on unambiguous notice that they are accepting uncapped liability for emotional distress damages. Recipients of federal funds (notably including state and local governments) should not be obliged to retain counsel

to explore the nuances of a rare exception to a general rule to guess whether accepting the funds will expose them to liability for emotional distress damages.

2. The implied nature of the cause of action for violating the Rehabilitation Act and ACA counsels for restraint in determining the remedies available. This Court has cautioned that recognizing an implied cause of action when a statute does not expressly provide one "risks arrogating" to the courts the "legislative power" of determining when a statutory violation warrants a remedy. *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020).

The same concern applies when courts determine the scope of remedies available under an implied cause of action. Deciding whether to allow a particular remedy turns on policy judgments that courts are ill equipped to make.

3. Exposure to uncapped emotional damages would create extreme risk for state and local governments. In contrast to traditional economic damages typically available for breach of contract, emotional distress damages by their nature are idiosyncratic, subjective, hard to measure, and subject to abuse because they depend on the feelings of the person who experiences them. They also can be very large.

Precisely for these reasons, courts and legislatures have tightly restricted their recovery in a wide variety

of contexts. Emotional distress damages are often unavailable even in tort actions. And, where available, state laws often cap the amount recoverable. Similarly, Congress imposed caps when it authorized recovery of emotional distress in suits for employment discrimination.

Here, because Congress never expressly created a private cause of action in the first place, it never exercised its judgment about whether to allow recovery of emotional distress damages and, if so, whether to cap them. Had Congress allowed such damages to be recoverable at all, it very likely would have capped the maximum recovery at reasonable levels, just as it did in Title VII, perhaps even with a specific cap for claims against state and local governments.

4. Exposing state and local governments to uncapped emotional distress damages has the potential to affect fiscal decisions made by those governments. The many state statutes limiting the liability of state and local governments reflect recognition of the grave risk that uncapped potential liability poses to the ability of local governments to perform their essential functions. Faced with uncapped exposure to emotional distress damages, state and local governments may decide they need to reallocate local funds, raise taxes, or refuse the federal funding.

Permitting recovery of emotional distress damages with carefully considered caps, like those in Title VII, would present a far different calculus for state and local governments. A cap would give recipients reliable protection against disastrous runaway results. In contrast, the possibility of a particular judge granting remittitur of a large award is speculative at best. With a cap, recipients of federal funds could make reasonable calculations of their potential liability and make informed judgments accordingly. Yet, unlike Congress, this Court is not positioned to make inherently legislative judgments about whether to allow recovery and, if so, how to limit and cap exposure.

5. In sum, the Rehabilitation Act and ACA do not provide clear notice to state and local governments (and other recipients of federal funds) that accepting federal funding exposes them to uncapped potential liability for emotional distress damages. Imposing that liability would have substantial adverse consequences for state and local governments. The Court should hold that emotional distress damages are not available under the implied cause of action for violations of the Rehabilitation Act and ACA, leaving to Congress the decision of whether to provide for such a remedy and, if so, whether to cap recoveries.

ARGUMENT

Congress must provide clear notice of any conditions attached to acceptance of federal funds. *E.g.*, *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937). This notice requirement is particularly important for state and local governments. Neither the Rehabilitation Act nor the ACA—nor Title VI, which those Acts incorporate—puts recipients of federal funding on unambiguous notice that they may be liable for emotional distress damages

I. State and local governments substantially rely on funding from the federal government to support their central operations.

State and local governments participate in a wide variety of federal funding programs. In fiscal year 2019, the federal government allocated approximately $721 billion to state and local governments. *See The State of State (and Local) Tax Policy*, Tax Policy Ctr. (May 2020), https://www.taxpolicycenter.org/briefing-book/what-types-federal-grants-are-made-state-and-local-governments-and-how-do-they-work#:~:text=The%20federal%20government%20distributed%20about,of%20these%20governments'%20total%20revenues. Nearly one-third of states' general revenue comes from the federal government, with that revenue

distributed across various programs such as "health care, transportation, income security, education, job training, social services, community development, and environmental protection." *See Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, Congressional Research Service at 1 (May 22, 2019), https://sgp.fas.org/crs/misc/R40638.pdf; *see also State and Local Revenues*, Urban Institute, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues (last visited Oct. 2, 2021).[2]

Federal funds play an even more critical role in certain policy areas. For example, federal grants make up "more than half of state government funding for health care and public assistance." *See Federal Grants to State and Local Governments: A Historical*

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[2] The percentage of state revenue coming from the federal government has likely increased since 2018. As one nonprofit research organization observed, while "[t]ransfers from the federal government have fluctuated considerably over the past three decades," it is understood that "the decline in state and local tax revenue resulting from the COVID-19 pandemic, and the large amount of federal transfers approved by Congress, particularly as part of the American Rescue Plan" will result in "radically different" numbers for both the current and upcoming fiscal years. *State and Local Revenues*, Urban Institute, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues.

Perspective on Contemporary Issues at 1. In short, federally funded programs account for a substantial portion of state and local government revenue.

II. Neither the Rehabilitation Act nor the ACA subject recipients of federal funds to uncapped potential liability for emotional distress damages.

Because state and local governments participate extensively in federal funding programs, clear notice of any conditions attached to those funds is essential. This Court has recognized the importance of such notice, holding that if Congress attaches conditions to funds disbursed under the Spending Clause, Congress must provide clear notice of those conditions. *See Pennhurst*, 451 U.S. at 17.

Proper notice of any conditions attached to federal funds ensures that state and local governments (and other recipients) can make informed decisions about whether to accept or forgo the funds. Providing upfront, unambiguous notice allows state and local governments to understand their obligations if they accept federal funds.

Congress did not authorize recovery for emotional distress damages under the Rehabilitation Act or the ACA. Indeed, Congress did not expressly authorize a private right of action at all; rather, this Court found an implied cause of action. Hornbook contract law

does not come close to putting recipients of federal funds on unambiguous notice of liability to third parties for emotional distress damages based on a violation of those Acts. This Court should therefore hold that emotional distress damages are not available under either Act.

A. Congress may attach conditions to accepting federal funds if it provides recipients with unambiguous notice of those conditions.

As this Court has recognized, "Congress may fix the terms on which it shall disburse federal money" under its Spending Clause power. *Pennhurst*, 451 U.S. at 17. In exchange for receiving federal funds, recipients "agree to comply with federally imposed conditions." *Id.*

This Court has stressed, however, that when "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* That is because Spending Clause legislation is "much in the nature of a contract." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17). Just as parties are bound by the terms of a contract only where they have "voluntarily and knowingly" accepted those terms, recipients of federal funds are bound by any conditions attached to the funds only where they have "voluntarily and knowingly" accepted the conditions. *Id.* A recipient cannot fairly be said to have

"voluntarily and knowingly" accepted the conditions placed on federal funding if the recipient is "unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17.

This notice requirement also applies in determining whether particular remedies are available. *See Barnes*, 536 U.S. at 187 (applying the "contract-law analogy" in determining the scope of remedies for violating a condition attached to federal funds). As this Court stated, a recipient is liable for a particular remedy only when the "recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* (emphasis in original) Thus, a recipient of federal funding is liable only for remedies expressly authorized in the legislation and "remedies traditionally available in suits for breach of contract." *Id.*

Because state and local governments depend so heavily on federal funds dispensed in connection with multiple programs, they are subject to multiple conditions placed on the acceptance of funds. Without clear notice of conditions on those funds, a state or local government may unwittingly violate them and place the funds in jeopardy.

State and local governments cannot make informed decisions about whether to accept federal funds unless they have clear notice of any obligations attached to accepting the funding. A state or local government

may deem an obligation too burdensome to be worth accepting the federal funds. For example, when a condition of receiving federal funds involves exposure to compensatory damages for violating funding-imposed obligations, some governments might limit the extent to which they accept funds because "compensatory damages" against recipients of federal funds "might well exceed a recipient's level of federal funding." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Clear advance notice of the conditions attached to federal funds allows state and local governments to make informed decisions at the outset about whether the bargain is worth accepting.[3]

Notice of potential liability for accepting federal funds is also important to state and local governments so they may intelligently consider the potential impact on their treasuries. State and local governments need to plan for potential financial

[3] Providing clear notice is particularly important when accepting funding entails waiving sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 291 (2011). This principle extends to remedies. *See Lane v. Peña*, 518 U.S. 187, 192 (1996) (providing that for a state to be "liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims"). Thus, although the states have waived their immunity against claims alleging discrimination under a federal statute by receiving federal funds, *see* 42 U.S.C. § 2000d-7(a)(1), that waiver extends to damages for emotional distress only if the federal law "unambiguously" subjects states to those damages.

impact on their operations and budgets flowing from any potential liability attached to acceptance of federal funds. Thus, unambiguous notice of any potential liability associated with acceptance of federal funds both allows recipients to make informed decisions about whether to accept the funds and permits them to plan for any potential liability if they accept them.

B. Neither the Rehabilitation Act nor the ACA provides clear notice that by accepting federal funds the recipient agrees to uncapped potential liability for emotional distress damages.

Applying these notice principles here, Congress did not provide unambiguous notice to recipients of federal funds (including, notably, state and local governments) that acceptance of the funding was conditioned on agreement to be subject to uncapped emotional distress damages. The debate between the parties regarding esoteric and unclear points of contract law shows that recipients of federal funds are not on unambiguous notice that they are accepting uncapped potential liability for emotional distress damages.

Under the Rehabilitation Act and the ACA, recipients of federal funds are prohibited from discriminating on the basis of disability. Those Acts incorporate Title VI remedies and thus implicitly

authorize third parties who allege they are victims of discrimination to bring private causes of action against funding recipients. *See Barnes*, 536 U.S. at 185–86. Because the cause of action is the product of judicial inference and not part of any of the statutes, Congress has never addressed whether emotional distress damages are recoverable.

Consequently, for recipients of federal funds to be on notice that they are subject to emotional distress damages (in addition to the other remedies unquestionably available), those damages must be "remedies traditionally available in suits for breach of contract." *Id.* at 187. Like the punitive damages at issue in *Barnes*, emotional damages do not meet that test.

1. Because the general rule is that emotional distress damages are not recoverable in a suit for breach of contract, recipients of federal funds are not on clear notice that accepting funding under the Rehabilitation Act or ACA subjects them to uncapped potential liability for such damages.

Contract law rests on the premise that parties to a contract have made mutual promises regarding an economic arrangement. Thus, typical contract damages remedy economic harm flowing from a breach of those promises. Restatement (Second) of

Contracts § 347 (1981). At the same time, although it is foreseeable that many breaches of contract will result in some degree of emotional distress for the non-breaching party, the law has long held that damages for emotional distress are not available in breach of contract actions. *Id.*; *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 324 (8th Cir. 1993) ("Ordinarily, emotional distress damages are not available in a contractual dispute.").

The exceptions to this general rule against emotional distress damages are rare, limited and narrow.[4] S*ee, e.g.*, 11 Timothy Murray, *Corbin on Contracts* § 59.1 (rev. ed. 2021).

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[4] Paradigmatic examples include contracts involving death and burial. *See, e.g.*, *Allen v. Jones*, 104 Cal. App. 3d 207 (1980) (failure to deliver cremated remains to requested location); *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976) (temporarily preventing plaintiff from viewing the deceased's body); *Russ v. W. Union Tel. Co.*, 23 S.E.2d 681, 682 (N.C. 1943) (failure to deliver a prepaid, unrepeated telegram regarding plaintiff's father's death); *see also Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351, 1359–60 (11th Cir. 2000) (recognizing the exception extends to "the burial of loved ones [and] suits based on a physician's promises to deliver a child"). Besides contracts involving sensitive matters, emotional distress damages may be available when a breach runs parallel to a personal injury tort. *See, e.g.*, *Stewart v. Rudner*, 84 N.W.2d 816 (Mich. 1957) (doctor liable for mother's mental suffering after failure to perform contracted-for Caesarean section caused the death of her unborn child); *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973) (doctor's incompetent performance resulted in more injury and necessitated further surgery for plaintiff). The exception is even

Petitioner's attempts to move this case out of the rare exception category by asserting that emotional distress damages are available in breach of contract cases where the breaching party engages in some sort of discriminatory act toward the other party are unavailing. *See* Br. for Pet'r at 15–16 (filed Aug. 23. 2021). While some courts have awarded emotional distress damages to individuals who were wrongfully expelled from a train or hotel, there is disagreement about when those damages are allowed in those circumstances. *See* 24 Richard A. Lord, *Williston on Contracts* § 64:11 (4th ed. 1993). Williston suggests they may be generally available when a person is ejected from a hotel or train. *Id.* By contrast, Corbin suggests emotional distress damages are available in those suits only incident to victims' physical harm. *See* 11 *Corbin on Contracts* § 59.1, at 543–44 ("Even in . . . cases [involving wrongful ejection from a hotel, car, or places of public amusement], courts refuse to award damages for mental distress even if the breach was willful, if no bodily injury exists."); *see also* 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 43a, at 52 (8th ed. 1920) (noting emotional distress damages are forbidden at common law except for when there is bodily harm).

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narrower for cases involving third-party beneficiaries. 11 *Corbin on Contracts* § 59.1, at 538 (stating that emotional distress damages are "particularly difficult for third persons who are not parties to the contract to recover").

This disagreement about whether emotional distress damages are recoverable absent proof of bodily injury, even in the limited circumstance of a person being ejected from a train or hotel, demonstrates that the contours of the exception are not sufficiently well established to put recipients on clear notice that accepting federal funds exposes them to liability for emotional distress damages.

In sum, there is no dispute that allowing emotional distress damages in actions arising from breach of contract is the rare, narrow and unclear exception—not the general rule. That fact alone should answer the question presented here. The parties' merits briefs admirably uncover and debate the historical origin and precise scope of the exception. But recipients of federal funds (notably, state and local governments) should not need to retain counsel to explore the nuances of a rare exception to a general rule to make a guess about whether accepting the funds would expose them to uncapped liability for emotional distress damages.

2. The implied nature of the cause of action for violating the Rehabilitation Act and the ACA further establishes the lack of notice.

Congress has expressly created causes of action for violations of some statutes and, in that context,

defined the remedies available to successful plaintiffs. In the Civil Rights Act of 1991, for example, Congress specifically created a private cause of action and provided for recovery of noneconomic damages, including "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life." 42 U.S.C. § 1981a(b)(3). As explained below, however, Congress also capped the amount recoverable for noneconomic damages to avoid the inherent danger of allowing uncapped recovery.

Here, of course, Congress never expressly created a private cause of action, let alone defined the scope of available remedies. Instead, this Court found an implied cause of action for enforcing Title VI's prohibition on discrimination (and consequently the anti-discrimination provisions in the Rehabilitation Act and the ACA). *See Barnes*, 536 U.S. at 186. As this Court recently stressed, courts must be extremely cautious in finding implied causes of action because it is the role of Congress, not the judiciary, to determine whether to permit a private right of action to recover damages for legal violations. *Alexander v. Sandova*l, 532 U.S. 275, 286 (2001). Recognizing an implied right of action when a statute does not provide one "risks arrogating" to the courts the "legislative power" of determining when a statutory violation warrants a remedy. *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020).

This same concern applies when courts determine the scope of remedies available under an implied cause of action. Deciding whether to permit a particular remedy, such as emotional distress damages, turns on policy considerations about who should bear the costs of violations, appropriate levels of deterrence, and countless other considerations. Similar policy judgments must also be made in determining whether to place limitations on a remedy—such as the strict caps on recovery that Congress prescribed in Title VII. Courts are ill equipped to make these kinds of judgments and thus should defer to Congress. For these reasons, courts should be extremely cautious about inferring a particular remedy is available, and they should resolve doubts in questionable cases against finding a remedy available.

III. Imposing uncapped potential liability for emotional distress damages would create extreme risks for state and local governments and could cause them to decline funds for important programs.

Emotional distress damages are idiosyncratic, subjective, difficult to predict, and they may be extremely large. It is for precisely those reasons Congress and states have prohibited or limited their recovery in most circumstances. Allowing recovery for emotional distress without limits would create extreme risks for state and local governments, forcing

them to reassess their fiscal policies and potentially decline federal funds used to support local programs and services.

A. Exposure to uncapped emotional distress damages would create an extreme risk for state and local governments because those damages are unpredictable, idiosyncratic, and subjective by nature.

Because state and local governments provide many services, they have countless interactions with the public. Those interactions inevitably result in numerous claims of discrimination—some meritorious and some not. The potential economic damage governments face for these claims is relatively predictable and manageable. State and local governments, therefore, can make well informed decisions about whether to accept that potential liability as a condition of taking federal funds.

In contrast, emotional distress damages, by their very nature, are idiosyncratic, subjective, and hard to measure since they depend on the feelings of unique individuals. *See, e.g.*, *Cochran v. Securitas Sec. Servs. USA, Inc.*, 93 N.E.3d 493, 500 (Ill. 2017) ("[C]ourts 'generally have been reluctant to allow recovery for purely mental or emotional distress' and . . . reasons for this include that 'the door would be opened for fraudulent claims, [] damages would be difficult to ascertain and measure, [] emotional injuries are

hardly foreseeable and [] frivolous litigation would be encouraged.'"); *Bradford v. Iron Cnty. C-4 Sch. Dist.*, Cause No. 82-303-C(4), 1984 WL 1443, at *7 (E.D. Mo. June 13, 1984) ("Damages for mental suffering and humiliation are difficult to measure at best, are often sizeable, and have been editorialized as gratuitous bonuses or prize money for prosecuting a successful suit."). One person might feel extreme distress from the same conduct that causes another person no distress at all. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 45 (2012) ("The severity of emotional harm is ordinarily dependent on self-reporting."); *Francis v. W. Union Tel. Co.*, 59 N.W. 1078, 1080 (Minn. 1894) ("The suffering of one under precisely the same circumstances would be no test of the suffering of another, and there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded."). Because emotional damages are unique to the individual who experiences them, they cannot readily be predicted. *See* Restatement (Second) of Contracts § 353 cmt. a (1981).

It is also extremely difficult to translate the emotional distress suffered by any particular person into a dollar amount. *Id.* ("Even if [emotional distress damages] are foreseeable, they are often particularly difficult to establish and to measure."); 11 *Corbin on Contracts* § 59.1 ("Mental distress . . . can scarcely be said to be measurable at all in terms of money.");

Holmes v. City of Massillon, Ohio, 78 F.3d 1041, 1048 (6th Cir. 1996) ("[E]motional harm can often be quite difficult to measure in mere monetary terms."); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936) (gathering ancient cases supporting that "the law cannot put a monetary value upon" emotional interests).

Emotional distress damages can also be extremely large. The award's size depends on the degree of the plaintiff's distress and the discretion of a jury or judge. There is not a natural cap on emotional distress damages. A person who is atypically distressed by a particular wrong is entitled to whatever damages are necessary to compensate for that distress, even if most people would not have experienced distress from the same experience. As one commentator aptly observed, emotional damages are "not subject to a definition that would prevent [them] from overflowing any reasonable limits." David Crump, *Negligent Infliction of Emotional Distress: An Unlimited Claim, but Does It Really Exist?*, 49 Tex. Tech L. Rev. 685, 686 (2017); *see also, e.g.*, *Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 34 (1st Cir. 1999) ("[D]etermining whether damages for emotional distress are excessive is difficult[.]").[5]

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[5] Examples of large emotional damages abound. *See, e.g.*, *Anne Arundel Cnty. v. Reeves*, 252 A.3d 921, 924 (Md. 2021) (jury awarded $750,000 in noneconomic damages but only $500,000 in

Courts have likewise recognized that allowing recovery of emotional distress damages carries with it the potential for abuse. Particularly, because emotional distress damages are so hard to measure and disprove, they are easily simulated. *See Dean v. Dean*, 821 F.2d 279, 282 (5th Cir. 1987) ("The reason the courts are hesitant to allow recovery for mental anguish in [contract] cases is the ease with which mental suffering may be simulated and the difficulty in disproving its existence."). Accordingly, regardless of the merits of their claims, litigants may bring suit simply because of the opportunity to win significant damages. *See* Jennifer Titus & Lauren Powell, *They say they're suing to help people with disabilities. Critics say they want 'blood money.'*, 10Investigates

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economic damages for a claim related to the shooting of a family dog); *Anderson v. Conwood Co.*, 34 F. Supp. 2d 650, 652 (W.D. Tenn. 1999) (jury awarded $4,000,000 in compensatory damages to two plaintiffs for pecuniary loss, emotional distress, and other related claims in case in which "plaintiffs presented minimal evidence of damages"); *Equal Emp. Opportunity Comm'n v. United Health Programs of Am., Inc.*, No. 14-CV-3673 (KAM)(JO), 2020 WL 1083771, at *13 (E.D.N.Y. Mar. 6, 2020) ("In the Second Circuit, 'garden variety' emotional distress claims generally merit $30,000 to $125,000 awards, and courts have declined to reduce even much higher emotional damages awards." (internal quotations omitted)). Older cases likewise reflect amounts that were large at the time of the awards. *See, e.g.*, *Emmke v. De Silva*, 293 F. 17 (8th Cir. 1923) (affirming $2,000 award to hotel guest for "mental anguish and humiliation"); *Lehnen v. E.J. Hines & Co.*, 127 P. 612 (Kan. 1912) (affirming judgment of $4,000 against innkeeper).

Tampa Bay (Sept. 23, 2019), https://www.wtsp.com/article/news/investigations/10-investigates/10investigates-ada-disability-website-lawsuits/67-9db9805b-5d09-440a-b4af-bd36d2fefe15 (recounting instances where, instead of seeking to increase accessibility by notifying businesses of potential non-compliance with the Americans with Disabilities Act, attorneys filed suit to secure quick monetary recoveries from settlements).

Precisely because of these attributes of emotional distress damages, courts and legislatures have prohibited or limited their recovery in myriad contexts. For example, emotional damages are typically not available in a negligence action unless the plaintiff suffered bodily harm.[6] *See, e.g.*, Restatement (Second) of Torts § 436A (1965) ("If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."); W. Page Keeton, et al., Prosser and Keeton on the Law of Torts

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[6] Even in cases seeking recovery for negligent inflection of emotional distress, many jurisdictions have traditionally required plaintiffs to prove some form of physical injury to obtain recovery. *See* Scott D. Mars, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress,* 28 Tort & Ins. L.J. 1 (1992).

§ 54 at 361 (5th ed. 1984) (discussing reluctance to grant emotional distress damages absent physical manifestations of injury). Likewise, state laws often cap emotional and other noneconomic damages in various contexts. See, for example:

- Alaska Stat. § 09.17.010 (capping noneconomic damages in personal injury or wrongful death suits at "$400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater," or "$1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement");

- Cal. Civ. Code § 3333.2(b) (capping noneconomic damages in medical malpractice cases at $250,000);

- Colo. Rev. Stat. § 13-21-102.5(3)(a) (capping noneconomic damages in civil actions, other than medical malpractice actions, at $250,000, "unless the court finds justification by clear and convincing evidence therefor," in which case damages are capped at $500,000, and declaring "that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state");

- Colo. Rev. Stat. Ann. § 13-64-302 (capping noneconomic damages in medical malpractice actions at $300,000, effective July 1, 2003, and capping the total damages at $1,000,000);

- Haw. Rev. Stat. Ann. § 663-8.7 (capping damages for "pain and suffering" at $375,000 in most actions);

- Idaho Code Ann. § 6-1603(1) (capping damages in most actions for personal injury, including death, at $250,000, subject to adjustment in accordance with adjustments to the average annual wage established by the Idaho industrial commission);

- Ind. Code § 34-18-14-3 (capping total damages in medical malpractice actions at $1,800,000 and applying further limits in certain contexts);

- Me. Rev. Stat. Ann. tit. 18-C, § 2-807 (capping damages for emotional distress and other noneconomic damages at $750,000);

- Md. Code Ann., Cts. & Jud. Proc. § 11-108 (capping noneconomic damages in actions for personal injury at $500,000 in 1994 and increasing by $15,000 each year);

- Mich. Comp. Laws § 600.1483 (capping noneconomic damages in medical malpractice

actions at $280,000 or $500,000 depending on whether the plaintiff meets certain enumerated conditions);

- Mo. Rev. Stat. § 538.210 (capping noneconomic damages in medical malpractice actions at $400,000, providing also for yearly increases in the limit);

- Nev. Rev. Stat. § 41A.035 (capping noneconomic damages in medical malpractice actions at $350,000);

- N.D. Cent. Code § 32-42-02 (capping noneconomic damages in medical malpractice actions at $500,000);

- Ohio Rev. Code Ann. § 2315.18 (capping noneconomic damages in tort actions, subject to enumerated exceptions, at $250,000 or three times the economic loss, not to exceed $350,000 for each plaintiff or a maximum of $500,000 per occurrence);

- S.C. Code Ann. § 15-32-220 (capping noneconomic damages in medical malpractice actions at $350,000 for each defendant and $1,050,000 for all claimants, but caps do not apply if defendant was grossly negligent, wilful, wanton, or reckless and that conduct proximately caused the noneconomic damages);

- S.D. Codified Laws § 21-3-11 (capping general damages available in medical malpractice actions at $500,000 but not imposing any limit on special damages);

- Tenn. Code Ann. § 29-39-102 (capping noneconomic damages in civil actions at $750,000 but allowing up to $1,000,000 in noneconomic damages for a "catastrophic" loss, and the cap does not apply in certain personal injury and wrongful death actions);

- Tex. Civ. Prac. & Rem. Code Ann. § 74.301 (capping noneconomic damages in medical malpractice actions at $250,000 per defendant and $500,000 per claimant);

- Utah Code Ann. § 78B-3-410 (capping noneconomic damages in medical malpractice actions at $450,000 in 2010, subject to yearly increases to adjust for inflation, but held unconstitutional as applied to wrongful death actions);

- Va. Code Ann. § 8.01-581.15 (capping total amount recoverable in medical malpractice actions at $2,500,000 from July 1, 2021 through June 30, 2022);

- W. Va. Code § 55-7B-8 (capping noneconomic damages in medical malpractice actions against insured medical professionals at $250,000 but increasing the cap to $500,000 in certain instances, subject to yearly increases for inflation,); and

- Wis. Stat. Ann. § 893.55 (capping noneconomic damages in medical malpractice actions at $750,000 in an effort "to ensure affordable and accessible health care for all citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice").

Perhaps most notably, Congress imposed caps when it authorized recovery of emotional and other noneconomic damages in suits for employment discrimination. *See* 42 U.S.C. § 1981a(b)(3). Specifically, Title VII limits recovery of noneconomic damages as follows:

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees . . ., [recovery for noneconomic damages shall not exceed] $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees . . ., [recovery for

noneconomic damages shall not exceed] $100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . ., [recovery for noneconomic damages shall not exceed] $200,000;

(D) in the case of a respondent who has more than 500 employees . . ., [recovery for noneconomic damages shall not exceed] $300,000.

Id.

Of course, because Congress never explicitly created a private cause of action for violations of the Rehabilitation Act or the ACA in the first place, it never exercised its judgment about whether to allow recovery of emotional distress damages and, if so, whether to cap them. *See Barnes*, 536 U.S. at 187–88. Had Congress created a cause of action here by statute, it may or may not have permitted recovery of emotional distress damages. There is no way to know. We do know, however, that all of the policy considerations that have caused courts and legislatures to prohibit or cap recovery of emotional distress damages in numerous contexts apply with full force to claims under the Rehabilitation Act and the ACA. Consequently, had Congress considered the

issue and allowed recovery of emotional distress damages at all, there is every reason to believe it would have capped recovery at reasonable levels, just as it did in Title VII.

B. Allowing recovery of unlimited emotional distress damages would affect fiscal decisions by state and local governments and discourage local governments from taking federal assistance.

Exposing state and local governments to unlimited emotional distress damages has the potential to affect fiscal decisions made by those governments. Because of the unpredictability and potentially large awards of emotional damages, the risk of liability may require state and local governments to reallocate local funds, thereby necessitating reduced community services. That risk may even lead local governments to consider increasing local taxes to offset potential damage awards.

Similarly, permitting those damages could force state and local governments to reconsider whether to accept federal assistance to fund certain programs. This Court has recognized that "compensatory damages" against recipients of federal funds could "exceed a recipient's level of federal funding." *Gebser*, 524 U.S. at 290. Permitting uncapped emotional distress damages—with all their uncertainty and indeterminacy—changes the risk assessment of

whether to take federal funds. *See Barnes*, 536 U.S. at 188. The potential for those damages may leave governments unwilling, if not financially unable, to risk accepting federal financial assistance.

This risk of severe adverse impact from uncapped liability on state and local governments has often been recognized in state statutes limiting the liability of state and local governments under many circumstances. See, for example:

- Ala. Code § 11-93-2 (capping recovery of damages against a governmental entity for bodily injury or death at $100,000 per person and $300,000 in the aggregate per occurrence, and $100,000 for damage or loss of property);

- Alaska Stat. § 09.65.070 (limiting circumstances under which damages claims against incorporated units of local government may be pursued but not capping damages recoverable);

- Colo. Rev. Stat. Ann. § 24-10-114 (capping damages recoverable from a public entity or public employee at $350,000 per claimant and $990,000 in the aggregate per occurrence, subject to adjustments for inflation, and allowing public entities to increase any maximum recovery by resolution);

- Del. Code tit. 10, § 4013 (capping damages against a political subdivision and its employees at $300,000 or any applicable amount of insurance coverage, whichever is greater);

- Fla. Stat. Ann. § 768.28 (capping tort recovery from state and its agencies and subdivisions at $200,000 per claimant and $300,000 per occurrence or incident);

- Ga. Code Ann. § 36-92-2 (capping damages recoverable from local government entities arising out of negligent use of a covered motor vehicle, ranging from $50,000 to $700,000 depending on the circumstances);

- Ga. Code Ann. § 50-21-29 (capping damages recoverable from state government entities at $1,000,000 per person and $3,000,000 in the aggregate per occurrence);

- Idaho Code Ann. § 6-926 (capping damages recoverable from a governmental entity at $500,000 per occurrence or the applicable limits of insurance if greater);

- 705 Ill. Comp. Stat. Ann. § 505/8(d) (capping tort damages against state at $2,000,000, except in certain enumerated instances);

- Ind. Code § 34-13-3-4 (capping damages recoverable from governmental entities and public employees at $700,000 per person and $5,000,000 in the aggregate per occurrence);

- Kan. Stat. Ann. § 75-6105 (capping damages recoverable from governmental entity at $500,000);

- La. Stat. Ann. § 13:5106 (capping damages recoverable from the state and political subdivisions for personal injury or wrongful death at $500,000 per person, exclusive of property damages, medical care and related benefits and loss of earnings, and loss of future earnings);

- Me. Rev. Stat. Ann. tit. 14, § 8105 (capping damages against a governmental entity or its employees at $400,000 per occurrence);

- Md. Code Ann., Cts. & Jud. Proc. § 5-303 (capping liability of a local government at $400,000 per claim and $800,000 per occurrence);

- Md. Code Ann., State Gov't § 12-104 (capping liability of state at $400,000 per claimant);

- Mass. Gen. Laws Ann. Ch. 258, § 2 (capping damages for public employers at $100,000,

except for claims against the Massachusetts Bay Transportation Authority for serious bodily injury);

- Minn. Stat. Ann. § 466.04 (imposing different caps on liability of any municipality under various circumstances);

- Minn. Stat. Ann. § 3.736 (imposing different caps on liability of the state and its employees under various circumstances);

- Miss. Code Ann. § 11-46-15 (capping liability for governmental entities and employees at $500,000);

- Mo. Rev. Stat. § 537.610 (capping liability of the state and public entities at $2,000,000 per occurrence and $300,000 per person, except for claims governed by Missouri workers' compensation law);

- Mont. Code Ann. § 2-9-108 (capping liability for state, county, municipality, taxing district, and any other political subdivision at $750,000 per claim and $1,500,000 per occurrence);

- Neb. Rev. Stat. § 13-926 (capping liability under the Political Subdivisions Tort Claims Act at $1,000,000 per person and $5,000,000 per occurrence);

- Nev. Rev. Stat.§ 41.035 (capping liability for state employees, political subdivision, or state legislator at $75,000);

- N.H. Rev. Stat. Ann. § 507-B:4 (capping liability of governmental unit for bodily injury, personal injury or property damage at $325,000 per person and $1,000,000 per occurrence);

- N.H. Rev. Stat. Ann. § 541-B:14 (capping liability for agency for tort damages at $475,000 per claimant and $3,750,000 per occurrence or proceeds of applicable insurance, whichever is greater);

- N.M. Stat. Ann. § 41-4-19 (imposing various caps on liability of a governmental entity or public employee based on the type of injury claimed);

- N.C. Gen. Stat. § 153A-435 (participating in local government risk pool or otherwise purchasing liability insurance waives county's governmental immunity);

- N.C. Gen. Stat. § 160A-485 (same for city);

- N.C. Gen. Stat. § 143-299.2 (capping liability of state at $1,000,000 per occurrence, less any applicable commercial liability insurance);

- N.D. Cent. Code § 32-12.2.02 (capping liability of state at $375,000 per person and $1,000,000 per occurrence);

- Ohio Rev. Code Ann. § 2744.05 (capping damages against political subdivision "that do not represent the actual loss of the person who is awarded the damages" at $250,000 per person, except in wrongful death actions);

- Okla. Stat. Ann. tit. 51, § 154 (imposing various caps on liability of state and political subdivisions at different amounts based on type of loss and other factors);

- Or. Rev. Stat. §§ 30.271–73 (imposing cap on liability of state and its officers, employees, and agents, subject to increases after 2015);

- 42 Pa. Cons. Stat. Ann. § 8528 (capping damages recoverable from state government at $250,000 per person and $1,000,000 per occurrence and limiting type of damages recoverable to past and future loss of earnings and earning capacity, pain and suffering, medical and dental expenses, loss of consortium, and property losses);

- 42 Pa. Cons. Stat. Ann. § 8553 (capping damages recoverable from local government at

$500,000 per occurrence and limiting types of damages recoverable to past and future loss of earnings and earning capacity, pain and suffering if the claim is for death or permanent loss of a bodily function or permanent disfigurement or dismemberment, medical and dental expenses, loss of consortium, loss of support, and property losses);

- R.I. Gen. Laws § 9-31-2 (capping damages against state or political subdivision at $100,000);

- R.I. Gen. Laws § 9-31-3 (capping damages against city, town, or fire district at $100,000);

- S.C. Code Ann. § 15-78-120 (capping damages against governmental entity at $300,000 per person and $600,000 per occurrence, subject to certain enumerated exceptions);

- S.D. Codified Laws § 21-32A-1 (public entity other than state waives sovereign immunity by participating in risk sharing pool or purchasing liability insurance that would afford coverage);

- S.D. Codified Laws § 21-32A-2 (sovereign immunity exists for state and public entities if no participation in risk sharing pool or no applicable insurance);

- Tenn. Code Ann. § 9-8-307 (capping damages for state at $300,000 per claimant and $1,000,000 per occurrence);

- Tenn. Code Ann. § 29-20-403 (prescribing requisite limit of insurance per type of injury or damage for governmental entities purchasing insurance, and capping damages against governmental entities not purchasing insurance at same levels);

- Tenn. Code Ann. § 29-20-404 (capping liability of governmental entity at applicable limit of insurance);

- Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (capping liability of state and local governments, municipalities, and emergency service organization at various levels);

- Utah Code Ann. § 63G-7-604 (capping liability of governmental entity or employee at $583,900 per person and $3,000,000 per occurrence);

- Vt. Stat. Ann. tit. 12, § 5601 (capping liability of state at $500,000 per person and $2,000,000 per occurrence);

- Vt. Stat. Ann. tit. 29, § 1404 (capping liability of municipal corporation or county at maximum amount of applicable liability insurance);

- Va. Code Ann. § 8.01-195.3 (capping damages against Commonwealth and transportation districts at $100,000 or the maximum limit of applicable liability insurance);

- W. Va. Code § 29-12A-7 (limiting noneconomic damages against government entities, in particular, to $500,000);

- Wis. Stat. Ann. § 893.80 (capping damages against volunteer fire company, political corporation, governmental subdivision, or agency at $50,000, subject to limited exceptions);

- Wis. Stat. Ann. § 893.82 (capping liability of state officer, employee, or agent at $250,000);

- Wyo. Stat. Ann. § 1-39-118 (capping liability of governmental entity or public employee at $250,000 per claimant and $500,000 per occurrence, unless the government entity has applicable insurance in which case the cap is the maximum level of insurance available).

Of course, these caps do not apply to federal causes of action. *See, e.g.*, *Patrick v. City of Florala*, 793 F. Supp. 301, 302–03 (M.D. Ala. 1992) (holding state laws limiting damages available against state and local government entities are not applicable to federal

causes of action). They accordingly provide no protection from boundless damage awards under the Rehabilitation Act or the ACA.

Permitting recovery of emotional distress damages with carefully considered caps, like those in Title VII, presents a far different calculus for state and local governments than permitting uncapped recovery of such damages. Most notably, caps give recipients protection against disastrous runaway results, in contrast to the possibility of a judge mitigating such an award to some unknowable degree by granting remittitur. With a cap, recipients of federal funds can reasonably calculate potential liability and, accordingly, make informed judgments.

In contrast, exposing state and local governments to uncapped emotional distress damages places those governments in the intolerable position of facing unknown exposure to potentially high damages awards. Yet, as noted above, unlike Congress, this Court is not positioned to make inherently legislative judgments about whether to allow recovery and, if so, how to limit and cap exposure.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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