Affordable Care Act & Rehabilitation Act — Spending Clause — Remedies — Emotional Distress — Cummings v. Premier Rehab Keller, P.L.L.C.

The Spending Clause[1] empowers Congress to pass statutes that condition the receipt of federal funds on compliance with certain terms, including not discriminating based on disability.[2] Title VI[3] is one such statute, as are the Rehabilitation Act[4] (RA) and the Affordable Care Act[5] (ACA), which incorporate Title VI's rights and remedies.[6] If federal funding recipients violate these statutes' antidiscrimination prohibitions, individuals have an implied private right of action to sue for damages.[7] In 2002, in *Barnes v. Gorman*,[8] the Supreme Court examined the scope of damages available in such suits, holding that compensatory damages and injunctive relief are available, but punitive damages are not available because funding recipients are not "on notice" that they would be liable for such damages.[9] Last Term, in *Cummings v. Premier Rehab Keller, P.L.L.C.*,[10] the Court further limited the scope of damages available under Spending Clause statutes. The Court held that plaintiffs may not recover emotional distress damages because such damages are not remedies "traditionally available" under contract law, which means federal funding recipients are not on notice of them.[11] This manipulation of the contract law analogy severs it from the fair-notice values on which it's based and removes a longstanding basis on which plaintiffs have gotten compensatory relief for discrimination by federal funding recipients.

In October 2016, Jane Cummings sought physical therapy services from Premier Rehab Keller, P.L.L.C., ("Premier") to treat her chronic back pain.[12] Cummings is deaf as well as legally blind, resulting in limited English proficiency and significant difficulty communicating by writing.[13] Her primary language is American Sign Language

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[1] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[2] *See* Barnes v. Gorman, 536 U.S. 181, 184–86 (2002).

[3] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

[4] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

[5] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

[6] 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 18116(a); *see Barnes*, 536 U.S. at 185.

[7] *See Barnes*, 536 U.S. at 185 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979); Alexander v. Sandoval, 532 U.S. 275, 280 (2001)).

[8] 536 U.S. 181 (2002).

[9] *Id.* at 187–88.

[10] 142 S. Ct. 1562 (2022).

[11] *Id.* at 1572 (quoting *Barnes*, 536 U.S at 187).

[12] Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 674 (5th Cir. 2020).

[13] Cummings v. Premier Rehab, P.L.L.C., No. 18-CV-649-A, 2019 WL 227411, at *1 (N.D. Tex. Jan. 16, 2019).

(ASL).[14] When scheduling an appointment with Premier, Cummings requested an ASL interpreter, but Premier refused the request, saying she could communicate through writing, lipreading, gestures, or by providing her own interpreter.[15] Cummings said such methods would be insufficient, but Premier still refused her request.[16] Cummings went to see a different physical therapy provider, but she alleged those services were "unsatisfactory" and twice more returned to Premier and requested ASL interpretation.[17] Premier denied both additional requests.[18]

On August 7, 2018, Cummings sued in the U.S. District Court for the Northern District of Texas, alleging that Premier had "discriminated against her on the basis of disability by denying her an interpreter"[19] and thereby violated the Americans with Disabilities Act Amendments Act[20] (ADAAA), the RA,[21] the ACA,[22] and the Texas Human Resources Code[23] (THRC). Premier receives federal funds through Medicare and Medicaid, subjecting it to the RA's and ACA's requirements that funding recipients not discriminate when providing services.[24] Cummings sought declaratory and injunctive relief, compensatory and exemplary damages, and attorney's fees.[25] Premier filed a motion to dismiss, arguing that Cummings lacked standing and failed to plead a claim on which the court could grant relief.[26] Cummings voluntarily withdrew her THRC claim.[27]

The district court granted Premier's motion to dismiss.[28] The court first held that Cummings did not have standing to seek equitable relief,

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.); 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

[21] 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

[22] 42 U.S.C. § 18116(a) ("[A]n individual shall not, on the ground prohibited under . . . [29 U.S.C. § 794(a)], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . .").

[23] TEX. HUM. RES. CODE ANN. § 121.003 (2021).

[24] *Cummings*, 142 S. Ct. at 1569.

[25] Cummings v. Premier Rehab, P.L.L.C., No. 18-CV-649-A, 2019 WL 227411, at *1 (N.D. Tex. Jan. 16, 2019).

[26] *Id.*

[27] *Id.* For speculation as to why, see Matthew "Hezzy" Smith & Michael Ashley Stein, *Global Disability Cause Lawyering*, THE PRACTICE, May/June 2022, https://thepractice.law.harvard.edu/article/global-disability-cause-lawyering [https://perma.cc/68BD-22X7].

[28] *Cummings*, 2019 WL 227411, at *5.

but did have standing to seek damages.[29] It then held that she could not recover damages under the ADAAA, RA, or ACA.[30] The court explained that Title III of the ADAAA provided no cause of action for damages, and that damages for emotional distress are not available under section 504 of the RA or section 1557 of the ACA.[31] Cummings had sought damages only for "humiliation, frustration, and emotional distress," thus failing to plead a claim on which relief could be granted.[32]

Cummings appealed the district court's holding that emotional distress damages are not recoverable under the RA or ACA.[33] Reviewing the issue de novo, the United States Court of Appeals for the Fifth Circuit affirmed the decision.[34] It was an issue of first impression.[35] The Fifth Circuit began from the premise that the RA and ACA, as legislation passed under Congress's spending power, have often been interpreted by analogy to contract law.[36] Invoking the Supreme Court's decision in *Barnes v. Gorman*, the Fifth Circuit explained that the availability of damages under Spending Clause legislation is contingent on whether "the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature."[37] Under *Barnes*, funding recipients are on notice that they are "subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies *traditionally available* in suits for breach of contract."[38] But, the Fifth Circuit explained, emotional distress damages are not a remedy traditionally available for breach of contract cases, and consequently, funding recipients are not liable for them.[39]

The Fifth Circuit likewise rejected Cummings's argument that her case fit an exception in the principles of contract law that "permits a plaintiff to recover emotional distress damages when the contract or breach is such that the plaintiff's 'serious' emotional disturbance was a

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[29] *Id.* at *2. Cummings failed to allege an ongoing or imminent threat of harm, so she did not have standing for equitable relief. *Id.* But she had alleged "unequal treatment and emotional harm," which were cognizable injuries that could be redressed with damages. *Id.* at *3.

[30] *Id.* at *4.

[31] *Id.* The district court acknowledged the principle that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). Yet the district court treated *Barnes* as supervening and analogously excluded nonpecuniary emotional distress harms. *Id.* (citing Barnes v. Gorman, 536 U.S. 181, 187–89 (2002)).

[32] *Id.* The district court also rejected her request to further amend her complaint. *Id.* at *5.

[33] Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 675 (5th Cir. 2020).

[34] *Id.* at 674–75.

[35] *Id.* at 675.

[36] *Id.* at 676 (quoting *Barnes*, 536 U.S. at 186).

[37] *Id.* at 677 (quoting *Barnes*, 536 U.S. at 187).

[38] *Id.* at 676 (quoting *Barnes*, 536 U.S. at 187 (emphasis added)).

[39] *Id.* at 677 (citing RESTATEMENT (SECOND) OF CONTS. § 353 cmt. a (AM. L. INST. 1981); *Barnes*, 536 U.S. at 187).

'*particularly likely* result.'"[40] It reasoned that the contract law analogy "is only a metaphor," such that the court is not obligated to follow every exception.[41] The Fifth Circuit also rejected the argument — which had been embraced by the Eleventh Circuit[42] — that funding recipients should be on notice because emotional distress is a foreseeable consequence of discrimination.[43] It reasoned first that "foreseeability" is distinct from "notice," and second that a foreseeability standard would expand rather than limit liability, which the court declined to do.[44] Cummings filed a petition for certiorari.[45]

The Supreme Court affirmed.[46] Writing for the Court, Chief Justice Roberts drew upon the contract law analogy. He explained that "whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause 'statutes operate': by 'conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.'"[47] Hence, the legitimacy of the condition rests on the funding recipient's voluntary and knowing acceptance of the terms of liability.[48] Where the statutory text contains no explicit remedies,[49] "a federal funding recipient may be considered 'on notice that it is subject . . . to those remedies traditionally available in suits for breach of contract.'"[50] The Court, therefore, agreed with the Fifth Circuit that the key question was: "Would a prospective funding recipient, at the time it 'engaged in the process of deciding whether [to] accept' federal dollars, have been aware that it would face such liability?"[51]

The Court held that because emotional distress damages, much like the punitive damages at issue in *Barnes*, are not a remedy generally available for breach of contract, they are not one for which funding recipients can be said to be "on notice."[52] As the Court explained, it "is hornbook law that 'emotional distress is generally not compensable in

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[40] *Id.* at 677–78 (quoting RESTATEMENT (SECOND) OF CONTS. § 353 cmt. a (AM. L. INST. 1981) (emphasis added)).

[41] *Id.* at 678.

[42] *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1198 (11th Cir. 2007).

[43] *Cummings*, 948 F.3d at 679.

[44] *Id.*

[45] Petition for Writ of Certiorari, *Cummings*, 142 S. Ct. 1562 (No. 20-219). For a critique of the petitioner's decision to seek certiorari, see Smith & Stein, *supra* note 27.

[46] *Cummings*, 142 S. Ct. at 1576.

[47] *Id.* at 1570 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998)).

[48] *Id.* (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)). A remedy is "'appropriate relief' in a private Spending Clause action 'only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.'" *Id.* (quoting *Barnes*, 536 U.S. at 187).

[49] The RA and ACA do not provide express rights of action, but they incorporate the rights and remedies of Title VI, which has an implied right of action. *See id.* at 1569.

[50] *Id.* at 1571 (quoting *Barnes*, 536 U.S. at 187).

[51] *Id.* at 1570–71 (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006)).

[52] *Id.* at 1571–72, 1576.

contract.'"[53] Moreover, not having such a limit on remedies "risks arrogating legislative power" given that there is no explicit provision for remedies in the statutory text.[54] Congruent with the Fifth Circuit, the majority rejected Cummings's argument that the funding recipients should be on notice under "the special rule" that emotional distress damages are recoverable for breaches of contracts where "serious emotional disturbance was a particularly likely result."[55] The relevant question, the Court emphasized, was "whether a remedy is 'traditionally,' 'generally,' or 'normally available for contract actions'"[56] and not "whether there is a 'more fine-grained' or 'more directly applicable' rule of contract remedies that, although not generally or normally applicable, 'govern[s] in the specific context.'"[57] The Court reasoned that Cummings's approach would be irreconcilable with *Barnes* because that decision had found punitive damages are not generally available for breach of contract, and thus are not a remedy for which federal funding recipients are on notice, even though there are special cases where punitive damages are available.[58] Plus, the majority disagreed with Cummings's claim that her "special rule" had widespread acceptance in American contract law.[59]

Justice Kavanaugh penned a short concurrence, which Justice Gorsuch joined.[60] The concurrence argued that "the contract-law analogy is an imperfect way to determine the remedies for this implied cause of action."[61] Instead, Justice Kavanaugh suggested he "would reorient the inquiry" to focus on a separation of powers concern: Congress, not the judiciary, should extend implied causes of action and their remedies.[62]

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented.[63] Justice Breyer agreed that the contract law analogy provided the correct framework, but he disagreed with the majority's application of the analogy.[64] He embraced Cummings's more specific rule, arguing that "[d]amages for emotional suffering have long been available as remedies for suits in breach of contract — at least where the breach was particularly likely to cause suffering of that kind."[65] Justice Breyer admitted

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[53] *Id.* at 1571 (quoting DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 216 (5th ed. 2019)).

[54] *Id.* at 1574 (quoting Hernández v. Mesa, 140 S. Ct. 735, 741 (2020)).

[55] *Id.* at 1572 (quoting Brief for Petitioner at 31, *Cummings* (No. 20-219)).

[56] *Id.* (quoting Barnes v. Gorman, 536 U.S. 181, 187–88 (2002)).

[57] *Id.* (quoting Brief for Petitioner, *supra* note 55, at 33–35).

[58] *Id.* at 1572–73 (noting, for example, cases where the breach of contract is also tortious conduct).

[59] *Id.* at 1574.

[60] *Id.* at 1576 (Kavanaugh, J., concurring).

[61] *Id.*

[62] *Id.* at 1576–77. In this way, the principles articulated by the concurrence took aim at implied causes of action, *see id.*, whereas the majority opinion had reaffirmed that "it is 'beyond dispute that private individuals may sue to enforce' the antidiscrimination statutes we consider here," *id.* at 1569–70 (majority opinion) (quoting Barnes v. Gorman, 536 U.S. 181, 185 (2002)).

[63] *Id.* at 1577 (Breyer, J., dissenting).

[64] *Id.*

[65] *Id.* at 1578.

that most commercial contracts seek pecuniary gain and thus lead to pecuniary remedies, but he insisted that "contract law traditionally does award damages for emotional distress 'where other than pecuniary benefits [were] contracted for' or where the breach 'was particularly likely to result in serious emotional disturbance.'"[66] Here, a promise not to discriminate has a nonpecuniary purpose, and often "emotional injury is the primary (sometimes the only) harm caused."[67] Emotional distress damages thus "serve contract law's central purpose of compensating the injured party for their expected losses," in contrast to punitive damages, which serve a tort law function.[68] Moreover, antidiscrimination statutes, Justice Breyer emphasized, "vindicate 'human dignity and not mere economics.'"[69] The majority's position "creates an anomaly" given how other antidiscrimination statutes, such as 42 U.S.C. § 1981 and § 1983, allow for the recovery of emotional distress damages.[70]

Cummings is the newest member in a series of cases where the Court analogized Spending Clause legislation to contract law as a way to limit the liability that entities face under the antidiscrimination commitments of Spending Clause statutes. The Court's deployment of the analogy in *Cummings*, however, manipulates how the Court assesses notice in a way that distorts that underlying concern. In collapsing the inquiry to high-level contract principles, the Court decontextualizes the inquiry, ignoring the statutory and judicial context as well as commonsense ideas of what notice a reasonable person subject to antidiscrimination requirements would have. The result is a newly emboldened tool for curtailing private-rights enforcement that is untethered from its initial values.

When the Court first analogized Spending Clause statutes to contract law, it reasoned that there should be sufficient clarity as to what conditions attach to federal funds for recipients to knowingly accept those obligations. In *Pennhurst State School & Hospital v. Halderman*,[71] the Court stated: "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[72] But where such conditions are clear, liability attaches. Accordingly, in *Franklin v. Gwinnett*

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[66] *Id.* at 1578–79 (quoting 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1340, at 2396 (1920); 3 E. ALLAN FARNSWORTH, CONTRACTS § 12.17, at 895 (2d ed. 1998)); *see also id.* at 1579 ("Contract law treatises make clear that expected losses from the breach of a contract entered for *nonpecuniary* purposes might reasonably include *nonpecuniary* harms.").

[67] *Id.* at 1579.

[68] *Id.* at 1581.

[69] *Id.* at 1582 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring)).

[70] *Id.* Title VII of the Civil Rights Act provides for damages for "emotional pain, suffering," and "mental anguish." 42 U.S.C. § 1981a(b)(3). *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), upheld compensatory damages for "personal humiliation, and mental anguish and suffering" under 42 U.S.C. § 1983. *Id.* at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

[71] 451 U.S. 1 (1981).

[72] *Id.* at 17.

County Public Schools,[73] the "notice problem [did] not arise" because a teacher's duty not to intentionally discriminate was unquestionably imposed by Title IX, and the Court had previously suggested that monetary awards could attach for intentional violations of federal statutes.[74] In *Gebser v. Lago Vista Independent School District*,[75] the Court reasoned that because school districts were protected by a deliberate indifference standard under other enforcement schemes, school districts that had accepted federal funds were not on notice that they would be held to a different standard for vicarious liability for teacher-to-student sexual harassment under Title IX.[76] Whereas in *Davis v. Monroe County Board of Education*,[77] the Court reasoned that schools had sufficient notice from the Court's prior decisions, state common law claims, and Department of Education regulations such that it could extend *Gebser*'s deliberate indifference standard to student-on-student harassment.[78]

In 2002, in *Barnes v. Gorman*, the Court extended the contract analogy to the scope of relief that is available for violations — even intentional ones — of Spending Clause statutes.[79] Notably, the way *Barnes* characterized *Davis*, *Pennhurst*, and *Gebser* in dicta obfuscated the notice interest. The Court did not mention how in *Davis* and *Gebser* it was the statutory and judicial contexts that helped give funding recipients notice that liability could attach.[80] Its cursory treatment of precedent focused on the fact *that* the Court had previously analogized to contract law to curtail liability, not *how* it had applied the analogy, in order to say the same analogy applied to the "*scope* of damages remedies."[81] Yet, after *Barnes*, the Court still appeared to treat its extension of the contract law analogy narrowly. In *Arlington Central School District Board of Education v. Murphy*,[82] for instance, the Court sought to find notice in the statutory language of the Individuals with Disabilities Education Act and the Court's related decisions.[83]

In *Cummings*, the Roberts Court stretched the idea of "clear notice" beyond recognition.[84] Instead of looking to statutory language, judicial context, or parties' reasonable expectations,[85] the decision rested notice

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[73] 503 U.S. 60 (1992).
[74] *Id.* at 74–75.
[75] 524 U.S. 274 (1998).
[76] *Id.* at 287–90.
[77] 526 U.S. 629 (1999).
[78] *Id.* at 641–44.
[79] Barnes v. Gorman, 536 U.S. 181, 187 (2002).
[80] *See id.*
[81] *Id.*
[82] 548 U.S. 291 (2006).
[83] *Id.* at 296–97, 300.
[84] *Cummings*, 142 S. Ct. at 1576 (quoting *Arlington*, 548 U.S. at 296).
[85] In *Barnes*, the Court held open the possibility that there could be "reasonably implied contractual terms," which would be "those that the parties would have agreed to if they had adverted

entirely on what remedies were "'traditionally,' 'generally,' or 'normally available for contract actions.'"[86] In this way, the Court conducted its notice inquiry at the highest level of generality. The Court squarely rejected Cummings's attempt to offer a "more fine-grained" understanding of contract law rules that was attuned to the nature of an antidiscrimination statute.[87] This fundamentally shifts the focus of the analogy. The Court lauded its approach as requiring "[n]o dive through the treatises, 50-state survey, or speculative drawing of analogies . . . to anticipate the[] availability" of damages.[88] Yet, the Court's approach decontextualizes its inquiry from the statute's antidiscrimination commitments. At the heart of the Court's argument is the assumption that a funding recipient gets more notice from the most general principles of contract law than from consideration of its obligations to uphold the country's antidiscrimination statutes as a condition of receiving federal funds.

The context of the ACA's and RA's antidiscrimination commitments is precisely what puts funding recipients on notice. Discrimination is a harm that Congress and juries have consistently understood as creating emotional distress that can and often does get remedied as part of compensatory damages.[89] When the Eleventh Circuit considered this issue in *Sheely v. MRI Radiology Network, P.A.*,[90] it described emotional distress as "a predictable, and thus foreseeable, consequence of discrimination" as "a matter of both common sense and case law."[91] This was in part because "federal courts have long found that violations of the RA and other antidiscrimination statutes frequently and palpably result in emotional distress to the victims."[92] The Eleventh Circuit found it "fairly obvious" and supported by case law that federal funding recipients are on notice that if they intentionally discriminate against third parties, then they may be liable for those parties' emotional distress.[93] The Office of the Solicitor General similarly noted in its Amicus Brief in *Cummings* that "[f]or at least three decades, courts and the federal

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to the matters in question," 536 U.S. at 188 (citing 2 FARNSWORTH, *supra* note 66, § 7.16, at 335), or "those that 'compor[t] with community standards of fairness,'" *id.* (quoting RESTATEMENT (SECOND) OF CONTS. § 204 cmt. d (AM. L. INST. 1981)).

[86] *Cummings*, 142 S. Ct. at 1572 (quoting *Barnes*, 536 U.S. at 187–88).

[87] *Id.* at 1572–73.

[88] *Id.* at 1573.

[89] *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (including "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" under compensatory damages for Title VII and ADA violations); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306–07 (1986) (describing how for tort cases "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering,'" *id.* at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)); Carey v. Piphus, 435 U.S. 247, 264–65 n.22 (1978) (listing decisions by courts of appeals awarding damages for "humiliation and distress caused by discriminatory refusals").

[90] 505 F.3d 1173 (11th Cir. 2007).

[91] *Id.* at 1199.

[92] *Id.* (collecting cases).

[93] *Id.* at 1198; *see also id.* at 1204.

government have recognized that federal-funding recipients are subject to compensatory damages for emotional distress."[94]

The Supreme Court in *Cummings* did not even discuss the possibility that the statutory scheme and case law would have put recipients on notice that compensatory remedies for discrimination would include those for emotional distress.[95] Whereas the Fifth Circuit had rejected *Sheely*'s analysis by distinguishing "foreseeability" from "notice,"[96] the Supreme Court made no such distinction. The Supreme Court asked if funding recipients would "have been aware" that they would be liable for certain damages.[97] Awareness would appear to be satisfied from the fact that not only were the damages foreseeable, but also the conduct was assumed to be an intentional violation of both statutes,[98] and the statutory scheme had long been interpreted to include such liability.[99] Instead, both the majority and the dissent embraced the traditional principles of contract law as the proper framework under which to decide the case.[100] And in elevating this legal fiction of "notice," the majority removed a longstanding, crucial way by which victims of discrimination had been able to vindicate their statutory rights in the face of intentional discrimination by federal funding recipients.[101]

Notably, Justices Kavanaugh and Gorsuch concurred to express their dissatisfaction with the contract law analogy. However, these Justices suggested trading the contract law analogy for a separation of powers approach that also would be likely to undercut the statutes' antidiscrimination aims.[102] The two-paragraph concurrence provided limited detail, but it cited *Hernández v. Mesa*,[103] where the Court declined to extend

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94 Brief for the United States as Amicus Curiae at III, *Cummings*, 142 S. Ct. 1562 (No. 20-219); *see also id.* at 20.

95 *Compare Cummings*, 142 S. Ct. 1562 (no mention), *with Sheely*, 505 F.3d at 1198.

96 Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 679 (5th Cir. 2020).

97 *Cummings*, 142 S. Ct. at 1570–71 (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006)). The district court also collapsed the notice and foreseeability inquiries, although it found emotional distress damages unforeseeable. *See* Cummings v. Premier Rehab, P.L.L.C., No. 18-CV-649-A, 2019 WL 227411, at *4 (N.D. Tex. Jan. 16, 2019).

98 For the motion to dismiss, the court accepted the allegations as true, assuming the behaviors constituted intentional discrimination in violation of the statutes. *Cummings*, 2019 WL 227411, at *3–4.

99 *See* Brief for the United States as Amicus Curiae, *supra* note 94, at 20; *cf.* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643–44 (1999) (explaining that state court decisions as well as "the regulatory scheme surrounding Title IX ha[ve] long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents," *id.* at 643).

100 *Cummings*, 142 S. Ct. at 1577 (Breyer, J., dissenting).

101 *See* Brief for the United States as Amicus Curiae, *supra* note 94, at 28; *see also* Smith & Stein, *supra* note 27 ("*Cummings* portends restrictive judicial rulings relating to emotional distress damages not only for the disability community but also for racial and ethnic minorities, women, and others seeking similar remedies."). It is possible, however, that creative litigants still may be able to seek some forms of similar damages. *Cf.* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 315 (1986) (Marshall, J., concurring in the judgment) (noting various types of loss of opportunity damages).

102 *Cummings*, 142 S. Ct. at 1576 (Kavanaugh, J., concurring).

103 140 S. Ct. 735 (2020).

Bivens[104] to create a damages remedy in a new context,[105] and Justice Scalia's concurrence in *Franklin v. Gwinnett County Public Schools*, where he disagreed with the presumption that courts can grant any appropriate relief in cases of implied causes of action.[106] These citations suggest that the Justices are broadly interested in curtailing remedies that are not explicitly provided by Congress. Given that Title VI, Title IX, and the many Spending Clause statutes that incorporate their remedies rely on implied causes of action,[107] the concurrence appears to suggest an even greater curtailment of liability than the majority does.

Regardless of the concurrence, the Court does not appear likely to rein in the analogy.[108] Other significant decisions in the 2021 Term also curtailed available legal remedies.[109] Plus, on May 2, 2022 — only four days after the Court released its opinion in *Cummings* — the Court granted a petition for certiorari for another Spending Clause case: *Health & Hospital Corp. of Marion County v. Talevski*.[110] The defendant-appellees in *Talevski* are urging the Court to apply the contract law analogy to hold that the private right of action set forth in § 1983 does not encompass individuals seeking to enforce rights conferred under Spending Clause statutes.[111] In *Cummings*, both the majority and the dissent agreed that the contract law analogy was the correct way to answer the question presented. That places the Court on a slippery slope of cases that cut back individuals' ability to hold federal funding recipients liable for discriminating against federally protected classes. The worry remains how much further the Court will go.

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[104] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[105] *Hernández*, 140 S. Ct. at 739 ("[T]he Constitution's separation of powers requires us to exercise caution before extending *Bivens* to a new 'context.'"); *see also Cummings*, 142 S. Ct. at 1577 (Kavanaugh, J., concurring) (citing *Hernández*, 140 S. Ct. at 741–42).

[106] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76–78 (1992) (Scalia, J., concurring in the judgment); *see also Cummings*, 142 S. Ct. at 1577 (Kavanaugh, J., concurring) (citing *Franklin*, 503 U.S. at 77–78)..

[107] *See Cummings*, 142 S. Ct. at 1569.

[108] *Cf.* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 408 (2008) (predicting in 2008 that the Roberts Court would extend the contract analogy).

[109] *See, e.g.*, Vega v. Tekoh, 142 S. Ct. 2095, 2107 (2022) (holding that a *Miranda* violation does not provide a basis for a § 1983 claim, Miranda v. Arizona, 384 U.S. 436 (1966)); Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022) (declining to extend a *Bivens* cause of action).

[110] 6 F.4th 713 (7th Cir. 2021), *cert. granted*, 142 S. Ct. 2673 (2022) (mem.).

[111] Petition for Writ of Certiorari at 8, *Talevski*, 142 S. Ct. 2673 (No. 21-806).