WITHOUT REMEDIES: THE EFFECT OF *CUMMINGS* AND THE CONTRACT-LAW ANALOGY ON ANTIDISCRIMINATION SPENDING CLAUSE PLAINTIFFS

It has become increasingly difficult for civil rights plaintiffs to vindicate their rights in federal court. Barriers to successful lawsuits are plentiful. Qualified immunity ensures many officials are insulated from suit;[1] the slow death of *Bivens* means many plaintiffs have no cause of action with which to litigate violations of their constitutional rights by federal actors;[2] and statutory schemes close the courthouse doors to some plaintiffs.[3] And even when Congress acts to permit some plaintiffs to bring suit by statute, the Supreme Court can develop new doctrines that curtail the ability of plaintiffs to secure relief.

One such set of statutes is the antidiscrimination Spending Clause statutes[4]: Title VI of the Civil Rights Act of 1964,[5] Title IX of the Educational Amendments of 1972,[6] Section 504 of the Rehabilitation Act of 1973,[7] the Age Discrimination Act of 1975,[8] and Section 1557 of the Patient Protection and Affordable Care Act.[9] These statutes were enacted under Congress's Spending Clause power, through which Congress can condition the grant of federal money to funding recipients in exchange for the recipient "agree[ing] to comply with federally imposed conditions."[10] The antidiscrimination Spending Clause statutes require recipients of federal funds (such as schools or hospitals) "to avoid discriminating on the basis of protected characteristics in exchange for funding,"[11] and protect individuals participating in federally funded programs (such as students or patients) from being "excluded from participation in," "denied the benefits of," or "subjected to

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[1] *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 479, 494–95 (2011).

[2] *See, e.g.*, Henry Rose, *The Demise of the* Bivens *Remedy Is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 230 (2022).

[3] *See, e.g.*, Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 143–44 (2021).

[4] This Note uses the term "antidiscrimination Spending Clause statutes" after other scholars in this area. *See, e.g.*, Shariful Khan, *An Expansive View of "Federal Financial Assistance*,*"* 133 YALE L.J.F. 691, 694 (2024).

[5] 42 U.S.C. §§ 2000d to 2000d-7 (prohibiting race, color, and national origin discrimination in programs that receive federal financial assistance).

[6] 20 U.S.C. §§ 1681–1688 (prohibiting sex discrimination in educational programs or activities that receive federal financial assistance).

[7] 29 U.S.C. § 794 (prohibiting disability discrimination in programs that receive federal financial assistance).

[8] 42 U.S.C. §§ 6101–6107 (prohibiting age discrimination in programs that receive federal financial assistance).

[9] 42 U.S.C. § 18116 (prohibiting discrimination on the basis of race, color, national origin, sex, age, and disability in health programs or activities that receive federal financial assistance).

[10] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[11] Khan, *supra* note 4, at 692.

discrimination" in "program[s] or activit[ies]" that "receiv[e] Federal financial assistance."[12]

These statutes are powerful tools. When a student at a public high school is subjected to harassment, threats, racial slurs, and physical attacks so severe he is unable to finish high school, he can sue his school district thanks to Title VI.[13] When a woman who is legally blind is prohibited from bringing her service dog to a medical appointment, she can bring a discrimination claim against the provider thanks to Section 504 of the Rehabilitation Act (as well as Title II of the Americans with Disabilities Act).[14] And when a college student is bruised, scratched, and strangled by a college football player who had previously assaulted two other female students, she can sue her university under Title IX.[15]

But in recent years, the Supreme Court has curtailed the ability of plaintiffs to bring these suits and recover damages by grafting a different body of law — contract law — onto suits brought under the antidiscrimination Spending Clause statutes. In the "contract-law analogy" line of cases, the Supreme Court determined that antidiscrimination Spending Clause statutes are analogous to contracts between the federal government and the funding recipient.[16] At first, the analogy seemed like a clear statement rule. Funding recipients, like parties to a contract, must be put on notice of what conditions they are agreeing to abide by in exchange for federal money.[17] But with cases like *Cummings v. Premier Rehab Keller, P.L.L.C.*,[18] the Supreme Court has used the contract-law analogy to significantly cut back on the ability of antidiscrimination plaintiffs to win their lawsuits and recover monetary damages at all.[19]

Part I recounts the history of antidiscrimination Spending Clause litigation. Part II discusses the contract-law analogy from its initial

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[12] 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a); 29 U.S.C. § 794(a); 42 U.S.C. § 6102; *id.* § 18116(a).

[13] *See* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 658–60, 663 (2d Cir. 2012). Anthony Zeno brought suit under Title VI after he experienced years of racial harassment and threats without corrective action from his high school. *Id.* at 659. Anthony won his Title VI trial and was awarded $1,000,000. *Id.*

[14] *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1178–80 (11th Cir. 2007). Annette Sheely, a "legally blind" woman aided by a guide dog, accompanied her minor son to get an MRI. *Id.* at 1178. The staff refused to let Sheely's guide dog into the appointment. *Id.* Sheely's case settled. *See* Joint Stipulation of Dismissal with Prejudice at 1, Sheely v. MRI Radiology Network, P.A., No. 05-cv-61240 (S.D. Fla. Mar. 11, 2008).

[15] *See* Brown v. Arizona, 82 F.4th 863, 866, 872 (9th Cir. 2023) (en banc). Officials at the University of Arizona were made aware that Orlando Bradford, a football player, "violently assaulted" two women he had been dating. *Id.* at 866, 867–70. Later, Bradford physically abused plaintiff Mackenzie Brown, leaving her with "burst blood vessels in the eye," "bruising," "scratches," "contusions," and a "likely concussion." *Id.* at 870, 872. Brown's Title IX suit settled. Notice of Settlement at 1, Brown v. Arizona, No. 17-cv-03536 (D. Ariz. Aug. 12, 2024).

[16] *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 186 (2002).

[17] *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 394 (2008) (describing an early contract-law analogy case as "a straightforward application of the clear-statement rule").

[18] 142 S. Ct. 1562 (2022).

[19] *Id.* at 1576; *see also Barnes*, 536 U.S. at 186–87.

announcement in *Pennhurst State School & Hospital v. Halderman*[20] to the Supreme Court's recent decision in *Cummings*. Part III critiques the Court's recent contract-law analogy cases, arguing the analogy (1) relies on an illogical comparison of statutes to contracts; (2) is disconnected, in its modern form, from any sensible conception of notice; and (3) was twisted in an intellectually bankrupt way such that the analogy operates to hurt plaintiffs, not defendants. Turning to empirical study, Part IV surveys Title IX and Title VI verdicts to catalog how the ability of plaintiffs to secure monetary recovery has changed since *Cummings* was decided. Finally, Part V discusses how district courts have been grappling with difficult questions since *Cummings* was decided.

I. THE RISE OF ANTIDISCRIMINATION SPENDING CLAUSE LITIGATION

The first of the antidiscrimination Spending Clause statutes was Title VI, enacted at the apex of the Civil Rights Movement as part of the Civil Rights Act of 1964.[21] Title VI prohibits discrimination based on "race, color, or national origin" in "any program or activity receiving Federal financial assistance."[22] Title IX followed in 1972, prohibiting discrimination based on sex in "any education program or activity receiving Federal financial assistance."[23]

Both Title VI and Title IX were enacted under the Spending Clause, a provision of the Constitution authorizing Congress to appropriate funds for the "general Welfare."[24] When Congress enacts laws under its Spending Clause authority, it can require funding recipients to abide by certain conditions in exchange for federal money.[25] Congress has used its Spending Clause authority to advance a wide range of policy goals,[26] including, with Title VI and Title IX, discouraging discrimination.

But although Title VI and Title IX were enacted to curb discrimination, the statutes did not provide an express cause of action permitting private parties to obtain judicial relief if they did experience discrimination in a program receiving federal funds.[27] Instead, both statutes contained only administrative remedies, allowing the federal government, not private actors, to enforce the statutes by terminating

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[20] 451 U.S. 1 (1981).

[21] *See* KIMBERLY JENKINS ROBINSON & GEDÁ JONES HERBERT, EDUC. RTS. INST., UNIV. OF VA. SCH. OF L., PREVENTING AND REMEDYING RACE, COLOR, AND NATIONAL ORIGIN DISCRIMINATION IN SCHOOLS: A PRIMER ON TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 9 (2024).

[22] 42 U.S.C. § 2000d.

[23] 20 U.S.C. § 1681(a).

[24] U.S. CONST. art. I, § 8, cl. 1.

[25] South Dakota v. Dole, 483 U.S. 203, 206 (1987).

[26] *See id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (plurality opinion)).

[27] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979).

or refusing to grant funds.[28] So if a student experienced sex discrimination at her school, Title IX as enacted did not provide her with an express remedy. She could contact the Department of Education and hope it took enforcement action against her school. But she could not sue the school herself.

This result — that the very people protected by the antidiscrimination statutes had no means of enforcing the statutes in court — would not last. In the twentieth century, courts often inferred rights of action such that a person who had been injured by a violation of a statute could sue to enforce the statute's guarantees.[29] Courts reasoned that it was their "duty" to recognize implied causes of action "to effectuate the purposes of the statute,"[30] because if someone "for whose especial benefit the statute was enacted" was "damage[d]" it was inherent that they should have a remedy.[31]

So it was with Title VI. In 1967, the Fifth Circuit in *Bossier Parish School Board v. Lemon*[32] inferred a private right of action for Title VI.[33] The Supreme Court declined to hear an appeal,[34] and federal courts thereafter presumed that Title VI permitted private plaintiffs to sue if they suffered race-based discrimination.[35] And in 1974, the Supreme Court assumed, without deciding, the consensus view among the circuits that Title VI implied a private cause of action.[36]

The Supreme Court squarely addressed whether an antidiscrimination Spending Clause statute provided a private right of action in *Cannon v. University of Chicago*.[37] There, the Court reasoned that Title IX did create a private right of action, in part because "Title IX was patterned after Title VI," and "the critical language in Title VI had already been construed as creating a private remedy" by courts like the Fifth Circuit in *Bossier Parish*.[38] The Court reasoned that in using the same language to draft Title IX that federal courts had interpreted as creating a private cause of action to enforce Title VI, the statutory drafters must have likewise intended to imply a private cause of action to enforce Title IX.[39]

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[28] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX).

[29] *See* Madeleine Weldon-Linne, Note, *Title IX: No Longer an Empty Promise* — Cannon v. University of Chicago, 29 DEPAUL L. REV. 263, 263 n.4 (1979) (collecting cases).

[30] *Id.* at 278.

[31] *See* Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916).

[32] 370 F.2d 847 (5th Cir. 1967).

[33] *Id.* at 852.

[34] Bossier Par. Sch. Bd. v. Lemon, 388 U.S. 911 (1967) (mem.) (denying petition for certiorari).

[35] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979).

[36] *See* Lau v. Nichols, 414 U.S. 563, 568–69 (1974).

[37] 441 U.S. 677 (1979).

[38] *Id.* at 694, 696.

[39] *See id.* at 694–98.

Whatever angst *Cannon* might have caused a future, more textualist Court,[40] Congress ultimately blessed the private rights of action. By statute, Congress abrogated state sovereign immunity for private discrimination suits, instructing that states do not have immunity from suits brought in federal court based on violations of Title VI, Title IX, or "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[41] The Court thereafter recognized that the statute abrogating sovereign immunity "cannot be read except as a validation of *Cannon*'s holding,"[42] such that it was "beyond dispute that private individuals may sue" to enforce Title VI and Title IX.[43]

The other antidiscrimination Spending Clause statutes can likewise be enforced via private right of action. The Rehabilitation Act, which prohibits discrimination on the basis of disability, expressly adopts Title VI's remedies and procedures,[44] meaning it too can be enforced by private parties.[45] Likewise, the antidiscrimination provision of the Patient Protection and Affordable Care Act adopts "[t]he enforcement mechanisms provided for and available" under Title IX, Title VI, Section 504 of the Rehabilitation Act, and the Age Discrimination Act.[46] And the Age Discrimination Act itself goes a step further, expressly permitting "any interested person" to bring suit for a violation of the Act.[47]

With the debate over the private right of action settled, federal courts were faced with questions about what remedies litigants could receive. For more than a decade, lower federal courts presumed that Title IX and Title VI suits were limited to injunctive and declaratory relief.[48] But the Supreme Court ruled otherwise in *Franklin v. Gwinnett County Public Schools*,[49] holding that private litigants suing to enforce Title IX could recover money damages from funding recipients in suits involving intentional discrimination.[50]

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[40] *See* Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2087–88 (2017) (explaining the shift away from recognizing implied causes of action was in part because of the rise of textualism).

[41] 42 U.S.C. § 2000d-7(a)(1).

[42] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 72 (1992).

[43] Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

[44] 29 U.S.C. § 794a(a)(2).

[45] *See* Barnes v. Gorman, 536 U.S. 181, 185 (2002).

[46] 42 U.S.C. § 18116(a).

[47] *Id.* § 6104(e)(1).

[48] *See, e.g.*, Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129, 133 (5th Cir. Unit A Apr. 1981), *abrogated by* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992).

[49] 503 U.S. 60 (1992).

[50] *Id.* at 76.

II. THE EXPANSION OF THE CONTRACT-LAW ANALOGY

The contract-law analogy, as initially announced, was simply used "to support a notice requirement."[51] The Court determined that when Congress used its Spending Clause power to impose conditions in exchange for federal funds, it needed to "speak with a clear voice" so that funding recipients could decide whether to accept funds "knowingly, cognizant of the consequences."[52] But as time passed, the Supreme Court expanded the contract-law analogy, curtailing the ability of private parties to bring successful suits by requiring Congress to provide funding recipients with not only notice of the applicable funding conditions, but also "notice of the *facts* in a given case that violate that condition," "notice of how the substantive rule imposed by that condition *applies* to particular facts," and "notice of the *remedy* for violation of a funding condition."[53]

The contract-law analogy was first announced in 1981, in *Pennhurst State School & Hospital v. Halderman*:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.[54]

The Court relied on the analogy to determine that Congress, in enacting the Developmentally Disabled Assistance and Bill of Rights Act of 1975, did not require the funding recipients to provide "appropriate treatment" to certain disabled people, because the statutory language did not clearly impose that condition on funding recipients.[55]

The Supreme Court applied the contract-law analogy with equal force to the antidiscrimination Spending Clause statutes. In *Gebser v. Lago Vista Independent School District*,[56] the Court affirmed that the antidiscrimination Spending Clause statutes are "essentially . . . a contract between the Government and the [funding] recipient."[57] The Court there considered a Title IX claim by a student alleging she had been

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[51] *See* Bagenstos, *supra* note 17, at 393.

[52] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[53] *See* Bagenstos, *supra* note 17, at 394.

[54] 451 U.S. at 17 (footnotes omitted) (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 585–98 (1937); Harris v. McRae, 448 U.S. 297 (1980); Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973); Edelman v. Jordan, 415 U.S. 651 (1974)).

[55] *Id.* at 18, 24. For a fuller history of *Pennhurst*, see Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1187–88 (2022).

[56] 524 U.S. 274 (1998).

[57] *Id.* at 286.

sexually harassed by a teacher.[58] The Court ultimately rejected the claim, reasoning that Title IX did not notify funding recipients they might be held liable for the actions of their agents.[59] As a result, schools could only be held liable for violating Title IX in the case of teacher-student harassment if the school responded to the harassment with deliberate indifference.[60]

Then in *Barnes v. Gorman*,[61] the Court expanded the contract-law analogy by applying it to limit remedies.[62] The Court reasoned that Congress not only needed to provide funding recipients with notice of what specific conduct might subject them to liability, but also notice of the particular types of damages private parties could recover through suit.[63] Punitive damages were not available in suits under the antidiscrimination Spending Clause statutes because Spending Clause statutes were like contracts and punitive damages were "generally not available [in an action] for breach of contract."[64]

Despite the Court's protestations otherwise,[65] this conclusion did not follow from *Pennhurst*. In *Pennhurst*, the contract analogy served to explain the relationship between the funding recipient and the government as it related to notice: Spending Clause statutes did not create literal contracts, but recipients needed to know what conditions they were agreeing to abide by in order to make an informed choice about whether to accept federal funding, just as a party to a contract would need to know the contract terms before deciding whether to sign.[66]

But in *Barnes*, the Court engaged in an analytical shift, moving from using the contract as an analogy to answer questions about notice, to using common law contract rules as the applicable doctrine for determining which remedies are available.[67] If Spending Clause statutes created something like a common law contract, plaintiffs could only recover

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[58] *Id.* at 277.

[59] *Id.* at 287–88.

[60] *Id.* at 290.

[61] 536 U.S. 181 (2002).

[62] *Id.* at 187 ("The same analogy applies, we think, in determining the *scope* of damages remedies."). The Court tried to obscure this expansion, writing that it had previously "applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation." *Id.* (citing Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 74–75 (1992)). But *Franklin* only invoked the notice principle as it related to the scope of liability — not the availability of damages — and it did not apply the contract-law analogy at all. *See Franklin*, 503 U.S. at 74–75.

[63] *See Barnes*, 536 U.S. at 186–87.

[64] *Id.* at 187–88 (citing, inter alia, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 192–201 (2d ed. 1998)).

[65] *Id.* at 186–87.

[66] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981).

[67] *See The Supreme Court, 2021 Term — Leading Cases*, 136 HARV. L. REV. 320, 446 (2022) [hereinafter *Case Comment*] ("[*Barnes*'s] 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 . . . .").

the types of damages available in an action for breach of contract, and punitive damages were not generally available in breach of contract actions.[68] In that way, the figurative contract became literal.

Concurring in *Barnes*, several Justices warned that the contract-law analogy might not always prove helpful. Justice Souter, joined by Justice O'Connor, "read the Court's opinion as acknowledging[] that the contract-law analogy may fail to give . . . clear answers to other questions . . . such as the proper measure of compensatory damages."[69] And Justice Stevens, joined by Justices Ginsburg and Breyer, more vigorously warned "the Court's novel reliance on what [was], at most, a useful analogy to contract law" could have "far-reaching consequences."[70] In the view of those three Justices, "the rules of contract law" were not "necessarily relevant to the tortious conduct described in" that disability discrimination case.[71]

Perhaps heeding those warnings, the Court did not immediately expand *Barnes* to preclude other kinds of relief, like emotional distress damages. In *Sossamon v. Texas*,[72] the Court considered whether states waived their sovereign immunity when accepting federal funds under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a Spending Clause statute, such that a private party could sue and seek money damages to enforce RLUIPA.[73] The petitioner there argued that because "Spending Clause legislation operates as a contract and damages are always available relief for a breach of contract," states were on notice they could be sued for a violation of that statute and thus waived their sovereign immunity when they accepted federal funds.[74]

The Court rejected that argument.[75] It acknowledged that the contract-law analogy does not "imply . . . that suits under Spending Clause legislation are suits in contract."[76] Nor did "contract-law principles apply to all issues" raised by Spending Clause statute litigation.[77] The Court then went even further, saying "applying ordinary contract principles" to all issues raised by Spending Clause statutes "would make little sense because contracts with a sovereign are unique."[78] With *Sossamon*, the Court decided to limit the reach of the contract-law analogy instead of permitting a plaintiff to enforce RLUIPA.

Then the Court decided *Cummings*. The Court there considered whether plaintiffs who allege a violation of an antidiscrimination

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68 *Barnes*, 536 U.S. at 187, 189.
69 *Id.* at 191 (Souter, J., concurring).
70 *Id.* at 192 (Stevens, J., concurring in the judgment).
71 *Id.*
72 563 U.S. 277 (2011).
73 *Id.* at 280–81.
74 *Id.* at 289 (citing Brief for the Petitioner at 27, *Sossamon*, 563 U.S. 277 (No. 08-1438)).
75 *Id.* at 290.
76 *Id.* (alteration in original) (quoting *Barnes*, 536 U.S. at 189 n.2).
77 *Id.* (quoting *Barnes*, 536 U.S. at 189 n.2).
78 *Id.*

Spending Clause statute can recover emotional distress damages.[79] The plaintiff, Jane Cummings, was denied an American Sign Language interpreter when she sought physical therapy services, and thereafter sued under Section 504 of the Rehabilitation Act and the antidiscrimination provision of the Affordable Care Act alleging discrimination on the basis of her disability.[80] Cummings sought damages to compensate her "humiliation, frustration, and emotional distress."[81]

In determining whether emotional distress damages were available, the Court reasoned that "when considering whether to accept federal funds, a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table."[82] Thus, the Court decided the key question was whether a prospective funding recipient would have been on notice that it could be subject to emotional distress damages at the time it decided whether to accept federal funding.[83]

In answering that question, the Court looked only to one source of law: the damages generally available in an action for breach of contract.[84] At the time *Cummings* was decided, federal courts had a practice of awarding emotional distress damages,[85] statutory context suggested liability for emotional distress damages,[86] and "[a]s a matter of . . . common sense . . . emotional distress is a predictable, and thus foreseeable, consequence of discrimination."[87] But the Court did not rely on any of those established sources of notice, asserting instead emotional distress damages were not available because they are not available in a breach of contract action.[88]

The Court further held, without explaining except by reference to *Barnes*, that funding recipients were only aware they "will be subject to the *usual* contract remedies," and emotional distress damages are not *usually* available in contract actions.[89] Even though "[d]amages for emotional disturbance" are actually recoverable in contract actions for contracts where "serious emotional disturbance was a particularly likely

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[79] Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1568 (2022).

[80] *Id.* at 1569 (alleging discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116).

[81] *Id.* (quoting Cummings v. Premier Rehab, P.L.L.C., No. 18-cv-649, 2019 WL 227411, at *4 (N.D. Tex. Jan. 16, 2019)).

[82] *Id.* at 1570.

[83] *Id.* at 1570–71.

[84] *Id.* at 1571.

[85] *See, e.g.*, Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) (collecting cases); Brief for the United States as Amicus Curiae at 20–22, *Cummings*, 142 S. Ct. 1562 (No. 20-219) ("For at least three decades, courts and the federal government have recognized that federal-funding recipients are subject to compensatory damages for emotional distress." *Id.* at 20.).

[86] *See Case Comment*, *supra* note 67, at 447.

[87] *Sheely*, 505 F.3d at 1199.

[88] *Cummings*, 142 S. Ct. at 1571.

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

result,"[90] the Court declined to import contract law wholesale.[91] Instead, it determined that emotional distress damages were an "*unusual*" remedy, and that remedy was not generally available in a breach of contract action.[92]

Cummings was about Section 504 of the Rehabilitation Act and the antidiscrimination provision of the Affordable Care Act, not the other antidiscrimination Spending Clause statutes. But the Court made clear it was considering "the antidiscrimination statutes" broadly.[93] As such, the decision "leaves little doubt" that plaintiffs can no longer recover emotional distress damages in any suit brought under any of the antidiscrimination Spending Clause statutes.[94] As a result, many antidiscrimination plaintiffs are left without access to what is often "the *only* 'available remedy to make good the wrong done.'"[95]

III. CONCEPTUAL FLAWS WITH *BARNES*, *CUMMINGS*, AND THE CONTRACT-LAW ANALOGY

The distortion of the contract-law analogy to preclude plaintiffs from recovering categories of damages has received significant criticism.[96] In *Cummings* itself, a majority of the Court took issue with the way the contract-law analogy was used to determine whether emotional distress damages should be available. In dissent, Justice Breyer, joined by Justices Sotomayor and Kagan, explained that emotional distress damages are available in contract actions when the contract or the breach is "of such a kind that serious emotional disturbance was a particularly likely result."[97] The dissent reasoned that prospective funding recipients should be "expected to be aware of . . . exceptions or subsidiary rules," such as the rule providing for emotional disturbance damages even in traditional contract actions.[98] And in concurrence, Justice Kavanaugh,

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[90] RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L. INST. 1981).

[91] *Cummings*, 142 S. Ct. at 1573.

[92] *Id.* at 1572.

[93] *Id.* at 1569–70.

[94] *See* S.C. v. Metro. Gov't of Nashville, 86 F.4th 707, 718 (6th Cir. 2023).

[95] Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

[96] *See, e.g.*, Derek Warden, *The Rehabilitation Act at Fifty*, 14 CALIF. L. REV. ONLINE 54, 66–67 (2023) (arguing *Cummings* was wrongly decided and would render the Rehabilitation Act "useless"); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1112 (2010) (arguing, before *Cummings*, against the expansion of the contract-law analogy); Amy Cohen, *The Most Important Decision No One Is Talking About: What* Cummings *Means for the Future of Civil Rights*, MINN. L. REV.: DE NOVO (Feb. 27, 2023), https://www.minnesotalawreview.org/2023/02/27/the-most-important-decision-no-one-is-talking-about-what-cummings-means-for-the-future-of-civil-rights [https://perma.cc/FG3T-8PP4]; *Case Comment*, *supra* note 67, at 445; Marie Piccone, Note, *Clear the Way: Removing Sources of Notice from Spending Clause Jurisprudence*, 65 B.C. L. REV. 2085, 2122–23 (2024).

[97] *Cummings*, 142 S. Ct. at 1577 (Breyer, J., dissenting) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L. INST. 1981)).

[98] *Id.* at 1580.

joined by Justice Gorsuch, went even further, arguing that the dueling applications of the contract analogy by the majority and the dissent demonstrate "the contract-law analogy is an imperfect way to determine the remedies" for suits under Spending Clause statutes.[99]

Criticism of the contract-law analogy is for good reason. First, statutes are not contracts.[100] Contract interpretation focuses narrowly on effectuating the intent of the parties based on the text of the contract and the full body of contract law.[101] But interpreting statutes instead involves a unique set of "accepted statutory interpretive approaches," which "should not be shelved in favor of *Williston*."[102] The interpretive methods differ in part because contract drafting differs from statutory drafting — while contracts are written by parties who can labor over every detail, statutes result from a complicated political process involving many actors such that it is "neither achievable nor desirable" to eliminate every ambiguity or reduce every detail to text.[103] Further, contracts typically "bind[] only the parties" to the contract; they generally do not create expectations, obligations, or induce reliance in third parties.[104] Statutes, by contrast, are directed at or created for the benefit of third parties, some segment of the public whom the statute is passed to affect.[105]

That distinction between contracts and statutes has particular force in the antidiscrimination Spending Clause context. The antidiscrimination Spending Clause statutes act to *bind* funding recipients, like schools or hospitals, who receive funds on the condition that they will not discriminate. Simultaneously, they operate to *benefit* the public, individuals who wish to participate in federally funded programs, like students or patients, who gain the right not to be discriminated against. The contract-law analogy is flawed because it overemphasizes the rights of the alleged parties to the contract — the funding recipients — to the detriment of the individuals for whose benefit the statute was enacted — the program participants.

Second, even accepting that the contract-law analogy is a useful clear statement rule,[106] the logic of *Barnes* and *Cummings* is at odds with any sensible principle of notice. The purpose of the contract-law analogy as first announced in *Pennhurst* was to explain that Congress needed to clearly inform funding recipients of the conditions they were required to

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

[100] *See* Seligmann, *supra* note 96, at 1120.

[101] *See* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1162 (1998).

[102] Seligmann, *supra* note 96, at 1121.

[103] *Id.* at 1112, 1120.

[104] Movsesian, *supra* note 101, at 1171–72.

[105] *See id.* at 1172.

[106] *See* Bagenstos, *supra* note 17, at 394.

abide by in exchange for federal funding[107] — funding recipients, like parties to a contract, could only be held to the terms made express in their contract.[108] But *Barnes* and *Cummings* moved away from that principle by baldly asserting punitive and emotional distress damages were foreclosed, without any explanation of *why* or *how* recipients were on notice they could be subject to contract remedies, but not other remedies.[109]

But as others have argued, the "statutory language, judicial context, [and] parties' reasonable expectations" all suggest that funding recipients were *in fact* on notice that they could be liable for emotional distress damages.[110] Discrimination is a harm that is regularly compensated via emotional distress damages.[111] And for three decades prior to *Cummings*, federal courts regularly awarded emotional distress damages in antidiscrimination Spending Clause statute cases specifically.[112] Moreover, the Court had previously held that case law could be used as a source of notice.[113] The *Cummings* Court could have reasoned that modern funding recipients were on notice that they could be liable for emotional distress damages because at the time they accepted funds, there was already an established practice of courts awarding such damages and because such damages were the typical remedy to compensate the harm of discrimination.[114]

Instead, the Court precluded punitive and emotional distress damages. In doing so, the Court decreed that recipients were on notice of a novel application of a judicially created abstract principle used in Spending Clause jurisprudence — that Spending Clause statutes are essentially contracts and only contract remedies apply — but not on notice that the harm of discrimination is generally compensated with emotional distress damages. That result is nonsensical. Further, the effect of these

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107 *See id.* at 393–94.

108 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

109 *See* Barnes v. Gorman, 536 U.S. 181, 187–88 (2002); Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1570–71 (2022).

110 *Case Comment*, *supra* note 67, at 446–47; *see also* Piccone, *supra* note 96, at 2122–23 (arguing that the Court should have considered other sources of notice including legislative history, administrative records, and case law).

111 *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (stating Title VII plaintiffs alleging employment discrimination can recover damages for "emotional pain, suffering, inconvenience, [and] mental anguish"); Carey v. Piphus, 435 U.S. 247, 255 (1978) (noting emotional distress damages are available in § 1983 suits involving violations of constitutional rights); *id.* at 264 n.22 (collecting cases where courts awarded emotional distress damages for constitutional violations); *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting) ("Employees who suffer discrimination at the hands of their employers can recover damages for emotional suffering, as can individuals who suffer discrimination at the hands of state officials.").

112 *See* Brief for the United States as Amicus Curiae, *supra* note 85, at 20–22; Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) (collecting cases).

113 *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005); *cf.* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300–02 (2006).

114 *See* sources cited *supra* notes 111–12.

holdings — that emotional distress damages are precluded even in cases involving extremely severe sexual violence or racial harassment — "is difficult to square . . . with the basic purposes that antidiscrimination laws seek to serve."[115]

Finally, even accepting that damages should be limited to only those available in actions for breach of contract, the Court acted unjustifiably in *Cummings* by twisting the contract-law analogy to apply in an expressly results-oriented way. As the dissent pointed out, emotional distress damages are in fact compensable in some breach of contract actions.[116] The *Restatement (Second) of Contracts* as well as each of the leading treatises relied on in *Barnes* acknowledge that emotional distress damages are compensable when "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[117] But the *Cummings* Court rejected that argument, reasoning that funding recipients cannot be expected to "know the contours of every contract doctrine, no matter how idiosyncratic or exceptional."[118] The same could probably be said for most parties to most contracts: Although some sophisticated actors might fully understand the liability implications of the contracts they sign, many actors do not. But the Court's reasoning upsets the settled principle that "[e]very citizen is presumed to know the law,"[119] meaning "*all* of the law — not just the rules that meet some ill-defined threshold of notoriety."[120]

Instead of importing contract law rules wholesale, *Cummings* held, for the first time, that the contract-law analogy should be employed "only as a potential *limitation* on liability,"[121] considering only the contract-law remedies that are "traditionally," "generally," or "normally available."[122] In other words, the Court instructed that the analogy should only be used to limit plaintiffs' claims, not to impose or expand liability on defendants.

The Court did not explain why that was so.[123] And such a holding was not predetermined. Contracts, after all, do not operate only to the benefit of one party; instead, a court hearing a true breach of contract action would consider the terms of the contract to determine the responsibilities owed by both parties. But in this context, the Court has instructed that the contract-law analogy is a means to the end of hurting plaintiffs, not defendants, because the analogy can only be a "limitation

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115 *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting).

116 *Id.* at 1578.

117 Brief for Petitioner at 31, *Cummings*, 142 S. Ct. 1562 (No. 20-219) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L. INST. 1981)).

118 *Cummings*, 142 S. Ct. at 1574.

119 Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1507 (2020) (quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)).

120 Brief for Petitioner, *supra* note 117, at 36.

121 *Cummings*, 142 S. Ct. at 1573 (quoting Sossamon v. Texas, 563 U.S. 277, 290 (2011)).

122 *Id.* at 1571 (quoting Barnes v. Gorman, 536 U.S. 181, 187–88 (2002)).

123 *See id.*

on liability."[124] Spending Clause statutes are contracts so long as thinking of them that way curtails plaintiffs' ability to win their lawsuits and secure remedies. Although some scholars predicted this holding was possible,[125] there is no doctrinal justification for it.

If not for a doctrinal reason, why would the Court adopt an expressly outcome-oriented rule? Professor Samuel Bagenstos sets forth one theory: Spending Clause statutes supported by conservatives are generally enforced through the withholding of funds, while Spending Clause statutes supported by liberals, such as the antidiscrimination statutes, primarily rely on third-party judicial enforcement.[126] Thus, the contract-law analogy "gives conservative Justices a way to limit conditional spending programs supported by liberals without risking much collateral damage to those programs supported by conservatives."[127] Likewise, the results-oriented approach in *Cummings* ensures the Court's analogy can only be used to limit — and not to expand — enforcement of the antidiscrimination Spending Clause statutes.

IV. AN EMPIRICAL ANALYSIS OF DAMAGES IN TITLE VI AND TITLE IX LITIGATION BEFORE AND AFTER *CUMMINGS*

In addition to the theoretical critiques of the contract-law analogy, there is a practical and more fundamental critique: *Cummings* will leave civil rights plaintiffs unable to recover damages, even when they have suffered severe discrimination. In dissent in *Cummings*, Justice Breyer warned about this likely future, noting that "victims of intentional discrimination may sometimes suffer profound emotional injury without any attendant pecuniary harms,"[128] such that categorically foreclosing emotional distress damages would "leave those victims with no remedy at all."[129] Although fewer than three years have passed since the Supreme Court issued *Cummings*, that warning seems to be actualizing.

The effect of *Cummings* on the landscape for civil rights plaintiffs can be shown concretely by analyzing the Title IX and Title VI cases available on the Westlaw Jury Verdicts and Settlements database. This data was compiled by performing a search for "Title IX" and "Title VI" on the Westlaw Jury Verdicts and Settlements database and limiting

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[124] *Id.* at 1573 (emphasis omitted) (quoting *Sossamon*, 563 U.S. at 290).

[125] *See* Bagenstos, *supra* note 17, at 410 (predicting, before *Cummings*, that "the Roberts Court [was] likely to limit Congress's conditional spending authority" in an indirect way "by limiting private parties' ability to enforce funding conditions").

[126] *Id.* at 409. Although the antidiscrimination Spending Clause statutes can be enforced through the withholding of funds, that threat "is remote at best" because the government does so in "an exceedingly tiny proportion of the cases in which funding recipients violate these statutes." *Id.* at 409 & n.337.

[127] *Id.* at 409.

[128] *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting) (citing Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 63–64, 76 (1992)).

[129] *Id.*

results to federal courts. Individual examination of each result determined which causes of action the plaintiff prevailed on, the total amount they recovered, and which categories of damages they received. Sometimes, finding this information required viewing the verdict form itself, the court order approving settlement, or other court filings available either on Westlaw or on the docket. The goal was not to conduct a scientific review of every single Title IX or Title VI verdict or settlement, but instead to collect a large enough sample of cases to observe trends.[130]

A. The Data

A Westlaw search for Title IX verdicts and settlements in federal cases as of January 1, 2025, returns 86 unique results.[131] In one of those cases, the district court later vacated the Title IX verdict, leaving 85 unique Title IX cases.[132] Of those cases, the plaintiff won 14; the defendant won 34. The remaining 37 cases ended in a settlement. Of the 14 plaintiff awards in Title IX cases, 10 were issued before *Cummings* was decided on April 28, 2022;[133] 4 were issued after.[134]

A Westlaw search for Title VI verdicts and settlements in federal cases as of January 1, 2025, turned up 22 unique Title VI cases.[135] One additional case, *Zeno ex rel. A.Z. v. Pine Plains Central School*

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[130] Research beyond the Westlaw Jury Verdicts and Settlements database reveals that the database does not seem to capture all Title IX or Title VI verdicts. *See* PUB. JUST., JURY VERDICTS AND SETTLEMENTS IN HIGHER EDUCATION HARASSMENT & BULLYING CASES 7 (2024) (compiling verdicts and settlements and including several results that did not come up in the search of the Westlaw database). In particular, the database seems to include more modern results and fewer results from longer ago. Still, the database contains a significant sample of verdicts and settlements, and this study focuses on those. Future research could engage in a more exhaustive review of federal district court dockets. Future research might also examine verdicts and settlements from the other antidiscrimination Spending Clause statutes.

[131] The search for "Title IX" returns 93 results, several of them duplicates of one another. Eliminating five duplicates and two cases that did not involve Title IX at all leaves 86 unique results.

[132] *See* Abraham v. Thomas Jefferson Univ., No. 20CV02967, 2023 WL 9420487 (E.D. Pa. Dec. 11, 2023); Abraham v. Thomas Jefferson Univ., No. 20CV02967, 2024 WL 1120987, at *65 (E.D. Pa. Mar. 14, 2024) (granting new trial on Title IX claim).

[133] *See* Doe v. Bd. of Trs. of the Neb. State Colls., No. 17CV00265, 2021 WL 6693925 (D. Neb. Dec. 8, 2021); Doe v. Sch. Bd. of Miami-Dade Cnty., No. 19CV24048, 2021 WL 5767835 (S.D. Fla. Oct. 1, 2021); Asfall v. L.A. Unified Sch. Dist., No. 18CV00505, 2019 WL 8632010 (C.D. Cal. Sept. 25, 2019); Miller v. Bd. of Regents of the Univ. of Minn., No. 15CV03740, 2018 WL 4931845 (D. Minn. Mar. 15, 2018); M.H. v. Onslow Cnty. Bd. of Educ., No. 16CV00069, 2017 WL 4582107 (E.D.N.C. May 24, 2017); Fox v. Pittsburg State Univ., No. 14CV02606, 2016 WL 11033455 (D. Kan. Oct. 11, 2016); A.S. v. S. San Antonio Indep. Sch. Dist., No. 13CV00940, 2015 WL 1608642 (W.D. Tex. Jan. 21, 2015); Dawn L. *ex rel* M.L. v. Greater Johnstown Sch. Dist., No. 06-cv-00019, 2008 WL 5574872 (W.D. Pa. Nov. 13, 2008); Theno v. Tonganoxie Unified Sch. Dist. No. 464, No. 04-2195, 2005 WL 2716272 (D. Kan. Aug. 11, 2005); Lam v. Bd. of Curators of Univ. of Mo., No. 94cv0462, 1995 WL 17008139 (W.D. Mo. Sept. 22, 1995).

[134] *See* Doe 1 v. Beaumont Indep. Sch. Dist., No. 21CV00190, 2024 WL 4681685 (E.D. Tex. May 24, 2024); Ashford v. Univ. of Mich., No. 20CV10561, 2024 WL 4228215 (E.D. Mich. May 21, 2024); L.K. v. Greater Albany Pub. Sch. Dist., No. 20CV00529, 2023 WL 11197709 (D. Or. Sept. 21, 2023); Roe v. Purdue Univ., No. 18CV00089, 2022 WL 18621316 (N.D. Ind. Sept. 23, 2022).

[135] The search for "Title VI" returns 27 results. Eliminating three duplicates and two cases that do not involve Title VI at all leaves 22 unique results.

District,[136] erroneously showed up in the Title IX search, but not the Title VI search, although the case involved a Title VI claim, not a Title IX claim. Counting that among the Title VI cases resulted in 23 unique Title VI cases. Of those, the plaintiff won 2; the defendant won 14. The remaining 7 cases ended in a settlement. The cases where the plaintiff prevailed were both from before *Cummings*.[137]

Table 1: Outcomes in Federal Title IX and Title VI Cases Before and After *Cummings*

	TITLE IX CASES	TITLE VI CASES
TOTAL UNIQUE RESULTS	85	23
SETTLEMENTS	37	7
DEFENSE VERDICTS OR JUDGMENTS	34	14
PLAINTIFF VERDICTS OR JUDGMENTS	14	2
PLAINTIFF VERDICTS OR JUDGMENTS BEFORE *CUMMINGS*	10	2
PLAINTIFF VERDICTS OR JUDGMENTS AFTER *CUMMINGS*	4	0

B. Verdicts Before and After Cummings

Although the sample is small, the differences in the size of the verdicts before and after *Cummings* are staggering. The "before" damages awards are largely, if not entirely, made up of pain and suffering damages compensable due to the plaintiffs' emotional distress, in amounts ranging from hundreds of thousands to millions of dollars.[138] Indeed, of the twelve "before" awards, at least eight were solely comprised of pain and suffering damages. Applying the *Cummings* rule to those verdicts would leave each plaintiff with precious little compensation.

For example, in 2019, a high school student filed suit against her school district because she had been repeatedly sexually abused by a

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136 No. 07 CIV. 6508, 2010 WL 1212987 (S.D.N.Y. Mar. 12, 2010).

137 *See id.*; Cerqueira v. Am. Airlines, No. 05-11651, 2007 WL 1029561 (D. Mass. Jan. 12, 2007).

138 *See, e.g.*, *A.S.*, 2015 WL 1608642 (awarding minor who was sexually assaulted by elementary school principal $4,500,000 in pain and suffering damages); *Sch. Bd. of Miami-Dade Cnty.*, 2021 WL 5767835 (awarding minor who was sexually harassed and abused by a high school teacher $6,000,000 in pain and suffering damages); *Bd. of Trs. of the Neb. State Colls.*, 2021 WL 6693925 (awarding college student who was sexually assaulted by a fellow student $300,000 in pain and suffering damages).

teacher.[139] The jury awarded the student $6,000,000 in damages based on past and future "pain and suffering, mental anguish, inconvenience, or loss of capacity for the enjoyment of life experienced."[140]

In rejecting the school district's motion to reduce the damages award, the district court recounted the "ample evidence" that the student had presented of "anxiety and stress," "nightmares and panic attacks," and diagnoses of "PTSD, major depressive disorder, and panic disorder" attributable "to the sexual abuse and exploitation [that the student suffered] by a trusted mentor."[141] The district court also conducted "a review of national verdicts," concluding that verdicts in the tens of millions had routinely been awarded in cases where students suffered sexual abuse at the hands of school officials when the school was on notice of the sexual abuse and did not take corrective action.[142]

Three of the four "after" awards are either significantly lower or rely on other causes of action to bring in emotional distress damages. In the first, a nineteen-year-old was suspended from Purdue University after she complained about being sexually assaulted.[143] She recovered only $10,000: compensation for lost tuition and costs incurred at the university to which she transferred.[144] The second plaintiff recovered $302,500 in emotional distress damages (recoverable because the plaintiff succeeded on a First Amendment claim and a state law claim) and $2,482 in lost compensation.[145] The third prevailed on an equal protection claim and a state law claim, in addition to a Title IX claim, and so recovered $275,000 in noneconomic damages and $42,353 in economic damages.[146]

The verdicts suggest that at least some plaintiffs will be able to recover moderate damages after *Cummings*, but so far that has only occurred in limited scenarios. The verdicts reveal the availability of damages where: (1) in addition to emotional distress the plaintiff experiences significant economic loss; or (2) the plaintiff can succeed on additional claims, such as state law claims, for which emotional distress damages are available.

These pathways to recovery lead to strange results. Because economic harm is compensable but emotional distress is not, a teacher who alerts an institution to a severe case of sexual violence and then is

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[139] Amended Complaint at 10–11, *Sch. Bd. of Miami-Dade Cnty.*, No. 2019-cv-24048, 2020 WL 12719789.

[140] Verdict Form at 2, *Sch. Bd. of Miami-Dade Cnty.*, No. 2019-cv-24048, 2021 WL 5749084.

[141] Doe v. Sch. Bd. of Miami-Dade Cnty., 624 F. Supp. 3d 1292, 1301–02 (S.D. Fla. 2022).

[142] *Id.* at 1302–03.

[143] Roe v. Purdue Univ., No. 18CV00089, 2022 WL 18621316 (N.D. Ind. Sept. 23, 2022).

[144] *Id.*; *see also* Joe Duhownik, *Jury Finds in Favor of Nancy Roe Against Purdue*, THE EXPONENT (Sept. 23, 2022), https://www.purdueexponent.org/city_state/article_4897c866-3b6c-11ed-afba-db2c9357ddef.html [https://perma.cc/4KMF-UN4K].

[145] Ashford v. Univ. of Mich., No. 20CV10561, 2024 WL 4228215 (E.D. Mich. May 21, 2024).

[146] L.K. v. Greater Albany Pub. Sch. Dist., No. 20CV00529, 2023 WL 11197709 (D. Or. Sept. 21, 2023).

retaliated against stands to recover all the compensation they lose.[147] Meanwhile, the student who experiences the sexual violence likely has no compensation to lose and thus little to recover in a lawsuit. And because emotional distress damages are compensable in First Amendment actions,[148] the hypothetical teacher who is fired because of their speech can recover emotional distress damages.[149] But the average Title IX plaintiff is a student, and by nature of not having a job, will not be fired for their speech giving rise to a First Amendment claim. After *Cummings*, such students are out of luck.[150]

The fourth "after" award does not fit the trend. Two middle school students brought suit against their school district, raising Title IX and other claims based on "graphic allegations of systemic child abuse."[151] One plaintiff alleged that Brandon Chillow, a substitute teacher at her middle school, "sexually assaulted her approximately five times," "provided [her] with alcohol to the point of intoxication, used force, . . . threatened to kill her," and "infected her with a sexually transmitted disease."[152] The second plaintiff alleged that Chillow had held "inappropriate sexual conversations" with her, and sent her "nude pictures"; Chillow confessed that he had done so.[153] The plaintiffs further alleged that Chillow was allowed to teach at their school after he had already been removed from a different school in the same district because of his inappropriate sexual relationships with students at that school.[154]

At trial, the jury found the school district liable for violating Title IX.[155] The jury awarded $2,700,000 in compensatory damages based on "[p]ast and future medical expenses in health care related to physical injuries" to one plaintiff, and $750,000 in nominal damages to the second

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147 In *Burch v. Regents of the University of California*, No. 04-cv-00038, 2007 WL 315765 (E.D. Cal. Jan. 19, 2007), a male wrestling coach complained about discrimination against female wrestlers, and helped the wrestlers file a complaint with the Department of Education. *Id.* The coach alleged he was retaliated against in violation of Title IX and the First Amendment and argued for $278,699 in lost compensation and up to $500,000 in emotional distress and reputational harm damages. Trial Brief and Motions in Limine at 2, 12, *Burch*, No. Civ. S-04-0038, 2006 WL 388125. His case settled for $725,000. *Burch*, 2007 WL 315765.

148 *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

149 In *Ashford v. University of Michigan*, 89 F.4th 960 (6th Cir. 2024), a university police officer "spoke with a reporter . . . about his concerns that the [university] police department was mishandling" allegations of sexual assault. *Id.* at 964. The university suspended the officer for ten days without pay. *Id.* The officer ultimately recovered $302,500 in emotional distress damages based on his First Amendment claim and a state law whistleblower claim. *Ashford*, 2024 WL 4228215.

150 *See* Tani, *supra* note 55, at 1205–06.

151 Doe v. Beaumont Indep. Sch. Dist., 615 F. Supp. 3d 471, 480–81, 485–86 (E.D. Tex. 2022).

152 Doe v. Beaumont Indep. Sch. Dist., 727 F. Supp. 3d 589, 606 (E.D. Tex. 2024).

153 *Id.*

154 *Id.* at 601–04.

155 Doe 1 v. Beaumont Indep. Sch. Dist., No. 21CV00190, 2024 WL 4681685 (E.D. Tex. May 24, 2024).

plaintiff.[156] The school district did not file a motion to reduce damages, nor did the school district file an appeal.[157]

Time will tell what lessons can be taken from this sizable post-*Cummings* jury award. The school board might have prevailed on a motion to reduce nominal damages, if only because an award of nominal damages is typically for an "inconsequential or trifling sum."[158] Still, the school board did not file any such motion, and so the verdict stands. Other plaintiffs bringing cases involving "deeply offensive" facts[159] might likewise prevail in winning sizable awards from juries, particularly where defendants are unwilling to extend the cost, time, and exposure to publicity that often comes with protracted litigation.

C. Settlements Before and After Cummings

The practical effect of the *Cummings* rule is likely to be equally profound in the settlement context. Research suggests that at least two-thirds of civil cases settle;[160] the data surveyed here shows many more settlements than plaintiff verdicts.[161] Prior to *Cummings*, Title IX and Title VI plaintiffs who secured a settlement were regularly able to recover hundreds of thousands of dollars, if not more, in settling with the defendant funding recipients.[162]

But after *Cummings*, defendants know that plaintiffs cannot recover emotional distress damages if they proceed to trial. This knowledge will incentivize defendants to dramatically reduce the total value of their settlement offers. Legal sociologists have recognized that a key factor in the outcome of settlement negotiations is "bargaining endowments created by legal rules that indicate the particular allocation a court will impose."[163] In other words, legal rules shape settlement outcomes[164] — if a plaintiff knows they have a strong chance of winning a damages

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156 Jury Verdict Form at 16, 18, *Beaumont Indep. Sch. Dist.*, No. 21CV00190, 2024 WL 4217683.

157 *See* Docket, *Beaumont Indep. Sch. Dist.*, No. 21CV00190.

158 Jury Verdict Form, *supra* note 156, at 18.

159 Doe v. Beaumont Indep. Sch. Dist., 615 F. Supp. 3d 471, 481 (E.D. Tex. 2022).

160 Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (concluding approximately two-thirds of civil cases settle and noting difficulties with calculating the settlement rate).

161 *See supra* Table 1, p. 1422.

162 *See, e.g.*, A.S. v. Cody-Kilgore Unified Sch. Dist., No. 21CV03103, 2023 WL 11160583 (D. Neb. Oct. 4, 2023) (reporting $227,500 settlement of a Title VI claim after a school cut the hair of two Lakota students, against their religious beliefs and without parental consent); Doe v. Carranza, No. 19CV02514, 2021 WL 4439636 (E.D.N.Y. Sept. 20, 2021) (reporting $700,000 settlement of a Title IX claim brought by four minor students alleging they were sexually harassed and assaulted at school); Flood v. Bd. of Trs. of the Fla. Gulf Coast Univ., No. 2008-cv-00030, 2008 WL 6930248 (M.D. Fla. Oct. 15, 2008) (reporting $3,400,000 settlement of a Title IX retaliation claim brought by two female volleyball coaches who complained about gender inequities to the university athletic department).

163 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966 (1979).

164 *See* Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV. NEGOT. L. REV. 221, 241 (2016).

award of millions of dollars by proceeding to trial, they will not settle for peanuts. By contrast, when defendants know plaintiffs can only recover limited damages, they will not offer to settle for more. And plaintiffs' lawyers working on a contingency fee basis may not be motivated to file these suits because they know they will not get paid much even if they prevail on the merits or achieve a settlement.[165] That dynamic could lead to a significant decline in the number of antidiscrimination Spending Clause cases that are filed at all.

The search of Westlaw Jury Verdicts and Settlements turns up only one Title IX or Title VI settlement after *Cummings*.[166] The plaintiffs, a group of women employed at the University of Montana, alleged that the university "systemically discriminate[d]" against female employees, doling out employment opportunities for women based on factors like their "[a]ttractiveness" and "[y]outh."[167] The suit ultimately settled for $350,000, mostly attributable to attorneys' costs and fees and with an award of only $1,855.49 to each plaintiff.[168]

V. The Uncertain Future for Antidiscrimination Spending Clause Litigation

Lower courts will continue to grapple with what the contract-law analogy means now. Though the *Cummings* Court insisted its "cases do not treat suits under Spending Clause legislation as *literal* 'suits in contract,'"[169] lower courts are left to consider whether contract law principles should guide only the availability of remedies or should also affect other aspects of Spending Clause litigation.[170] And while *Barnes* and *Cummings* declared that plaintiffs cannot recover punitive or emotional distress damages, it remains an open question what other categories of damages are "normally available" in an action for breach of contract,[171] and are thus recoverable.

So lower courts are left to divine which categories of damages are "normal." The *Cummings* Court seemed to think "[n]o dive through the treatises, 50-state survey, or speculative drawing of analogies" would be required to complete the inquiry.[172] But given that contract law is

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165 *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 654 (2023).

166 *See* Cole v. Mont. Univ. Sys., No. 21CV00088, 2024 WL 2366443 (D. Mont. Jan. 9, 2024).

167 Plaintiffs' Preliminary Pretrial Statement at 1, 4–5, *Cole*, No. CV-21-88, 2021 WL 12252335.

168 Order Granting Joint Motion for Approval of Settlement Agreement and Motion for Dismissal; and Order Granting Plaintiffs' Motion for Approval of Disbursement at 2, *Cole*, No. CV-21-88, 2024 WL 1622648.

169 Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1573 (2022) (emphasis added) (quoting Sossamon v. Texas, 563 U.S. 277, 290 (2011)).

170 *See, e.g.*, Doe v. Emory Univ., Inc., No. 21-CV-4859, 2022 WL 17419555, at *5 (N.D. Ga. Dec. 5, 2022) (discussing Title IX plaintiff's argument that the statute of limitations for state breach of contract actions should apply to her suit).

171 *Cummings*, 142 S. Ct. at 1572 (quoting Barnes v. Gorman, 536 U.S. 181, 187–88 (2002)).

172 *Id.* at 1573.

mostly a state law enterprise,[173] it seems that lower federal courts have no choice but to determine which remedies are "normal" by considering treatises, state law, and analogizing discrimination to contract breaches.

Already, district courts are struggling to determine what categories of damages are available for plaintiffs suing under the antidiscrimination Spending Clause statutes. Most district courts that have considered the question agree that damages for dignitary harms are not compensable.[174] But courts are sharply divided over the availability of expectation or consequential damages[175] and nominal damages.[176] And though many district courts have recognized that plaintiffs can recover damages for lost opportunities in a variety of contexts,[177] recovery is not permissible where the lost opportunity is too speculative.[178]

Some litigants are pursuing creative theories of recovery, like arguing that mental health conditions resulting from the discrimination are compensable physical injuries. In one district court, a Title IX plaintiff offered expert testimony explaining that the plaintiff had suffered posttraumatic stress disorder (PTSD) because she had been repeatedly sexually assaulted and harassed, and would suffer future medical expenses.[179] The court allowed the arguments to go to the jury, reasoning that "a reasonable jury could find that, if Plaintiff has PTSD, her PTSD was the result of a physical injury attributable to [the defendant school

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[173] *See* Transcript of Oral Argument at 15, *Cummings*, 142 S. Ct. 1562 (No. 20-219), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-219_bocf.pdf [https://perma.cc/JPN5-ZR2E] (statement of Chief Justice Roberts) ("[S]eeing what the Spending Clause binds you to, you look to what contract remedies are, right? That's typically a question of state law.").

[174] *See, e.g.*, Wade v. Univ. Med. Ctr. of S. Nev., No. 18-cv-1927, 2023 WL 9598746, at *3 (D. Nev. Feb. 13, 2013); Unknown Party v. Ariz. Bd. of Regents, No. CV-18-01623, 2022 WL 17459745, at *4 (D. Ariz. Dec. 6, 2022); Fantasia v. Montefiore New Rochelle, No. 19 CV 11054, 2022 WL 20540940, at *3–4 (S.D.N.Y. June 16, 2022). *But see* Lozano v. Baylor Univ., No. 16-CV-403, 2023 WL 8103167, at *5 (W.D. Tex. Nov. 21, 2023).

[175] *See, e.g.*, Luke v. Lee County, No. 20-CV-388, 2023 WL 6141594, at *1–2 (W.D. Tex. Sept. 20, 2023) (summarizing the debate and collecting cases).

[176] *See, e.g.*, Matagrano v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 19-cv-763, 2023 WL 5932943, at *7 (N.D.N.Y. Sept. 12, 2023) (collecting cases).

[177] *See, e.g.*, J.C. v. Bd. of Regents of the Univ. Sys. of Ga., No. 20-CV-4445, 2023 WL 4938054, at *4 (N.D. Ga. Aug. 1, 2023) (permitting Title IX plaintiff to seek damages for lost educational benefits); Ramond v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 20-CV-1380, 2024 WL 4268385, at *5 (N.D.N.Y. Sept. 19, 2024) (permitting inmates to seek lost opportunity damages based on the additional time they spent in prison because of disability discrimination); Chaitram v. Penn Med.-Princeton Med. Ctr., No. 21-17583, 2022 WL 16821692, at *2 (D.N.J. Nov. 8, 2022) (permitting plaintiff to seek damages based on her lost opportunity to participate in her own medical care); Montgomery v. District of Columbia, No. 18-1928, 2022 WL 1618741, at *25 (D.D.C. May 23, 2022) (permitting plaintiff to seek damages based on his lost opportunity to participate in his interrogations with police).

[178] *See, e.g.*, Doe v. Fairfax Cnty. Sch. Bd., No. 18-cv-00614, 2023 WL 424265, at *4–5, *6–7 (E.D. Va. Jan. 25, 2023) (permitting Title IX plaintiff to seek damages for lost educational opportunities, but holding that damages for diminished earning capacity or lost employment opportunities were too speculative and "attenuated in time from the alleged Title IX violations," *id.* at *7).

[179] B.R. v. F.C.S.B., 730 F. Supp. 3d 233, 242–43 (E.D. Va. 2024).

board] under Title IX."[180] And another district court distinguished between emotional distress damages and physical pain and suffering damages, letting the plaintiff seek the latter at trial.[181] But other district courts have rejected similar arguments, holding that even costs of "counseling and psychiatric treatment"[182] are not recoverable, because they are "merely emotional distress damages under another name."[183]

Lower courts are also considering whether plaintiffs who suffer only emotional injury should have standing to sue at all. Holding the courthouse doors open, the Sixth Circuit reasoned that even where a Title IX plaintiff "alleges only emotional injuries," the plaintiff still has standing to sue because "[d]iscrimination is itself a harm."[184] But the Second Circuit took the opposite tack, reasoning that a disability discrimination suit was properly dismissed on standing grounds because it alleged only emotional injury and emotional distress damages were no longer available.[185] Given these significant barriers to success, and the meager damages available even for the prevailing plaintiff, plaintiffs and their lawyers might not seek vindication in court at all.

CONCLUSION

The future for antidiscrimination Spending Clause statute plaintiffs is uneasy. Assuming plaintiffs can find a lawyer to bring their suit, they can still recover modest damages — through state law causes of action, compensation for economic loss, or other creative theories of recovery. Still, plaintiffs who bring suit today will likely recover far fewer dollars than those who did before *Cummings* was decided.

This will continue until the Supreme Court changes pace or legislatures intervene.[186] Just as Congress abrogated state sovereign immunity for the Spending Clause civil rights statute thereby affirming the implied statutory causes of action, a legislative fix could make express that equitable and monetary relief should both be available, including emotional distress damages.[187] Until then, plaintiffs who have suffered discrimination while participating in a federally funded program will struggle to see their rights vindicated in federal court.

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[180] *Id.* at 243.

[181] Wade v. Univ. Med. Ctr. of S. Nev., No. 18-cv-1927, 2023 WL 9598746, at *4 (D. Nev. Feb. 13, 2023).

[182] *J.C.*, 2023 WL 4938054, at *4.

[183] *Id.* at *5; *see id.* at *4 (collecting cases).

[184] Doe v. Univ. of Ky., 111 F.4th 705, 724 (6th Cir. 2024) (citing Muldrow v. City of St. Louis, 144 S. Ct. 967, 980 (2024) (Kavanaugh, J., concurring)).

[185] Doherty v. Bice, 101 F.4th 169, 171, 175 (2d Cir. 2024).

[186] Indeed, Illinois has enacted the Illinois Civil Rights Remedies Restoration Act, which provides that a violation of the antidiscrimination Spending Clause statutes also violates that Act and expressly permits plaintiffs to seek emotional distress damages for violations. *See* 775 ILL. COMP. STAT. 60/15, 60/20 (2024).

[187] *See* CHRISTINE J. BACK, CONG. RSCH. SERV., LSB10775, CIVIL RIGHTS REMEDIES IN *CUMMINGS* AND IMPLICATIONS FOR TITLE VI AND TITLE IX 4 (2022).