No. 20-219

In the Supreme Court of the United States

JANE CUMMINGS, PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an award of compensatory damages against a recipient of federal financial assistance under Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d *et seq.*), or other statutes that incorporate Title VI's remedies may include compensation for emotional distress.

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INTEREST OF THE UNITED STATES

This case concerns the scope of remedies available under Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, Tit. V, 87 Stat. 394 (29 U.S.C. 794), Section 1557 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, Tit. I, Subtit. G, 124 Stat. 260, and other nondiscrimination statutes that incorporate the remedies available under Title VI of the Civil Rights Act of 1964 (Title VI), Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d *et seq.*). The federal government is charged with enforcing these statutes, see, *e.g.*, 29 U.S.C. 794a(a)(2); 42 U.S.C. 2000d-1, 18116(a), and the United States has a significant interest in ensuring full compliance with their nondiscrimination provisions. At the Court's invitation, the United States filed a brief at the petition stage urging

this Court to grant a writ of certiorari and reverse the decision below.

STATEMENT

Petitioner Jane Cummings is both deaf and legally blind. Pet. App. 2a. She sought physical therapy from respondent, Premier Rehab Keller, P.L.L.C., a company that receives federal financial assistance, but she was unable to obtain respondent's services because respondent repeatedly refused her requests for the sign-language interpreter she needs to communicate. *Id.* at 1a-2a. Petitioner sued, alleging that respondent had violated the prohibitions against disability discrimination in Section 504 of the Rehabilitation Act and Section 1557 of the ACA.

The district court dismissed petitioner's case based on its *sua sponte* determination that Section 504 and the ACA do not permit compensation for the "humiliation, frustration, and emotional distress" caused by respondent's violations of the nondiscrimination provisions. Pet. App. 25a. The court observed that Section 504 and the ACA incorporate the remedies available to victims of discrimination under Title VI, and—in the court's view—those remedies do not include compensation for the humiliation and other nonpecuniary harms caused by discrimination. *Ibid.* (citation omitted). The court of appeals affirmed, concluding that a federal-funding recipient may never be subject to compensatory damages for the emotional distress caused by a violation of the nondiscrimination provisions in the statutes that incorporate Title VI's remedies. *Id.* at 7a. This Court granted certiorari to decide whether the court of appeals' conclusion conflicts with the well-established principle that "[w]hen a federal-funds recipient violates

conditions of Spending Clause legislation," it may be required to remedy the breach by "*compensat*[*ing*] * * * a third party beneficiary" for the harms caused by the violation. *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002); see *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74-76 (1992).

1. a. Section 504 of the Rehabilitation Act provides that "[n]o 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." 29 U.S.C. 794(a). Both federal regulations and relevant case law have long recognized that refusing a request for a sign-language interpreter constitutes a violation of the statute, at least where the interpreter is necessary to facilitate effective communication with the deaf individual, and where the provision of an interpreter does not pose an undue financial and administrative burden. See 45 C.F.R. 84.4, 84.52(d), 92.102 (2019); 45 CFR 92.202 (2017); *Liese* v. *Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) (collecting cases).

Section 505 of the Rehabilitation Act provides that federal-funding recipients that violate Section 504 may be subject to compensatory—but not punitive—damages. 29 U.S.C. 794a(a)(2); see *Barnes*, 536 U.S. at 187. Congress added Section 505 to the Rehabilitation Act in 1978 to make clear that a "person aggrieved" by a violation of Section 504 has recourse to the "remedies, procedures, and rights set forth in [T]itle VI." 29 U.S.C. 794a(a)(2). In 1979, this Court held that Title VI's remedies include an implied cause of action, *Cannon* v. *University of Chicago*, 441 U.S. 677, and in 1986, Congress

amended the Rehabilitation Act to abrogate States' Eleventh Amendment immunity under Title VI, Section 504, Title IX of the Education Amendments of 1972 (Education Amendments), Pub. L. No. 92-318, 86 Stat. 373-375, and other similar nondiscrimination statutes. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (42 U.S.C. 2000d-7(a)(2)) (emphasis added). Congress further specified that States should be subject to remedies "both *at law* and in equity" under Title VI and the related statutes "to the same extent" as other federal-funding recipients. 42 U.S.C. 2000d-7(b) (emphasis added). Accordingly, the 1986 amendments both "ratified *Cannon*'s holding" that Title VI and the statutes that incorporate its remedies may be enforced through a private right of action, *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001), and demonstrated Congress' understanding that "damages are available" in those actions, *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). In 2002, the Court further clarified the scope of the remedies Congress had ratified, holding that a federal-funding recipient is "subject to suit for compensatory damages and injunction," but not for "punitive damages." *Barnes*, 536 U.S. at 187 (internal citation omitted).

b. Congress has incorporated the remedies available under Section 505, and therefore under Title VI, in two other statutes that prohibit discrimination on the basis of disability. In 1990, Congress enacted the Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*). Title II of the ADA prohibits disability discrimination by "public entities," and affords the victims of such discrimination the "remedies, procedures, and rights" set out in Section 505. 42 U.S.C. 12133. Twenty years later, Congress enacted

Section 1557 of the ACA, which bars federally-funded health care programs from discriminating in violation of Title VI, Section 504, and other civil rights statutes. Section 1557 further mandates that "[t]he enforcement mechanisms provided for and available under such title VI," Section 505, and the other enumerated statutes "shall apply for purposes of violations of this subsection." 42 U.S.C. 18116(a).

2. Petitioner, who is both deaf and legally blind, depends on American Sign Language for communication. Pet. App. 2a. In 2016 and 2017, doctors referred petitioner to respondent for treatment of her chronic back pain. D. Ct. Doc. 11, at 3-4 (Oct. 25, 2018). But when petitioner attempted to make an appointment, respondent refused her request to provide a sign-language interpreter, even after petitioner explained that the nature of her disabilities meant that she could not communicate through other means such as notes, lipreading, or gestures. Pet. App. 2a. Two additional attempts to schedule appointments over the next several months ended the same way, with respondent refusing to provide an interpreter even after petitioner reiterated that she would not be able to communicate without one. *Ibid.*; see D. Ct. Doc. 11, at 3-4.

a. Petitioner sued respondent in the Northern District of Texas, alleging a violation of Section 504 of the Rehabilitation Act and Section 1557 of the ACA. Pet. App. 3a, 15a-17a, 25a. In her prayer for relief, petitioner requested a declaratory judgment, an injunction barring respondent from discriminating on the basis of disability, D. Ct. Doc. 11, at 12-13, and an award of compensatory damages for the "humiliation, frustration, and emotional distress" caused by respondent's actions, *id.* at 5, 13.

Respondent moved to dismiss, arguing primarily that, in order for petitioner's claim to be viable, she would have to attend an appointment without an interpreter to establish that she really could not communicate without one. D. Ct. Doc. 14 (Nov. 16, 2018). The district court granted the motion without considering that theory or otherwise analyzing whether respondent's alleged conduct violated Section 504 and the ACA. Pet. App. 15a-27a.

Instead, the district court predicated its dismissal on the perceived absence of an available remedy. The court first found that petitioner lacked standing to request injunctive relief because, while her complaint stated that she "still wishes to[] access [respondent's] services and receive care in [respondent's] facilities," that statement was insufficient to establish that she was likely to return to respondent if she prevailed. Pet. App. 19a (citation omitted). The court then determined *sua sponte* that petitioner had not stated a claim for damages because the Rehabilitation Act and the ACA do not permit compensatory damages for emotional distress. *Id.* at 23a-25a.

b. The court of appeals affirmed. Pet. App. 1a-14a. It observed that, under *Barnes*, the remedies available for a violation of a Spending Clause statute are limited to those for which the federal-funding recipient is "on notice"—that is, the remedies enumerated in the statute and those "traditionally available in suits for breach of contract." *Id.* at 8a-9a (quoting *Barnes*, 536 U.S. at 187). The court concluded that compensatory damages for emotional distress did not qualify because it believed that such damages "are traditionally unavailable in breach-of-contract actions." *Id.* at 9a. The court acknowledged two exceptions, recognizing that courts

permit damages to compensate for emotional distress "where 'the emotional disturbance accompanies a bodily injury,'" or "when the contract or breach is such that the plaintiff's 'serious emotional disturbance was a []*particularly likely result*.'" *Ibid.* (quoting Restatement (Second) of Contracts § 353 cmt. a (1981) (Second Restatement) (emphasis added; brackets and citation omitted). The court also acknowledged petitioner's contention that the second exception "applies here." *Ibid.* The court concluded, however, that what it deemed the "'exceptional situation' exception" did not put federal-funding recipients "'on notice'" that they might be liable for emotional distress damages because "funding recipients are unlikely to be aware that the exception exists, let alone think that they might be liable under it." *Id.* at 10a.

The court of appeals recognized that its decision was contrary to the Eleventh Circuit's decision in *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173 (2007), which had held that compensation for emotional distress is available for violations of Section 504 of the Rehabilitation Act. Pet. App. 11a-14a. But the court "disagree[d]" with the Eleventh Circuit's determination that foreclosing the availability of compensatory damages for emotional distress was incompatible with *Barnes*. *Id.* at 12a.[1]

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[1] This Court recently granted certiorari in *CVS Pharmacy, Inc.* v. *Doe*, No. 20-1374 (July 2, 2021), to consider a question involving the scope of the conduct prohibited by Section 504 of the Rehabilitation Act and Section 1557 of the ACA. There is no overlap with this case, however, because *CVS Pharmacy* does not concern the remedies available under the Rehabilitation Act and the ACA, and this case does not concern what conduct those statutes prohibit. Indeed, neither the district court nor the court of appeals in this case

SUMMARY OF ARGUMENT

I. In 1992, all nine Members of this Court agreed that compensatory damages are available under Title VI and the statutes that incorporate its remedies. *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992); see *id.* at 78 (Scalia, J., concurring in the judgment). Ten years later, this Court reiterated that holding in *Barnes* v. *Gorman*, 536 U.S. 181 (2002). *Barnes* explained that because Spending Clause legislation is "much in the nature of a contract," federal-funding recipients are generally "on notice" that a violation of a nondiscrimination condition may subject the breaching party "to those remedies traditionally available in suits for breach of contract." *Id.* at 186-187. Applying that principle, *Barnes* held that a federal-funding recipient is subject to "compensatory," but not "punitive," damages because "unlike compensatory damages and injunction," punitive damages "are generally not available for breach of contract." *Id.* at 187.

Respondent now asks this Court to depart from its longstanding precedent recognizing the availability of compensatory damages by holding that a recipient of federal funding may never be required to pay compensatory damages for the emotional harms that result from a violation of Title VI and the other civil rights statutes that incorporate its remedies. Respondent's request should be denied.

A. For well over a century, courts have recognized that a plaintiff may obtain compensatory damages for the mental suffering and other nonpecuniary harms resulting from the breach of a contract protecting something "other than pecuniary" interests. *Wadsworth* v.

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even considered whether respondent's alleged conduct constitutes a statutory violation.

Western Union Tel. Co., 8 S.W. 574, 576-577 (Tenn. 1888). Because there can be no real dispute that nondiscrimination provisions protect "other than pecuniary" interests, *ibid.*, compensation for emotional distress is available when a federal-funding recipient breaches its nondiscrimination obligations under Title VI, Section 504, and related civil rights statutes.

B. Further, while the *Barnes* Court was "doubtful" that funding recipients would be willing to accept government funds conditioned on exposure to punitive damages liability, 536 U.S. at 188, the availability of compensatory damages for emotional distress does not raise similar doubts, because courts have often awarded such damages since *Franklin*, and this Court has considered at least four cases involving claims for compensatory damages for emotional distress.

C. Similarly, while *Barnes* suggested that punitive damages might be imposed only through the judicial creation of an "implied punitive damages provision," 536 U.S. at 188 (citation omitted), Congress itself has ratified the availability of compensatory damages for the harms caused by violations of the nondiscrimination provisions. Even if it were appropriate for courts to narrow a remedy Congress has ratified, no persuasive reason exists for doing so here because—unlike punitive damages awards, which *Barnes* described as "unorthodox and indeterminate," *ibid.*—compensatory damages for emotional distress are constrained by the usual rules that confine damages to no more than what is necessary to make good the harms a plaintiff has both pleaded and proved.

D. Precluding the award of compensatory damages for emotional distress is also irreconcilable with *Barnes*'s application of what it described as "the 'well settled'

rule" that federal courts have the power to award the relief necessary to "'make good'" the harm caused by a violation of a federal statute that affords a private right of action. 536 U.S. at 189 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). Damages for emotional distress are often the most important, if not the only, remedy available to victims of discrimination. Barring that form of compensatory relief would leave victims without redress.

II. Like the court of appeals, respondent suggests that compensatory damages for emotional distress should be barred on the theory that federal-funding recipients are not "on notice" that they may be subject to that remedy because compensation for nonpecuniary harms is generally awarded only in cases where the contract is "of such a kind that serious emotional disturbance was a particularly likely result" of a breach. Br. in Opp. 7 (quoting Second Restatement § 353 & cmt. a) (emphasis omitted). But that describes cases involving Title VI and related nondiscrimination provisions to a tee; this Court has often recognized the "profound personal humiliation" and other forms of mental suffering inflicted by discrimination, *Powers* v. *Ohio*, 499 U.S. 400, 413-414 (1991).

A. Respondent's argument that it should nonetheless be exempt from such damages depends on the assertion that a federal-funding recipient might not be aware of the relevant principle of contract law permitting compensatory damages for emotional distress because that principle is sometimes described as an exception to the rule precluding such damages. Pet. App. 10a. That rule, however, reflects practice and expectations concerning ordinary commercial contracts, not contracts that are intended to protect against nonpecuniary

harm. In any event, federal-funding recipients' potential ignorance of a settled aspect of contract law is irrelevant because "[e]very citizen is presumed to know the law," exceptions and all. *Georgia* v. *Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (citation omitted).

Nor is it significant that *Barnes* held that punitive damages are categorically unavailable even though they are sometimes awarded under an exception for contract claims that could also be pleaded as torts. That particular exception merely confirms that punitive damages are essentially a *tort* remedy. The same is not true for compensatory damages for emotional distress because compensatory damages in general are the preferred remedy for breach of contract, and contract law makes them available specifically for nonpecuniary harms in cases, like this one, involving a breach of conditions protecting nonpecuniary interests.

B. As for respondent's secondary argument that there is insufficient support in the common law for awarding compensation to third-party beneficiaries, it is "too late in the day" for such a contention, which amounts to the assertion that private parties should not be able to sue for violations of Title VI *at all*. *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). Thirty years ago, this Court recognized that Congress had ratified the availability of a cause of action for money damages for violations of these nondiscrimination statutes. *Ibid.*; see *id.* at 72-73 (majority opinion). Twenty years ago, the Court reiterated that a federal-funding recipient may be required to "*compensate*[]" a "third-party beneficiary * * * for the loss caused by" a breach of Section 504 and related nondiscrimination legislation. *Barnes*, 536 U.S. at 189. This Court should not depart from that settled understanding by holding

that a recipient of federal funding cannot be required to compensate a victim of discrimination for the nonpecuniary harms caused by a breach of Title VI or the statutes that incorporate its remedies.

ARGUMENT

I. AN AWARD OF COMPENSATORY DAMAGES FOR THE BREACH OF TITLE VI OR RELATED CIVIL RIGHTS STATUTES MAY INCLUDE COMPENSATION FOR EMOTIONAL DISTRESS

In *Barnes* v. *Gorman*, 536 U.S. 181 (2002), this Court set out a basic framework for determining the scope of the "appropriate relief" for a breach of a funding condition in Spending Clause legislation. *Id.* at 185. *Barnes* explained that, because Spending Clause statutes are "'much in the nature of a contract,'" a funding recipient may be subject to a particular remedy only when it is "*on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). The Court recognized, however, that a remedy need not be enumerated in the statute to put the funding recipient on notice. *Ibid.* Rather, the Court held, under Spending Clause legislation, a funding recipient is "generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available" under contract law. *Barnes*, 536 U.S. at 187.

Applying those principles to Title VI, Section 504, and the other Spending Clause statutes that borrow Title VI's remedies, *Barnes* reaffirmed the Court's prior holdings that both "compensatory damages" and an "injunction" are available when a federal-funding recipient engages in "intentional conduct that violates the clear

terms of the" nondiscrimination statutes because both remedies are "forms of relief traditionally available in suits for breach of contract." 536 U.S. at 187 (citing in *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677, 711-712 (1979)). But the Court explained that those holdings do not permit an award of punitive damages because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Ibid.*

Respondent now asks this Court to depart from *Barnes's* straightforward rule that funding recipients may be subject to compensatory, but not punitive, damages by barring victims of discrimination from obtaining compensatory damages for the emotional harms caused by a violation of Title VI, Section 504, or other related civil rights litigation. Each of *Barnes*'s rationales demonstrates why respondent's request should be denied.

A. Federal-Funding Recipients Are On Notice That They May Be Subject To Compensatory Damages For Emotional Distress Because That Remedy Is Traditionally Available In Suits For The Breach Of A Contract Protecting Nonpecuniary Interests

While *Barnes* held that punitive damages "are generally not available" in suits for breach of contract, it recognized that "compensatory damages" are a "form[] of relief traditionally available" in such suits. 536 U.S. at 187. Indeed, the basic rule is that, when a party has committed a breach, the court should award compensatory damages "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." 3 Samuel Williston, *The Law of Contracts* § 1338, at 2392 (1920) (*Law of Contracts*); see Justice

Oliver Wendell Holmes, *The Path of the Law* (1897), *reprinted in* 2 *The World of Law: Law* as *Literature* 614, 618-619 (Ephraim London ed., 1960) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

There is an exception to this basic rule that applies where a plaintiff alleges that a breach of an ordinary, commercial contract has caused nonpecuniary harms. Courts generally will not award compensation to redress those nonpecuniary injuries, on the theory that such harms typically are not among those contemplated by the parties in entering into a commercial contract. *Law of Contracts* § 1340, at 2396; see *Stewart* v. *Rudner*, 84 N.W.2d 816, 823-825 (Mich. 1957) (recognizing that non-pecuniary concerns typically are not addressed by "ordinary, commercial contract[s]").

That exception, however, has no application in this case because courts generally *will* award "damages for mental suffering" in breach-of-contract cases "where other than pecuniary benefits are contracted for." *Law of Contracts* § 1340, at 2396. Because the benefits secured by Title VI and related nondiscrimination statutes indisputably include benefits that are "other than pecuniary," federal-funding recipients that breach nondiscrimination conditions may be subject to compensatory damages for emotional distress. *Ibid.*

1. For well over a century, courts and treatises have recognized that where a "contract was made specially to procure exemption" from nonpecuniary harms, a party may obtain compensation for those harms if the contract is breached. 1 J. G. Sutherland, *A Treatise on the Law of Damages* 157-158 (1883); see 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 45, at 59-

63 (8th ed. 1891) (describing various circumstances in which courts permit "breach of contract damages for mental pain"). For example, in his 1883 treatise, Sutherland explained that courts do not often award damages for something other than pecuniary harm in contract cases because "the nature of the transactions which [contracts] involve" means that the "natural and direct injuries" from a breach are "ordinarily" pecuniary. Sutherland 156. But Sutherland observed that courts had long awarded emotional distress damages in suits for breach of a marriage contract in order to ensure "adequate compensation" in light of the "nature and benefits of the thing promised." Sutherland 156-157. He further noted that, while such a suit for the breach of a marriage contract is sometimes deemed "an exceptional action," "[o]ther actions upon contract may embrace like damages," where they similarly protect nonpecuniary interests. *Ibid.*; see *Wadsworth* v. *Western Union Tel. Co.*, 8 S.W. 574, 574-577 (Tenn. 1888) (permitting recovery of compensation for emotional distress for breach of contract where defendant failed to deliver a telegram informing the plaintiff that her brother was "seized with a mortal malady," because "where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages").

Notably, courts have traditionally permitted compensatory damages for mental suffering in cases involving the "[u]njustifiable expulsion or mistreatment of passengers by carriers, or of guests by innkeepers," on the theory that those businesses contract to provide not just services, but protection from distress and inconvenience in the provision of those services. Samuel Wil-

liston & George J. Thompson, *Selections from Williston's Treatise on the Law of Contracts* § 1340A, at 835 (rev. ed. 1938) (Williston & Thompson). For example, in 1908, the New York Court of Appeals explained that an "essential part" of the contract between guest and innkeeper is the right of the guest to "insist upon * * * respectful and decent treatment." *De Wolf* v. *Ford*, 86 N.E. 527, 530; see Pet. Br. 20-21 (describing additional cases). When this duty is breached, "[t]he measure of liability * * * will be purely compensatory" and will include relief for "injury to [the plaintiff's] feelings and such personal humiliation as she may have suffered." *De Wolf*, 86 N.E. at 531; see *Rogers* v. *Loether*, 467 F.2d 1110, 1117 n.23 (7th Cir. 1972) ("At common law, an innkeeper was liable in damages for insulting or abusing his guests or indulging in any conduct resulting in unnecessary physical discomfort or distress of mind."), aff'd, 415 U.S. 189 (1974).

In its early years, courts sometimes disagreed over the precise contours of the principle permitting the award of compensatory damages for mental suffering caused by the breach of a contract protecting nonpecuniary interests, see *Western Union Tel. Co.* v. *Wood*, 57 F. 471 (5th Cir. 1893), and some sources suggested the principle sounded in something other than contract law, see *id.* at 474. For example, the first Restatement of Contracts declared that "compensation for mental suffering" is generally available only if the breach is "wanton or reckless," and the commentary suggested that the availability of such damages might sometimes sound in tort. Restatement (First) of Contracts § 341 & cmt. a (1932). But other contemporaneous sources rooted the principle firmly in contract law and applied no heightened *mens rea* requirement. See, *e.g.*, *F. Becker*

Asphaltum Roofing Co. v. *Murphy*, 141 So. 630 (Ala. 1932); *Carmichael* v. *Bell Tel. Co.*, 72 S.E. 619, 621 (N.C. 1911).

In any event, by the time Title VI was enacted in 1964, the law was sufficiently settled that the Michigan Supreme Court deemed the "award of damages for mental distress and suffering" "commonplace" in suits for the breach of a contract concerned "not with pecuniary aggrandizement but with matters of mental concern and solicitude." *Stewart*, 84 N.W.2d at 823-824; see *Lamm* v. *Shingleton*, 55 S.E.2d 810, 812-814 (N.C. 1949) (similar). And in the decades since, recognition of this principle has been widespread and apparently uniform. See, *e.g.*, *Gregory & Swapp, PLLC* v. *Kranendonk*, 424 P.3d 897, 906-907 (Utah 2018); *Miranda* v. *Said*, 836 N.W.2d 8, 14-24 (Iowa 2013); *University of S. Miss.* v. *Williams*, 891 So. 2d 160, 172-173 (Miss. 2004) (en banc); *Kishmarton* v. *William Bailey Constr., Inc.*, 754 N.E.2d 785, 788 (Ohio 2001); *Erlich* v. *Menezes*, 981 P.2d 978, 987-988 (Cal. 1999); *Francis* v. *Lee Enters., Inc.*, 971 P.2d 707, 713-715 (Haw. 1999); *Decker* v. *Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 448 (Colo. 1997) (en banc); *Sexton* v. *St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 962 (Ala. 1995); *Guerin* v. *New Hampshire Catholic Charities, Inc.*, 418 A.2d 224, 227-228 (N.H. 1980); *Sullivan* v. *O'Connor*, 296 N.E.2d 183, 188-190 (Mass. 1973); see also, *e.g.*, E. Allan Farnsworth, *Contracts* § 12.17, at 895 (1982).

2. The principle that a party may be subject to compensatory damages for nonpecuniary harms when it breaches a contract designed to protect nonpecuniary interests clearly applies when a federal-funding recipient breaches the nondiscrimination conditions in Spending Clause legislation.

a. When the principle was developing in the late 19th and early 20th Century, courts seldom confronted cases involving an alleged breach of a contract prohibiting discrimination.[2] But courts permitted damages for emotional distress where, for example, a common carrier breached its contract by permitting a streetcar passenger to be subject to sexual harassment by a conductor. *Knoxville Traction Co.* v. *Lane*, 53 S.W. 557 (Tenn. 1899). And in those rare instances when courts interpreted a contract to bar discrimination, they permitted compensation for the emotional distress resulting from a breach. Thus, in *Aaron* v. *Ward*, 96 N.E. 736 (1911), New York's highest court recognized that a ticketed bathhouse guest could obtain compensation for emotional distress to remedy the breach of contract claim she brought after she was denied access and referred to by a derogatory term for a person of Jewish ancestry. *Id.* at 738; see *Aaron* v. *Ward*, 136 A.D. 818, 819 (N.Y. App. Div. 1910) (describing the facts of the case), aff'd, 96 N.E. 736 (N.Y. 1911); see, *e.g.*, *Odom* v. *East Ave. Corp.*, 34 N.Y.S.2d 312, 314-317 (N.Y. Sup. Ct.) (denying motion to dismiss because the plaintiffs, African-American hotel guests who were denied service because of

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[2] Indeed, one of the few cases considering racial discrimination in the context of a breach-of-contract case at the time involved a white plaintiff alleging that a railroad had "violated its contract" with her by forcing her to sit in a carriage reserved for non-whites. *Missouri, K. & T. Ry. Co. of Texas* v. *Ball*, 61 S.W. 327, 329 (Tex. Civ. App. 1901). The Texas court concluded that the plaintiff was entitled to "damages for such discomfort and humiliation as [were] proximately caused" by the alleged violation. *Ibid.*

their race, had stated a claim for damages for mental distress), aff'd, 37 N.Y.S.2d 491 (N.Y. App. Div. 1942).[3]

b. The nondiscrimination provisions in Spending Clause legislation are quintessential examples of the sort of contractual conditions for which emotional distress damages are appropriate in the event of a breach. While courts and treatises have employed various ways of characterizing the contracts that give rise to compensation for mental suffering, even the strictest articulation favored by respondent—under which such damages are available only when "serious emotional disturbance was a particularly like result" of a breach, Br. in Opp. 1; see Second Restatement § 353—readily covers Title VI and related civil rights provisions.

This Court has repeatedly recognized the profound emotional harms engendered by discrimination. In *Brown* v. *Board of Education*, the Court explained that discrimination based on race "generates a feeling of inferiority as to [the victims'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 494 (1954). Elsewhere, the Court has recognized that those who are discriminated against "suffer[] a profound personal humiliation." *Powers* v. *Ohio*, 499 U.S. 400, 413-414 (1991).

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[3] There are also cases in which a defendant allegedly breached a contract for admission through the discriminatory exclusion of a ticket-holder and the court declined to award compensatory damages for emotional distress, not on the premise that such damages are unavailable for a violation of a nondiscrimination provision, but because the court found that the defendant was within its rights to discriminate as long as it refunded the ticket price. See, *e.g.*, *De La Ysla* v. *Publix Theatres Corp.*, 26 P.2d 818, 820 (Utah 1933) (concluding that theatre owners are permitted to "exclude persons at their pleasure," even based on race).

The Court has likewise acknowledged the "'stigmatizing injury,'" harmful stereotypes, and diminution of "everyday life activities" that often accompany disability discrimination, placing provisions that bar such discrimination squarely within the principle of contract law permitting compensatory damages for emotional distress. *Olmstead* v. *L. C.*, 527 U.S. 581, 600-601 (1999) (citation omitted); see H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 47 (1990) (recognizing that protections against disability discrimination are intended to prevent "arbitrary, confining, and humiliating treatment").

B. For At Least Three Decades, Courts And The Federal Government Have Recognized That Federal-Funding Recipients Are Subject To Compensatory Damages For Emotional Distress

Barnes bolstered its conclusion that punitive damages are precluded in suits under Title VI and related civil rights statutes by observing that "it is doubtful whether" those entities receiving federal funds "would even have *accepted the funding* if punitive damages liability was a required condition." 536 U.S. at 188. The same cannot be said of compensatory damages for emotional distress because courts have awarded or affirmed such awards for over thirty years.

Barnes had plenty of reason to cast doubt on federal-funding recipients' willingness to accept exposure to punitive damages as a condition on the acceptance of federal funding. When *Barnes* came before the Court in 2002, the parties could not cite a single case in which this Court had affirmed an award of punitive damages under Section 504 or similar Spending Clause statutes. The courts of appeals, too, were nearly uniform in rejecting the availability of punitive damages in this context. See *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d

782, 789 (6th Cir. 1996). And the United States submitted an amicus brief urging the Court to reject the availability of punitive damages because such awards "could frustrate the achievement of programmatic goals, and perhaps even deter entities from accepting federal financial assistance." U.S. Amicus Br. at 26, *Barnes*, *supra* (No. 01-682).

The situation is completely different with respect to compensatory damages for emotional harms.

1. This Court has considered cases in which a plaintiff sought compensatory damages for emotional distress under Title VI or related civil rights statutes on at least four occasions, without ever suggesting that an award of compensation for emotional distress might be foreclosed. Both *Franklin* and *Barnes* themselves involved claims for damages for emotional distress, see Pet. Br. at 20, *Franklin*, *supra* (No. 90-913); U.S. Amicus Br. at 13 n.3, *Barnes*, *supra* (No. 01-682). The same is true of *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), a case in which the Court addressed the requirements for a damages action under Title IX of the Education Amendments. Pet. App. at 100a, *Davis*, *supra* (No. 97-843). And, more recently, the Court unanimously held that a plaintiff seeking monetary damages under Section 504 and Title II of the ADA need not exhaust administrative remedies, in a case in which the "money damages" petitioner sought were for "emotional injury." *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754 n.8 (2017).

2. Precedents from the courts of appeals similarly support the availability of compensatory damages for emotional distress. See Pet. Br. 3 n.1 (collecting cases). For example, in 1998, the Sixth Circuit affirmed the availability of compensatory damages under Section 504

and Title II of the ADA in a case where the plaintiff sought damages for, among other things, "humiliation and embarrassment, anxiety, and pain and suffering." *Johnson* v. *City of Saline*, 151 F.3d 564, 572-573. The Sixth Circuit observed that, while its precedent foreclosed the availability of punitive damages under Section 504 (and therefore Title II, *see* p. 4, *supra*), case law from this Court and its "sister circuits" uniformly recognized the availability of compensatory damages under Section 504. 151 F.3d at 573. In the same year, the First Circuit observed that it might be fair to predict "that the Supreme Court might well allow damages for emotional distress under Section 504 in some circumstances." *Schultz* v. *Young Men's Christian Ass'n of the U.S.*, 139 F.3d 286, 290 (1998). And, after *Barnes* was decided in 2002, the Eleventh Circuit expressly held that compensatory damages are available for claims of emotional distress under Section 504. *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173 (2007).

By contrast, between 1992 when *Franklin* was decided and the court of appeals' decision in this case in 2020, no court of appeals had found that compensatory damages for emotional distress are barred in cases involving Title VI, Section 504, or related statutes. See *Swogger* v. *Erie Sch. Dist.*, No. 20-cv-128, 2021 WL 409824, at *6 (W.D. Pa., Feb. 5, 2021) (observing that the plaintiff had cited "numerous" "district court and appellate decisions supporting the availability of emotional distress damages" under Section 504, while the defendant could point only to the decision in this case and two isolated decisions from the New Mexico district court finding such damages foreclosed).

3. The United States government has also long embraced the availability of emotional distress damages

under Title VI and related statutes. For example, the Department of Justice's *Title VI Legal Manual* states that a recipient of federal funding is subject to suit for compensatory damages, which "traditionally includes damages for both pecuniary and nonpecuniary injuries." Civil Rights Div., U.S. Dep't of Justice, *Title VI Legal Manual* Pt. IX.A.2, at 4-5 (2017); see *id.* at 5 ("[c]ourts applying *Barnes* and *Franklin* generally have interpreted these decisions to permit * * * damages for emotional distress"). Similarly, since at least 1994, the Department has recognized the availability of compensation for emotional distress under Title II of the ADA, which expressly incorporates the remedies available under Section 505. See Civ. Rights Div., U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § II-9.2000 (Supp. 1994) (an individual excluded from a jury "because of his blindness," may obtain damages for "any emotional distress caused by the discrimination").

In other words, until the decision below (and certainly at the time of respondent's alleged breach in 2016 and 2017), the weight of authority and practice supported the conclusion that a recipient of federal financial assistance is subject to compensatory damages for emotional distress. Thus, unlike in *Barnes*, there is no basis for concluding that federal-funding recipients in general (or even respondent in particular) would refuse government money if it were conditioned on the availability of compensatory damages for emotional distress.

C. Congress Has Ratified The Availability Of Compensatory Damages Awards, Which Are Necessarily Limited By The Harm The Plaintiff Has Pleaded And Proved

Barnes also suggested that it would be unwise and inappropriate for courts to use a novel "interpretive

technique" to recognize an "implied punitive damages provision" because punitive damages tend to expose defendants to "unusual and disproportionate" liability that "could well be disastrous." 536 U.S. at 188 (emphasis added). Those concerns do not apply with respect to compensatory damages for emotional distress.

1. This Court need not engage in any novel "interpretive techniques" to confirm the availability of compensatory damages for emotional distress. As every member of the Court recognized in *Franklin*, Congress itself made clear that compensatory damages are available in the 1986 amendments to the Rehabilitation Act. 503 U.S. at 72-73 (majority opinion); *id.* at 77 (Scalia, J., concurring in the judgment). Those amendments abrogated States' Eleventh Amendment immunity under Title VI and the nondiscrimination statutes that borrow its remedies, providing that States may face the same remedies available against non-State actors, "including remedies both at law and in equity." 42 U.S.C. 2000d-7(a)(2). Because compensatory damages are the paradigmatic remedy at law, see *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988), the amendments constitute an acknowledgement that compensatory damages are available to private parties under Title VI and the related nondiscrimination statutes. See p. 4, *supra*.

Further, in 2010, Congress expressly incorporated the "enforcement mechanisms" of Title VI, Section 504, and related statutes into a new nondiscrimination provision in the Affordable Care Act. See pp. 4-5, *supra*. At the time it did so, courts had been routinely approving compensation for emotional distress under the referenced statutes for almost 20 years, see pp. 21-22, *supra;* Pet. Br. 3 nn. 1, 2, suggesting that Congress em-

braced the use of that damages "mechanism" for enforcing its nondiscrimination requirements. See *Franklin*, 503 U.S. at 71 ("evaluat[ing] the state of the law when the Legislature passed Title IX" to determine whether compensatory damages were available).

2. The only question, therefore, is whether this Court should draw back from the compensatory damages remedy that Congress has ratified. There is no reason to do so. Unlike punitive damages, which create liability of "indeterminate magnitude," *Barnes*, 536 U.S. at 188, damages that compensate for emotional distress are bound by the usual rules that limit awards to the amount necessary to remedy the harm a plaintiff has pleaded and proved.

As the damages award in *Barnes* itself illustrates, there is often a marked difference between the magnitude of punitive damages and compensatory damages for nonpecuniary harms. The *Barnes* jury awarded the plaintiff $1.2 million in punitive damages and $1 million in compensatory damages; only $150,000 of that compensatory award was for the emotional distress plaintiff experienced when—as a result of being transported in a police van that did not accommodate his disability—he was thrown to the bottom of the van, forced to lie in a puddle of his own urine, and subjected to injuries that left him permanently unable to work. See 536 U.S. at 183-184; *Gorman* v. *Easley*, No. 95-475, 1999 WL 34808615, at *1 (W.D. Mo. Oct. 28, 1999), aff'd in part, rev'd in part, and remanded 257 F.3d 738 (8th Cir. 2001), rev'd *sub nom. Barnes*, 536 U.S. 181.

The fact that the punitive damages award in *Barnes* was many times larger than the amount awarded to compensate the plaintiff for emotional distress reflects

a fundamental distinction between the two forms of relief. While punitive damages are, by their nature, untethered to the extent of the harm experienced by the plaintiff, compensatory damages cannot exceed the amount necessary to make good plaintiff's harms. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). Thus, courts may instruct juries regarding appropriate factors to consider in issuing awards, *Barker* v. *Niles Bolton Assocs., Inc.*, 316 Fed. Appx. 933, 939 (11th Cir. 2009), and courts generally insist that plaintiffs provide "specific individualized proof" to support the assertion that they were "personally affected by the discriminatory conduct" and to establish the "nature and extent of the harm." *DeCorte* v. *Jordan*, 497 F.3d 433, 442 (5th Cir. 2007). As a result, large compensatory awards for emotional distress are typically permitted only where there is medical evidence and corroborating testimony. See *Duarte* v. *St. Barnabas Hosp.*, 341 F. Supp. 3d 306, 320 (S.D.N.Y. 2018) (surveying case law in the Second Circuit).

Further, in those instances where a jury award exceeds the amount necessary to compensate the plaintiff for her emotional harm, judges can and do remit awards for emotional damages to an appropriate level. See, *e.g.*, *Sooroojballie* v. *Port Auth. of N.Y. & N.J.*, 816 Fed. Appx. 536, 545-548 (2d Cir. 2020) (ordering remittitur of award of $2.16 million to $250,000 to account for evidence of "significant," but not "egregious," emotional distress); *Delli Santi* v. *CNA Ins. Cos.*, 88 F.3d 192, 205-206 (3d Cir. 1996) (upholding remittitur of award of $300,000 to $5000 where the award rested solely on plaintiff's testimony); *Burns* v. *Nielsen*, 506 F. Supp. 3d 448, 481-488 (W.D. Tex. 2020) (remitting a jury's award

for noneconomic damages in a Rehabilitation Act suit from $125,000 to $90,000).[4]

D. Precluding Compensation For Emotional Distress Would Prevent Courts From Awarding The Relief Necessary To Make Good A Breach Of The Nondiscrimination Conditions

Barnes also stressed that precluding punitive damages awards was "consistent with the 'well settled' rule that 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" 536 U.S. at 189 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). Punitive damages, the Court explained, do not fall within that rule because they do not do anything to "'make good'" a wrong; rather, in the context of Title VI and related statutes, the "wrong is 'made good' when [the funding recipient] *compensates* the Federal Government or a third-party beneficiary * * * for the loss caused by" the recipient's failure to adhere to the nondiscrimination condition. *Ibid.*

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[4] Respondent observes (Supp. Br. in Opp. 11) that the Second Restatement describes compensatory damages for emotional distress as "particularly difficult to establish and measure." Second Restatement § 353 cmt. a. But the Restatement is merely describing, without citation, a concern that allegedly led some courts to limit the availability of damages for emotional distress to cases in which "serious emotional disturbance" was a "particularly likely result" of a breach. *Ibid.* In those cases, defendants can foresee that they will be subject to damages for emotional distress and can take any potential difficulties in measurement into consideration before entering the contract. The same is true with respect to recipients of federal funds.

It would not be consistent with the understanding of the "well settled rule" invoked in *Barnes* to preclude compensatory damages for emotional distress, because those damages play an important role in "mak[ing] good" the wrong done by discrimination. *Barnes*, 536 U.S. at 189 (citation omitted). Indeed, in many discrimination cases, emotional distress damages are the major, if not "the *only* 'available remedy to make good the wrong done,' and the *only* way to 'put private parties in as good a position as they would have been had the contract been performed.'" *Sheely*, 505 F.3d at 1203 (quoting *Franklin*, 503 U.S. at 66, and *Barnes*, 536 U.S. at 189). In a wide variety of cases—such as those involving sexual harassment, race-based mistreatment, or the denial of accommodations for individuals with disabilities—a victim of discrimination may experience significant emotional distress without suffering pecuniary harm. Depriving courts of the power to award compensation for emotional distress in private suits would therefore weaken the efficacy of a vital enforcement mechanism for Title VI and related civil rights statutes.

II. THE ARGUMENTS TO THE CONTRARY LACK MERIT

The court of appeals concluded that compensatory damages for emotional distress are off-limits because federal-funding recipients are unlikely to be familiar with what it described as the "rare and narrow exception" under which compensatory damages are available for emotional distress. Pet. App. 10a. There are multiple errors baked into that conclusion, and respondent's additional assertion (Supp. Br. in Opp. 8) that funding recipients are not on notice that they may be liable to third-party beneficiaries is equally mistaken.

A. 1. Most fundamentally, the court of appeals misunderstood the relevant notice inquiry. It is blackletter

law that whether a party is on notice with respect to a particular feature of the law depends on whether the law itself is clear, not whether the party is likely to be familiar with the specific legal principle. See *Georgia* v. *Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) ("Every citizen is presumed to know the law.") (citation omitted). Yet the court did not suggest that the law is unclear as to whether compensatory damages for emotional distress are available when a party breaches a contract specifically designed to protect nonpecuniary interests. Nor could respondent plausibly make such an argument because every major treatise cited in *Barnes*, as well as numerous decisions of state supreme courts have recognized the principle that compensatory damages for emotional distress are available when a contract protects nonpecuniary interests. See pp. 13-17, *supra.*

The court of appeals instead relied on the rationale that federal-funding recipients "are unlikely to be aware" that the principle exists because it is expressed as an "exception," and because—in the court's view—it is "rare[ly]" applied. Pet. App. 10a. But a party may not excuse his ignorance of his legal obligations on the ground that the obligation is not the general rule, or that it is not frequently applied. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) ("We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'") (quoting *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833)). In the context of contract law in particular, this Court has recognized that "[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he

did not read it when he signed it, or did not know what it contained." *Upton* v. *Tribilcock*, 91 U.S. 45, 50 (1875).

Respondent suggests that the inquiry should be different with respect to remedies in Spending Clause suits because in *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), the Court observed that—when analyzing whether a State has received sufficient notice of a remedy imposed through Spending Clause legislation—courts should ask whether the State "would clearly understand that one of the obligations" of accepting the funding is accepting exposure to a particular remedy. Resp. Supp. Br. in Opp. 8-9 (quoting *Arlington Cent. Sch. Dist.*, 548 U.S. at 296). But nothing in *Arlington Central School District* suggested that the Court was departing from the notice principles it had articulated in *Barnes*, where it held that federal-funding recipients are "generally on notice" with respect to the remedies "traditionally available in suits for breach of contract." 536 U.S. at 187.

In any event, in *Arlington Central School District*, the Court determined whether the statute provided sufficient notice not by asking whether or not the State was likely to be aware of the statutory provision that allegedly subjected it to the remedy, 548 U.S. at 296, but rather by analyzing the text of the statute and the applicable precedent. *Id.* at 296-303. An analogous analysis here demonstrates that compensatory damages for emotional distress are available. See pp. 13-22, *supra*.

2. The court of appeals' conclusion that a contract remedy may not be available merely because it is awarded as an exception is also irreconcilable with *Barnes's* recognition that plaintiffs suing under Title VI and related statutes may obtain an "injunction" because it is a "form[] of relief traditionally available in suits for

breach of contract." 536 U.S. at 187. Injunctions are themselves available only as an exception to the general contract rule favoring damages. Second Restatement §§ 357, 359-369.

The court of appeals appears to have nonetheless believed that relief awarded under an exception is foreclosed because "contract law also has exceptions for awarding punitive damages for breach of contract," the form of relief that *Barnes* found precluded. Pet. App. 10a-11a. But none of the parties and none of the Justices made any mention of that exception in *Barnes*, likely because it is not an exception that sounds in contract at all. Section 355 of the Second Restatement recognizes that courts may award punitive damages in suits where the breach of contract is "also a tort for which punitive damages are recoverable." § 355 (emphasis omitted).[5] Thus, far from suggesting that punitive damages are a form of traditional contractual relief, the exception confirms that they are a *tort* remedy. That is not true with respect to the principle permitting compensatory damages for emotional distress, which makes the availability of such damages turn on whether "the contract or the breach" is likely to result in emotional disturbance, not whether the contract claim is also a tort. *Id.* § 353 cmt. a.

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[5] Courts have likewise recognized that compensatory damages for emotional distress may be awarded for breach of contract where the breach "accompanies a bodily injury" because "[i]n such cases the action may nearly always be regarded as one in tort." Second Restatement § 353 cmt. a; see Pet. App. 9a. That exception is not instructive when determining the contours of the damages remedy for violations of Title VI and related statutes precisely because—like the exception for punitive damages awards—that exception is based on tort principles. *Ibid.*

3. There is also a logical problem with the court of appeals' belief that a federal-funding recipient is unlikely to "think" it will be subject to compensatory damages for emotional distress. Pet. App. 10a. The principle precluding compensation for emotional distress for a breach of an ordinary commercial contract is itself an exception to the fundamental principle that a party who breaches a contract must pay the damages necessary to make good the breach. See pp. 13-14, *supra*. A funding recipient with only a cursory knowledge of contract law is therefore likely to assume compensatory damages are available for *all* of the harms that flow from its breach.

B. Respondent's assertion (Br. in Opp. 8) that it lacked notice that it might be liable for emotional-distress damages to a third-party beneficiary is similarly flawed. Respondent observes (*id.* at 12-13) that contract law cases granting compensatory damages for emotional distress generally do not involve a third-party beneficiary. That, however, is hardly surprising because contractual awards to third-party beneficiaries are another example of a form of contractual relief that is available only through an exception, this time to the general rule that "the only parties who can sue on a contract are the parties between whom the contract is made." *Baker* v. *Eglin*, 8 P. 280, 281 note (Or. 1884). And that exception did not gain firm traction in general American contract law until the 20th Century. 4 Arthur Linton Corbin, *Corbin on Contracts* § 779J, at 59 (1951) (Corbin).

That third-party relief is something of a modern development under contract law, however, does not alter the fact that remedies for third-party beneficiaries are indisputably available under Title VI and similar civil rights litigation. *Barnes* expressly recognized that a

party who breaches a nondiscrimination provision may be required to make good its breach by "compensat[ing]" a "third-party beneficiary." 536 U.S. at 189 (emphasis omitted). A contrary rule would also be irreconcilable with the well-established principle that there is a private right of action under these Spending Clause statutes. See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001).

Nor does contract law generally impose any relevant limitation on the remedies that a person who has been determined to have particular rights as a third party may obtain when she is permitted to sue. Treatises and courts have consistently held that "[a] third party beneficiary has the same rights and remedies it would have enjoyed as a promisee of the contract." 9 John E. Murray, Jr. & Timothy Murray, *Corbin on Contracts* § 46.1, at 99 (rev. ed. 2007); see Corbin § 810, at 230 ("The remedies available to a beneficiary are exactly the same as would be available to him if he were a contractual promisee of the performance in question."); see *Flores* v. *Baca*, 871 P.2d 962, 966-971 (N.M. 1994) (third-party beneficiaries of a contract for burial services—family members of the deceased—were entitled to sue for emotional distress damages resulting from a breach that resulted in the improper treatment of the deceased).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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