EMOTIONALLY HARMED? IT MIGHT NOT MATTER: AN ANALYSIS OF *CUMMINGS V. PREMIER REHAB KELLER* AND ITS IMPLICATIONS FOR TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990

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INTRODUCTION

On April 28, 2022, the U.S. Supreme Court handed down an opinion that shocked the disability rights community.[1] In *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Court ruled that compensatory damages for emotional distress may not be recovered by claimants who sue for disability discrimination under section 504 of the Rehabilitation Act of 1973 (section 504)[2] and section 1557 of the Patient Protection and Affordable Care Act of 2010.[3].

Cummings involved a woman, Jane Cummings, who is both deaf and legally blind.[4] Because of her disabilities, she communicates through American Sign Language (ASL)—her first and primary language—and cannot communicate effectively in writing.[5] On October 27, 2016, Ms. Cummings contacted Premier Rehab Keller (Premier), a physical therapy provider that receives federal funds, for physical therapy treatment for her chronic back pain.[6] Ms. Cummings requested an ASL interpreter for her visit, which Premier refused to provide.[7] Instead, Premier suggested Ms. Cummings provide an ASL interpreter herself, or attempt to communicate through written notes, lip reading, and gesturing—all of which were ineffective for Ms. Cummings because of her visual impairment.[8] She subsequently visited another physical therapy provider but "received unsatisfactory care."[9] Ms. Cummings again, on two separate

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1 *See* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022); George M. Chuzi, Cummings' *Rejection of Damages Under § 794 May Be Mistaken, but Damages Are Still Available for Employees Who Claim Disability Discrimination*, KALIJARVI, CHUZI, NEWMAN & FITCH, P.C. (Apr. 29, 2022), https://kcnfdc.com/blog/cummings-rejection-of-damages-may-be-mistaken-but-damages-are-still-available-for-employees-who-claim-disability-discrimination [https://perma.cc/5UFW-KQZ7] ("Cummings has sent shock waves through the Civil Rights community almost from the moment it was released . . . .").

2 Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a)). For a full discussion of section 504, see *infra* Section I.A.

3 Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (codified as amended at 42 U.S.C. § 18116); *see also Cummings*, 596 U.S. at 230.

4 Cummings v. Premier Rehab Keller, P.L.L.C., No. 18-CV-649-A, 2019 WL 227411, at *1 (N.D. Tex. Jan. 16, 2019), *aff'd*, 948 F.3d 673 (5th Cir. 2020), *aff'd*, 596 U.S. 212 (2022).

5 *Id.*

6 *Id.*; *Cummings*, 948 F.3d at 674.

7 *Cummings*, 2019 WL 227411, at *1.

8 *Id.*

9 *Id.* (quoting Complaint ¶ 17, *Cummings*, 2019 WL 227411 (No. 18-CV-649-A)).

occasions, contacted the defendant for an appointment and an interpreter.[10] Premier again denied her request.[11] In response to these denials, Ms. Cummings exercised her federally protected rights against discrimination by suing Premier for the emotional distress caused by her experience at its facility.[12] To her dismay, she was denied recovery of damages for her emotional distress.[13]

Emotional distress damages have been an important form of relief for individuals with disabilities who have suffered discrimination.[14] As Justice Breyer noted in his dissenting opinion in *Cummings*, "Often, emotional injury is the primary (sometimes the only) harm caused by discrimination."[15] Further, it is a rather foreseeable consequence of disability discrimination that the individual will be emotionally harmed.[16] The Supreme Court's holding in *Cummings* opens the door for the complete annihilation of emotional distress damages—as recent district court and court of appeals decisions have shown[17]—in future claims

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10 *Id.*

11 *Id.*

12 *See infra* Section I.D (discussing plaintiff's claim).

13 *See infra* Section I.D.

14 Brief for the United States as Amicus Curiae at 10, Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) (No. 20-219), 2021 WL 3931275.

15 *Cummings*, 596 U.S. at 235 (Breyer, J., dissenting).

16 *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007).

17 *See* Montgomery v. District of Columbia, No. CV 18-1928, 2022 WL 1618741, at *25 (D.D.C. May 23, 2022) (holding that Title II ADA claimant could not recover for emotional distress damages); Luke v. Texas, 46 F.4th 301, 306 n.4 (5th Cir. 2022) (leaving "it for the district court to decide the effect, if any, *Cummings* has on Luke's ability to recover emotional distress damages under Title II"); Hill v. SRS Distrib. Inc., No. CIV 21-370, 2022 WL 3099649, at *5 (D. Ariz. Aug. 4, 2022) ("[T]he Supreme Court recently held that damages for emotional distress are not recoverable under the Rehabilitation Act; it is therefore unlikely such damages are available under the ADA." (citing *Cummings*, 596 U.S. at 230)); Faller v. Two Bridges Reg'l Jail, No. 21-cv-00063, 2022 WL 17260763, at *4 n.8 (D. Me. Nov. 2, 2022) (noting that the *Cummings* limitation "likely . . . extends to Plaintiff's ADA claim as well" (citing Gillette v. Oregon, No. 20-cv-00513, 2022 WL 2819057, at *7 n.5 (D. Or. July 19, 2022))); *Gillette*, 2022 WL 2819057, at *7 n.5 (noting that, although the issue is not squarely before the court, "[p]laintiff may no longer recover for emotional damages on these claims" because of *Cummings*); Wolfe v. City of Portland, No. 20-cv-1882, 2022 WL 2105979, at *6 (D. Or. June 10, 2022) (noting that *Cummings* "forecloses emotional distress damages under the Rehabilitation Act and thus likely also under the ADA, for which remedies are construed coextensively with the Rehabilitation Act" (citing *Cummings*, 596 U.S. 212)); Chaney v. E. Cent. Indep. Sch. Dist., No. SA-21-CV-01082, 2022 WL 17574080, at *6 (W.D. Tex. Dec. 9, 2022) (dismissing emotional distress damages claim under Title VI of the Civil Rights Act and section 504, but not deciding the issue of emotional distress damages under Title II until the parties brief the court); Getman v. Or. Health & Sci. Univ., No. 21-cv-01408, 2022 WL 17156760, at *1, *6 (D. Or. Nov. 22, 2022) (dismissing plaintiff's Title II claim for emotional distress); A.W. *ex rel.* J.W. v. Coweta Cnty. Sch. Dist., No. 21-cv-218, 2022 WL 18107097, at *3–4 (N.D. Ga. Nov. 16, 2022) (deciding that *Cummings* applies to Title II and dismissing plaintiff's claim for emotional distress damages); J.P. *ex rel.* A.S.W. v. Nebraska, No. 22-CV-3095, 2022 WL 5254121, at *6 (D. Neb. Oct. 6, 2022) ("Although the Supreme Court did not directly address § 202 of the ADA in *Cummings*,

brought under Title II of the Americans with Disabilities Act of 1990 (Title II).[18] Section 504—the statute directly addressed in *Cummings*—and Title II are similar statutes in that they both aim to prevent discrimination against people with disabilities.[19] Although the Americans with Disabilities Act (ADA)[20] references the Rehabilitation Act[21] in terms of remedies,[22] these two statutes should be analyzed differently for the purposes of emotional distress damages.[23]

While *Cummings*'s holding is clear—emotional distress damages are not recoverable under Spending Clause legislation like the Rehabilitation Act because federal fund recipients are not *on notice* that they would be liable for these types of damages[24]—what is far from certain is the effect it will have on ADA Title II claims.[25] In response to this lack of clarity, this Note takes the position that the *Cummings* decision should not be read so broadly as to implicate claims under Title II of the ADA because the constitutional basis for this statute and the rights therein differ from that of section 504 of the Rehabilitation Act and Title VI of the Civil Right Act of 1964 (Title VI).[26] Additionally, significant barriers are already present for claimants attempting to recover compensatory damages in Title II ADA cases,[27] and further barriers should not be placed on Title II because it would frustrate the purpose of the statute.[28] As will

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its holding implicitly found that emotional distress damages are unavailable under that section." (citing Barnes v. Gorman, 536 U.S. 181, 185 (2002))); M.D. v. Nebraska, Nos. 21CV3315, 22CV3095, 2022 WL 4540390, at *1 (D. Neb. Sept. 28, 2022) ("Because the Rehabilitation Act does not allow [emotional distress] damages, neither does the ADA." (citing *Barnes*, 536 U.S. at 185)).

18 Pub. L. No. 101-336, §§ 201–205, 104 Stat 327, 337–38 (codified as amended at 42 U.S.C. §§ 12131–12134).

19 *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1097 (1995) [hereinafter Weber, *Disability Discrimination*] ("The similarities between section 504 and title II comprise duties, excuses for failure to act, and remedies.").

20 42 U.S.C. § 12133.

21 29 U.S.C. § 794a(a).

22 *See infra* Section I.B.

23 *See infra* Section II.B.

24 Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 230 (2022).

25 The list of decisions *supra* note 17 indicates a willingness by courts to simply apply the *Cummings* holding to Title II claims instead of delving deeper and questioning if the same reasoning applies.

26 *See infra* Section II.B.

27 *See infra* Section I.B.

28 *See* 42 U.S.C. § 12101(b)(1) ("It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."). It is undisputed that the ADA was a step forward in disability advocacy and protecting against discrimination. However, narrowing the remedies available to victims of

be explained in further detail below, Title II's remedial provision references and incorporates the rights and remedies of section 504.[29] In turn, section 504's remedial provision, which is supposed to provide the remedies available to Title II claimants, references and incorporates the remedies available under Title VI.[30]

Part I of this Note will first provide an overview of Title II of the ADA and section 504 of the Rehabilitation Act, as well as their respective remedial provisions. It will explore the similarities and differences between Title II and section 504, and the considerable limitations that exist for recovering compensatory damages under these statutes. Additionally, it will discuss why any concern about applying emotional distress damages, such as the difficulty of determining the value of a plaintiff's claim, is unfounded. Next, it will provide background information on the Spending Clause—as section 504 and Title VI of the Civil Rights Act are pieces of Spending Clause legislation—and the Court-developed "on notice" requirement. Lastly, Part I will provide an in-depth exploration of the *Cummings* decision and how the Court reached its conclusion.

Part II will then discuss pre-*Cummings* decisions and how courts have treated emotional distress damages under Title II, section 504, and Title VI, as well as *Cummings*'s implications for Title II claims. It will argue that courts have generally allowed emotional distress damages under section 504 and Title II and should continue to do so. Moreover, it will call attention to the significant errors made by the *Cummings* Court, such as the disregard of binding precedent and congressional intent. Furthermore, it will go on to analyze why Title II should not be affected by *Cummings* by pointing out that Title II was enacted by Congress under the Fourteenth Amendment and the Commerce Clause powers, and concludes that the "on notice" requirement cannot apply to Title II. Finally, Part II will highlight specific scholarship that, using similar rationales, argues for abolishing the intentional discrimination standard, which would justify allowing emotional distress damages for Title II violations.

discrimination, particularly when noneconomic injuries are present, might disincentivize plaintiffs from bringing their claims.

29 *See infra* Section I.B.

30 *See infra* Section I.B.

I. BACKGROUND

A. *Legislative Response to Discrimination Against Individuals with Disabilities*

In 1990, approximately forty-three million Americans had some form of disability,[31] and these numbers were "expected to rise as the population ages."[32] It did just that: the Centers for Disease Control and Prevention reported in 2018 that "one in 4 U.S. adults—61 million Americans—have a disability that impacts major life activities."[33] People with disabilities, therefore, constitute the largest minority group in the United States.[34]

These staggering numbers only illustrate part of the picture, and the long history of appalling discrimination these individuals have faced reveals the need for action.[35] Like other civil rights movements, disability rights advocacy over the last few decades has shed light on disability discrimination to politicians and the American public.[36] Although other federal civil rights laws have been enacted to correct these injustices by protecting the rights of people with disabilities,[37] two pieces of legislation stand at the forefront.[38]

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31 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(1), 104 Stat 327, 328.

32 *See* Elizabeth Pendo, *Taking It to the Streets: A Public Right-of-Way Project for Disability Law*, 54 ST. LOUIS U. L.J. 901, 904 (2010).

33 Press Release, Ctrs. for Disease Control & Prevention, CDC: 1 in 4 US Adults Live with a Disability (Aug. 16, 2018, 1:00 PM), https://archive.cdc.gov/#/details?url=https://www.cdc.gov/media/releases/2018/p0816-disability.html [https://perma.cc/NH8C-6URW]. Notably, this statistic only includes adults. The United States Census Bureau estimated that 4.3% of the American population are children with disabilities, a figure that has increased from 3.9% since 2008. *See* NATALIE A.E. YOUNG, U.S. CENSUS BUREAU, ACSBR-006, CHILDHOOD DISABILITY IN THE UNITED STATES: 2019, at 2 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-006.pdf [https://perma.cc/9LNK-XNTS].

34 Shayna Korol, *A Brief History of the Disability Rights Movement in America*, ACCESSIBILITY.COM (Oct. 27, 2021), https://www.accessibility.com/blog/a-brief-history-of-the-disability-rights-movement-in-america [https://perma.cc/8HD5-2KP5].

35 *See A Brief History of the Disability Rights Movement*, ADL (May 3, 2022), https://www.adl.org/resources/backgrounder/brief-history-disability-rights-movement [https://perma.cc/A8FL-RWXH] (discussing, briefly, the discrimination individuals with disabilities have suffered).

36 *See* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada [https://perma.cc/5EEP-9ASJ].

37 *See* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L.L. REV. 413, 428–29 (1991) (providing an overview of these statutes).

38 *See* JACQUELINE VAUGHN SWITZER, DISABLED RIGHTS: AMERICAN POLICY AND THE FIGHT FOR EQUALITY 8 (2003) (describing the ADA and section 504 as "groundbreaking statutes").

In 1973, Congress enacted section 504 of the Rehabilitation Act[39] to prohibit disability discrimination within programs receiving federal funding.[40] In pertinent part, it 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."[41] Thus, section 504 prohibits discrimination against disabled persons by federally funded entities, and requires that disabled individuals have equal opportunities to receive the same benefits as nondisabled persons.[42]

However, section 504 is not without its limitations. Specifically, section 504's scope is limited to "program[s] . . . receiving Federal financial assistance."[43] There are some state and local programs that do not receive federal funding, and therefore could freely discriminate under section 504.[44] Perhaps even more crucially, section 504 does not cover private sector entities, such as private employers, places of public accommodation (e.g., supermarkets or gyms), and private transportation, unless these entities receive federal funds.[45] The remedial provision to section 504 is set out in section 505 of the Rehabilitation Act.[46] It provides that persons aggrieved by the acts of federal funds recipients in violation of section 504 shall have the same remedies as are available under Title

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39 Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a)).

40 S. REP. NO. 93-318, at 2143 (1973) (explaining that section 504 of the Rehabilitation Act "prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance").

41 29 U.S.C. § 794(a).

42 Jonathan Lave, Maggie Sklar & Avra van der Zee, *A Right Without a Remedy: An Analysis of the Decisions by the District Court and Eleventh Circuit in* Sheely v. MRI Radiology Network P.A., *and the Implication for Disabled Americans' Ability to Receive Emotional Damages Under the Rehabilitation Act and the Americans with Disabilities Act*, 4 SETON HALL CIR. REV. 1, 5 (2007).

43 29 U.S.C § 794(a); *see* Sarah Jones, Note, *Walk This Way: Do Public Sidewalks Qualify as Services, Programs, or Activities Under Title II of the Americans With Disabilities Act?*, 79 FORDHAM L. REV. 2259, 2267 (2011) ("The scope of section 504 is limited in that it only covers entities that receive federal financial assistance.").

44 *See* Burgdorf, *supra* note 37, at 429 (discussing the fact that, under section 504 and various other disability discrimination statutes, "almost all activities and programs not funded by the federal government could freely discriminate on the basis of disability"); Jones, *supra* note 43, at 2272.

45 *See* H.R. REP. NO. 101-485, pt. 4, at 24 (1990) (recognizing that private sector entities are not covered by section 504); Weber, *Disability Discrimination*, *supra* note 19, at 1131 n.235 ("Some public agencies may not receive federal funding. These entities are bound by title II of the ADA, but not by § 504.").

46 29 U.S.C. § 794a.

VI of the Civil Rights Act of 1964, which includes compensatory and injunctive relief.[47]

Realizing these limitations under section 504, Congress enacted the Americans with Disabilities Act of 1990[48] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[49] The ADA, more broadly than section 504, prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private facilities that are open to the general public.[50] Title I of the ADA, for example, prohibits discrimination in employment.[51] Specifically, Title I covers both public and private sector employers[52] with fifteen or more employees,[53] while section 504 only covers the federal government and recipients of federal funds.[54] Title III, specifically directed toward private entities,[55] prohibits discrimination by commercial facilities and places of public accommodation.[56] The purpose

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47 *Id.* § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."); *see* Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373, 408–15 (2016). For a full discussion on the remedial provision of section 504, see *infra* Section I.B.

48 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

49 42 U.S.C. § 12101(b)(1).

50 Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RSRV. L. REV. 467, 473 (2010) ("The ADA as passed in 1990 purported to significantly extend the provisions of the Rehabilitation Act."); Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1123–26 (2000) (explaining the broad coverage of the ADA).

51 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

52 Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 219 (2001).

53 42 U.S.C. § 12111(5)(A).

54 *See* Lauren R.S. Mendonsa, Note, *Dualing Causation and the Rights of Employees with HIV Under § 504 of the Rehabilitation Act*, 13 THE SCHOLAR 273, 284–87 (2010). Importantly, section 504 does not have a minimum number of employees requirement like Title I does. *Id.* at 286.

55 *See* Cheryl L. Anderson, *Damages for Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, but Are the Remedies the Same?*, 9 BYU J. PUB. L. 235, 239 n.15 (1995) ("Title III is expressly limited to the private sector and only applies to certain facilities.").

56 *See* 42 U.S.C. §§ 12182–12183. Section 12182 prohibits discrimination based on disability by public accommodations and § 12183 requires that all new construction and alterations in public accommodations and commercial facilities be readily accessible to and usable by individuals with disabilities. The term "public accommodation" refers to twelve specific types of private entities. *See, e.g.*, *id.* § 12181(7) (defining "public accommodation" to include, among other entities, businesses such as restaurants, shopping centers, parks, schools, and health clubs).

of the law is to ensure that people with disabilities have the same rights and opportunities as everyone else, and thus should "be broadly construed to effectuate its purpose."[57]

The importance of Titles I and III should not be understated. They provide broad protection in employment and places of public accommodation and allow people with disabilities to seek redress when their rights have been violated. These Titles also provide an opportunity, at least in certain circumstances, to receive reasonable accommodations from employers and places of public accommodation.[58]

This Note is primarily concerned with Title II of the ADA because the remedial provisions of Title II incorporate the rights and remedies of section 504—which was the issue directly addressed in *Cummings*.[59] Title II specifically provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[60] Public entity is defined as "any State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[61]

In Title II claims, courts assess whether the plaintiff (1) "is 'an individual with a disability,'" (2) "is 'otherwise qualified to participate in or receive the benefits of some public entity's services, programs, or activities,'" (3) "was 'either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was

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57 *See* Mary Jo C. v. N.Y. State & Loc. Ret. Sys., 707 F.3d 144, 160 (2d Cir. 2013) (quoting Noel v. N.Y.C. Taxi & Limousine Comm'n, 687 F.3d 63, 68 (2d Cir. 2012)); 42 U.S.C. § 12101(a)(8) ("[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . .").

58 *See generally* Julie Brandfield, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113 (1990) (providing an overview of Title I of the ADA); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) (explaining the substantive requirements of Title III of the ADA).

59 *See* 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."); *see also infra* Section I.D.

60 42 U.S.C. § 12132.

61 *Id.* § 12131(1)(A)–(B). A "qualified individual with a disability" is defined as a person with a disability who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

otherwise discriminated against by the public entity,'" and (4) was excluded, denied, or discriminated against "'by reason of' his disability."[62]

Courts often apply the same standard when addressing section 504 claims,[63] with the additional requirement of establishing that the program in question receives federal financial assistance.[64] Still, despite the similarities, Title II of the ADA and section 504 should not be viewed as mutually exclusive and be held to the same analysis when considering emotional distress damages.

B. *The Relationship Between Title II and Section 504*

Title II of the ADA and section 504 share a special relationship. Some scholars have even called the two "companion[s]"[65] because Title II was largely modeled after section 504.[66] In addition to the similarities in language, the regulations promulgated for implementing Title II have been very similar to those of section 504.[67] However, while Title II's language greatly resembles that of section 504, there are a few notable differences.[68]

First, Title II is not limited to "program[s] or activit[ies] receiving Federal financial assistance," but rather applies more broadly in scope to "public entit[ies]."[69] Second, section 504 applies to programs and activities conducted by the executive branch of the federal government and the United States Postal Service.[70] This language was not included in Title II, making Title II inapplicable to any executive agency or the United

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62 Payne v. Arizona, No. CV-09-1195, 2010 WL 1728929, at *2 (D. Ariz. Apr. 26, 2010) (quoting McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004)).

63 *See infra* notes 75–76 and accompanying text.

64 Raj, *supra* note 47, at 407; *see infra* Section I.C.2.

65 *See* Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 390 (2003).

66 *See* Anderson, *supra* note 55, at 236.

67 *Id.* at 237 n.10.

68 *Compare* 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."), *with* 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

69 *See supra* note 68; *supra* Section I.A (describing the differences between federally funded programs and public entities).

70 *See* 29 U.S.C. § 794(a).

States Postal Service.[71] Lastly, section 504 uses the phrase "solely by reason of her or his disability," while Title II says "by reason of such disability."[72] Cognizant of the limitations of section 504's narrow language, Congress omitted the phrase "solely by reason of her or his disability" from Title II.[73] "A literal reliance on the phrase 'solely by reason of his or her handicap,'" the Congressional Report on the ADA explained, "leads to absurd results."[74] These are significant differences between the "companion" statutes. Nonetheless, many disabled persons bring their section 504 and Title II claims together because of the statutes' similarities.[75] Furthermore, because of their similarities, courts have stated that the two statutes should be analyzed together.[76]

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71 *See* 42 U.S.C. § 12132; Jones, *supra* note 43, at 2272 n.93 ("Title II covers only state and local governments, not the federal government. Programs conducted by any executive agency or the United States Postal Service fall under the purview of Section 504." (citation omitted)).

72 *See* 29 U.S.C. § 794(a); 42 U.S.C. § 12132; *see also* Betsy Ginsberg, *Out with the New, In with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 FORDHAM URB. L.J. 713, 737 (2009) (recognizing the difference in language between Title II and section 504).

73 *See* Ginsberg, *supra* note 72, at 737.

74 H.R. REP. NO. 101-485, pt. 2, at 85 (1990). The report went on to give an example:

> [A]ssume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.
>
> In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.

Id. Professor Betsy Ginsberg explains that, despite evidence that this absurd result was not Congress's intent for section 504, courts have nevertheless allowed such a result—both in the context of Title II and section 504. *See* Ginsberg, *supra* note 72, at 737.

75 Rachael Kohl, *Reconsidering "Able and Available": Using the ADA to Combat Disability Discrimination Due to Outdated State Unemployment Laws*, 31 CORNELL J.L. & PUB. POL'Y 1, 47 (2021) ("The standards for both Title II and Section 504 are generally the same and the claims are often brought together.").

76 *See, e.g.*, Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) ("As the District Court correctly noted, '[a]lthough there are . . . differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities.' Indeed, unless one of those . . . distinctions is pertinent to a particular case, we treat claims under the two statutes identically." (citation omitted) (quoting Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 206 (E.D.N.Y. 2000)) (first citing Weixel v. Bd. of Educ., 287 F.3d 138, 146 n.6 (2d Cir. 2002); then citing Rodriguez v. City of New York, 197 F.3d 611, 618; and then citing Cercpac v. Health & Hosps. Corp., 147 F.3d 165, 167 (2d Cir. 1998))); D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 453 (5th Cir. 2010) ("Because this court has equated liability standards under § 504 and the ADA, we evaluate [plaintiff's] claims under the statutes together." (first citing Hainze v. Richards, 207 F.3d

The enforcement provision of Title II of the ADA[77] explains that the remedies set forth in section 505 of the Rehabilitation Act[78] are the remedies available to any person alleging discrimination on the basis of disability in violation of section 202 of the ADA.[79] Section 505 of the Rehabilitation Act, in turn, provides that the remedies afforded under Title VI of the Civil Rights Act of 1964[80] are those available to any person aggrieved by recipients of federal funds in violation of section 504.[81] Importantly, the provisions set out in Title VI, as the Court in *Cummings* recognized, are silent as to what possible remedies may be available.[82] Likewise, Title VI is silent as to whether a private right of action even exists.[83] Nevertheless, courts have determined that section 504 and Title II allow for compensatory and injunctive relief.[84]

1. The Requirement of Intentional Discrimination

Section 504 of the Rehabilitation Act and Title II of the ADA have one important caveat: to recover monetary damages under these statutes, there must be a showing of intentional discrimination.[85] Although there

795, 799 (5th Cir. 2000); and then citing Pace v. Bogalusa City Sch. Bd., 403 F.3d 272 (5th Cir. 2005) (en banc))).

77 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in section [504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

78 29 U.S.C. § 794a(a).

79 42 U.S.C. § 12132.

80 *Id.* §§ 2000d–2000d-7.

81 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (and in subsection (e)(3) of section 706 of such Act, applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." (citations omitted)).

82 Cummings v. Premier Rehab Keller P.L.L.C., 596 U.S. 212, 220 (2022) (noting that "the statutes at issue are silent as to available remedies").

83 *See* Barnes v. Gorman, 536 U.S. 181, 185 (2002) (recognizing that "Title VI does not mention a private right of action").

84 *See Cummings*, 596 U.S. at 221. Compensatory damages are used to compensate—as the word suggests—the plaintiff for their actual losses. *See* Anderson, *supra* note 55, at 260. However, as Professor Cheryl Anderson correctly argues, compensatory damages include both pecuniary losses, "such as medical expenses, transportation costs, admission fees, licensing fees, and other out-of-pocket expenses, and loss of professional opportunities," and nonpecuniary losses, "such as damage to reputation, inconvenience, loss of enjoyment of life, mental anguish and distress, and pain and suffering." *Id.* at 260.

85 *See* Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009) (noting that, although monetary damages are available under section 504 of the Rehabilitation Act, "monetary damages are recoverable only upon a showing of an *intentional* violation"); Silberman v. Miami Dade Transit, 927 F.3d 1123, 1134 (11th Cir. 2019) (explaining that, under Title II of the ADA, to

is some disagreement among the circuits about whether the standard should be one of deliberate indifference or discriminatory animus, it is clear that plaintiffs must prove some form of intentional discrimination.[86] For intentional discrimination to be shown, the claimant needs to prove that the defendant had knowledge that a harm to a federally protected right was substantially likely and the defendant failed to act in spite of the likelihood of that harm.[87] The first element will be satisfied if the public entity knows the plaintiff requires an accommodation that they failed to provide.[88] The second element requires that the public entity's failure to act must be a result of conduct that is beyond negligence, such that it involves an element of deliberateness.[89]

This intentional discrimination standard was first developed in a lawsuit where Black and Hispanic members of a city police department challenged the department's "last-hired, first-fired" policy.[90] The minority officers of the New York City Police Department alleged that the department's layoff policy was discriminatory under Title VI of the Civil Rights Act of 1964.[91] Title VI bars discrimination by recipients of federal financial assistance on the basis of race, color, or national origin.[92] The plaintiffs were only able to show that the policy had a "disparate impact" on minority employees, but were not able to prove intentional

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receive monetary damages, "a plaintiff must . . . prove that the entity that he has sued engaged in intentional discrimination").

86 *See* Derek Warden, *Ending the Charade: The Fifth Circuit Should Expressly Adopt the Deliberate Indifference Standard for ADA Title II and RA Section 504 Damages Claims*, 9 TEX. A&M L. REV. 437, 442 (2022). The distinction between deliberate indifference and discriminatory animus, or possibly something in-between, goes beyond the scope of this Note. However, it seems as though the majority of circuits have adopted the deliberate indifference standard. *Id.* at 443–50.

87 *See* Nina Golden, *Compounding the Error: "Deliberate Indifference" vs. "Discriminatory Animus" Under Title II of the ADA*, 23 N. ILL. U. L. REV. 227, 243 (2003).

88 *See id.* ("When a plaintiff notifies the public entity of his need for accommodation, or when the need is obvious or required by statute or regulation, the public entity is on notice that the plaintiff requires an accommodation. At that point, the plaintiff has satisfied the first element of the test."). Although the example provided speaks only to "accommodation[s]," the standard is the same for any type of discrimination, not just failure to accommodate. *See* Warden, *supra* note 86, at 442 ("To win damages against public entities, most circuits now say that a plaintiff can prove intentional discrimination by a showing of 'deliberate indifference.' This means (1) a government actor had knowledge of a substantial risk of harm to an ADA or RA right and (2) that actor failed to act appropriately on that risk." (footnote omitted)).

89 *See* Golden, *supra* note 87, at 243–44 ("[D]eliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course." (alteration in original) (quoting Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001))).

90 Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 585 (1983) (plurality opinion).

91 *Id.* at 585–86.

92 42 U.S.C. § 2000d.

discrimination.[93] The *Guardians Ass'n v. Civil Service Commission of the City of New York* decision was badly fractured, having three concurrences (filed by Justices Powell, Rehnquist, and O'Connor), two dissents (filed by Justices Marshall and Stevens), and a plurality opinion by Justice White.[94] The plurality decided that "unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations."[95] However, despite the fragmented opinion, and commentators' objections,[96] the intentional discrimination standard remains the law.[97]

2. Limitations on Compensatory Damages

Two other significant barriers exist for plaintiffs attempting to recover compensatory damages. The first, albeit a requirement not unique to Title II of the ADA, is standing—a requirement that originates from Article III, Section 2 of the Constitution.[98] For prospective plaintiffs to possess Article III standing, they must allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[99] Plaintiffs must also, when seeking injunctive relief, "establish a likelihood of future harm from a

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93 *Guardians*, 463 U.S. at 586–87.

94 *See* Anderson, *supra* note 55, at 248.

95 *Guardians*, 463 U.S. at 584.

96 *See, e.g.*, Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1464 (2015) ("[T]he imposition of intent requirements in section 504 and ADA Title II cases, particularly those requesting monetary relief, is the consequence of insufficient attention to *Alexander v. Choate*, *Alexander v. Sandoval*, *Barnes v. Gorman*, statutory text and legislative history, and the policy considerations that ought to determine the scope of liability and relief." (first citing Alexander v. Choate, 269 U.S. 287 (1985); then citing Alexander v. Sandoval, 532 U.S. 275 (2001); and then citing Barnes v. Gorman, 536 U.S. 181 (2002))).

97 Mortland v. Ohio State Univ., No. 19-cv-3361, 2022 WL 17848109, at *8 (S.D. Ohio Dec. 22, 2022) ("It is well settled that compensatory damages are available under the ADA and Rehabilitation Act, and evidence of intentional discrimination is necessary to obtain them." (citations omitted) (first citing Johnson v. City of Saline, 151 F.3d 564, 572–73 (6th Cir. 1998); then citing Moreno v. Consol. Rail Corp., 99 F.3d 782 (6th Cir. 1996); then citing Davis v. Flexman, 109 F. Supp. 2d 776, 790 (S.D. Ohio 1999); then citing S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 264 (3d Cir. 2013); then citing Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011); then citing Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152–53 (10th Cir. 1999); and then citing Hill v. Bradley Cnty. Bd. of Educ., 295 F. App'x 740, 742 & n.2 (6th Cir. 2008))).

98 *See* U.S. CONST. art. III, § 2 (restraining the judicial power of the federal courts to actual "Cases" or "Controversies").

99 *See* Already, LLC v. Nike, Inc., 568 U.S. 85, 90 (2013) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

discriminatory practice—beyond experiencing prior discrimination."[100] However, it is unlikely that a victim of discrimination will return to the facility that has mistreated them, making standing particularly difficult to obtain.

The other significant roadblock for plaintiffs attempting to pursue compensatory damages under Title II is sovereign immunity. Sovereign immunity, it is important to point out, does not apply in all Title II cases.[101] The Eleventh Amendment[102] protects states from unconsented suits by citizens of another state or by a state's own citizens.[103] Congress may abrogate that protection and grant citizens the right to sue their states.[104] However, abrogation of sovereign immunity has proven to be a difficult hurdle. As the Court explained in *Tennessee v. Lane*, "[T]wo predicate questions" must first be answered: "[F]irst, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority."[105] The first question is usually easily resolved when Congress clearly states its intention in a statute.[106] The second question poses a larger challenge and makes it difficult to sue a state. The existence of sovereign immunity has put undue pressure on Title II claimants to recover monetary damages because it is already quite difficult to prove intentional discrimination.[107] Thus, it is not necessary to foreclose emotional distress damages in these cases because the path to

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100 NAT'L COUNCIL ON DISABILITY, *CUMMINGS V. PREMIER REHAB KELLER PLLC*: IMPLICATIONS AND AVENUES FOR REFORM 18 (2023), https://beta.ncd.gov/assets/uploads/reports/2023/ncd_cummings-implications-brief.pdf [https://perma.cc/455C-7KLV]; *see* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

101 Although the concept of arrogating sovereign immunity is a crucial topic, this Note will only briefly describe it.

102 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

103 *See id.*; Tennessee v. Lane, 541 U.S. 509, 517 (2004).

104 *Lane*, 541 U.S. at 517.

105 *Id.* (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).

106 *See, e.g.*, 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.").

107 *See* Christiana Prater-Lee, Note, *Reformulating* Graham v. Connor*'s Excessive Force Test to Adapt for Individuals with Disabilities*, 47 AM. J.L. & MED. 477, 496 (2021); *see also* Hamer v. City of Trinidad, 924 F.3d 1093, 1109 (10th Cir. 2019) ("Title II and section 504 plaintiffs are hard-pressed to receive any monetary damages unless they can prove that a service, program, or activity is intentionally discriminatory toward individuals with disabilities . . . . This stands as an additional limitation of a public entity's liability under Title II and section 504.").

recovery is so stringent and the damage awards are comparatively small.[108] Moreover, a plaintiff might not even be able to seek injunctive relief because of the Article III standing requirement.

C. *The Spending Clause and Its Progeny*

Having explained the relevant background of the ADA and the Rehabilitation Act, another important topic requires clarification: the Court's Spending Clause jurisprudence, critical to the Court's analysis and final decision in *Cummings*.

1. The Clear Notice Standard

Under the Spending Clause,[109] Congress has the authority to grant money contingent on a state's compliance with a federal mandate.[110] As explained in *South Dakota v. Dole*, Congress's broad authority under the Spending Clause is subject to a few limitations.[111] Most pertinent for our purpose is the limitation that if Congress places a condition on the states

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108 *See supra* notes 212, 230; *see also supra* Section I.B (discussing the requirements for recovering compensatory damages in Title II cases).

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

110 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012) ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions." (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999))).

111 483 U.S. 203, 207–08 (1987) ("The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare.' In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." (alteration in original) (footnote omitted) (citations omitted) (first quoting Helvering v. Davis, 301 U.S. 619, 640–41 (1937); then quoting United States v. Butler, 297 U.S. 1, 65 (1936); then quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); and then quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)) (first citing *Helvering*, 301 U.S. at 640, 645; then citing Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); then citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985); then citing Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); and then citing King v. Smith, 392 U.S. 309, 333 n.34 (1968))).

to receive federal funds, Congress must speak unambiguously to allow the "States to exercise their choice knowingly, cognizant of the consequences of their participation."[112] This has come to be known as the "clear notice standard."

The seminal case on the clear notice standard is *Pennhurst State School and Hospital v. Halderman*.[113] The case involved the requirements of the Developmentally Disabled Assistance and Bill of Rights Act, in particular 42 U.S.C. § 6010, the so-called "bill of rights" section.[114] The Act establishes "a federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled."[115] The plaintiffs were residents at the Pennhurst facility, which housed approximately 1,200 residents.[116] They contended that the bill of rights in § 6010 gave them the right to challenge the restrictive and abusive treatment that they received in the Pennhurst facility.[117]

The district court found, and the Third Circuit agreed, that § 6010 guaranteed "'appropriate treatment, services, and habilitation' in 'the setting that is least restrictive of . . . personal liberty,'" and that residents of Pennhurst's facility could enforce these rights through civil actions, even though no cause of action was specified in the statute.[118] The Supreme Court, however, found nothing in the legislative history to impose an obligation on the states simply because they had accepted federal funding under the Act.[119] The majority reasoned that Spending Clause legislation is "in the nature of a contract."[120] Thus, when a state

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112 *Id.* at 207 (quoting *Pennhurst*, 451 U.S. at 17).

113 451 U.S. 1; *see* James F. Blumstein, NFIB v. Sebelius *and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule, and the Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123, 129–30 (2013) ("[As] first established in *Pennhurst State School and Hospital v. Halderman*, . . . for states to determine knowingly and voluntarily whether or not to participate in a federal spending program, they must have clear notice and a clear understanding of their obligations when they make their decision. This is known as the Pennhurst Clear Notice Rule. Pennhurst established that, to be enforceable, conditions on federal spending must provide clear and unambiguous notice to states of their obligations . . . .").

114 *Id.* at 13 (stating that 42 U.S.C. § 6010 provides that persons with developmental disabilities "have a right to appropriate treatment, services, and habilitation" in "the setting that is least restrictive of the person's personal liberty" (quoting 42 U.S.C. § 6010(1)–(2))).

115 *Id.* at 11.

116 *Id.* at 5–6.

117 *Id.* at 6. The district court found that the conditions at Pennhurst were so abysmal that some patients regressed during their stay and that many of the residents were abused, drugged, or left alone to the point of danger. *Id.* at 7 (citing Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1308–10 (E.D. Pa. 1977)).

118 *Id.* at 8–9 (alteration in original) (quoting Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 96, 104 (3d Cir. 1979)).

119 *Id.* at 18.

120 *Id.* at 17.

enters into a "contract" with the federal government, it must know what to expect and the conditions imposed by the federal government must be voluntarily accepted, and that can only occur if the conditions are "unambiguous[]."[121] In applying these principles to § 6010, the Court stated that "[n]othing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights," and that the statute is merely a federal-state funding statute.[122]

2. *Barnes v. Gorman*

Twenty-one years later, in *Barnes v. Gorman*,[123] the Court ruled that punitive damages are not recoverable in Title II and section 504 cases.[124] Using the clear notice principle, the Court added a new standard for determining the scope of damages. Jeffrey Gorman, the plaintiff, was a paraplegic man who lacked voluntary control of his upper body.[125] Because of his disability, he had to wear a catheter attached to a urine bag around his waist.[126] He was arrested in May 1992 for misdemeanor trespass after a confrontation with a bouncer at a nightclub.[127] Thereafter, he was denied the opportunity to empty his urine bag, taken out of his wheelchair and placed into the police van, and strapped into the van using a seatbelt and his own belt.[128] While riding in the police van, he released the seatbelt, fearing it placed excessive pressure on his urine bag.[129] When the belt came loose, Mr. Gorman fell, causing his urine bag to break and injuring his shoulder and back.[130] For the remainder of the trip, the officer, who was alone with Mr. Gorman in the van, left him fastened to

121 *Id.*

122 *Id.* at 18. The Court explained that a federal-state funding statute is one where "the Federal Government provides financial assistance to participating States to aid them in creating programs . . . . Like other federal-state cooperative programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding." *Id.* at 11.

123 536 U.S. 181 (2002).

124 *Id.* at 189–90 ("Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act.").

125 *Id.* at 183.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

a support.[131] Mr. Gorman brought suit claiming the defendants[132] discriminated against him in violation of Title II of the ADA and section 504 of the Rehabilitation Act.[133]

In denying the punitive damages award, the Court reasoned that "[j]ust as a valid contract requires offer and acceptance of its terms," the same is true when Congress legislates using its spending power.[134] Building on its prior decision in *Franklin v. Gwinnett County Public Schools*,[135] the Court stated that a remedy is only appropriate under Spending Clause legislation if "the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature."[136]

According to the Court, a recipient is *on notice* in two circumstances: (1) the relevant legislation explicitly provides for that remedy or (2) the remedy is traditionally awarded in breach of contract suits.[137] The Court found that Title VI does not expressly provide for any remedies.[138] Therefore, the only basis for finding punitive damages as an

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131 *Id.*

132 The defendants were "members of the Kansas City Board of Police Commissioners, the chief of police, and the officer who drove the van." *Id.* at 184.

133 *Id.* Because of this incident, Mr. Gorman "suffered serious medical problems—including a bladder infection, serious lower back pain, and uncontrollable spasms in his paralyzed areas—that left him unable to work full time." *Id.* At trial, a jury awarded Mr. Gorman $1 million in compensatory damages and $1.2 million in punitive damages. *Id.* The punitive damages award was vacated because the district court concluded that punitive damages were unavailable in Title II and section 504 cases. *Id.* The Eighth Circuit reversed, finding that punitive damages are an appropriate form of relief because "they are 'an integral part of the common law tradition and the judicial arsenal.'" *Id.* (quoting Gorman v. Easley, 257 F.3d 738, 745 (8th Cir. 2001)). The Eighth Circuit also relied on *Franklin v. Gwinnett County Public Schools*, "which stated the 'general rule' that 'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.'" *Id.* (quoting Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 70–71 (1992)).

134 *Id.* at 186 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

135 503 U.S. 60 (1992). *Franklin* involved a student who alleged she was sexually harassed by a sports coach and teacher employed by North Gwinnett High School. *Id.* at 63–64. The school allegedly became aware of the harassment but failed to take any action to stop it. *Id.* The student sought compensatory damages from the school district under Title IX. *Id.* at 62–63. Title IX prohibits discrimination on the basis of sex in educational settings. *See* 20 U.S.C. §§ 1681–1689. In reaffirming the *Bell v. Hood* principle—which allows federal courts to grant any necessary relief as a remedy for the violation of a legal right when a federal statute provides for a general right to sue—the Court stated broadly that it would "presume the availability of *all* appropriate remedies unless Congress has expressly indicated otherwise." *Franklin*, 503 U.S. at 66 (emphasis added) (citing Davis v. Passman, 442 U.S. 228 (1979)); Bell v. Hood, 327 U.S. 678, 684 (1946). The Court asserted that "absent clear direction to the contrary by Congress, the federal courts have the power to award *any* appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70–71 (emphasis added). Applying these principles, the Court determined that monetary damages were available for an action brought to enforce Title IX. *Id.* at 76.

136 *Barnes*, 536 U.S. at 187.

137 *Id.*

138 *Id.*

appropriate form of relief would be if punitive damages are "traditionally available in suits for breach of contract."[139] No such basis was found.[140] Interestingly, nearly the entire opinion centered around the "on notice" requirement—which is grounded in the Spending Clause—despite Title II of the ADA (unlike section 504 and Title VI) not being a piece of Spending Clause legislation.[141] Justice Stevens wrote separately—joined by Justices Ginsburg and Breyer—in a concurrence to voice his objection to implicating Title II.[142] Writing for the majority, Justice Scalia, a famous textualist, followed the words of the statute to find that the remedies under Title II are the same as those under section 504, and in turn Title VI.[143] Since the statutory provisions are clear, whatever remedies are available under section 504, "which *is* Spending Clause legislation," are those available under Title II.[144] Therefore, any "discussion of the ADA's status as a 'non Spending Clause' . . . statute," Justice Scalia claimed, is "irrelevant."[145] However, the "far-reaching consequences" Justice Stevens alluded to,[146] and that Justice Scalia did not accept,[147] have come to light in *Cummings*.[148] The Court in *Barnes* should not have implicated Title II of the ADA and, instead, should have decided the case on narrower grounds—namely, that punitive damages are unavailable only in section 504 cases.

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139 *Id.*

140 *Id.* ("But punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract."). Justice Scalia reasoned that punitive damages are of indeterminate magnitude and that "[n]ot only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition." *Id.* at 188. However, Justice Scalia did make a point of mentioning that compensatory damages and injunctive relief are "forms of relief traditionally available in suits for breach of contract." *Id.* at 187.

141 *Id.* at 189; *id.* at 191 (Stevens, J., concurring).

142 *Id.* at 192–93 ("The prohibition is set forth in two statutes, one of which, Title II of the ADA, was not enacted pursuant to the Spending Clause. Our opinion in *Pennhurst* says nothing about the remedy that might be appropriate for such a breach. Nor do I believe that the rules of contract law on which the Court relies are necessarily relevant to the tortious conduct described in this record. Moreover, the Court's novel reliance on what has been, at most, a useful analogy to contract law has potentially *far-reaching consequences* that go well beyond the issues briefed and argued in this case." (emphasis added)).

143 *See id.* at 189 n.3 (majority opinion). Justice Scalia found the issue of whether the "on notice" requirement applied to Title II to be one for Congress, not the Court. *Id.* at 189.

144 *Id.*

145 *Id.*

146 *Id.* at 192 (Stevens, J., concurring).

147 *Id.* at 188 n.2 (majority opinion).

148 The *Cummings* decision relied heavily on *Barnes* in reaching the conclusion that emotional distress damages are not recoverable under section 504. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022).

D. *The Supreme Court's Reasoning in* Cummings

Jane Cummings brought suit against Premier for discriminating against her by failing to provide an ASL interpreter.[149] She claimed Premier violated Title III of the ADA,[150] section 504 of the Rehabilitation Act,[151] section 1557 of the Patient Protection and Affordable Care Act of 2010,[152] and section 121.003 of the Texas Human Resources Code.[153] As part of her claim, Ms. Cummings sought damages for the "humiliation, frustration, and emotional distress" caused by her experience at Premier.[154] Premier moved to dismiss Ms. Cummings's claims, asserting that the court lacked subject matter jurisdiction, that Ms. Cummings lacked standing, and that she had failed to state a claim upon which relief could be granted.[155]

The district court dismissed her complaint for failure to state a claim upon which relief can be granted.[156] The Fifth Circuit affirmed the dismissal, adopting the district court's reasoning, and stating that "emotional distress damages are not available under the [Rehabilitation Act] or the [Affordable Care Act]."[157] In a 6-3 decision, the U.S. Supreme

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

150 42 U.S.C. § 12182(a).

151 29 U.S.C. § 794(a).

152 42 U.S.C. § 18116(a).

153 *Cummings*, 2019 WL 227411, at *1. The Texas Human Resources Code claim was withdrawn by Ms. Cummings in her response to Premier's motion to dismiss. *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at *5. The district court stated that "to survive a motion to dismiss for failure to state a claim, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible." *Id.* at *4 (citing Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)). Moreover, "[t]o allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient." *Id.* (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566–69 (2007)). The court held that it "cannot infer from the facts alleged that Cummings has a plausible right to relief" because Cummings only alleged humiliation, frustration, and emotional distress, all of which are not compensable under section 504. *Id.* The court reasoned that although the long-standing rule has been to "use any available remedy to make good the wrong done," *id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)), the damages must still compensate the victim of discrimination "for the loss caused by that failure," *id.* (quoting Barnes v. Gorman, 536 U.S. 181, 189 (2002)). Like punitive damages, the court continued, emotional distress damages "do not compensate plaintiffs for their pecuniary losses, but instead punish defendants for the outrageousness of their conduct." *Id.* (citing Bell v. Bd. of Educ. of the Albuquerque Pub. Schs., 652 F. Supp. 2d 1211, 1224–25 (D.N.M. 2008)). Similarly, these types of damages are unforeseeable for recipients of federal funds "and expose them to 'unlimited liability.'" *Id.* (quoting *Bell*, 652 F. Supp. 2d at 1225).

157 Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 680 (5th Cir. 2020). Ms. Cummings did not appeal her Title III dismissal. *See id.* at 675 n.3.

Court affirmed the court of appeals' decision[158] and held that emotional distress damages are unavailable under section 504 of the Rehabilitation Act or section 1557 of the Patient Protection and Affordable Care Act of 2010.[159]

Section 504, the *Cummings* Court explained, is a Spending Clause[160] statute and thus Congress has the authority to "fix the terms on which it shall disburse federal money."[161] Private individuals may sue for discrimination they have suffered, the Court acknowledged, and although the right to sue is beyond dispute, it is less clear what remedies are available.[162] In *Franklin*, a case involving intentional discrimination under Title IX, the Court ruled that monetary damages are available,[163] but the Court did not "describe the scope of 'appropriate relief.'"[164] The key to "whether a remedy qualifies as appropriate relief," the Court stated, lies in the way Spending Clause statutes operate.[165]

In the antidiscrimination statutes at issue here, Congress conditions an offer of federal funds on a promise not to discriminate,[166] which "amounts essentially to a contract between the Government and the recipient of funds."[167] As in any contract, the recipient must be *on notice* of its liabilities, the "terms" of that contract must be accepted voluntarily and knowingly, and Congress must set these terms or conditions

158 Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 230 (2022).

159 *Id.* It is important to note, however, that the Court's reasoning does not only affect section 504 and section 1557, the provisions that Ms. Cummings actually sued to enforce. At the end of the majority opinion, Justice Roberts specifically stated: "[W]e hold that emotional distress damages are not recoverable under the *Spending Clause antidiscrimination statutes* we consider here." *Id.* (emphasis added). This rather broad language additionally implicates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which forbids race, color, and national origin discrimination in federally funded programs or activities, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which similarly prohibits sex-based discrimination in educational programs and activities that receive federal funding. *See* Chuzi, *supra* note 1 (stating that in addition to section 504 and the Affordable Care Act, Title VI and Title IX are also affected by *Cummings*).

160 *See* U.S. CONST. art. I, § 8, cl. 1.

161 *Cummings*, 596 U.S. at 217 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). It has long been recognized that the U.S. Constitution is a document of limitation. In other words, it is one of delegated powers. As such, the federal government is only permitted to act when the Constitution allows it. *See* W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 137 (1919). One of the many delegated powers is Congress's broad authority "to grant money contingent on states[']' compliance with a federal mandate." Ravika Rameshwar, Note, *NFIB's New Spending Clause: Congress' Limited Authority to Prevent Campus Sexual Assault Under Title IX*, 70 U. MIAMI L. REV. 390, 401 (2015).

162 *Cummings*, 596 U.S. at 218.

163 Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992).

164 *Cummings*, 596 U.S. at 218 (quoting Barnes v. Gorman, 536 U.S. 181, 185 (2002)).

165 *Id.* at 219 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998)).

166 *Id.*

167 *Id.* (quoting *Gebser*, 524 U.S. at 286).

unambiguously.[168] Thus, the question to ask is: "Would a prospective funding recipient, at the time it 'engaged in the process of deciding whether [to] accept' federal dollars, have been aware that it would face such liability?"[169] In other words, when a federal funds recipient accepts the funds from the government, do they know that they may be liable for emotional distress or punitive damages if they discriminate in violation of section 504?[170] The essence of the Court's reasoning in *Cummings* thus rests on normal contract principles and remedies.[171]

The Court explained that punitive damages are not an ordinary remedy in contract disputes.[172] Justice Roberts, writing for the majority, recognized, however, that although punitive damages are not usually available in contract disputes, they are hardly unheard of.[173] Roberts noted that the *Barnes* Court had concluded that this "exception" to the general rule, that punitive damages may be awarded in breach of contract claims where the breach is also a tort, is not enough to give the requisite notice for federal funds recipients.[174] The same reasoning led the Court in *Cummings* to conclude that because emotional distress damages are generally not compensable in contract disputes, they do not provide the requisite notice.[175] Thus, the Court concluded, the federal funds recipient in this case, a physical therapy provider, could not be expected to have known it might be liable for emotional distress damages when it accepted the funds.[176]

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168 *Id.* (quoting *Barnes*, 536 U.S. at 186).

169 *Id.* at 220 (alteration in original) (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy 548 U.S. 291, 296 (2006)).

170 *See id.*

171 *See id.* at 229–30 ("Many of these cases unsurprisingly mix contract, quasi-contract, and tort principles together." (first citing Knoxville Traction Co. v. Lane, 53 S.W. 557, 560 (Tenn. 1899); and then citing Chamberlain v. Chandler, 5 F. Cas. 413, 414 (C.C. Mass. 1823) (No. 2,575))); *Barnes*, 536 U.S. at 187 ("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 in suits for breach of contract*." (emphasis added)).

172 *Id.* at 221 (citing *Barnes*, 536 U.S. at 187).

173 *Id.* ("Indeed, according to the treatises we cited, punitive damages are recoverable in contract where 'the conduct constituting the breach is also a tort for which punitive damages are recoverable.'" (quoting RESTATEMENT (SECOND) OF CONTS. § 355 cmt. a (AM. L. INST. 1981))).

174 *Id.*

175 *Id.* at 221–22 (citing authorities that state that damages for "emotional distress" are not generally allowed in contract disputes).

176 *Id.* at 230.

II. ANALYSIS

Following the *Cummings* decision, the issue remains as to whether emotional distress damages in Title II claims will be treated the same as those in section 504 claims.[177] This Part argues that emotional distress damages should continue to be a form of relief available under Title II of the ADA, despite *Cummings*. Case law and congressional intent have bolstered the general trend in the courts of awarding damages for emotional distress and should continue to do so post-*Cummings*.[178]

A. *Emotional Distress Damages Under Title II, Section 504, and Title VI*

For years, there has been severe disagreement in the district courts, and in the few courts of appeals cases that address the issue, as to whether emotional distress damages are available under Title II of the ADA, section 504 of the Rehabilitation Act, and Title VI of the Civil Rights Act.[179] Despite this, most courts have generally allowed emotional distress damages.[180]

1. Decisions Supporting Emotional Distress Damages

Before *Cummings*, courts allowed emotional distress damages in Title II cases. For example, in *Reed v. Illinois*, the plaintiff alleged "that Defendants failed to accommodate her disabilities in previous state-court proceedings and prevented her from effectively presenting her *pro se* personal injury action to a jury."[181] After exploring several decisions that

177 *See* cases cited *supra* note 17.

178 *See infra* Section II.A.1.

179 *See infra* Section II.A.1.

180 *See infra* Section II.A.1.

181 No. 12-cv-7274, 2016 WL 2622312, at *1 (N.D. Ill. May 9, 2016). According to the plaintiff, "[d]efendants' failures denied her a fair trial . . . and caused her emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." Reed v. Illinois, No. 12-cv-7274, 2014 WL 917270, at *2 (N.D. Ill. Mar. 10, 2014).

have allowed for emotional distress damages,[182] and some that did not,[183] the court ultimately concluded that it would allow the plaintiff's emotional distress claim to go forward.[184] The defendant's failure to provide any Seventh Circuit authority directly on point led the court to follow *Reed v. Columbia St. Mary's Hospital*, which held that compensatory damages are available in section 504 and ADA Title III claims, but which did not specifically address the availability of emotional distress damages.[185] Seemingly, the district court accepted the fact that compensatory damages include emotional distress. This implicit acceptance shows that emotional distress damages are available under section 504 of the Rehabilitation Act, since otherwise the *Reed* court could have distinguished its holding from *Columbia*.

In another Title II case, *Johnson v. City of Saline*, the Sixth Circuit reversed the district court's ruling disallowing the plaintiff's claim for compensatory damages under Title II.[186] The plaintiff, Mr. Johnson, sought damages for "physical damage . . . , psychological and emotional trauma, humiliation and embarrassment, anxiety, and pain and suffering."[187] Mr. Johnson suffered from ankylosing spondylitis, "a type of arthritis that causes inflammation in the joints and ligaments of the spine."[188] He had entered into an agreement with the city to operate its public access cable station; however, the station was on the second floor and the only available restroom was on the first.[189] Allegedly, Mr. Johnson

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182 *Reed*, 2016 WL 2622312, at *4; *see, e.g.*, Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1198 (11th Cir. 2007) ("The open question before us today is narrower still: whether a subset of compensatory damages—non-economic compensatory damages—is available under § 504 of the Rehabilitation Act for intentional discrimination. We hold that it is."); Stamm v. N.Y.C. Transit Auth., No. 04-CV-2163, 2013 WL 244793, at *7 (E.D.N.Y. Jan. 22, 2013) ("[T]his Court holds that damages for emotional distress are available under Title II."); Prakel v. Indiana, 100 F. Supp. 3d 661, 673 (S.D. Ind. 2015) (confirming the availability of a compensatory damages remedy in Title II and section 504 cases, including for emotional distress).

183 *Reed*, 2016 WL 2622312, at *4; *see, e.g.*, Bell v. Bd. of Educ. of the Albuquerque Pub. Schs., 652 F. Supp. 2d 1211, 1225 (D.N.M. 2008) (holding that "emotional distress damages are an inappropriate relief in actions brought pursuant to Title II of the ADA"); Gardiner v. Nova Se. Univ., Inc., No. 06-60590 CIV, 2006 WL 3804704, at *6 (S.D. Fla. Dec. 22, 2006) (concluding that "emotional distress type damages and punitive damages are not available to a Rehabilitation Act plaintiff").

184 *Reed*, 2016 WL 2622312, at *4–5.

185 *Id.* (citing Reed v. Columbia St. Mary's Hosp., 782 F.3d 331, 337 (7th Cir. 2015)).

186 151 F.3d 564, 574 (6th Cir. 1998).

187 *Id.* at 572–73 (alteration in original).

188 *Id.* at 566; *see Ankylosing Spondylitis*, NIH, https://www.niams.nih.gov/health-topics/ankylosing-spondylitis [https://perma.cc/6J5W-TRA6]. His disability had "caused him to get both of his hips replaced, and his doctor ha[d] told him not to carry heavy objects or to use stairs." *Johnson*, 151 F.3d at 566.

189 *Id.* at 566–67.

had notified city officials of his condition and pleaded with them to move the studio to a more accessible location.[190]

The court began by recognizing the statutory scheme in Title II.[191] Speaking from a position that assumed the availability of emotional distress damages under section 504, and drawing on the Supreme Court's reasoning in *Franklin*, the court held that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[192]

Because Title IX and Title VI have nearly identical language, the court noted, *Franklin*'s holding therefore applies to Title VI, section 504, and Title II.[193] Admittedly, the Sixth Circuit's decision in *Johnson* broadly applies to compensatory damages and the plaintiff had other monetary damages he was seeking to recover. The decision, therefore, can be read to apply only to the pecuniary injuries Mr. Johnson had suffered—such as the worsening of his condition.[194]

However, only three years later, in *Dorsey v. City of Detroit*, a Title II case, the plaintiff claimed damages "for his personal experiences of being denied access, humiliation, emotional distress, [and] embarrassment."[195] The *Dorsey* court read *Johnson* to include compensatory damages for such claims.[196] Neither the *Johnson* nor *Dorsey* decisions made any mention of the contract analogy or the "on notice" requirement that *Barnes* and *Cummings* principally relied on.[197] That is because *Pennhurst* and its progeny are not applicable to the ADA as a non–Spending Clause statute.

Perhaps one of the most prominent section 504 cases is *Sheely v. MRI Radiology Network, P.A.*, where the Eleventh Circuit held that noneconomic damages, specifically damages for emotional distress, are recoverable.[198] The plaintiff, Ms. Sheely, who has been blind since 1999,

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190 *Id.* at 567. The court further stated that, although Mr. Johnson's disability was noticeable, it was not clear what his limitations were. *Id.* Additionally, the court found that there was "ample evidence that city officials knew that the second floor of the building was generally inaccessible to disabled people." *Id.* Mr. Johnson was not compensated for his work, as per the contractual agreement, and later sued under the ADA. *Id.*

191 *See supra* Section I.B.

192 *Johnson*, 151 F.3d at 573 (quoting Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 70–71 (1992)).

193 *Id.*

194 *See id.* at 567.

195 157 F. Supp. 2d 729, 731 (E.D. Mich. 2001) (alteration in original) (quoting Amended Complaint ¶ 25, *Dorsey*, 157 F. Supp. 2d 729).

196 *Id.*

197 *Johnson*, 151 F.3d 564; *Dorsey*, 157 F. Supp. 2d 729.

198 505 F.3d 1173, 1206 (11th Cir. 2007).

visited the defendant's facility for her minor son's MRI appointment.[199] Ms. Sheely's son was called for the MRI, but she was denied access because of her service dog.[200] Ms. Sheely sued the defendant claiming a violation of section 504 of the Rehabilitation Act, and sought declaratory and injunctive relief, costs and attorneys' fees, and "non-economic compensatory damages."[201]

In a case of first impression, the Eleventh Circuit found that emotional distress damages were compensable under section 504.[202] In reaching its decision, the court reasoned that, following *Barnes*, the federal funding recipients *are* on notice because "a frequent consequence of discrimination is that the victim will suffer emotional distress."[203] "As a result," the court explained, "emotional distress is a foreseeable consequence of funding recipients' 'breach' of their 'contract' with the federal government not to discriminate against third parties, and they therefore have fair notice that they may be subject to liability for emotional damages."[204] Moreover, the court found that, even under contract law principles, "emotional damages are recoverable for intentional violations of § 504 of the [Rehabilitation Act]."[205] Relying on the Restatement (Second) of Contracts,[206] the court stated that when a breach involves "personal" contracts—a breach of the kind where emotional disturbance is particularly likely to occur (like cases of discrimination)—emotional distress damages should be awarded.[207] Lastly, the court, relying on the principle announced in *Bell v. Hood* and reiterated in *Franklin*—namely 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

199 *Id.* at 1178. Ms. Sheely was accompanied by her guide dog during the visit. *Id.*

200 *Id.* When she inquired as to why her service dog was not permitted to accompany her, the staff said "that the policy existed for the dog's safety, for Sheely's own comfort, and that it reflected the concern that the metal in the dog's harness might harm the MRI equipment." *Id.*

201 *Id.* at 1180. The district court found, on cross-motions for summary judgment, that emotional damages are not available under section 504. *Id.* at 1182.

202 *Id.* at 1190.

203 *Id.* at 1198.

204 *Id.* The court went on to cite a series of cases supporting the proposition that "emotional distress is a predictable, and thus foreseeable, consequence of discrimination." *Id.* at 1199 (collecting cases).

205 *Id.* at 1200.

206 RESTATEMENT (SECOND) OF CONTS. § 353 (AM. L. INST. 1981).

207 *Sheely*, 505 F.3d at 1200 ("Although the general rule is that emotional damages for breach of contract will not lie, this rule is simply a shorthand way of saying that emotional distress is usually not a foreseeable consequence of breach. But when the nature of the contract is such that emotional distress is foreseeable, emotional damages will lie . . . ." (citation omitted) (citing RESTATEMENT (SECOND) OF CONTS. § 353)).

wrong done"[208]—distinguished compensatory damages from the punitive damages rejected in *Barnes* to find that compensatory damages "make good the wrong done."[209] Punitive damages, the court explained, unlike emotional distress damages, are not embraced by the *Bell* principle because they do not compensate the victims for their injuries,[210] but rather punish the wrongdoer.[211] Many other decisions have also held that emotional distress damages are recoverable,[212] and scholars have argued

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208 *Id.* at 1198 (quoting Barnes v. Gorman, 536 U.S 181, 189 (2002)); *see also* Bell v. Hood, 327 U.S. 678, 684 (1946); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 66 (1992).

209 *Sheely*, 505 F.3d at 1203 (quoting *Barnes*, 536 U.S. at 189).

210 *Id.*

211 Khan v. Albuquerque Pub. Schs., No. CIV-03-0118, 2003 WL 27384754, at *2 (D.N.M. Dec. 31, 2003).

212 *See, e.g.*, Luciano v. E. Cent. Bd. of Co-op. Educ. Servs., 885 F. Supp. 2d 1063, 1075 (D. Colo. 2012) (agreeing with *Sheely*'s reasoning and allowing for emotional distress damages under section 504 of the Rehabilitation Act and Title II of the ADA); N.T. *ex rel.* Trujillo v. Espanola Pub. Schs., No. CIV 04-0415, 2005 WL 6168483, at *15 (D.N.M. June 21, 2005) (concluding that plaintiff may seek emotional distress damages under section 504 and Title II, but noting that "[p]laintiff must offer specific facts as to the nature of her claimed emotional distress and its causal connection to [defendant's] alleged violations" (citing Webner v. Titan Distrib., Inc., 267 F.3d 828, 836 (8th Cir. 2001))); Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 295 (D. Conn. 2001) ("[T]he Court finds that $1,000 is fair and adequate compensation for the emotional pain and suffering that [plaintiff] sustained."), *aff'd in part, rev'd in part sub nom.* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003); Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth., No. 10CV00007, 2011 WL 1655810, at *9 (W.D. Va. May 3, 2011) (following *Sheely* and concluding that plaintiff may recover emotional distress damages under Title VI of the Civil Rights Act); Doe v. District of Columbia, 796 F. Supp. 559, 573 (D.D.C. 1992) ("In consideration of the emotional pain [plaintiff] has been made to endure due to the [defendants'] ill-conceived fears and prejudices, the Court awards [plaintiff] compensatory damages in the amount of $25,000.00." (citing Tanberg v. Weld Cnty. Sheriff, 787 F. Supp. 970, 973 (D. Colo. 1992))); *Tanberg*, 787 F. Supp. at 972 (allowing recovery for compensatory damages under section 504 for "loss of employment opportunities, emotional distress, and pain and suffering"); Swogger *ex rel.* P.W. v. Erie Sch. Dist., 517 F. Supp. 3d 414, 425 (W.D. Pa. 2021) ("[T]his Court holds that Title II of the ADA and Section 504 of the [Rehabilitation Act] allow plaintiffs to recover damages for emotional harm where there is evidence of intentional discrimination."); Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 17–18 (1st Cir. 2006) ("Without some evidence of intentional discrimination, [plaintiff] cannot recover under Title II for non-economic damages . . . ."); Kuntz v. City of New Haven, No. 90CV00480, 1993 WL 276946, at *2 (D. Conn. June 18, 1993) (allowing compensatory damages, including emotional distress, in a section 504 suit); Sumes v. Andres, 938 F. Supp. 9, 13 (D.D.C. 1996) ("[P]laintiff may recover compensatory damages for humiliation, embarrassment, and emotional pain and suffering under [section 504]." (citing *Doe*, 796 F. Supp. at 572–73)); Ferguson v. City of Phoenix, 157 F.3d 668, 675 n.4 (9th Cir. 1998) (noting that emotional distress damages "would, of course, be compensable if intentionally inflicted"); Peacock v. Terhune, No. CIV.S-01-1589, 2002 WL 459928, at *3 (E.D. Cal. Jan. 23, 2002) (allowing "plaintiff's claim for emotional distress damages [to] go forward" because the allegation raised an inference of intentional discrimination); Worthington v. City of New Haven, No. 94-CV-00609, 1999 WL 958627, at *16 (D. Conn. Oct. 5, 1999) ("[Plaintiff's] testimony revealed that she has suffered pain, humiliation, emotional distress, and financial hardship as a result of the defendant's violations of federal law. Accordingly, the Court awards [plaintiff] compensatory damages in the amount of $ 150,000."); De La Cruz v. Guilliani, No. 00Civ.7102, 2002 WL 32830453, at *10 (S.D.N.Y. Aug. 26, 2002) (recognizing that Title II allows

that other courts could possibly find that emotional damages fit "within the 'full spectrum' of damages."[213]

2. Decisions Denying Emotional Distress Damages

On the other side of the proverbial coin, some courts have determined emotional distress damages are unavailable under Title II of the ADA, section 504 of the Rehabilitation Act, and Title VI of the Civil Rights Act. In *Khan v. Albuquerque Public Schools*, an action brought under Title II and section 504,[214] the district court found that damages for emotional distress are akin to punitive damages, in that they "generally are not available in an action for breach of contract."[215] The court questioned whether compensatory damages, which *Barnes* found to be available under Title II and section 504,[216] "necessarily encompass[] emotional distress damages."[217] However, this argument is irrelevant because Congress has all but answered the question of whether compensatory damages necessarily encompass emotional distress damages by including them as a bundle in other antidiscrimination statutes.[218]

To support its position, *Khan* relied on *Witbeck v. Embry-Riddle Aeronautical University, Inc.*,[219] a section 504 case, which limited

for pain and suffering damages); Coleman v. Zatechka, 824 F. Supp. 1360, 1373–74 (D. Neb. 1993) (allowing recovery for "the feelings of isolation and segregation" plaintiff experienced as a result of the university's actions); Hopwood v. Texas, 999 F. Supp. 872, 906–07 (W.D. Tex. 1998) (assuming recoverability of mental anguish damages under Title VI of the Civil Rights Act); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 672 (2d Cir. 2012) (affirming jury's award of damages for "frustration, loneliness, and other emotional anguish"); Fuller v. Wellington Reg'l Med. Ctr., Inc., No. 05-81131-CIV, 2008 WL 11333270, at *4 (S.D. Fla. Feb. 22, 2008) (allowing plaintiff to pursue damages for "shame, anxiety, emotional distress, fear and discrimination" (quoting Amended Complaint ¶ 24, *Fuller*, 2008 WL 11333270 (No. 05-81131-CIV))); Moreno v. Consol. Rail Corp., 909 F. Supp. 480, 488 (E.D. Mich. 1994) (affirming jury's award of $125,000 for emotional damages in section 504 claim); Norton v. Lakeside Fam. Prac., P.A., 382 F. Supp. 2d 202, 206 (D. Me. 2005) (awarding plaintiff "$7,500 under the Rehabilitation Act for loss of enjoyment of life, loss of self-esteem, emotional distress, pain and suffering, and other non-pecuniary losses").

213 Lave, Sklar & van der Zee, *supra* note 42, at 13–14 (quoting Waldrop v. S. Co. Servs., Inc., 24 F.3d 152, 157 (11th Cir. 1994)) (citing cases).

214 2003 WL 27384754, at *1.

215 *Id.* at *4.

216 Barnes v. Gorman, 536 U.S. 181, 187–90 (2002).

217 *Khan*, 2003 WL 27384754, at *4.

218 Title I of the Civil Rights Act of 1991, for example, expressly provides for compensatory damages, including damages for "emotional pain, suffering," and "mental anguish." 42 U.S.C. § 1981a(b)(3). Additionally, as the *Sheely* court acknowledged, noneconomic compensatory damages (i.e., emotional distress damages) are a subset of compensatory damages. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1198 (11th Cir. 2007).

219 269 F. Supp. 2d 1338 (M.D. Fla. 2003).

compensatory relief to "expenses and attorney's fees."[220] However, as other scholars have rightly argued, the *Witbeck* court relied on two pre-*Franklin* decisions[221] to conclude that emotional distress damages are unavailable under section 504.[222] Similarly, *Khan* relied on two different pre-*Franklin* cases,[223] ignoring post-*Franklin* precedent.[224] The court in *Khan* went on to argue that emotional distress damages are not generally available in contract disputes, with two exceptions[225] that the court found to be inapplicable.[226] Rather quickly, the *Khan* court disregarded *Franklin*'s holding because *Franklin* did "not include extraordinary damages, such as punitive awards and emotional distress damages."[227] However, the abundantly clear statement from *Franklin*, that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise,"[228] cannot be ignored. This is especially so since Title II's remedies arise from those available under Title VI of the Civil Rights Act, and Title IX of the Education Amendments—the statute directly at issue in *Franklin*—has been interpreted consistently with Title VI.[229] Moreover, the court misclassified emotional distress damages as being "extraordinary." Comparatively, damages for emotional distress have been modest at best.[230]

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220 *Id.* at 1340. *Khan* and *Witbeck* characterized "compensatory damages" as limited "to actual compensation for pecuniary damages." *Khan*, 2003 WL 27384754, at *4 (citing *Witbeck*, 269 F. Supp. 2d at 1340).

221 *See* Rhodes v. Charter Hosp., 730 F. Supp. 1383, 1386 (S.D. Miss. 1989) ("[D]amages for emotional distress and humiliation are not recoverable and . . . therefore plaintiff has failed to state a claim under section 504."); Shuttleworth v. Broward County, 649 F. Supp. 35, 38 (S.D. Fla. 1986) ("The damages available to the plaintiff under § 504 include reinstatement, backpay and attorneys' fees.").

222 Lave, Sklar & van der Zee, *supra* note 42, at 17.

223 *See* Ams. Disabled for Accessible Pub. Transp. v. SkyWest Airlines, Inc., 762 F. Supp. 320, 326 (D. Utah 1991); Bradford v. Iron Cnty. C-4 Sch. Dist., No. 82-303-C(4), 1984 WL 1443, at *9 (E.D. Mo. June 13, 1984).

224 *See* Lave, Sklar & van der Zee, *supra* note 42, at 18.

225 *See Khan*, 2003 WL 27384754, at *4 ("There are two limited exceptions to this rule: (i) one for damages accompanying physical injury or loss; and (ii) another for mental anguish 'of such a kind that serious emotional disturbance was a particularly likely result [at the time of the formation of the contract].'" (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTS. § 353 (AM. L. INST. 1981))).

226 *Id.* at *5.

227 *Id.* (first citing Barnes v. Gorman, 536 U.S. 181, 188 (2002); and then citing *Bradford*, 1984 WL 1443, at *7). The court also pointed out the indeterminate nature of emotional distress damages. *Id.* at *6.

228 Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 66 (1992) (citing Davis v. Passman, 442 U.S. 228, 246–47 (1979)).

229 *See Barnes*, 536 U.S. at 185 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 694–98 (1979)).

230 *See* Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 295 (D. Conn. Dec. 21, 2001) ("[T]he Court finds that $1,000 is fair and adequate compensation for the emotional pain and suffering that [plaintiff] sustained."), *aff'd in part, rev'd in part sub nom.* Tsombanidis v. W. Haven

3. *Cummings*'s Mistakes

The majority in *Cummings* failed to adequately consider a critical point in differentiating punitive damages from compensatory damages. That is, punitive damages punish the wrongdoer for their breach, whereas compensatory damages are meant simply to "compensat[e] the injured party."[231] Emotional injury, if sufficiently proven, is just like any other physical injury, and should be compensated as such. One critical argument that Justice Scalia made and that Justice Souter agreed with in *Barnes* is that punitive damages have such an "indeterminate magnitude" that it is doubtful that a federal funding recipient "would even have accepted the funding if punitive damages liability was a required condition."[232] The Court in *Cummings* failed to address this justification for disallowing punitive damages in section 504 cases, but adopted nearly all other possible justifications and applied them to emotional distress damages.

This curious omission by the *Cummings* Court reflects what this author believes to be two possibilities: one, the *Cummings* Court disagreed with this argument; or two, failed to recognize it at all. If it is the former, the *Cummings* Court should have explicitly rejected that justification. Instead, the Court in *Cummings* gave the impression that it believes emotional distress damages cannot be distinguished from punitive damages. If it is the latter, the majority failed in its duty to distinguish emotional distress damages from punitive damages, and to avoid ambiguity in the law. In either event, the Court made a costly mistake that all but dooms emotional distress damages for Title II claims.

Fire Dep't, 352 F.3d 565 (2d Cir. 2003); Doe v. District of Columbia, 796 F. Supp. 559, 573 (D.D.C. 1992) ("In consideration of the emotional pain [plaintiff] has been made to endure due to the [defendants'] ill-conceived fears and prejudices, the Court awards [plaintiff] compensatory damages in the amount of $25,000.00." (citing Tanberg v. Weld Cnty. Sheriff, 787 F. Supp. 970, 973 (D. Colo. 1992))); Norton v. Lakeside Fam. Prac., P.A., 382 F. Supp. 2d 202, 206 (D. Me. 2005) (awarding plaintiff "$7,500 under the Rehabilitation Act for loss of enjoyment of life, loss of self-esteem, emotional distress, pain and suffering, and other non-pecuniary losses"); *see also* Brief of the American Association for Justice as Amicus Curiae in Support of Petitioner at 13–17, Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) (No. 20-219), 2021 WL 4081041 (arguing that "juries award pain-and-suffering damages responsibly and in line with the severity of the injury").

231 *Cummings*, 596 U.S. at 238 (Breyer, J., dissenting) (quoting RESTATEMENT (SECOND) OF CONTS. § 355 cmt. a (AM. L. INST. 1981)) (citing *Barnes*, 536 U.S. at 189). As the American Association for Justice rightly argued as Amicus Curiae in *Cummings*, "emotional distress damages comprise a 'species of ordinary compensatory damages'" that "serve no punitive purpose, just an entirely compensatory one." Brief of the American Association for Justice as Amicus Curiae in Support of Petitioner, *supra* note 230, at 7 (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, 520 (2008)).

232 *Barnes*, 536 U.S. at 188 (emphasis omitted); *id.* at 190 (Souter, J., concurring).

For some scholars, the difficulty in quantifying emotional distress damages is a rather pressing concern.[233] However, there are several types of "economic damages" that are similarly difficult to quantify and yet courts have allowed them to be recovered—for example, "[l]ost profits for future sales, valuations of property, future medical expenses, lost future wages, [and] life plans."[234] In any event, plaintiffs must have sufficient evidence to prove their emotional injuries, and courts have used the best evidence available to them, including expert testimony, to allow recovery.[235] Illustrative, in a different context, is *Metro-North Commuter Railroad Co. v. Buckley*.[236] In Justice Ginsburg's concurrence, she stated that she would deny the plaintiff's emotional distress claim because the plaintiff "did not present objective evidence of severe emotional distress."[237] Again, unlike punitive damages, emotional distress damages, which are a form of compensatory relief,[238] can, to a certain degree, be measured.[239] Improperly conflating punitive damages and emotional

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233 *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778 (1985) ("It is difficult to justify monetary damages for intangible injuries exclusively on the basis of victim compensation. Significantly, such injuries cannot be readily quantified.").

234 Brief of the American Association for Justice as Amicus Curiae in Support of Petitioner, *supra* note 230, at 10.

235 *See* Tyner v. Brunswick Cnty. Dep't of Soc. Servs., 776 F. Supp. 2d 133, 153 (E.D.N.C. 2011) ("The plaintiffs will have to produce competent evidence, of course, to prove their claims, which may or may not survive scrutiny on a more complete record.").

236 521 U.S. 424 (1997).

237 *Id.* at 445 (Ginsburg, J., concurring in part and dissenting in part) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 566 n.13, 569 n.18 (1987)).

238 *See* Jade McKenzie, Comment, *Em"BARK"ing on the Journey to Expand Recovery of Damages for the Loss of a Companion Animal*, 19 CHAP. L. REV. 659, 679 (2016); Gregg S. Bateman, Comment, *No Financial Injury No Problem: The Redressability of Emotional Distress Claims for Willful Violation of the Automatic Stay Under 11 U.S.C. § 362(h)*, 1 SETON HALL CIR. REV. 169, 176 n.42 (2005) ("Generally, actual damages in tort law include general compensatory damages (including emotional distress damages) and special compensatory damages."); Baker v. John Morrell & Co., 249 F. Supp. 2d 1138, 1191 (N.D. Iowa 2003) ("It is widely recognized that Congress enacted the 1991 Civil Rights Act [allowing for compensatory damages, including emotional distress damages, in Title VII actions], in part, because the damages available to successful civil rights plaintiffs were an insufficient deterrent to employers and did not function as an adequate compensatory mechanism."); Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 505 (2018) ("The greater the distress, the greater the damages. The individual experiences of humiliation, shame, or degradation should be directly proportional to the award of compensatory, or emotional distress, damages." (footnote omitted)); Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 126 (2013) ("Compensatory damages for pain, suffering, and mental distress are often a major—if not the only—part of the damages sought [in civil rights cases].").

239 *See* Swogger *ex rel.* P.W. v. Erie Sch. Dist., 517 F. Supp. 3d 414, 424–25 (W.D. Pa. Feb. 5, 2021) (recognizing that, unlike punitive damages, emotional distress damages "do not 'range in orders of indeterminate magnitude untethered to compensable harm,' and thus, do not 'pose a concern that recipients of federal funding could not reasonably have anticipated.'" (quoting Barnes v. Gorman, 536 U.S. 181, 190–91 (2002) (Souter, J. concurring))).

distress damages leads to absurd results such as the *Cummings* decision. The Court should have been more mindful of the distinction between punishing and compensating when determining the availability of emotional distress damages.

a. Congress's Intent and the *Bell* Principle

The *Cummings* Court similarly failed to consider another crucial point. Justice Roberts stated that the plaintiff "would have us treat statutory silence as a license to freely supply remedies we cannot be sure Congress would have chosen to make available."[240] However, this seemingly textual view of statutory interpretation disregards a more open-minded view; namely, that Congress has spoken. While there are many judges who believe congressional intent should not be considered during statutory interpretation, many others believe that it is a critical aspect.[241] On the present topic, Congress's intent is most illustrative. The House Report before the enactment of the ADA explained that the "full panoply of remedies" should be available for violations of Title II.[242] Therefore, Congress did intend for emotional distress damages to be available under Title II. If they did not, perhaps they would have used narrower language to convey their thoughts. In fact, neither *Cummings* nor *Barnes* address this clear direction by Congress.[243] In the circuit court decision in *Barnes*, the Eighth Circuit assumed that Congress wanted the full panoply of remedies under Title II and section 504.[244]

The Court, likewise, misses another point. The long-standing principle set out in *Bell v. Hood* 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."[245] This principle should have been given more weight. Instead, the Court in *Cummings* was more concerned with the notice and

240 Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 226 (2022).

241 This Note, for the sake of brevity, bypasses a potentially long discussion on the differences between textualism and intentionalism. "Textualists emphasize a statute's text and are not concerned with the legislature's subjective intent, but only with the text's 'objective' meaning. Textualists try to identify the meaning a reasonable person would give to the text." On the other hand, intentionalists "permit reliance on evidence of congressional intent beyond the semantic context of a statute's text." *See* Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 191–94 (2008) (footnotes omitted).

242 H.R. REP. NO. 101-485, pt. 3, at 52 (1990).

243 *See Cummings*, 596 U.S. 212; *Barnes*, 536 U.S. 181.

244 Gorman v. Easley, 257 F.3d 738, 747 (8th Cir. 2001) ("Congress has never expressly limited the remedies available under those sections either. Therefore, logic dictates, the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202.").

245 Bell v. Hood, 327 U.S. 678, 684 (1946).

expectations standards than with following *Bell*.[246] If a Title II claimant is able to overcome the already significant barriers to recover damages,[247] then all remedies should be available to them, and federal courts should remedy the wrong done. This is especially true when the federal rights invaded are of such sensitive character.[248]

B. *Distinguishing Title II from Section 504*

The Court's analysis in *Cummings* rides on section 504 being a Spending Clause statute, as well as the Court analogizing the receipt of federal funding to voluntarily and knowingly accepting the terms of a contract to determine the scope of damages.[249] Therefore, the recipient of federal funding must be "on notice" that they might be held liable for emotional distress damages—a form of relief not usually awarded in contract cases—if they discriminate against people with disabilities.[250] Title II of the ADA is not a Spending Clause statute. Rather, it was enacted under Congress's Fourteenth Amendment[251] and Commerce Clause powers.[252] This distinction impacts the way courts should analyze section 504 and ADA claims.

As the Court stated in *Cummings*, when a federal funding recipient agrees to receive federal funds, they essentially agree to not discriminate.[253] The potential recipient does not *have* to accept the funds. This grant of funds basically amounts to a contract between the

246 *See Cummings*, 596 U.S. 212.

247 *See supra* Sections I.B.1–I.B.2.

248 In *Bell*, the constitutionally protected rights at issue were "deprivation of [plaintiffs'] liberty without due process of law" and "unreasonable searches and seizures." *See Bell*, 327 U.S. at 679. The defendant in *Bell* was subjected to unlawful imprisonment and an unlawful search and seizure. *Id.*

249 *Cummings*, 596 U.S. at 219–20 (2022) (citing Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

250 *Id.* (emphasis omitted) (quoting *Barnes*, 536 U.S. at 187).

251 Two sections of the Fourteenth Amendment are important for our purposes. Section 1 reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

252 *See* 42 U.S.C. § 12101(b)(4). The Commerce Clause refers to Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3.

253 *Cummings*, 596 U.S. at 219.

government and the recipient,[254] thus creating a voluntary obligation.[255] On the other hand, Title II does not rest on such a contractual analogy, and is not premised on a "voluntary . . . obligation": it is a mandatory obligation not to discriminate.[256] Further, "[b]ecause such legislation imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[257] When a public entity is sued for discriminating against a person with disabilities, there is no question of whether they are deemed to be on notice. Rather, it is their nature as a public entity that holds them to a standard of nondiscrimination.[258] While the question of sovereign immunity might loom over a federal claim against a state, that is an entirely separate analysis than that required for Spending Clause legislation.[259]

The ADA's nature as a non–Spending Clause statute was not sufficiently contemplated by the recent pre-*Cummings* decisions, but it should have been.[260] Failure to recognize this important distinction between Spending Clause and non–Spending Clause statutes leads to an improper analysis that conflates the ADA and section 504. The *Cummings* Court stated that they employed the contract analogy "'only as a potential limitation on liability' compared to that which 'would exist under nonspending statutes.'"[261] Imposing this limitation allows federal

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254 *Id.*

255 *See* Leonard J. Augustine, Jr., *Disabling the Relationship Between Intentional Discrimination and Compensatory Damages Under Title II of the Americans with Disabilities Act*, 66 GEO. WASH. L. REV. 592, 610 (1998).

256 *Id.* As the *Pennhurst* Court explained: "Unlike legislation enacted under § 5, however, legislation 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." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

257 *Pennhurst*, 451 U.S. at 16.

258 *See* Swogger *ex rel.* P.W. v. Erie Sch. Dist., 517 F. Supp. 3d 414, 423 (W.D. Pa. 2021) ("This Court further agrees with the *Sheely* Court's conclusion that public entities and recipients of federal funding are on fair notice when they violate Section 202 of the ADA or Section 504 of the [Rehabilitation Act] that they are potentially liable for the aggrieved individual's emotional harm."); James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651, 651 (1999) ("Like other segments of American society, state governments are forbidden to practice discrimination against the disabled. The principal source of this non-discrimination mandate is Title II of the Americans with Disabilities Act ('ADA') which applies broadly to 'services, programs, or activities of a public entity.'" (quoting 42 U.S.C. § 12132)).

259 Although beyond the scope of this Note, a brief discussion on sovereign immunity is presented *supra* Section I.B.2.

260 *See* cases cited *supra* note 17.

261 Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 225 (2022) (quoting Sossamon v. Texas, 563 U.S. 277, 290 (2011)).

funding recipients to have full knowledge of the consequences of accepting federal dollars.[262] It placed no such limitation on non–Spending Clause statutes.[263] Of Congress's many enumerated powers, perhaps the most important is Section 5 of the Fourteenth Amendment, the so-called enforcement clause,[264] which empowers Congress to "enforce, by appropriate legislation," the rights guaranteed by the Fourteenth Amendment.[265] While Section 5 enforces all portions of the Fourteenth Amendment, the first Section guarantees the privileges and immunities of citizenship, due process, and equal protection.[266] The Supreme Court, however, has stated that Congress's power to legislate under Section 5 is not unlimited.[267] Congress may pass legislation under Section 5 so long as it does not expand a court-defined right.[268] It is the judiciary's duty "to say what the law is,"[269] and Congress may only enforce the rights granted under the Fourteenth Amendment.[270] In other words, giving meaning to the substance of the Fourteenth Amendment is the job of the Court, not Congress. There is a thin line between remedying and preventing unconstitutional actions on the one hand, and, on the other, "substantive[ly] chang[ing] . . . the governing law."[271] "There must be a congruence and proportionality," the Court has stated, "between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[272]

The Court has used this approach to halt Congress's attempts to use its Section 5 power to grant state employees the opportunity to sue their

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262 *Id.*

263 The "nonspending statutes" the Court spoke of must be derived from one of Congress's many other enumerated powers. See, for example, the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, the power to coin money, *id.* art. I, § 8, cl. 5, and the power to raise and support armies, *id.* art. I, § 8, cl. 12, to name a few.

264 *See* Leonard, *supra* note 258, at 652.

265 U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

266 *Id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

267 *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997); Tennessee v. Lane, 541 U.S. 509, 520 (2004).

268 *See Flores*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

269 *Id.* at 536 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

270 *Id.* at 519.

271 *Id.*

272 *Id.* at 520.

employers for monetary damages as a remedy for discrimination based on disability.[273] In *Tennessee v. Lane*, the Court allowed, as a valid exercise of Congress's Fourteenth Amendment Section 5 power, citizens to sue the State of Tennessee under Title II of the ADA for failing to comply with Congress's courthouse accessibility mandate.[274] The Court's ruling in *Lane*, notably, does not apply to all of Title II, but rather to "the fundamental right of access to the courts."[275] Before a plaintiff may bring a Title II claim against a state, they must overcome the significant barrier of showing that their right to sue is within the constitutional bounds of Congress's Section 5 authority. The existence of this Section 5 analysis distinguishes the ADA from section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act because the analysis is not required under Spending Clause legislation. Additionally, as other scholars have noted: "The Supreme Court has observed that to uphold a statute as an exercise of Section 5 authority, the Court must 'be able to discern some legislative purpose or factual predicate that supports the exercise of that power.'"[276]

C. *Disposing of the Intentional Discrimination Standard*

The distinction between Congress's Fourteenth Amendment and Spending Clause powers additionally implicates whether or not it is necessary to impose an intentional discrimination standard for recovering compensatory damages under Title II.[277] The intentional discrimination standard should not be required because the ADA's construction clause[278] "suggests that remedies under the Rehabilitation

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273 *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that state employees may not recover monetary damages against the State for failing to comply with Title I of the ADA).

274 541 U.S. 509, 533–34 (2004).

275 *Id.*

276 *See* Buhai & Golden, *supra* note 50, at 1123 (quoting EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983)). Further, Professors Sande Buhai and Nina Golden argue that "Title II of the ADA regulates state and local government activities, which constitutes state action and therefore 'falls within the scope of congressional authority to enact legislation that Congress deems appropriate to implement the equal protection guarantee of the fourteenth amendment.'" *Id.* (quoting Burgdorf, *supra* note 37, at 439).

277 *See* Augustine, *supra* note 255, at 595 ("Part IV argues that the lower courts, by requiring 'intentional discrimination' under Title II, have misconstrued Supreme Court decisions dealing with similar issues. Specifically, Part IV argues that Title II does not require intent for compensatory damages because Congress enacted Title II pursuant to the Commerce Clause and the Fourteenth Amendment rather than the Spending Clause, and because the Court requires only that the violator have notice of the potential for damages.").

278 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the

Act are not necessarily identical to those under the ADA."[279] Rather, section 504 only sets a floor to the rights and remedies available under Title II, not a ceiling.[280] Courts should be free to award the damages necessary to cure the wrong committed, particularly since neither Congress, the Attorney General, nor the regulations that have been promulgated have specified the appropriate remedies.[281] Rather, the regulations only reiterate the ADA House Report's language by stating: "As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies."[282] Further, because of the mandatory nature of the ADA's nondiscrimination obligation, "Congress's mandates under the ADA are strictly controlling and [are] not subject to judicial balancing under the contractual theories of Spending Clause jurisprudence."[283]

Similarly, Title II should not be treated the same as section 504 or Title VI because it is not a Spending Clause statute.[284] In fact, "[m]ost cases involving Title II violations by a local or state government involve disparate impact discrimination, not intentional discrimination," and so "[r]equiring discriminatory animus effectively eviscerates the protections Congress intended Title II to provide to people with disabilities."[285] The same is true for emotional distress damages. Claimants have a right to be free from discrimination. If that right is violated, and claimants are emotionally harmed in the process, damages should be awarded regardless of whether there is any pecuniary loss.

CONCLUSION

To extend *Cummings* to Title II of the ADA would be to significantly restrict the statute's usefulness. As the National Council on Disability recently explained in their letter to President Biden: plaintiffs' counsel will have less incentive to bring these types of claims and "many claims of intentional discrimination will go wholly unaddressed for lack of meaningful damages available to potential plaintiffs."[286] That is because

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Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." (citation omitted)).

279 *See* Augustine, *supra* note 255, at 609.

280 *Id.*

281 *Id.* at 610. Section 204 of the ADA provides that the Attorney General "shall promulgate regulations in an accessible format that implement this part." 42 U.S.C. § 12134(a).

282 28 C.F.R. pt. 35, app. B (2024).

283 Augustine, *supra* note 255, at 610.

284 *See* Golden, *supra* note 87, at 253.

285 *Id.* at 251–52.

286 *See* NAT'L COUNCIL ON DISABILITY, *supra* note 100, at 9–10.

emotional distress damages are often the only appropriate compensation where there is "no monetary loss to the plaintiff, but the non-monetary harm suffered is undeniable."[287]

Justice Scalia may be correct in stating that this is an issue for Congress to resolve.[288] In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court ruled that employees cannot challenge ongoing pay discrimination if the employer's original discriminatory pay decision occurred more than 180 days earlier, even when the employee continues to receive paychecks that have been discriminatorily reduced.[289] Following this decision, Congress passed the Lilly Ledbetter Fair Pay Act of 2009 to statutorily overrule the 2007 decision.[290] The same can be done with Title II. If the Court is presented with the question of whether Title II allows for emotional distress damages, it should rule in the affirmative. If Congress is not pleased with the decision, Congress may amend the statute.

There is a clear basis in the law to hold that emotional distress damages are available under Title II of the ADA. In recognizing the importance of these damages, courts have generally been more than willing to award these damages because of the long-standing principles established in *Bell* and *Franklin*.[291] The few courts that have addressed the issue of emotional distress damages in Title II cases have misinterpreted the law as it stands today—blatantly ignoring precedent and clear congressional intent. Moreover, the improper equivalence of emotional distress damages to punitive damages has led to inappropriate results. These errors, both by the Supreme Court and lower courts, have all but doomed the existence of emotional distress damages in Title II claims. It is time for district courts around the country to acknowledge that the contract analogy is wholly irrelevant to legislation passed under the Fourteenth Amendment—like Title II. Furthermore, they must realize that Congress has been more than clear: the "full panoply of remedies" should be awarded to victims of disability discrimination under Title II.[292]

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287 *Id.* at 9.

288 *See* Barnes v. Gorman, 536 U.S. 181, 189 n.3 (2002).

289 550 U.S. 618, 628–29 (2007).

290 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

291 *See supra* Section II.A.2.

292 H.R. REP. NO. 101-485, pt. 3, at 52 (1990).