# The Cascading Remedy:

# Cummings, the 2012 Ratification Record, and the Disparate Impact of Spending Clause Erasure

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**Abstract**

The Supreme Court held in *Cummings v. Premier Rehab Keller, P.L.L.C.* that emotional distress damages are not recoverable in private actions to enforce Section 504 of the Rehabilitation Act or Section 1557 of the Affordable Care Act, on the theory that Spending Clause statutes operate as quasi-contracts and that emotional distress damages are not traditionally available for breach of contract. By 2026 the Second, Eleventh, and Ninth Circuits had extended the holding to Title II of the Americans with Disabilities Act, reaching every public entity that receives federal financial assistance.

This Article advances three claims. First, the *Cummings* reasoning operates as a metaphor doing the work of an analogy, asserting that Section 504 is a contract for remedial purposes rather than that it is analogous to one for some purposes and not others. Justice Souter flagged the limit twenty years earlier in *Barnes v. Gorman*, concurring to note that the contract analogy might not produce clear answers about compensatory damages; the majority extended the metaphor through that warning without engaging it. Second, the 2012 Convention on the Rights of Persons with Disabilities ratification record contains formal scope representations by the executive branch and the Senate Foreign Relations Committee that existing United States law, including Section 504 in its remedial dimension, fulfilled or exceeded the effective access to justice obligation of Article 13. *Cummings* is doctrinally inconsistent with those representations.

Third, even on its own facially neutral terms, the *Cummings* rule produces an *Alexander v. Choate* disparate impact within the protected class. The disabled subpopulations whose injuries are predominantly emotional, psychological, dignitary, and stigmatic are precisely the subpopulations whose principal cognizable damages the rule forecloses, while disabled plaintiffs whose injuries map cleanly onto pecuniary loss are largely unaffected. The Article proposes a doctrinal repair limiting *Cummings* to substantive scope while restoring the remedial tradition the 1973 Congress, the 2012 executive branch, and the disparate impact framework all assumed.

*Keywords:* disability law; civil rights remedies; Spending Clause; contract analogy; dignitary harm; emotional distress damages; within-class disparate impact; effective access to justice; ratification record; scope representation; metaphor in legal reasoning; special education.

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## I. Introduction

An autistic adult is denied a reasonable modification at a public accommodation that receives federal financial assistance. The denial is humiliating in form and consequential in fact. The adult experiences the denial as an episode of public exposure, rumination, and sensory overload that propagates through the following days as sleep disruption, social withdrawal, deepening of underlying autistic burnout, and a measurable worsening of her capacity to navigate the next encounter. The accommodation denied was the means by which she could have participated equally in the experience she paid for. The discrimination produced no measurable lost wages. It produced no out-of-pocket medical costs that survive insurance. It produced the harm Section 504 was enacted to remedy: dignitary erasure of a disabled person by an entity bound by federal nondiscrimination law.

Under current doctrine, she has no compensable injury.

The Supreme Court held in 2022 that emotional distress damages are not recoverable in private actions to enforce Section 504 of the Rehabilitation Act or Section 1557 of the Affordable Care Act.[1][2] The reasoning relied on a chain of Spending Clause cases that treats federal-funding statutes as analogous to contracts, on the proposition that funded entities are only on the hook for remedies traditionally available in suits for breach of contract, and on the further proposition that emotional distress damages are not so available.[3] The Court explicitly built on its earlier holding in Barnes v. Gorman, which had foreclosed punitive damages under Section 504 and Title II of the ADA on substantially identical reasoning.[4]

1. Marc Charmatz, *U.S. Supreme Court Holds That Compensatory Damages for Emotional Distress Not Available Under Section 504, Title IX, Title VI*, 27 DISABILITY COMPLIANCE FOR HIGHER EDUC. 3 (2022) (characterizing the decision as a major blow to the civil rights community with profound institutional consequences); *see also* Eric Lyerly, *U.S. Supreme Court Limits Emotional Distress Damages in Title IX and Other Cases*, 22 CAMPUS LEGAL ADVISOR 4 (2022).

2. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 215 (2022).

3. *Id.* at 220–22 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981), and Barnes v. Gorman, 536 U.S. 181, 187 (2002)).

4. Barnes, 536 U.S. at 189.

By 2026, the Second, Eleventh, and Ninth Circuits had extended Cummings to Title II of the ADA. In Doherty v. Bice the Second Circuit held that "[b]ecause recovery for emotional distress damages is unavailable under the Rehabilitation Act's cause of action,. . . such recovery is likewise unavailable under Title II of the ADA, which explicitly borrows the remedies, procedures, and rights of the Rehabilitation Act."[5] The Eleventh Circuit reached the same result in A.W. v. Coweta County School District,[6] and the Ninth Circuit in Payan v. Los Angeles Community College District, decided in March 2026.[7] No federal court of appeals has gone the other way. The doctrinal landscape is, as of this writing, unanimous in extending Cummings to the principal disability rights statute that operates as a damages-bearing private remedy against public entities receiving federal financial assistance.

This Article argues that the unanimity is structurally wrong, that the Court's underlying analysis in Cummings is internally defective, and that three independent doctrinal interventions identify the defect and supply a repair.[8]

Part II reconstructs the Cummings holding and traces the chain of Spending Clause cases that produces it.[9] Part III argues that the Court's analysis operates as a metaphor doing the work of an analogy, asserting identity where analogical reasoning would have asserted limited similarity, and that Justice Souter's concurrence in Barnes flagged the limit twenty years before the majority crossed it. Part IV applies a statutory-originalism methodology drawn from the 2012 Convention on the Rights of Persons with Disabilities ratification record to the remedial dimension of Section 504: the 2012 Convention on the Rights of Persons with Disabilities ratification record contains formal scope representations by the executive branch and the Senate Foreign Relations Committee that existing United States law, including Section 504, fulfilled

5. Doherty v. Bice, 101 F.4th 169, 175 (2d Cir. 2024).

6. A.W. by and through J.W. v. Coweta County Sch. Dist., 110 F.4th 1309 (11th Cir. 2024).

7. Payan v. Los Angeles Cmty. Coll. Dist., 169 F.4th 971, 977 (9th Cir. 2026).

8. *See Doherty v. Bice*, 101 F.4th 169 (2d Cir. 2024); *A.W. ex rel. J.W. v. Coweta Cnty. Sch. Dist.*, 110 F.4th 1309 (11th Cir. 2024); *Payan v. L.A. Cmty. Coll. Dist.*, 169 F.4th 971 (9th Cir. 2026). No circuit has held otherwise.

9. *See infra* Part II (tracing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), through *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), and *Barnes v. Gorman*, 536 U.S. 181 (2002)).

or exceeded the Convention's Article 13 effective-access-to-justice obligation. Cummings is doctrinally inconsistent with those representations. Part V develops the principal substantive contribution of this Article: an application of Alexander v. Choate's disparate impact framework to the Cummings rule itself. The rule is facially neutral as among disabled and nondisabled plaintiffs but produces a within-class disparate impact, disfavoring those subpopulations of the disabled community whose injuries are predominantly emotional, psychological, and dignitary. Part VI proposes the doctrinal repair: a reading of Cummings limited to substantive scope, leaving the remedial scope of Section 504 governed by the statute's purpose, the post-1973 enforcement tradition, and the 2012 baseline. Part VI closes by addressing the state law workaround and its limits. Part VII concludes.

A note on scope.[10] This Article concerns Section 504 and the statutes that Cummings has been extended to reach, principally Title II of the ADA after Doherty, Coweta, and Payan, and Section 1557 of the ACA as squarely held in Cummings itself. The Article does not concern Title III of the ADA, which is not a Spending Clause statute, whose principal remedy is injunctive relief, and which is therefore unaffected by Cummings as such. The Article also does not concern Title I of the ADA, which has its own remedial framework under 42 U.S.C. § 12117 incorporating Title VII remedies.

## II. The Cummings Holding and Its Mechanism

### *A. The Facts and the Question Presented*

Jane Cummings was deaf and legally blind. She sought physical therapy from Premier Rehab Keller, a private rehabilitation clinic in Texas. She asked Premier to provide an American Sign Language interpreter so that she could communicate effectively with her therapist. Premier refused. Cummings sued under Section 504 of the Rehabilitation Act and Section 1557 of the

10. *See* 42 U.S.C. § 12133 (incorporating the remedies of 29 U.S.C. § 794a(a)(2) into Title II); *Doherty*, 101 F.4th at 175 (treating the incorporation as dispositive of the Spending Clause objection).

Affordable Care Act, both of which apply to recipients of federal financial assistance and both of which Premier conceded apply to it.

Cummings established liability without difficulty. The damages question was harder. Cummings did not seek pecuniary damages; her injury was the humiliation and frustration of being denied effective communication during medical treatment for a deaf and legally blind person. The district court dismissed her complaint on the ground that emotional distress damages were not available under Section 504 or Section 1557. The Fifth Circuit affirmed.[11] The Supreme Court granted certiorari to resolve the question of whether emotional distress damages are recoverable in private actions to enforce these statutes.

### *B. The Holding*

The Court held that "[e]motional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act."[12] The reasoning proceeded in four steps.

First, the Court characterized Section 504 and Section 1557 as Spending Clause statutes.[13] The Rehabilitation Act conditions federal funding on nondiscrimination on the basis of disability; Section 1557 does the same in the healthcare context.

Second, the Court invoked the line of cases beginning with Pennhurst State School and Hospital v. Halderman that characterizes Spending Clause legislation as "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions."[14]

Third, the Court invoked Barnes v. Gorman for the proposition that, in this contract-analogous framework, a remedy is "appropriate relief" under Spending Clause legislation only if "the funding recipient is on notice that, by accepting federal funding, it exposes

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11. Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673 (5th Cir. 2020), *aff'd*, 596 U.S. 212 (2022).
12. Cummings, 596 U.S. at 215.
13. 29 U.S.C. § 794(a); 42 U.S.C. § 18116.
14. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); *see also* Cummings, 596 U.S. at 219.

itself to liability of that nature."[15] Funding recipients are deemed on notice "not only [for] those remedies explicitly provided in the relevant legislation, but also [for] those remedies traditionally available in suits for breach of contract."[16]

Fourth, the Court concluded that emotional distress damages are not traditionally available for breach of contract. "It is hornbook law that emotional distress is generally not compensable in contract."[17] Therefore, funding recipients were not on notice that they exposed themselves to emotional distress damages by accepting federal funding. Therefore, such damages are not recoverable.

### *C. The Chain of Spending Clause Cases*

The Cummings reasoning does not stand alone. It is the latest link in a chain of Supreme Court decisions that has progressively constrained the remedies available under Spending Clause civil rights statutes by reference to a contract analogy. The chain runs roughly as follows.

Pennhurst, decided in 1981, held that Congress must speak with a "clear voice" when imposing conditions on federal funding, because the recipient must be able to make an informed choice whether to accept the funding subject to those conditions.[18] The contract-formation analogy in Pennhurst was used to require clarity about substantive obligations. It said nothing about remedies.

Franklin v. Gwinnett County Public Schools, decided in 1992, held that an implied private right of action under Title IX authorized monetary damages, in part on the rationale that the "appropriate relief" standard does not exclude damages.[19] Franklin did not engage the contract analogy on the remedial question.

Gebser v. Lago Vista Independent School District, decided in 1998, used the contract analogy to require "actual notice" of the discriminatory conduct as a precondition for monetary

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15. Barnes, 536 U.S. at 187, quoted in Cummings, 596 U.S. at 220.
16. Barnes, 536 U.S. at 187, quoted in Cummings, 596 U.S. at 220.
17. Cummings, 596 U.S. at 221 (internal citation omitted).
18. Pennhurst, 451 U.S. at 17.
19. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 73 (1992).

damages liability in Title IX teacher-on-student sexual harassment cases.[20] The analogy was extended from substantive notice (Pennhurst) to causation-based notice (Gebser).

Davis v. Monroe County Board of Education, decided in 1999, applied a parallel actual-knowledge-and-deliberate-indifference framework to Title IX student-on-student harassment claims.[21]

Barnes v. Gorman, decided in 2002, applied the analogy to remedies for the first time. The Court held that punitive damages are not available under Title II of the ADA or Section 504 of the Rehabilitation Act because punitive damages are not traditionally available for breach of contract.[22]

Cummings, decided in 2022, extended Barnes to emotional distress damages on the same reasoning.[23]

The chain has a direction.[24] It begins with substantive notice in Pennhurst, expands to causation notice in Gebser and Davis, expands to remedial scope in Barnes, and culminates in the foreclosure of the principal compensable damages category for disability discrimination in Cummings. The Supreme Court has used a single analogy across the chain, and the analogy has carried progressively heavier doctrinal weight at each step.

### *D. The Extension to Title II*

The Cummings holding by its terms reached Section 504 and Section 1557. Title II of the Americans with Disabilities Act prohibits disability discrimination by public entities. Title II's remedies provision, 42 U.S.C. § 12133, provides that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter

20. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287–90 (1998).

21. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642–43 (1999).

22. Barnes, 536 U.S. at 189.

23. Cummings, 596 U.S. at 221–22.

24. *See Pennhurst*, 451 U.S. at 17 (unambiguous-condition requirement); *Gebser*, 524 U.S. at 287–88; *Davis*, 526 U.S. at 640; *Barnes*, 536 U.S. at 186–87. On the limits of the *Pennhurst* rule, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), and *Sossamon v. Texas*, 563 U.S. 277 (2011).

provides to any person." Section 794a is the Rehabilitation Act's remedies provision, which itself incorporates the remedies available under Title VI of the Civil Rights Act of 1964.[25]

Three Circuits have now held that Title II's incorporation of Section 504's remedies extends Cummings to Title II claims. The Second Circuit held in Doherty that "[b]ecause recovery for emotional distress damages is unavailable under the Rehabilitation Act's cause of action, we now hold that such recovery is likewise unavailable under Title II of the ADA, which explicitly borrows the remedies, procedures, and rights of the Rehabilitation Act."[26] The Eleventh Circuit followed in A.W. v. Coweta County School District.[27] The Ninth Circuit followed in Payan v. Los Angeles Community College District, decided March 11, 2026.[28] No federal court of appeals has gone the other way. No federal district court that the author has identified has gone the other way.

The Cummings reasoning has accordingly traveled from Spending Clause statutes proper, where the contract analogy at least had a textual foothold, to Title II of the ADA, which is not a Spending Clause statute and operates instead under congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment.[29] The bridge from Spending Clause statutes to a non-Spending Clause statute was the cross-reference in 42 U.S.C. § 12133, which Congress enacted in 1990 with no apparent contemplation that the remedies it imported from Section 504 would, three decades later, be substantially narrowed by reference to a contract analogy that had not yet been extended to remedies. The result is that the principal private damages remedy against state and local governments for disability discrimination, in the principal civil rights statute Congress enacted to address that discrimination, has been doctrinally narrowed

25. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 2000d-7.

26. Doherty, 101 F.4th at 175.

27. A.W. by and through J.W. v. Coweta County Sch. Dist., 110 F.4th 1309 (11th Cir. 2024).

28. Payan v. Los Angeles Cmty. Coll. Dist., 169 F.4th 971, 977–79 (9th Cir. 2026). The Payan court extended Cummings to Title II for emotional distress damages but expressly preserved compensatory damages for "lost opportunities," which the court treated as economic rather than emotional in character. The preservation is doctrinally important and is the subject of further development in Section VI of this Article.

29. *See* United States v. Georgia, 546 U.S. 151, 158–59 (2006); Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

by reference to a metaphor that Congress did not anticipate and that operates on a constitutional theory the statute itself does not invoke.

## III. Metaphor and Analogy

### *A. The Distinction in Legal Reasoning*

Legal reasoning frequently proceeds by analogy.[30] An analogy compares two structurally similar things in service of an inference about the second from the first, while preserving the awareness that the two things are not identical and that the inference is bounded by the points of similarity.[31] The analogist asks: in what respects is this case like that case? In what respects is it unlike? What follows from the points of similarity, and what is constrained by the points of difference?

A metaphor, by contrast, asserts identity.[32] It claims that one thing IS another thing, for purposes of reasoning, and conducts the reasoning on that asserted identity without preserving awareness of the underlying difference. The metaphor is rhetorically more powerful than the analogy because it short-circuits the careful tracking of similarity and difference that the analogy preserves. The metaphor is also doctrinally more dangerous because it carries with it inferences that depend on the asserted identity but that would not survive the analogist's tracking.

The distinction matters in statutory interpretation.[33] An analogy permits the interpreter to reason from one statute to another by identifying the points of similarity and the points

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30. EDWARD H. LEVI, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948) (the canonical account of reasoning by example, in which the moving classification is built case by case rather than deduced); *see also* Cass R. Sunstein, *Analogical Reasoning*, in LEGAL REASONING AND POLITICAL CONFLICT (1996).

31. Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Grant Lamond, *Analogical Reasoning in the Common Law*, 34 OXFORD J. LEGAL STUD. 567 (2014) (surveying the dispute over the rational force of analogy and locating its structure in the reasons the source case supplies rather than in resemblance as such).

32. *Cf.* Heather M. Whitney & Robert Mark Simpson, *Search Engines, Free Speech Coverage, and the Limits of Analogical Reasoning*, in THE FREE SPEECH CENTURY (2019) (arguing that an analogy carried past the respects in which the compared things are alike ceases to supply a reason and begins to supply a conclusion).

33. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); *see also* Maciej Koszowski, *Analogical Reasoning in Statutory Law* (2017); Joshua C. Teitelbaum, *Analogical Legal Reasoning: Theory and Evidence*, 16 AM. L. & ECON. REV. 160 (2014).

of difference. A metaphor instructs the interpreter to treat one statute AS another statute, and to import the inferences from the second into the first without the careful tracking the analogist would perform. The risk of the metaphor is that the import is wholesale: features of the analogous concept that have nothing to do with the actual statute under interpretation are imported because the metaphor has asserted identity rather than similarity.

### *B. Cummings as Metaphor*

The Cummings Court did not say that Section 504 is analogous to a contract in some respects. The Court said that Section 504 is, for remedial analysis purposes, a contract. The chain of statements is illustrative:

> [F]ollowing the contract analogy set out in our Spending Clause cases, a federal funding recipient may be considered 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.[34]

The phrase "the contract analogy" is the Court's own language.[35] But the analytical operation the Court performs is not analogical. It is metaphorical. The Court does not ask in what respects Section 504 is like a contract and in what respects it is unlike. The Court treats Section 504 as a contract for the purpose of determining which remedies the funded entity could have anticipated, and then imports the inference (no emotional distress damages, because contracts) without examining the points of difference (Section 504 is a civil rights statute enacted to remedy dignitary harm, not a commercial agreement).

An analogist examining the same materials would have asked a different set of questions.[36] In what respects is Section 504 like a contract? A funded entity accepts terms in exchange for federal money. The acceptance is voluntary in the structural sense, though often functionally compelled by the dependence of the entity's operations on the federal funding. The

34. Cummings, 596 U.S. at 220 (quoting Barnes, 536 U.S. at 187).

35. *Cummings*, 596 U.S. at 219 (adopting the phrase); *Barnes*, 536 U.S. at 186–87.

36. *See* Levi, *supra* note 30; Sherwin, *supra* note 31.

statute supplies the terms. The acceptance is implied by conduct (taking the money) rather than by signature on a document. These are real points of similarity.

In what respects is Section 504 unlike a contract? The harmed third party is not a party to the agreement.[37] The harm the statute exists to remedy is dignitary and stigmatic, not commercial. The statute is one of the principal civil rights statutes of the federal government, enacted to vindicate the equal participation of disabled people in publicly funded life, not to allocate commercial risk. The remedial purpose of the statute, as expressed in its enforcement provisions and the legislative history of its various amendments, is to make the disabled person whole, not to compensate the entity for a breach of commercial agreement. These are also real points of difference.

An analogist would have weighed both.[38] The Cummings Court weighed only the first. The Court declared Section 504 to be a contract for the relevant purpose and imported the inferences that follow from contracts in commercial litigation. The points of difference, which a careful analogist would have foregrounded, are absent from the analysis.

### *C. Souter's Warning*

This is not a new critique.[39] Justice Souter flagged the limit of the contract analogy in his concurrence in Barnes, twenty years before the Cummings majority crossed it. Concurring in the judgment, Souter wrote:

> I realize, however, and read the Court's opinion as acknowledging, that the contract-law analogy may fail to give… helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation, such as the proper measure of compensatory damages.[40]

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37. *See* Whitney & Simpson, *supra* note 32; *cf. Franklin*, 503 U.S. at 66–68.
38. *See* Lamond, *supra* note 31; *cf. Barnes*, 536 U.S. at 190 (Souter, J., concurring).
39. *Barnes*, 536 U.S. at 190 (Souter, J., concurring).
40. Barnes, 536 U.S. at 189 n.* (Souter, J., concurring in the judgment).

Souter identified the precise limit the Cummings majority would later transgress.[41] The contract analogy, he wrote, gives a defensible answer to whether punitive damages are available, because punitive damages are universally understood as a contract-law oddity. The analogy may not give a clear answer about "the proper measure of compensatory damages," because compensatory damages in commercial contract law and in civil rights law operate on different principles. Souter joined the punitive damages holding and warned against extending its reasoning. The Cummings Court extended its reasoning twenty years later without engaging Souter's warning.

The methodological point is that the Cummings extension was foreseen and flagged by a Supreme Court Justice as a doctrinal step too far in 2002.[42] The Court took the step anyway in 2022. The Souter concurrence is the doctrinal record of the Court itself having been warned that the analogy was being asked to do work it could not bear.

### *D. What the Metaphor Erased*

The analogist's tracking of differences identifies several features of Section 504 that the metaphor erased.

The statute's enforcement structure does not resemble contract enforcement. Section 504 has private rights of action that have been recognized since the statute's enactment. The remedial structure is supplied by reference to Title VI of the Civil Rights Act of 1964, which itself was enacted to vindicate civil rights, not to allocate commercial risk. The historical line of authority on Title VI remedies includes Franklin v. Gwinnett County Public Schools, which recognized money damages as an available remedy for civil rights violations precisely because the remedies

41. The point was made again, and closer to the remedial question, in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Justice Ginsburg wrote that *Pennhurst*'s clear-notice requirement "should not be unmoored from its context," having confronted "an unexpected condition for compliance," a new programmatic obligation, while the controversy before the Court concerned "the remedies available against a noncomplying [district]." *Id.* at 308–09 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983)). Justice Breyer made the same distinction, noting that the Court has held *Pennhurst*'s unambiguity requirement "does not necessarily apply to legislation setting forth 'the remedies available against a noncomplying State.'" *Id.* at 321 (Breyer, J., dissenting) (quoting *Bell*, 461 U.S. at 790 n.17).

42. *See supra* note 41. Two Justices drew the programmatic-obligation/remedy line eighteen years before *Cummings* erased it.

are "appropriate relief" for the kinds of harm the statute exists to address.[43] Franklin's remedial logic and Cummings's remedial logic point in opposite directions, and the Cummings majority did not address the tension.

The statute's underlying purpose does not resemble commercial agreement.[44] Section 504 was enacted to address the systematic exclusion of disabled people from federally funded programs and activities. The harm the statute exists to remedy is dignitary, stigmatic, and exclusionary. The principal cognizable injury for the protected class is the injury to the person's standing as an equal participant in publicly funded life. That injury is not pecuniary, except incidentally; it is the kind of injury that contract law, in its historical posture, was explicitly designed not to compensate. The metaphor's importation of that historical contract-law posture into a statute whose purpose is to compensate dignitary harm is a doctrinal inversion.

The funded entity's relationship to the protected person does not resemble a contracting party's relationship to a counterparty.[45] The funded entity is not in a commercial relationship with the disabled person. The funded entity has accepted federal money on condition that it not discriminate against disabled people, and the disabled person is in a position more analogous to a regulatory beneficiary than to a third-party beneficiary of a commercial contract. The contract analogy treats the disabled person as a third-party beneficiary whose recovery is limited to what the contract anticipated, when the more accurate characterization is that the disabled person is a regulatory beneficiary whose recovery is bounded by the regulatory purpose of the statute.

The analogist would have foregrounded each of these features.[46] The metaphor erased each of them. The result is a remedial framework for Section 504 that resembles commercial contract law in its restrictions but does not resemble it in its compensatory purpose.

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43. Franklin, 503 U.S. at 73.

44. 29 U.S.C. § 701; *see Alexander v. Choate*, 469 U.S. 287, 295–97 (1985) (recounting the antidiscrimination purpose); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284–86 (1987).

45. *See Arline*, 480 U.S. at 284–85; *cf. S.D. v. Dole*, 483 U.S. 203, 206–07 (1987).

46. *See* Levi, *supra* note 30, at 501–02; Sunstein, *supra* note 30.

## IV. The 2012 Ratification Record

### *A. The Methodology*

The methodology applied in this Part proceeds as follows.[47] Formal scope representations made by the executive branch and the Senate Foreign Relations Committee in the course of CRPD ratification consideration constitute authoritative interpretations of the substantive scope of existing United States disability law, binding on subsequent doctrinal interpretation as a matter of statutory originalism.

The methodology applies with equal force to the remedial dimension of the same statutes.[48] A statute's scope, properly understood, includes the scope of the remedies it provides. A statement that existing United States law fulfills or exceeds the obligations of an international human rights treaty implies that the existing law provides not only the substantive protections but also the remedies that the treaty's protections presuppose. A protection without an enforceable remedy is, in operative legal terms, not a protection at all.

### *B. The Transmittal Letter and the SFRC Declaration*

The 2012 CRPD ratification record contains a series of formal scope representations. The President transmitted the Convention to the Senate for advice and consent on May 17, 2012, with a transmittal letter representing that "[t]he Convention does not require any change in existing United States law because current United States law is sufficient to implement the Convention."[49] The transmittal letter identified the ADA, the Rehabilitation Act, and IDEA as the principal statutes providing the protections the Convention required.

47. *See infra* Part IV.B (setting out the representations); *cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81 (1969).

48. *See Franklin*, 503 U.S. at 66 ("[A]bsent 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."); *cf.* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

49. Letter of Submittal from the President to the Senate, Convention on the Rights of Persons with Disabilities, Treaty Doc. No. 112-7 (May 17, 2012).

The Senate Foreign Relations Committee held a hearing on the Convention on July 12, 2012, and reported the Convention favorably on July 31, 2012, by a vote of 13 to 6, subject to three reservations, eight understandings, and two declarations.[50] The proposed declarations included a statement that "in view of the reservations to be included in the instrument of ratification, current United States law fulfills or exceeds the obligations of the Convention for the United States."[51] The declaration was adopted on a Committee vote of 14 to 5. It was attached to the proposed instrument of ratification.

The Committee's executive report expanded on the declaration in terms that bear directly on the remedial dimension of the named statutes: "The United States has a comprehensive network of existing federal and state disability laws and enforcement mechanisms… In the large majority of cases, existing federal and state law meets or exceeds the requirements of the Convention."[52] The phrase "enforcement mechanisms" is significant. The Committee did not represent that existing United States law fulfills the Convention only in its substantive prohibitions; the Committee represented that existing law's enforcement mechanisms also meet or exceed the Convention's requirements. The remedial dimension was within the scope of the representation.

### *C. Article 13 and Effective Access to Justice*

Article 13 of the Convention provides:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[53]

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50. Exec. Rep. No. 112-6, 112th Cong., 2d Sess. (2012).
51. *Id.* at 22.
52. *Id.* at 5.
53. Convention on the Rights of Persons with Disabilities art. 13, Dec. 13, 2006, 2515 U.N.T.S. 3.

The text reaches both procedural access (the disabled person's ability to participate in legal proceedings) and effective access (the proceedings' capacity to provide meaningful redress).[54] The phrase "on an equal basis with others" makes clear that the equality at stake is not merely formal but substantive: the proceedings must function for disabled people as they function for nondisabled people. A proceeding that yields a formal finding of liability but no meaningful remedy does not function as a proceeding functions for nondisabled people, who in equivalent civil rights cases routinely obtain compensation for dignitary harm.

The Article 13 obligation thus extends to the remedial framework that supports the substantive protections.[55] If the substantive prohibition is meaningful only when paired with an enforceable remedy, the obligation to provide effective access to justice includes the obligation to provide the remedy.

### *D. Administration Testimony on Enforcement*

Administration witnesses before the Senate Foreign Relations Committee elaborated the scope representations in remedial detail. Judith Heumann, Special Adviser for International Disability Rights at the State Department, testified that the Convention "does not create new rights for disabled people, and no new legislation would be required to implement the Convention."[56] Heumann's testimony, framed by reference to existing United States law's adequacy, encompasses both the substantive and remedial dimensions of the statutes referenced.

Eve Hill, Senior Counselor to the Assistant Attorney General for Civil Rights at the Department of Justice, testified that "ratifying the Convention, as proposed, will not require new

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54. Convention on the Rights of Persons with Disabilities art. 13, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3.

55. *See supra* Part IV.C; *cf. Franklin*, 503 U.S. at 66–68 (treating the availability of a remedy as part of what a right consists in).

56. Testimony of Judith E. Heumann, Special Adviser for International Disability Rights, U.S. Dep't of State, Hearing on the Convention on the Rights of Persons with Disabilities, S. Comm. on Foreign Relations, 112th Cong. (July 12, 2012).

legislation or create new rights."[57] Hill's testimony was the position of the federal government's principal civil rights enforcement agency, delivered by its senior civil rights official. Her representation that ratification would not create new rights, against the backdrop of the Article 13 obligation, is a representation that existing United States law's enforcement framework already provides the effective access to justice the treaty requires.

### *E. The Tension with Cummings*

Cummings is doctrinally inconsistent with the 2012 representations.

The disability rights statutes named in the 2012 record include Section 504 of the Rehabilitation Act.[58] The 2012 record represented that existing United States law, including Section 504, fulfilled or exceeded the obligations of the Convention. The Convention's Article 13 requires effective access to justice on an equal basis with others. Effective access to justice for civil rights violations, in the ordinary sense the international community would understand, includes meaningful compensation for the harms the violations produce. The principal harm for civil rights violations in the disability rights context is dignitary, psychological, and emotional. Effective access to justice for those harms requires compensability of those harms.

In 2022, the Supreme Court held that emotional distress damages are not recoverable under Section 504.[59] The holding is doctrinally inconsistent with the 2012 representation that Section 504 already provided what Article 13 requires. The inconsistency cannot be resolved by saying that the 2012 representation was wrong, because the representation was made formally, on the record, by the executive branch and the Senate Foreign Relations Committee, in the course of treaty consideration. The representations were made to the Senate, to the international community, and into the historical record. The representations were not withdrawn before the

57. Testimony of Eve L. Hill, Senior Counselor to the Assistant Attorney General for Civil Rights, U.S. Dep't of Justice, Hearing on the Convention on the Rights of Persons with Disabilities, S. Comm. on Foreign Relations, 112th Cong. (July 12, 2012).

58. 29 U.S.C. § 794(a); *see also* 42 U.S.C. §§ 12101–12213; 20 U.S.C. §§ 1400–1482.

59. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219–22 (2022).

December 4, 2012, floor vote in which the Convention failed to achieve the two-thirds threshold required for ratification.

The inconsistency must be resolved in one of two ways.[60] Either the 2012 representations were correct, in which case Cummings is wrong as a matter of statutory interpretation because it produces a result the 1973 Congress, the 2012 executive branch, and the 2012 Senate Foreign Relations Committee all understood the statute not to produce. Or the 2012 representations were wrong, in which case the United States misrepresented its existing law to the Senate and to the international community on the formal ratification record. The second resolution requires concluding that the United States's central position on disability rights at the moment of CRPD consideration was knowingly false. That conclusion is doctrinally available only if one is willing to accept that the State Department, the Department of Justice, and the Senate Foreign Relations Committee operated in coordinated bad faith.

The first resolution is doctrinally available without that conclusion.[61] The first resolution treats the 2012 representations as a baseline for the proper interpretation of the statutes, against which subsequent doctrinal developments must be measured. Under that resolution, Cummings is the doctrinal development that fell below the baseline. The repair is to interpret Cummings narrowly, leaving the remedial scope of Section 504 governed by the statute's purpose and the Title VI enforcement tradition the 1973 Congress incorporated by reference.

## V. The Within-Class Disparate Impact

### *A. Alexander v. Choate and Disparate Impact Under Section 504*

The Supreme Court held in Alexander v. Choate that Section 504's prohibition on disability discrimination reaches at least some facially neutral rules that produce disparate impact on disabled persons. The Court declined to define the precise contours of the disparate impact reach but recognized that "much of the conduct that Congress sought to alter in passing the

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60. *See supra* Part IV.B; *Cummings*, 596 U.S. at 230.

61. *See infra* Part VI.A.

Rehabilitation Act would be difficult, if not impossible, to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[62] The Court endorsed a "meaningful access" standard under which a facially neutral practice can violate Section 504 when its operation denies disabled persons meaningful access to a federally funded benefit.

The Choate framework is the central doctrinal instrument by which Section 504 reaches the structural discrimination that constitutes most disability discrimination in modern public life.[63] Most discriminatory exclusions of disabled people do not result from animus. They result from neutral rules whose operation produces exclusion: the building lacks ramps, the form requires capacities the disabled person lacks, the policy requires the disabled person to absorb costs the nondisabled person does not face. Choate makes those rules cognizable.

### *B. The Population Within the Population*

The disabled population is not homogeneous in the kinds of injuries discrimination produces.[64]

For some disabled people, the principal injuries of discrimination are pecuniary. A wheelchair user denied employment at a workplace whose building is inaccessible suffers lost wages. A blind student denied accessible course materials suffers measurable academic and professional consequences. A deaf person denied effective communication during medical care may suffer medical mismanagement with measurable downstream costs.

For other disabled people, the principal injuries of discrimination are not pecuniary. They are emotional, psychological, dignitary, and stigmatic.

The clinical literature documents that certain disability categories are characterized by heightened vulnerability to these non-pecuniary injuries. People with autism spectrum disorder, particularly autistic adults whose presentation includes emotional dysregulation,

62. Alexander v. Choate, 469 U.S. 287, 297 (1985).

63. *Choate*, 469 U.S. at 297, 301; *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996); *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008).

64. Catarina Branco, Miguel R. Ramos & Miles Hewstone, *The Association of Group-Based Discrimination with Health and Well-Being: A Comparison of Ableism with Other "Isms,"* 75 J. SOC. ISSUES 814 (2019) (analyzing European Social Survey data from representative samples in thirty-two countries across seven waves and finding that ableism is associated with lower health and well-being, and that the magnitude of that association exceeds the effect of discrimination based on other disadvantaged group memberships).

experience discriminatory encounters as triggering events for rumination, sleep disruption, sensory overload, and autistic burnout, with measurable downstream effects on functioning.[65] People with post-traumatic stress disorder experience discriminatory encounters as triggers for re-traumatization, with characteristic emotional and somatic sequelae.[66] People with anxiety disorders experience cumulative cortisol load and avoidance learning from systemic exclusion.[67] People with depression experience each discriminatory exposure as an event that worsens the underlying course of the disorder.[68] People with traumatic brain injury experience emotional dysregulation as a direct neurological sequela of the underlying injury, such that discriminatory exposure produces emotional response disproportionate to the apparent stimulus.[69] People with intellectual or developmental disabilities experience compounding identity damage when they cannot articulate or process the discriminatory harm they have experienced.[70]

These subgroups within the disabled population are not edge cases.[71] They are substantial portions of the population the disability rights statutes were enacted to protect. They are also the subpopulations for whom the harm of discrimination is principally non-pecuniary. For them, the dignitary, emotional, and psychological dimensions of discrimination are not incidental to the pecuniary injury. They are the principal injury.

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65. The clinical literature on autistic emotional vulnerability and autistic burnout is reviewed in, among other sources, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 50–59 (5th ed., text rev. 2022) (DSM-5-TR, autism spectrum disorder); D.M. Raymaker et al., “Having All of Your Internal Resources Exhausted Beyond Measure and Being Left with No Clean-Up Crew”: Defining Autistic Burnout, 2 Autism in Adulthood 132 (2020).

66. DSM-5-TR, *supra*, at 301–13 (posttraumatic stress disorder).

67. DSM-5-TR, *supra*, at 217–61 (anxiety disorders).

68. DSM-5-TR, *supra*, at 177–214 (depressive disorders).

69. DSM-5-TR, *supra*, at 689–92 (neurocognitive disorder due to traumatic brain injury).

70. DSM-5-TR, *supra*, at 37–47 (intellectual developmental disorder).

71. David Pettinicchio & Michelle Maroto, *Economic Precarity and Changing Levels of Anxiety and Stress Among Canadians with Disabilities and Chronic Health Conditions Throughout the COVID-19 Pandemic*, 61 CAN. REV. SOCIO. 25 (2024) (applying the minority stress framework to disability status and collecting the evidence that disabled people are more likely to experience stress, anxiety, depression, and loneliness, and locating the source of those stressors in socially constructed barriers rather than in functional limitation).

### *C. The Four-Level Cascade*

The within-class disparate impact of the Cummings rule operates through four nested levels.

The first level is the baseline. Disabled people experience emotional and psychological harm from discrimination at rates substantially higher than the nondisabled population.[72] The clinical literature on minority stress, applied to the disabled population, documents the elevated baseline.

The second level is disparate impact within the disabled population. Among disabled people, the subpopulations identified in the preceding subsection experience emotional and psychological harm at rates substantially higher than the disabled baseline. The structure of their disability is such that emotional and psychological injuries are more severe, more durable, and more functionally consequential than they are for disabled people whose conditions do not implicate emotional regulation, attention, anxiety, or trauma response.

The third level is the cascade within the affected individual.[73] The injury produced by a discriminatory event in these subpopulations is not a discrete emotional reaction. It is a system perturbation that propagates through the affected person's life across days, weeks, and years. The autistic person who is humiliated by a denied accommodation experiences the humiliation, then experiences rumination and sleep disruption, then experiences worsening of underlying autistic burnout, then experiences social withdrawal, then experiences reduced social support, then experiences reduced resilience to subsequent discriminatory encounters, then experiences the next discriminatory encounter at a baseline already worsened by the first. The cascade is

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72. Lauren Krnjacki et al., *Disability-Based Discrimination and Health: Findings from an Australian-Based Population Study*, 42 AUSTL. & N.Z. J. PUB. HEALTH 172 (2017) (finding, on 2015 national survey data, that disability-based discrimination was associated with higher psychological distress at an odds ratio of 2.53, 95% CI 2.11–3.02, and with poorer self-reported health at an odds ratio of 1.63, and characterizing disability-based discrimination as an under-recognized determinant of health); *see also* Branco, Ramos & Hewstone, *supra* note 64.

73. David R. Williams et al., *Understanding How Discrimination Can Affect Health*, 54 HEALTH SERVS. RSCH. 1374 (2019) (PRISMA review of twenty-nine reviews and meta-analyses, reporting that a single discriminatory event was not adversely related to well-being while accumulated exposure was, that the Study of Women Across the Nation found the highest accumulation over ten years produced the highest depressive symptoms across every racial group measured, that a United Kingdom study found a dose-response relationship between cumulative discrimination and nonspecific psychological distress, and that a review of twenty-five daily diary studies found discriminatory events associated with increased distress symptoms more than ninety percent of the time).

documented in the clinical literature and is observable in the lived experience of the affected population. It is not metaphor; it is the actual structure of the harm.

The fourth level is the compounding remedy denial.[74] The Cummings rule tells the affected individual that the category of harm that constitutes her principal injury is not legally compensable. The legal system designed to remedy discrimination against disabled people has selected the category of injury that disproportionately befalls the most vulnerable disabled subpopulations and declared it invisible to the remedial framework. The denial is itself a dignitary harm, layered on top of the underlying discrimination, because the denial communicates to the affected individual that her experience does not count as legally cognizable harm. The legal erasure compounds the substantive discrimination.

### *D. Cummings as a Within-Class Disparate Impact Rule*

The Cummings rule is facially neutral as among disabled and nondisabled plaintiffs.[75] Both groups, on the rule's text, are barred from recovering emotional distress damages in private actions under Section 504. The facial neutrality is the precise structure Alexander v. Choate addresses. The Choate framework recognizes that facial neutrality does not prevent disparate impact analysis, because the operative question is whether the rule's operation produces unequal access to a federally funded benefit, not whether the rule on its face mentions the protected class.

The federally funded benefit at issue here is the remedial framework of Section 504 itself.[76] Section 504 is administered as a system of federal civil rights protection for disabled persons in programs and activities receiving federal financial assistance. The remedial framework

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74. Blythe A. Barker et al., *Associations Between Perceived Discrimination Events and Next-Day Emotions Assessed Via Ecological Momentary Assessments*, 42 STRESS & HEALTH (2026) (twenty-eight-day ecological momentary assessment study finding that, at the within-person level, experiencing a discrimination event was associated with higher ratings of afraid, depressed, anxious, and miserable emotions on the following day, and framing the mechanism through allostatic load, the accumulated physiological cost of repeated stress exposure); *see also* Williams et al., *supra* note 73.

75. *See supra* Part II.A; *cf. Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001).

76. 29 U.S.C. § 794a(a)(2); *see Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (the presumption of all appropriate remedies).

is the means by which the substantive protection is operationalized. Access to the remedial framework is part of the federally funded benefit.

The Cummings rule's operation produces unequal access to the remedial framework as between disabled subpopulations. For disabled plaintiffs whose injuries are predominantly pecuniary, the rule has limited operative effect: the principal damages remain recoverable, the case proceeds in substantially its ordinary form, the plaintiff obtains compensation that approximates the harm. For disabled plaintiffs whose injuries are predominantly emotional, psychological, dignitary, and stigmatic, the rule has substantially complete operative effect: the principal damages are foreclosed, the case proceeds with damages remedies that do not correspond to the actual harm, and the plaintiff obtains compensation that approximates very little of the harm. The remedial framework is functionally available to the first group and functionally unavailable to the second.

That operative pattern is the structure of a disparate impact rule.[77] A facially neutral rule with disparate operational effect across subpopulations of the protected class is the precise structure Choate identified as within Section 504's reach. The unusual feature here is that the rule producing the disparate impact is itself a rule of the federal civil rights enforcement framework, articulated by the Supreme Court rather than by a state agency or a federally funded recipient. The structural pattern is, however, identical: a facially neutral rule that produces unequal access to a federally funded benefit across subpopulations of the protected class.

The doctrinal posture this Article advances is not that Cummings can be enjoined as a Section 504 violation. The Supreme Court is not a federally funded recipient subject to Section 504. The doctrinal posture is rather that the Cummings rule is in tension with the principle Section 504 itself embodies: that disability rights enforcement reaches the disparate operation of facially neutral rules. A judicial doctrine that produces precisely the kind of disparate impact

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77. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) (developing the account of damages as serving functions beyond individual compensation, against which a remedial rule that extinguishes an entire injury category can be measured).

Section 504 was enacted to address is doctrinally suspect. The tension supplies a reason for narrowing the Cummings rule on subsequent application.

## VI. The Doctrinal Repair

### *A. Narrowing Cummings to Substantive Scope*

The repair this Article proposes is a reading of Cummings limited to the substantive notice question for which the contract analogy was originally invoked in Pennhurst, rather than to the remedial scope question for which the analogy has been extended without textual or historical foundation. The reading would preserve Pennhurst's clear-statement rule for substantive conditions imposed on federal funding while restoring the remedial framework of Section 504 to the Title VI enforcement tradition the 1973 Congress incorporated.

The reading is doctrinally available because Cummings is a recent decision that has not yet been embedded in a fully consolidated body of doctrine.[78] The three circuits that have extended Cummings to Title II have done so on the textual cross-reference in 42 U.S.C. § 12133 rather than on independent endorsement of the underlying reasoning. A subsequent Supreme Court decision, or a circuit decision properly framed, could distinguish Cummings's holding (no emotional distress under Section 504 itself) from the question of whether the contract metaphor should be extended to other remedial questions.

The reading is also doctrinally available because Souter's concurrence in Barnes flagged the limit, the disability bar has developed the argument in the intervening four years, and the Ninth Circuit's preservation of "lost opportunities" damages in Payan indicates that the doctrinal trajectory is not foreclosed. The Payan court grounded that preservation in Franklin v. Gwinnett County Public Schools, reasoning that where a federal statute provides a right to sue, courts may use any available remedy to make good the wrong, a make-whole principle that

78. *See supra* Part III.C; *see also Payan*, 169 F.4th at 977–79 (declining to extend the rule to lost educational opportunity damages).

operates independently of the Cummings contract analogy.[79] A future court asked to address whether economic damages that have emotional components remain available, or whether nominal damages of substantial value (responsive to the dignitary harm rather than the emotional response) survive Cummings, will have available the analytical materials to distinguish the rule from its outer applications.

### *B. Restoring the Title VI Enforcement Tradition*

The repair would restore the Title VI enforcement tradition that the 1973 Congress incorporated by reference when it enacted Section 504. The tradition includes Franklin v. Gwinnett County Public Schools, which recognized money damages as "appropriate relief" for civil rights violations.[80] It includes the line of authority recognizing dignitary harm as compensable in federal civil rights actions generally. It includes the structural understanding that civil rights statutes exist to vindicate equal participation, not to allocate commercial risk.

The Title VI enforcement tradition was the framework against which the 1973 Congress wrote Section 504. The framework against which the 1990 Congress wrote Title II of the ADA was Section 504 itself, which by 1990 had a developed body of remedial doctrine including the recognition that emotional distress damages were available. The 2008 Congress that enacted the ADA Amendments Act did not understand itself to be writing against a Cummings-narrowed remedial baseline; the Amendments Act's findings and purposes refer to "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," a mandate that presupposes an effective remedial framework.[81]

The repair would treat the post-1973 enforcement tradition as the baseline against which Cummings is measured, rather than treating Cummings as the baseline against which the tradition must be reconciled.[82] The doctrinal effect would be to limit Cummings to the

79. Payan, 169 F.4th at 978–79 (quoting Franklin, 503 U.S. at 66).

80. Franklin, 503 U.S. at 73.

81. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553.

82. *See Franklin*, 503 U.S. at 66–71; *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *cf.* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

precise facts presented (a private clinic, deaf and legally blind plaintiff, ASL interpreter denial, emotional-distress-only damages claim) and to leave the remedial framework of Section 504 in its post-1973 posture for cases not squarely controlled by those facts.

### *C. Implications for Title VI, Title IX, and Section 1557*

The repair would have implications beyond Section 504 itself.[83] The contract analogy on which Cummings rests has been used to constrain remedies under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 1557 of the Affordable Care Act. The implications of narrowing Cummings would extend to each of these statutes.

For Title VI, the implication would be that emotional distress damages remain available for race-based discrimination in federally funded programs, restoring the principal compensable harm in the principal civil rights statute of the federal government to its pre-2002 posture. For Title IX, the implication would be similar, restoring the remedy for sex-based discrimination and sexual harassment in federally funded education to the framework Franklin v. Gwinnett established.[84] For Section 1557, the implication would be that emotional distress damages remain available for healthcare discrimination, addressing the precise category of harm that Section 1557 was enacted to remedy in the wake of the Affordable Care Act's expansion of healthcare access.

The implications are large because the Cummings reasoning has been deployed across the Spending Clause civil rights framework.[85] The repair is correspondingly consequential: it would restore the remedial dimension of federal civil rights enforcement to a posture consistent with the statutes' purposes, the legislative history of their various reauthorizations, and the international human rights baseline the United States represented in 2012.

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83. *See Barnes*, 536 U.S. at 185; *Tennessee v. Lane*, 541 U.S. 509 (2004); *United States v. Georgia*, 546 U.S. 151 (2006).

84. The implication for Title IX is complicated by Gebser and Davis, which independently constrain Title IX damages by reference to actual notice and deliberate indifference standards. The Gebser/Davis framework is doctrinally distinct from Cummings and is not directly addressed by the repair this Article proposes.

85. *See Gebser*, 524 U.S. at 287–88; *Davis*, 526 U.S. at 639–40; Matthew D. Taggart, *Title II of the Americans with Disabilities Act After* Garrett, 91 CAL. L. REV. 827 (2003).

### *D. State Law and Its Limits*

In the interim before the doctrinal repair, plaintiffs in Cummings-affected cases retain access to parallel claims under state disability rights statutes that do not depend on the Spending Clause analogy and that are not constrained by the federal contract analysis. California's Unruh Civil Rights Act and Disabled Persons Act, the New York State Human Rights Law, the Illinois Human Rights Act, Massachusetts General Laws Chapter 151B, and analogous statutes in other jurisdictions generally authorize damages including dignitary, emotional, and other non-pecuniary harms.[86] Most of the major commercial defendants in disability rights litigation are domiciled in jurisdictions that provide such parallel state-law remedies. The state-law layer is accordingly the principal practical workaround for the Cummings limitation in the present period.

The state-law workaround has three significant limits.

First, the workaround is unevenly available across jurisdictions.[87] Some states do not have state-law disability rights statutes with private damages remedies. Plaintiffs in those jurisdictions do not have a state-law substitute for the federal remedy Cummings forecloses, and accordingly receive substantially less protection than plaintiffs in more protective jurisdictions. The unevenness produces a federalism gap in disability rights enforcement that the federal statutes were enacted to close.

Second, the workaround does not apply to claims that depend on the federal funding hook for jurisdictional purposes.[88] A federal funding recipient that operates in a jurisdiction without protective state law may face Section 504 liability without compensable damages and no parallel state law to fill the gap. The workaround is not available where it is most needed.

Third, the workaround does not address the dignitary harm of the federal remedial erasure.[89] The disabled person whose federal claim is foreclosed by Cummings and whose state

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86. *See* Cal. Civ. Code § 51 et seq.; Cal. Civ. Code § 54 et seq.; N.Y. Exec. Law § 296; 775 Ill. Comp. Stat. 5/1-101 et seq.; Mass. Gen. Laws ch. 151B.

87. *See infra* Part VI.D.

88. 29 U.S.C. § 794(b) (defining program or activity by reference to federal financial assistance).

89. *See supra* Part V.C; Branco, Ramos & Hewstone, *supra* note 64.

law claim is preserved still receives the communication that the federal civil rights framework does not count her injury. The state law remedy compensates the underlying harm but does not undo the meta-discrimination of the federal foreclosure. The dignitary harm of being told by the federal civil rights framework that one's principal injury is invisible to the law is itself a harm that no state law remedy can address.

The state-law workaround is the principal practical instrument available in the present period. It is not a substitute for the doctrinal repair this Article proposes.

## VII. Conclusion

The Cummings doctrine has restructured the remedial framework of federal disability rights law over four years.[90] The Spending Clause contract metaphor, originally invoked in Pennhurst to require clear statement of substantive conditions on federal funding, has been progressively extended to constrain remedies under Section 504, Section 1557, and Title II of the ADA. The extension is doctrinally vulnerable on three independent grounds. The metaphor is doing the work of an analogy and has crossed the limit Justice Souter flagged in 2002. The 2012 ratification record contains formal scope representations by the executive branch and the Senate Foreign Relations Committee that the statutes already provided what the Convention on the Rights of Persons with Disabilities required, including the Article 13 effective-access-to-justice obligation, an obligation Cummings cannot satisfy. The rule produces a disparate impact within the protected class precisely of the kind Section 504 was enacted to address: a facially neutral remedial rule whose operation forecloses the principal cognizable damages for the most vulnerable disabled subpopulations, while leaving largely intact the remedies available to disabled subpopulations whose injuries are predominantly pecuniary.

Two further features of the record make the repair easier to reach than its novelty suggests. The programmatic-obligation and remedy distinction the repair depends on is not an invention of this Article. It was drawn by the Court itself in *Bell v. New Jersey* in 1983,

90. *See supra* Parts II, V; *Cummings*, 596 U.S. at 230.

restated by Justice Ginsburg and by Justice Breyer in *Arlington Central* in 2006, and flagged by Justice Souter in *Barnes* in 2002.[91] Three Justices across twenty-three years marked the line that *Cummings* crossed without argument. The second feature is that the 2012 representations were made by the political branches rather than found by a court, which means the repair does not require the Court to concede error. It requires only that the Court read a metaphor as the analogy it was, and read *Pennhurst* as the Court has already said it should be read, in its context.[92]

The repair is available without overruling Cummings.[93] A reading of the case limited to the substantive notice question for which the contract analogy was originally invoked, leaving the remedial framework of Section 504 governed by the Title VI enforcement tradition the 1973 Congress incorporated and the 2012 executive branch reaffirmed, restores the statute's remedial dimension to its purposes. The disability bar has begun developing the argument in the four years since Cummings was decided. The Ninth Circuit's preservation of "lost opportunities" damages in Payan indicates that the doctrinal trajectory is not foreclosed. The argument has analytical materials supplied by Souter's concurrence in Barnes, by the 2012 record, by Alexander v. Choate, and by the structural disparity the rule has produced over its first four years of operation. The work of the next four years is to develop those materials into doctrinal arguments that a court can adopt and into legislative arguments that a Congress can act on.

In the meantime, disabled persons continue to experience civil rights violations that produce the dignitary, emotional, psychological, and stigmatic harms the statutes were enacted to address.[94] The federal remedial framework continues to tell those persons that the harms they actually experience are not the harms the framework will compensate. The cascade continues. And the record that answers it is not hidden. It sits in a Senate committee print, in a transmittal letter, in sworn testimony from the two agencies charged with enforcing these statutes, and in

91. *See supra* note 41; *Barnes*, 536 U.S. at 190 (Souter, J., concurring); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983).

92. *See supra* Part III; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 308–09 (2006) (Ginsburg, J., concurring in part and concurring in the judgment).

93. *See supra* Part VI.A; *see also supra* note 41 (Ginsburg and Breyer, JJ., drawing the same programmatic-obligation/remedy line).

94. *See* Krnjacki et al., *supra* note 72; Williams et al., *supra* note 73; Barker et al., *supra* note 74.

two concurrences and a dissent that drew the line before anyone needed it.[95] What is missing is not authority. What is missing is the argument, made in a brief, in a case, by someone willing to make it. The repair is overdue.

95. *See supra* Parts III.C, IV.B; S. Exec. Rep. No. 112-6 (2012).

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