

The Cascading Remedy

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

Three independent grounds show the *Cummings* doctrine is structurally wrong, and a doctrinal repair is available without overruling the case.

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. She experiences no lost wages. She incurs no out-of-pocket medical costs. She experiences 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.

Cummings v. Premier Rehab Keller, 596 U.S. 212 (2022); extended to Title II by three circuits, 2024–2026.

STEP 1

Spending Clause statute

Section 504 conditions federal funding on nondiscrimination.

Pennhurst (1981)

STEP 2

Quasi-contract

Spending Clause statutes are "much in the nature of a contract."

Pennhurst (1981)

STEP 3

Contract remedies only

Available remedies are those traditionally available for breach of contract.

Barnes v. Gorman (2002)

STEP 4

No emotional distress

Emotional distress is not traditionally compensable in contract. Therefore: unavailable.

Cummings (2022) → Doherty, A.W., Payan (2024–26)

The chain now reaches Title II of the ADA, not a Spending Clause statute, through a cross-reference Congress enacted in 1990 with no anticipation of what the analogy would carry.

AUTHORITIES Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981); Barnes v. Gorman, 536 U.S. 181 (2002); Cummings, 596 U.S. 212; Doherty v. Bice (2024); A.W. v. Coweta County (2024); Payan v. LACCD (2026).

Metaphor Doing the Work of an Analogy

The Court asserted identity where it should have tracked similarity and difference.

An analogy preserves awareness that two things are not identical. A metaphor asserts identity and carries with it inferences that depend on that identity but that would not survive the analogist's tracking.



WHAT ANALOGY WOULD HAVE ASKED

Points of similarity:

A funded entity accepts terms in exchange for money; the statute supplies the terms; acceptance is implied by conduct.

Points of difference:

The harmed party is not the contracting party. The harm the statute exists to remedy is dignitary, not commercial. The purpose is equal participation, not risk allocation.

WHAT THE COURT DID INSTEAD

Section 504 IS a contract for this purpose. No emotional distress in contract. Therefore: no emotional distress.

The points of difference, which a careful analogist would have foregrounded, are absent from the analysis. The metaphor imported contract law's historical refusal to compensate dignitary harm into the statute whose entire purpose is to compensate it.

BARNES V. GORMAN 2002–20 YEARS BEFORE CUMMINGS

"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."

, Justice Souter, concurring in Barnes, 536 U.S. at 189 n.*

The Cummings majority extended the reasoning twenty years later without engaging the warning.

Souter identified the precise limit the Cummings majority would later transgress. He warned that the analogy gives a defensible answer on punitive damages, universally understood as a contract-law oddity, but may not give a clear answer on compensatory damages, which operate on different principles in civil rights and commercial law. The Court was told. It proceeded anyway. The concurrence is the doctrinal record of the Court itself having been warned.

The 2012 CRPD Ratification Record

The United States formally represented that existing law already satisfied Article 13. Cummings made that representation false.

The executive branch and the Senate Foreign Relations Committee represented on the ratification record that existing United States law, including Section 504, fulfilled or exceeded the Convention's obligation of effective access to justice for disabled persons.



Presidential Transmittal

May 17, 2012

"The Convention does not require any change in existing United States law because current United States law is sufficient to implement the Convention."

Treaty Doc. No. 112-7; statutes identified: ADA, Rehabilitation Act, IDEA.

SFRC Declaration

July 31, 2012 (14-5)

"Current United States law fulfills or exceeds the obligations of the Convention for the United States."

Exec. Rep. No. 112-6. Executive report: "enforcement mechanisms" meet or exceed Convention requirements, including the remedial dimension.

DOJ Testimony

Eve L. Hill, July 12, 2012

"Ratifying the Convention, as proposed, will not require new legislation or create new rights", the position of the federal government's principal civil rights enforcement agency, covering both substantive and remedial dimensions.

AUTHORITIES Convention on the Rights of Persons with Disabilities, Treaty Doc. No. 112-7 (May 17, 2012); Exec. Rep. No. 112-6, 112th Cong., 2d Sess. (2012); Hearing on the CRPD, S. Comm. on Foreign Relations, 112th Cong. (July 12, 2012).

— THE IRRESOLVABLE TENSION

The inconsistency between the 2012 representations and Cummings must be resolved one of two ways.

RESOLUTION A (AVAILABLE)

The 2012 representations were correct. Cummings fell below the baseline and is wrong as a matter of statutory interpretation. Repair: read Cummings narrowly.

RESOLUTION B (UNAVAILABLE)

The 2012 representations were wrong. The United States misrepresented its existing law to the Senate and to the international community. Requires assuming the State Department, DOJ, and SFRC operated in coordinated bad faith.

Within-Class Disparate Impact

The rule is facially neutral. Its operation forecloses the principal remedy for those most harmed.

Under *Alexander v. Choate*, a facially neutral rule violates Section 504 when its operation denies disabled persons meaningful access to a federally funded benefit. The federally funded benefit here is the remedial framework itself.



PRINCIPAL INJURIES ARE PECUNIARY

Wheelchair users denied employment; blind students denied course materials; deaf patients who experience medical mismanagement. The Cummings rule has limited operative effect on these plaintiffs. Principal damages remain recoverable.

PRINCIPAL INJURIES ARE NON-PECUNIARY

Autistic adults, discrimination triggers rumination, sleep disruption, autistic burnout. **PTSD**, re-traumatization. **Anxiety disorders**, cumulative cortisol load and avoidance learning. **Depression**, worsened course. **TBI**, disproportionate emotional dysregulation. **Intellectual and developmental disabilities**, compounding identity damage. The Cummings rule has substantially complete operative effect. The principal damages are foreclosed.

01 Elevated baseline

Disabled people experience emotional and psychological harm from discrimination at rates substantially higher than the nondisabled population, before any subgroup analysis.

02 Disparate impact within the class

Among disabled people, the identified subpopulations experience emotional harm at rates substantially higher than the disabled baseline. The structure of their condition is such that emotional injuries are more severe, more durable, and more consequential.

03 The cascade within the individual

The injury is not a discrete emotional reaction. It is a system perturbation: humiliation → rumination → sleep disruption → autistic burnout → social withdrawal → reduced resilience → worsened response to the next discriminatory encounter. It propagates across days, weeks, and years.

04 Compounding remedy denial

The Cummings rule declares the category of harm that constitutes the principal injury legally invisible. The denial is itself a dignitary harm, layered on top of the underlying discrimination. The legal erasure compounds the substantive discrimination.

The repair is available without overruling Cummings. Limit it to what the contract analogy was originally invoked to do.

The contract analogy was invoked in *Pennhurst* to require clear statement of substantive conditions. The repair reads *Cummings* as answering that question, no more. The remedial framework of Section 504 would return to the Title VI enforcement tradition the 1973 Congress incorporated, with Souter's warning, the 2012 baseline, and Choate as analytical materials.

PAYAN SIGNAL (9TH CIR. 2026)

Preserved "lost opportunities" damages on *Franklin* make-whole grounds. The trajectory is not foreclosed.

THE CUMMINGS RULE WAS NEVER EMBEDDED

It is a four-year-old decision. Its circuit extensions rest on a cross-reference, not independent endorsement. A narrowing reading is doctrinally available.

State-law parallel claims are the principal practical instrument available in the present period. They are not a substitute for the doctrinal repair.

Cal. Civ. Code §§ 51, 54; N.Y. Exec. Law § 296; 775 Ill. Comp. Stat. 5/1–101; Mass. Gen. Laws ch. 151B, and analogous statutes in other jurisdictions, generally authorize non-pecuniary damages.

Limit 1, Uneven availability

Not all states have protective statutes. The workaround is unavailable in the jurisdictions where it is most needed.

Limit 2, Federal funding hook

Claims that depend on Section 504's federal funding jurisdiction have no state substitute when state law is absent.

Limit 3, Meta-discrimination

The state remedy compensates the underlying harm but does not undo the communication that the federal civil rights framework does not count your injury. The dignitary harm of federal erasure is unreachable by state law.

— IN CONCLUSION

The repair is available without overruling Cummings. The cascade continues. The repair is overdue.

Metaphor ground

The Court asserted identity where analogy was required. Souter warned in 2002 that this step was too far. The majority took it in 2022 without engaging the warning.

Ratification ground

The executive branch and SFRC formally represented on the 2012 CRPD record that Section 504 already fulfilled Article 13. Cummings made that representation false.

Disparate impact ground

The rule forecloses the principal remedy for the disabled subpopulations whose injuries are predominantly emotional, psychological, and dignitary, precisely the structure Choate was designed to reach.

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