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Emotions Matter: Emotional Distress Damages for Discrimination in Public Benefits

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EMOTIONS MATTER: EMOTIONAL DISTRESS DAMAGES FOR DISCRIMINATION IN PUBLIC BENEFITS*

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"Title VI is sound; it is morally right; it is legally right; it is constitutionally right . . . What will it accomplish? It will guarantee that the money collected by colorblind[1] tax collectors will be distributed by Federal and State administrators who are equally colorblind. Let me say it again: The title has a simple purpose—to eliminate discrimination in Federally financed programs."
– Senator John Pastore[2]

** Third Year Law Student and Chancellors Scholar at the University of North Carolina at Chapel Hill School of Law, Second Year Master of Public Policy Student and Margolis Scholar at Duke University. I am grateful to the law journal editors for their careful editorial work on this piece. I also appreciate the thoughtful and invaluable feedback provided by Madison Allen, Heather Hunt, Jane Perkins and others in the litigation team at the National Health Law Program, David Super, and Joseph Wardenski. Further, I would like to thank Professor Kathryn A. Sabbeth who teaches us in the UNC Civil Legal Assistance Clinic that our clients' emotions matter. Finally, I wish to thank my father Jack Holtzman, who not only provided edits on this Comment, but also served as an incredible role model to me of a meaningful, lifelong career in direct legal services work and civil rights advocacy. Thank you.

1. Note that the concept of a "colorblind" society is no longer promoted, nor accepted, as the ideal. Instead, this quote, read within today's context, might use the word "non-discriminatory" in place of "colorblind."

2. U.S. DEP'T OF JUST. C.R. DIV. FED. COORDINATION & COMPLIANCE SECTION, TITLE VI LEGAL MANUAL: SECTION II - SYNOPSIS OF LEGIS. HISTORY & PURPOSE OF TITLE VI (2021) (Senator John Pastore (D-RI) in 1964, addressing how North Carolina received federal money for the construction of hospitals that discriminated against Black patients and staff), https://www.justice.gov/crt/fcs/T6manual2.

INTRODUCTION

Many North Carolina families, including the 13% who live in poverty,[3] depend upon federally funded benefits. These benefits not only provide food and health care, but they also seek to provide a basic level of economic security and stability to low-income North Carolinians that low-wage work does not. Given the crucial role public benefits play, legal protections are essential to ensure benefits are fairly administered to individuals who rely upon them. This makes *Cummings v. Premier Rehab Keller, P.L.L.C.,* a recent decision of the United States Supreme Court which significantly limits the scope of remedies available to those denied federally funded programs or activities due to discrimination, vastly troubling.[4]

Beginning with the Civil Rights Act of 1964, our country enacted important anti-discrimination statutes to protect against discrimination by individuals and entities receiving federal funding (also called "federal funding recipients").[5] A key provision of the Civil Rights Act of 1964, Title VI, was interpreted to protect against discrimination, in part, by providing a private right of action for victims of intentional discrimination in violation of the statute.[6] Later anti-discrimination statutes incorporated Title VI's private right of action.[7] As a result, victims of discrimination were able to recover for the emotional pain and suffering they experienced due to that

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3. U.S. CENSUS BUREAU, QUICKFACTS N.C. (2021), https://www.census.gov/quickfacts/NC.

4. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).

5. Note that the word "recipient" is used in two ways throughout this comment: (1) federal funding recipients (individuals or entities) that are perpetuating the discrimination, and (2) public benefits recipients who are individuals experiencing the discrimination being perpetuated by the federal funding recipient.

6. *See* Cannon v. Univ. of Chicago*,* 441 U.S. 677, 703 (1979) (holding that the Court has "no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination").

7. Title VI's private right of action has been incorporated into Title IX of the Education Amendments Act of 1972, Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Affordable Care Act. *See Cannon*, 441 U.S. at 699–701 (holding that Title VI's private right of action applies to cases brought under Title IX); Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act . . . shall be available . . . [under Section 504]."); Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a) ("The enforcement mechanisms provided for and available under such Title VI, Title IX, Section 794, or such Age Discrimination Act shall apply for purposes of [Section 1557]."). For more information, see Part III(b) below.

discrimination.[8] These emotional distress damages served as a key protection for victims of discrimination and an important deterrent for federal funding recipients that might otherwise discriminate.[9]

In 2016, a woman named Jane Cummings contacted Premier Rehab Keller (Premier Rehab) to schedule a physical therapy appointment for her chronic back pain.[10] Cummings, who is deaf and partially blind, communicates using American Sign Language (ASL).[11] Despite Cummings asking Premier Rehab three different times for an ASL interpreter, Premier Rehab refused to provide her with one.[12] Cummings brought suit, alleging that Premier Rehab discriminated against her on the basis of disability in violation of Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act (ACA).[13] Cummings sought damages for the "humiliation, frustration, and emotional distress" she suffered because of the discrimination she experienced.[14] When the District Court for the Northern District of Texas held *sua sponte*, and the Fifth Circuit then affirmed, that damages for emotional distress are categorically unrecoverable to victims of discrimination under these statutes, Cummings sought review by the Supreme Court.[15]

At stake was whether individuals facing discrimination under or denied the benefits of a federally funded program or activity, in violation of four federal anti-discrimination statutes enacted under the Spending Clause, may recover emotional distress damages as one form of relief.[16] These four Spending Clause anti-discrimination statutes are: Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments Act of 1972

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8. *See, e.g.*, Prescott v. Rady Child.'s Hosp. – San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (holding that a mother may recover non-economic compensatory damages for pain and suffering caused by a federally funded children's hospital that discriminated against her transgender son because of his gender identity).

9. TITLE VI LEGAL MANUAL: SECTION II, *supra* note 3.

10. Cummings v. Premier Rehab, P.L.L.C., No. 4:18-CV-649-A, 2019 WL 227411, at *1 (N.D. Tex. Jan. 16, 2019).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 680 (5th Cir. 2020).

16. *Id.* at 675.

(Title IX), Section 504 of the Rehabilitation Act of 1973 (Section 504), and Section 1557 of the Affordable Care Act of 2010 (Section 1557).[17]

The Fifth Circuit's ruling was the first federal appellate decision finding emotional distress damages unavailable under the Spending Clause anti-discrimination statutes, and a sharp deviation from an Eleventh Circuit ruling from more than a decade ago: *Sheely v. MRI Radiology Network, P.A.* held that "non-economic damages are indeed available under the Rehabilitation Act."[18] The Eleventh Circuit wrote, "[w]e think it fairly obvious . . . that a frequent consequence of discrimination is that the victim will suffer emotional distress. As a result, 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."[19] Thus, the Eleventh Circuit concluded, "[a]s a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination."[20]

Nonetheless, in *Cummings*, the Supreme Court deviated from the Eleventh Circuit when it held, in a 6-3 opinion, that emotional distress damages are categorically unavailable in cases brought under Section 504 of the Rehabilitation Act and Section 1557 of the ACA.[21] The Court used contract law for its analysis of these Spending Clause anti-discrimination statutes, because "'legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [federal funding recipients] agree to comply with federally imposed conditions.'"[22] The Court then reasoned that, because emotional distress damages are not usually available under contract law, they are not available to individuals denied the benefits of federally funded programs or activities due to discrimination.[23]

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17. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1569 (2022).

18. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1177 (11th Cir. 2007).

19. *Id.* at 1198.

20. *Id.* at 1199.

21. *See Cummings*, 142 S. Ct. at 1576 ("[W]e hold that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here.").

22. *Id.* at 1568 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

23. *Id.* at 1576.

This decision is detrimental in myriad ways. The decision removes key remedies for victims of intentional discrimination suing under Section 504 and Section 1557, the two Spending Clause anti-discrimination statutes in *Cummings*. Further, it threatens those remedies for victims suing under the other Spending Clause anti-discrimination statutes that also incorporate Title VI's private right of action and associated remedies, as discussed further below.

This comment will examine the important role that emotional distress damages have historically played as remedies for victims of intentional discrimination by federally funded programs or activities, and will argue that the emotions of discrimination victims matter. Further, this comment will explain how the *Cummings* decision will impact public benefits recipients specifically, and why public benefits recipients' voices must be centered in all decisions regarding changes to public benefits moving forward.[24]

Part I provides a brief explanation of the terms and concepts. It explains that only the largest means-tested social welfare public benefits programs (such as Medicaid, Children's Health Insurance Program or CHIP, Temporary Assistance for Needy Families or TANF, and Supplemental Nutrition Assistance Program or SNAP) are included in the scope of this comment and that this comment primarily focuses on intentional discrimination within those programs.

Next, Part II discusses discrimination in public benefits programs, explaining the long, painful history of federally funded public benefits administrators discriminating against vulnerable recipients. It notes that although intentional discrimination in public benefits is difficult to prove, researchers have documented discrimination in public benefits generally, and that such discrimination causes multiple types of harm upon the victim.

Part III shifts to provide an overview of the Spending Clause anti-discrimination statutes. This part begins with an explanation of Title VI and then walks through three other anti-discrimination statutes that incorporate

24. While the scope of this article focuses on remedies and uses the term "victim" for the sake of brevity, people hold vast and diverse forms of power—such as relational power—beyond the injuries they suffer from discrimination they have experienced. The model of movement lawyering, or social justice lawyering, approaches lawyering through a framework of collective power, instead of individual injury. For more, *see*, *e.g.*, Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 42 (2011) ("Too often, 'rights' in litigation are synonymous with grievances, so that those who claim them (or on whose behalf lawyers claim them) are defined by their weakness and need for state intervention.").

Title VI's private right of action and associated remedies. This part also gives an overview of the caselaw establishing emotional distress damages as an available remedy for victims of intentional discrimination under these statutes.

Part IV explains the *Cummings* case. This part summarizes the case at the district court and Fifth Circuit levels before turning to the decision of the Supreme Court. For the Supreme Court's decision, this part provides an overview of the majority's holding before exposing the moral and legal flaws in the majority opinion.

Finally, Part V considers the impact of the Supreme Court's decision on both low-income people in general and North Carolinians in particular. Additionally, it considers the importance of reimagining public benefits programs moving forward, and of centering the voices of public benefits recipients in that work.

I. BACKGROUND

This Part first provides a definition of public benefits programs, which are a subset of all the federally funded programs and activities to which Title VI, and *Cummings*, apply. This Part also gives an overview of the various types of discrimination. Further, this Part briefly summarizes the main categories of remedies available generally, as well as those available in discrimination cases specifically.

A. *Explanation of Public Benefits*

This comment focuses on means-tested public benefits programs.[25] These programs are administered and supervised by entities or individuals

25. Means-tested public benefits, however, are frequently referred to by a myriad of other names, including: "public assistance programs," "government benefits," "safety net programs," "social safety net programs," and (perhaps the most stigmatized, and most often used when speaking about cash benefits for young, unmarried mothers of color) "welfare." *See* Hari Sreenivasan, Sam Weber, & Connie Kargbo , *The True Story Behind the 'Welfare Queen' Stereotype*, PBS NEWS HOUR WEEKEND (June 1, 2019, 5:06 PM), https://www.pbs.org/newshour/show/the-true-story-behind-the-welfare-queen-stereotype. Note that in North Carolina, state statutes refer to this category of benefits as "public assistance program[s]," and defines them as "[a]ny means-tested benefit program administered or supervised by a county department of social services or the Department of Health and Human Services which is funded in whole or in part by federal, State, or county

that receive federal funding. Examples of federally funded public benefits administrators include county departments of social services, county public health departments, and state departments of health and human services.[26] Other federal funding recipients that are included under the scope of this comment (although not public benefits administrators *per se*) include health care providers that receive federal funding, such as Medicaid or Medicare reimbursements.[27] A federal funding recipient need not operate *exclusively* on federal funding to be considered a federal funding recipient.

An individual's eligibility for public benefits programs is means-tested, meaning it is based on the income and assets of the applicant or their household. The actual rules for determining what is included as income and assets vary based upon the program. The myriad rules are dizzying at best, and often leave applicants at the whim of caseworkers to know and navigate the complex eligibility rules.

To maintain a reasonable scope in this piece, I address only the largest public benefits programs in North Carolina, which are shown in Table 1 of the Appendix.[28] These include health programs (such as Medicaid and the Children's Health Insurance Program or 'CHIP'), income security programs

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resources." N.C. GEN. STAT. § 108A-25.3(a)(4) (1997). For the sake of consistency throughout this comment, I will use the term "public benefits" when referring to means-tested public benefits programs.

26. The name of the agency or department that administers public benefits programs differs by state—and in some states, it is divided into multiple agencies or departments. For example, in Alabama, the Alabama Department of Human Resources administers TANF and SNAP, *see, e.g.,* ALA. DEP'T HUM. RES., https://dhr.alabama.gov/food-assistance/ (last visited Oct. 5, 2022), the Alabama Department of Public Health runs WIC, *see, e.g.*, ALA. DEP'T OF PUB. HEALTH, https://www.alabamapublichealth.gov/index.html (last visited Oct. 5, 2022), and the Alabama Medicaid Agency runs Medicaid, *see, e.g.*, ALA. MEDICAID, https://medicaid.alabama.gov/ (last visited Oct. 5, 2022). Meanwhile, in Texas, the Texas Department of Health and Human Services administers all public benefits covered in this comment. *See, e.g.*, TEX. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.texas.gov/ (last visited Oct. 5, 2022).

27. 99% of all non-pediatric physicians receive Medicare funding. Nancy Ochieng, Karyn Schwartz, & Tricia Neuman, *How Many Physicians Have Opted-Out of the Medicare Program?*, KAISER FAM. FOUND. (Oct. 22, 2020), https://www.kff.org/medicare/issue-brief/how-many-physicians-have-opted-out-of-the-medicare-program/.

28. Because North Carolina is one of the states that does not offer the income security program called General Assistance (GA), I will not include that within the scope of this comment. Liz Schott, *State General Assistance Programs Very Limited in Half the States and Nonexistent in Others, Despite Need*, CTR. ON BUDGET & POL'Y PRIORITIES 13 (July 2, 2020), https://www.cbpp.org/sites/default/files/atoms/files/7-9-15pov.pdf.

(such as Temporary Assistance for Needy Families or 'TANF'),[29] and nutrition programs (Supplemental Nutrition Assistance Program or 'SNAP' and Special Supplemental Nutrition Program for Women, Infants and Children or 'WIC'). While each of these programs is federally funded, they are all administered by the North Carolina Department of Health and Human Services (NCDHHS) at the state level and county Departments of Social Services at the local level.[30]

I excluded other forms of benefits. For example, I excluded tax credits because they are largely administered by the Internal Revenue Service.[31] Further, I excluded social insurance programs,[32] as eligibility for these programs is usually based on criteria such as age, employment, or veteran status, instead of income or assets.[33] Additionally, I excluded Section 8 and Public Housing benefits because, although they are means-tested federally funded benefits programs, (1) they fall under the Fair Housing Act, which the Supreme Court has already interpreted to provide for emotional distress

29. *E.g.*, STAFF OF H. COMM. ON THE BUDGET, 115TH CONG., WHAT YOU NEED TO KNOW ABOUT MEANS-TESTED ENTITLEMENTS (Comm. Print 2017), https://democrats-budget.house.gov/sites/democrats.budget.house.gov/files/documents/Means%20Tested%20Entitlement%20Programs.pdf. Although Supplemental Security Income (SSI) is an income security program like TANF, SSI is not administered at a state or local level to the same extent that the other programs are, and so it will not be included within the scope of this paper.

30. As the NCDHHS website explains, "North Carolina has a federally mandated, state supervised, county administered social services system. This means the federal government authorizes national programs and a majority of the funding, and the state provides oversight and support. The 100 local social service agencies deliver the services and benefits." *About DSS: General Information,* N.C. DEP'T OF HEALTH & HUM. SERVS., https://www.ncdhhs.gov/divisions/social-services/about-dss/general-information (last visited Oct. 5, 2022).

31. Examples of tax credits include Earned Income Tax Credits, Child Tax Credits, and the Affordable Care Act's Premium Tax Credits.

32. Examples of social insurance programs include social security retirement, VA benefits, unemployment insurance, and workers compensation.

33. *About Public Assistance*, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/public-assistance/about.html (last visited Oct. 20, 2022).

damages,[34] and (2) an existing body of research addresses the availability of emotional distress damages under the Fair Housing Act.[35]

B. *Types of Discrimination*

Discrimination may be described as (1) intentional discrimination, the victims of which would bring a disparate treatment claim, or (2) causing disparate impact, the victims of which would bring a disparate impact claim.[36] This comment will primarily focus on intentional discrimination because private parties seeking to enforce Title VI's anti-discrimination provisions must prove discriminatory intent; liability for disparate impact

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34. Even Attorney Shanmugam, arguing for Premier Rehab during oral arguments, acknowledged this. Oral Argument at 1:10:46, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219 ("First, there are statutes, and I think the best examples are Section 1983 and the Fair Housing Act, where emotional distress damages are permitted. Those are statutes with pretty broad language. The Fair Housing Act, for instance, provides for actual damages, and courts have construed that to include emotional distress damages.").

35. *See* Alan W. Heifetz & Thomas C. Heinz, *Separating the Objecting, the Subjective, and the Speculative: Assessing Compensatory Adjudication*, 26 J. MARSHALL L. REV. 3, 17–24 (1992) ("Actual damages in housing discrimination cases are not limited to tangible economic or out-of-pocket losses, but may also include damages for intangible injuries, including such psychic harm as embarrassment, humiliation, and emotional distress. In recognizing a "dignitary" interest that is subject to damage by a discriminatory act, the United States Supreme Court in *Curtis v. Loether* made it clear that housing discrimination law was intended to redress harm to the person, as well as harm to the victim's ability to contract for housing."); *see also* Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L.J. 1143 (2003); Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, app. A at 175 (1981) (outlining all reported federal fair housing cases that awarded compensatory damages, and whether the plaintiff had a claim or other evidence of emotional distress).

36. I take issue with the term "intentional." I believe the notion that only select instances of discrimination are "intentional" provides a convenient cover for federal funding recipients to engage in discriminatory behavior without revealing their intention behind it—only to claim later that because there is no *evidence* of their intention, the discrimination must not have been intentional (even when it was). However, many scholars, attorneys, legislators, and judges use the term "intentional discrimination," so for the sake of clarity, I will too.

claims is unavailable under Title VI.[37] Intentional discrimination in public benefits may look different depending upon the circumstance. For example, sometimes the person administering the public benefit is the person discriminating *(e.g.*, a case worker deciding on sanctions in TANF, or an eligibility worker deciding on eligibility for SNAP), and sometimes a third party is discriminating and the administrators knew about it but proceeded with deliberate indifference by not stopping it (*e.g.*, when a third party created a hostile environment in a school and the administration did not intervene).[38] Given the variety of circumstances in which intentional discrimination may occur, plaintiffs can prove discriminatory intent through direct evidence (such as express classifications, comments, or conduct by decision makers) or through circumstantial evidence.[39]

Instances of either type of discrimination may be attributed to several factors. As Randal Jeffrey explains, these factors include "low staff pay and understaffing, administrators' failure to invest in management systems, the lack of political power of the poor to demand reform, and the dysfunction inherent within government bureaucracies."[40] Further, Michael Lipsky points out that public benefits administrators, whom he calls "street-level bureaucrats," are tasked with interpreting and executing ambiguous agency goals, despite having huge caseloads and inadequate resources to handle

37. *See, e.g.*, U.S. DEP'T OF JUST. C.R. DIV. FED. COORDINATION & COMPLIANCE SECTION, TITLE VI LEGAL MANUAL: SECTION VI – PROVING DISCRIMINATION – INTENTIONAL DISCRIMINATION (2021), https://www.justice.gov/crt/fcs/T6Manual6 (citing Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001)).

38. TITLE VI LEGAL MANUAL SECTION VI, s*upra* note 38.

39. Circumstantial evidence may be proven through, for example, the *Arlington Heights* mosaic of factors often used to prove discrimination against groups of people, or the *McDonnell-Douglas* framework often used to prove discrimination against individuals. *See* TITLE VI LEGAL MANUAL: SECTION VI, *supra* note 38. One case from Ohio helps elucidate what the *Arlington Heights* factors may look like in an intentional discrimination case about SNAP. In *Almendares v. Palmer*, Spanish-speaking SNAP recipients in Ohio alleged that the state agencies administering SNAP had engaged in intentional discrimination based upon national origin when they failed to provide bilingual services for SNAP applicants with limited English proficiency, despite knowing that applicants were being harmed by a lack of such services. Almendares v. Palmer, 284 F. Supp. 2d 799, 806 (N.D. Ohio 2003). After the defendants filed a motion to dismiss, the court determined the plaintiffs had alleged enough to survive the motion because "disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants" were the types of circumstantial evidence on which intentional discrimination claims may be based. *Id.*

40. Randal Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 BROOK. L. REV. 281, 293 (2003).

them.[41] As a result, each administrator adopts shortcuts, which are often interwoven with biases that prevent evenhanded treatment.[42]

C. *Addressing Discrimination: Types of Remedies and Their Goals*

The more essential the resource, the more it ought to be protected. Civil actions are a critical form of protecting public benefits for those who need them. Unfortunately, limiting the remedies available in civil suits strips this protection of much of its power.

In the U.S. judicial system, there are three major types of remedies: punitive damages, injunctive relief, and compensatory damages. While the goal of punitive damages is to punish, and the goal of injunctive relief is to stop bad behavior or compel good behavior, the goal of compensatory damages is to make the victim "whole." Within compensatory damages, there are economic damages (also called pecuniary damages) and non-economic damages (also called non-pecuniary damages). Non-economic damages include emotional distress damages. Emotional distress damages are awarded for a variety of types of emotional distress. Although the most common is emotional pain and suffering, emotional distress damages may be awarded for other types of distress as well.[43]

In civil rights cases, Supreme Court jurisprudence permits victims of intentional discrimination to bring suits under any of the Spending Clause anti-discrimination statutes. Through those suits, plaintiffs may seek injunctive or compensatory relief—but not punitive damages.[44] The type of relief historically available for cases brought under the Spending Clause anti-discrimination statutes is discussed further in Part III below.

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41. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (30th anniversary expanded ed. 2010).

42. *See generally id.*

43. For example, see the Equal Employment Opportunity Commission's summary of emotional distress damages available in employment discrimination claims under Title VII: "inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, fright, shock, humiliation, indignity, apprehension, marital strain, loss of self-esteem, anxiety, depression, loss of respect of one's friends and family, isolation, and grief." *Nonpecuniary Compensatory Damages: Issues for Review with Claimants Prior to Filing Suit,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/regional-attorneys-manual/d-nonpecuniary-compensatory-damages-issues-review-claimants-prior-filing.

44. *See* Barnes v. Gorman, 536 U. S. 181, 185, 187, 189 (2002).

II. ONGOING HISTORY OF DISCRIMINATION IN PUBLIC BENEFITS

This country has a long and sordid history of discrimination in public benefits.[45] One of many historical examples is "the Franklin D. Roosevelt Administration's deliberate exclusion of Black people from New Deal-era policies, which created our modern public benefits programs and elevated many low-income white people into the middle class."[46] Researchers have documented the pervasiveness of such discrimination over time, as well as its effects on victims.

A. *Research Documenting Discrimination in Public Benefits*

Discrimination in public benefits is documented in research. In a 12-month study by the Urban Institute on the experiences of adults of *any income* seeking public assistance or social services (which includes means-tested programs as well as non-means tested program), Black respondents (5.6%) were more likely to report unfair treatment or judgment than their Latinx (4.9%) and white (1.5%) counterparts.[47] But reports of unfair treatment or judgment were even more pervasive among *low-income* adults seeking public assistance or social services (which would include higher amounts of means-

45. *See, e.g.,* Alma Carten, *How Racism Has Shaped Welfare Policy in America Since 1935*, THE CONVERSATION (Aug. 21, 2016), https://theconversation.com/how-racism-has-shaped-welfare-policy-in-america-since-1935-63574 (explaining how racism has shaped benefits programs, like TANF, since 1935); *see also* Jeffrey, *supra* note 41, at 286.

46. Alice Aluoch, Maryann Broxton, Yolanda Gordon, Barbie Izquierdo, Tamika Moore, Parker Gilkesson, Teon Dolby, & Elizabeth Lower-Basch, *A Community-Driven Anti-Racist Vision for SNAP*, CTR. FOR L. & SOC. POL'Y 7 (Sept. 2022), https://www.clasp.org/wp-content/uploads/2022/09/2022.9.28_A-Community-Driven-Anti-Racist-Vision-for-SNAP.pdf ("For example, Southern states sometimes restricted access to benefits during harvesting seasons to effectively coerce poor, Black families into working in the fields as sharecroppers at whatever wages were offered. *Anderson v. Burson* successfully challenged Georgia's policy of cutting all 'able-bodied Negro women' off welfare at cotton-picking time.").

47. Eleanor Pratt & Heather Hahn, *What Happens When People Face Unfair Treatment or Judgment When Applying for Public Assistance or Social Services?*, URB. INST. (Aug. 2021), https://www.urban.org/sites/default/files/publication/104566/what-happens-when-people-face-unfair-treatment-or-judgment-when-applying-for-public-assistance-or-social-services_0.pdf.

tested programs), with Black respondents (11.2%) more likely to report unfair treatment than their Latinx (6.7%) and white (3.7%) counterparts.[48]

Intentional discrimination in public benefits, however, is often difficult to prove through research. This is true for multiple reasons. As David Super wrote about cash assistance programs, but relevant to all public benefits programs, "[o]btaining a representative sample of cash assistance recipients is difficult and expensive without the cooperation of human services agencies, who may be skittish about facilitating research that could result in their exposure to civil rights claims."[49] Further, even for agencies who are willing to facilitate the research, "recipients' privacy rights may hamper its ability to open its files to outside researchers."[50]

While intentionality is difficult to prove, researchers have documented discrimination in public benefits generally. Below are a few of examples of such research in SNAP and TANF.

1. Supplemental Nutrition Assistance Program (SNAP)

One example of SNAP discrimination can be seen in states' practices of alleging Intentional Program Violations (IPVs) against recipient households.[51] For example, David Super, a national SNAP expert, conducted research on nearly two decades of IPV applications in the Georgia SNAP program. He found that "(1) the process by which [IPVs] are determined in SNAP is profoundly abusive in a great many instances, and (2) we have reason to believe that those abusive forces are unleashed on people of color disproportionately."[52] This is because "solid evidence of actual guilt is rarely

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48. *Id.*

49. DAVID SUPER, PUBLIC WELFARE LAW 1045 (2016).

50. *Id.* (citing 7 U.S.C. § 2020(e)(8) (protecting SNAP recipients' information)) ("Reportedly, some human services agencies have conditioned their cooperation on researchers agreeing to give them a veto on the release of any results and then suppressed embarrassing findings.").

51. A person has committed an IPV if they intentionally "(1) [m]ade a false or misleading statement, or misrepresented, concealed or withheld facts; or (2) [c]ommitted any act that constitutes a violation of SNAP, SNAP regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of SNAP benefits or EBT cards." 7 C.F.R. § 273.16 (2011).

52. Email from David Super, Professor of Law, Georgetown Law, to author (Jan. 20, 2022, 09:22pm EST) (on file with author); *see, e.g.*, David Super, Complaint Filed with United States Department of Agriculture, *Complaint Concerning Financial Improprieties and Violations of Federal Law in the Pursuit of Alleged SNAP Intentional Program*

a part of what gets someone in trouble for an IPV. For eligibility IPVs, if the information in the case file does not match other information the SNAP agency receives, the eligibility worker makes a highly discretionary assessment of whether it is likely fraud."[53]

Discretionary assessments in SNAP "create[] opportunity for racial discrimination."[54] While the discrimination may be hard to prove, "[g]iven our nation's history and the studies about racial skew in eligibility workers' exercises of discretion in other contexts (e.g., approving transportation and child care subsidies in TANF work programs), it would be very naive to believe that race play[s] no part" when a SNAP eligibility worker sees inconsistencies within two applications and believes the Black applicant intended to defraud the agency, yet the comparable white applicant simply made an innocent mistake.[55]

2. Temporary Assistance for Needy Families (TANF)

Much has been published regarding discrimination in TANF. Extensive research across states documents that the application of sanctions on TANF recipients by case workers is deeply imbued with racist stereotypes, prejudice, and discrimination.[56] In TANF, if recipients do not meet certain work and other programmatic requirements imposed by the state agency, they

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Violations under Contracts between the Georgia Department of Human Services and the Prosecuting Attorneys' Council (Sept. 3, 2010), https://perma.cc/2DTT-G2YM (documenting extensive data showing that Georgia's SNAP program was illegally utilizing IPVs for nearly two decades) (on file with author).

53. Email from David Super, Professor of Law, Georgetown Law, to author (Jan. 20, 2022, 09:22pm EST) (on file with author).

54. Parker L. Gilkesson, *SNAP "Program Integrity:" How Racialized Fraud Provisions Criminalize Hunger*, CTR. FOR L. & SOC. POL'Y 8 (March 2022), https://www.clasp.org/wp-content/uploads/2022/04/2022_SNAP20Program20Integrity20-20How20Racialized20Fraud20Provisions20Criminalize20Hunger.pdf (citing Email from David Super to CLASP (June 5, 2021), https://www.clasp.org/sites/default/files/David%20Super%20-%20Thoughts%20on%20Race%20and%20SNAP%20IPVs%20-%2006.05.21.pdf).

55. *Id.*

56. *See generally* Ife Floyd, LaDonna Pavetti, Laura Meyer, Ali Safawi, Liz Schott, Evelyn Bellew, & Abigail Magnus, *TANF Policies Reflect Racist Legacy of Cash Assistance Reimagined Program Should Center Black Mothers,* CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 4, 2021), https://www.cbpp.org/sites/default/files/8-4-21tanf.pdf.

or their entire family may be subject to sanctions.[57] A review of TANF research found that "[n]early every study comparing the race and ethnicity of sanctioned and non-sanctioned TANF recipients finds that African American recipients are significantly more likely to be sanctioned than their white counterparts," citing studies from Michigan, Florida, New Jersey, and especially, Wisconsin.[58] Other studies show that, in addition to Black families being sanctioned at higher rates, Latinx families, American Indian families, and Alaska Native families are more likely to be sanctioned than their white counterparts.[59]

Another example of research documenting racist discrimination in the application of TANF sanctions comes from an experiment in Florida. Florida TANF case managers were randomly assigned to case studies of families that "differed in their race/ethnicity and in the possession of stereotype-consistent

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57. *See, e.g.*, *The Sanction Epidemic in the Temporary Assistance for Needy Families Program,* LEGAL MOMENTUM 1 (2008), https://www.legalmomentum.org/sites/default/files/reports/sanction-epidemic-in-tanf.pdf.

58. LaDonna Pavetti, *TANF Studies Show Work Requirement Proposals for Other Programs Would Harm Millions, Do Little to Increase Work*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 13, 2018), https://www.cbpp.org/research/family-income-support/tanf-studies-show-work-requirement-proposals-for-other-programs ("In 2002, the ACLU and the Milwaukee branch of the NAACP filed a complaint with HHS' Office for Civil Rights claiming racial and disability discrimination in the application of sanctions against TANF participants. The claim was based on data from the Wisconsin Department of Workforce Development showing a consistent pattern of racial and ethnic discrepancies in TANF sanctions. Statewide, 42 percent of African American participants and 45 percent of Hispanic participants were sanctioned, compared to just 24 percent of white participants. Though the state did not admit to any violations to the Civil Rights Act, it entered into an agreement with the Office for Civil Rights requiring staff training, improved assessment screening tools and procedures, reasonable accommodations for clients' needs, and new procedures to ensure that the agency considers disabilities and barriers before taking adverse action."); *see also* Karyn Rotker & Jerry Hamilton, *Complaint Filed with Office for Civil Rights in the United States Department of Health and Human Services* (Feb. 18, 2002), https://nclej.org/wp-content/uploads/2015/11/ocrada1.pdf ("We have serious concerns regarding the Wisconsin [state agency's] failure to properly comply with civil rights requirements and the [ADA]."); Reggie Bicha & Valerie Morgan-Alston, *Voluntary Compliance Agreement Between the United States Department of Health and Human Services Office for Civil Rights and the Wisconsin Department of Children and Families* (no date), https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/examples/TANF/witanfagreement.pdf.

59. Elisa Minoff, *The Racist Roots of Work Requirements*, CTR. FOR THE STUDY OF SOC. POL'Y 24 (2020), https://cssp.org/wp-content/uploads/2020/02/Racist-Roots-of-Work-Requirements-CSSP-1.pdf.

discrediting traits."[60] The researchers then asked the case managers whether they would choose to impose sanctions onto the fictional family to which they were randomly assigned.[61] The researchers found that "the probability of a sanction rose significantly when a 'discrediting marker' — such as a previous sanction, or having multiple children — was attached to a Black participant, but not when it was attached to a [w]hite participant."[62] Ultimately, the researchers theorized that the discrediting markers triggered racist stereotypes that Black people did not want to work—thus increasing the chance that the case managers would sanction Black people.[63]

Meanwhile, pivotal research by Professor Susan Tinsley Gooden documented the discriminatory nature of eligibility workers' interactions with Black TANF recipients in Virginia.[64] Professor Gooden had convinced the Virginia Department of Social Services to mail letters to TANF recipients in two counties, requesting that they contact Professor Gooden and authorize a release of information to her about their case.[65] Through those interviews with TANF recipients, Professor Gooden found that Black TANF recipients were less likely than white recipients to find their eligibility workers helpful, less likely to have had a eligibility worker encourage them to pursue educational or other training opportunities, and less likely to receive offers for TANF-funded transportation support from their eligibility worker.[66] While these findings do not necessarily prove intentional discrimination, they elucidate disparate impact based upon race.

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60. Sanford F. Schram, Joe Soss, & Linda Houser, *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 AM. SOCIO. REV. 398, 399, 414 (June 1, 2009) https://doi.org/10.1177%2F000312240907400304.

61. *Id.* at 399.

62. Minoff, *supra* note 60, at 24.

63. *Id.*

64. DAVID SUPER, PUBLIC WELFARE LAW 1045–49 (2016) (citing Susan Tinsley Gooden, *All Things Not Being Equal: Differences in Caseworker Support Towards Black and White Welfare Clients*, 4 HARV. J. AFR.-AM. PUB. POL'Y 22 (1998)).

65. *Id.* at 1045.

66. *Id.* at 1046–47.

B. *Discrimination's Effect on Public Benefits Applicants and Recipients*

Discrimination in public benefits programs harms low-income people's emotional and physical wellbeing, as well as their ability to access the essential benefits they need.

1. Harm to Emotional and Physical Wellbeing

Discrimination can cause severe harm to the victim's emotional and physical wellbeing. Victims of discrimination may experience "anger, frustration, resentment, humiliation, or shame," along with "[d]epression . . . evidenced by hostility, irritability, or indecision."[67] Further, victims may experience "[m]ortification in the presence of others and fear of recurrence of the discriminatory conduct [which] may lead the victim to withdraw from contact or diminish emotional involvement with family, friends, or colleagues."[68]

Emotional distress can manifest as physical symptoms too. For example, physical symptoms of emotional harm include ulcers, nausea, sleep disturbance, and impotence.[69] Moreover, research documents that Black people who have been racially discriminated against over the course of their lives experience a shortening of their telomeres (which in turn, increases their susceptibility to and progression of aging-related diseases).[70] Because of the incredibly damaging effects of discrimination, proper remedies are essential to ameliorate existing harm and prevent future harm.

2. Harm Due to Lack of, or Delayed, Access to Life's Bare Essentials

The Urban Institute found that among people who reported unfair treatment or judgment when applying for social services or public assistance,

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67. Heifetz & Heinz, *supra* note 36, at 20.

68. *Id.*

69. *Id.*

70. *See, e.g.*, David H. Chae, Connor D. Martz, Tiffany Yip, Thomas E. Fuller-Rowell, Karen A. Matthews, Erica C. Spears, Yijie Wang, Natalie Slopen, Nancy E. Adler, Jue Lin, Gene H. Brody, Eli Puterman, & Elissa S. Epel, *Racial Discrimination and Telomere Shortening Among African Americans: The Coronary Artery Risk Development in Young Adults (CARDIA) Study*, 39(3) HEALTH PSYCH. 209 (Mar. 2020), available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7373166/.

26.8% delayed going to get the benefit, and 40.8% did not get the benefit at all.[71] Moreover, extensive research shows that "people face severe short- and long-term consequences when they do not get or delay getting needed assistance."[72] This is true across a wide variety of public benefits programs, including Medicaid and SNAP.[73] It is unsurprising that such a delay would result in negative consequences for the victim, as an improper denial or reduction of public benefits strips a low-income person of life's bare essentials, like clothing and shelter,[74] as well as the ability to buy food[75] and afford medical care.[76] As Randal Jeffrey explained, a "deprivation of even a portion of public assistance, food stamps, or Medicaid constitutes almost *per se* irreparable harm."[77]

One example of research documenting the importance of benefits is the infamous "Oregon study," which was conducted after Oregon expanded Medicaid to a number of adults through a randomized lottery in 2008.[78]

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71. Pratt & Hahn, *supra* note 48, at 4.

72. *See, e.g.*, *id.* at 5.

73. *See* Robert C. Whitaker, Shannon M. Phillips, & Sean M. Orzol, *Food Insecurity and the Risks of Depression and Anxiety in Mothers and Behavior Problems in Their Preschool-Aged Children*, 118(3) PEDIATRICS 859 (2006) https://doi.org/10.1542/peds.2006-0239; *see also* Martha Zaslow, Jacinta Bronte-Tinkew, Randolph Capps, Allison Horowitz, Kristin A Moore, & Debra Weinstein, *Food Security during Infancy: Implications for Attachment and Mental Proficiency in Toddlerhood,* 13(1) MATERNAL AND CHILD HEALTH JOURNAL 66 (2009).

74. *See* Hurley v. Toia, 432 F. Supp. 1170 (S.D.N.Y. 1977) (holding that the erroneous denial of public benefits results in "extreme and very serious damage" that constitutes an irreparable injury) (internal quotations omitted), aff'd, 573 F.2d 1291 (2d Cir. 1977).

75. *See* Willis v. Lascaris, 499 F. Supp. 749, 759 (N.D.N.Y. 1980) ("Even a slight change in food stamp allotments effects a public assistance household's ability to procure the necessities of life.") (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

76. *See* Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749, 753 (1st Cir. 1983) ("Termination of (Medicaid) benefits that causes individuals to forgo . . . necessary medical care is clearly irreparable injury.").

77. Jeffrey, *supra* note 41, at 308 (citing Morel v. Giuliani, 927 F. Supp. 622, 635 (S.D.N.Y. 1995) ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury.")); *see also* Mayhew v. Cohen, 604 F. Supp. 850 (E.D. Pa. 1984). Jeffrey also wrote, "[c]ertainly all of these harms give rise to the emotional and sometimes physical distress that can support compensatory damages." Jeffrey, *supra* note 41, at 307.

78. Katherine Baicker, Sarah L. Taubman, Heidi L. Allen, Mira Bernstein, Jonathan H. Gruber, Joseph P. Newhouse, Eric C. Schneider, Bill J. Wright, Alan M. Zaslavsky, & Amy N. Finkelstein, *The Oregon Experiment — Effects of Medicaid on Clinical Outcomes*,

Researchers found that receiving Medicaid coverage "decreased the probability of a positive screening for depression . . . , increased the use of many preventive services, and nearly eliminated catastrophic out-of-pocket medical expenditures."[79] Meanwhile, another study documented the effects of benefits delays, finding that 60% of SNAP applicants facing some emergency situation reported that the emergency could have been either lessened or avoided altogether had their food benefits arrived more quickly.[80]

Discrimination and its effects are particularly dangerous when paired with the lack of a remedy. The Urban Institute found that among people who reported unfair treatment or judgment when applying for social services or public assistance, only 19.8% spoke to a social services or public assistance provider about the treatment the applicant experienced, and only 14% filed any sort of complaint about what happened.[81] This is partially due to the fact that there is insufficient funding for (and thus, insufficient availability of) civil legal services attorneys to help public benefits recipients bring private suits to enforce their rights.[82]

III. PROTECTIONS EXIST THROUGH ANTI-DISCRIMINATION STATUTES

While the central piece of legislation discussed in this comment, the Civil Rights Act of 1964, included many important provisions that paved the road for later protections, it did not come into existence without decades of struggle. Many legal and historical events—led primarily by movements of community members, activists, and faith leaders of color in the South—

368 NEW ENG. J. MED. 1713 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3701298/.

79. *Id.*

80. JULIA ISAACS, MICHAEL KATZ, & RIA AMIN, URB. INST., IMPROVING THE EFFICIENCY OF BENEFIT DELIVERY: OUTCOMES FROM THE WORK SUPPORT STRATEGIES EVALUATION 1, 8 (2016), https://www.urban.org/sites/default/files/publication/85851/improving-the-efficiency-of-benefit_delivery_report_4.pdf.

81. Pratt & Hahn, *supra* note 48, at 4.

82. *See, e.g.*, *Civil Legal Needs Assessment,* N.C. EQUAL JUST. ALL.: THE CIV. LEGAL AID CMTY., https://ncequaljusticealliance.org/assessment/ (last visited Oct. 5, 2022) ("Legal service offices have been shuttered in some smaller communities [in North Carolina], stretching the remaining resources too thin. One legal aid provider cited that their office of eight attorneys covers a region of eleven counties, less than one attorney per county.").

contributed to what would become the Civil Rights Act of 1964.[83] With its passage, Congress formalized the cries of the nation to further civil rights by prohibiting discrimination in employment, housing, and public accommodations. With this statute, Congress also ushered in a new era of anti-discrimination legislation enacted under Congress's Spending Clause authority, as discussed further below.

A. *Title VI of the Civil Rights Act of 1964*

The landmark anti-discrimination statute from this era is Title VI of the Civil Rights Act of 1964 (Title VI).[84] Title VI, which has been repeatedly interpreted by the Supreme Court as resting upon Congress's Spending Clause authority,[85] prohibits discrimination in federally funded programs. Section 601 of Title VI states that, as a condition of the receipt of federal financial assistance, recipients must comply with the requirement that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[86]

The purpose of Title VI is two-fold: (1) to "avoid the use of federal resources to support discriminatory practices," and (2) "to provide individual citizens effective protection against those practices."[87] These two purposes are accomplished through Title VI's broad applicability. As one Congressional Research Service report explains, "because the federal government, through its full array of departments and agencies, disburses considerable amounts of funding to an exceedingly broad range of recipients,

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83. *The Civil Rights Act of 1964: A Long Struggle for Freedom - Legal Timeline*, THE LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html (last visited Feb. 13, 2022) (highlighting select events, movements, and pieces of legislation leading up to the passing of the Civil Rights Act).

84. 42 U.S.C. §2000d.

85. Christine J. Back, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 44 (2020) https://crsreports.congress.gov/product/pdf/R/R46534.

86. 42 U.S.C. § 2000d.

87. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979). These two purposes have also been established through well documented legislative debates on Title VI. *See, e.g.*, *id.* n.36 (quoting excerpts from the Congressional Record discussing both Title VI and Title IX).

Title VI—which applies to all such recipients—has an accordingly far reach."[88]

When a federal funding recipient violates Title VI, the statute provides for various means of enforcement against the recipient.[89] One such means of enforcement is for the victim of the discrimination, or an entity acting on their behalf, to file a complaint with the executive agency that distributes the funds. If the complaint is verified, the agency can terminate federal funds to the entity or individual that engaged in discrimination. However, while executive agencies technically *can* terminate federal funds to federal funding recipients in violation of Title VI, fund termination is very rarely implemented.[90]

Because executive agencies rarely terminate funds, the enforcement power of private individuals is crucial. In *Cannon v. University of Chicago*, the Supreme Court found that while Title VI does not include an *explicit* private right of action for victims of intentional discrimination, it does include an *implied* one.[91] Two decades later, in *Alexander v. Sandoval*, the Supreme Court further emphasized its earlier finding, holding that it was "beyond dispute that private individuals may sue to enforce" Title VI.[92] Further, the Supreme Court held that this private right of action permits individuals to "sue to enforce § 601 of Title VI and obtain both injunctive relief and damages."[93] The impact of these holdings extends far, as many subsequent

88. Back, *supra* note 86.

89. TITLE VI LEGAL MANUAL: SECTION VI, *supra* note 38.

90. A report by the Congressional Research Service found that: "[a]s a matter of practice, academics and practitioners have observed that though some departments and agencies have used fund terminations, or the threat of terminating funds, as an effective enforcement tool in the past, other agencies have never or rarely ordered the withdrawal or termination of a recipient's funding. Agencies far more commonly resolve a Title VI violation through 'voluntary means'— that is, a settlement or resolution agreement in which the recipient agrees to take certain actions to address the Title VI violation(s), including changes or reforms to its practices." CONGRESSIONAL RESEARCH SERVICE, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 57 (2020), https://crsreports.congress.gov/product/pdf/R/R46534.

91. Cannon v. Univ. of Chicago, 441 U.S. 677, 696, 703 (1979); *see also* Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001) (establishing that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages," and that "§ 601 prohibits only intentional discrimination"); *see also id.* at 293 (holding that no private right of action exists within Title VI to prohibit disparate impact discrimination).

92. 532 U.S. at 280.

93. *Id.* at 279.

anti-discrimination statutes enacted under Congress's Spending Clause powers (*e.g.*, all of the anti-discrimination statutes raised in *Cummings* and discussed below) incorporate the private right of action found in Title VI.

However, the Supreme Court held in *Franklin v. Gwinnett County Public Schools* that the Spending Clause anti-discrimination statutes prohibit only intentional discrimination, not disparate impact.[94] As one *Cummings* amici brief wrote, "there is no simple negligence standard in Title VI or any of the related statutes."[95] This was reinforced by the *Sandoval* Court, which said in plain terms, "it is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."[96]

In instances of intentional discrimination, the *Franklin* Court recognized "the traditional presumption in favor of *any appropriate relief* for violation of a federal right."[97] However, *Franklin* did not provide details on the scope of what was to be considered "appropriate relief."[98] A decade later, in *Barnes v. Gorman*, the Court provided some answers. The Court began its analysis by likening Spending Clause statutes to contracts, explaining that "[w]e have repeatedly characterized [Title VI] and other 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.'"[99] The Court further explained that this contract law analogy establishes the availability of a damages remedy for private suits brought under Spending Clause legislation.[100]

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94. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 74–75 (1992) ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award . . . . This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.").

95. Brief for Amici Curiae Disability Organizations in Supporting Petitioner at 17, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219); *see Franklin*, 503 U.S. at 74 (holding that an entitlement to monetary damages under Spending Clause statutes does not extend to victims of disparate impact).

96. *Sandoval*, 532 U.S. at 280. *Franklin* and *Sandoval* closed the courthouse doors for victims of systemic discrimination who wish to bring disparate impact claims. For those individuals, their only legal option is to file an administrative complaint with the appropriate federal agency, leaving litigation and settlement decisions up to discretion of the agency staff and the U.S. Department of Justice attorneys.

97. *Franklin,* 503 U.S. at 73.

98. *See id.*

99. Barnes v. Gorman, 536 U.S. 181, 186 (2002) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

100. *Id.* at 186–87 (citing *Franklin,* 503 U.S. at 74–75).

After determining that the Court would use contract law to establish the *availability* of damages remedies, it then went on to specify that "[t]he same [contract law] analogy applies, we think, in determining the *scope* of damages remedies."[101] The Court affirmed the "well settled rule that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available* remedy to make good the wrong done."[102] Further:

> When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient *compensates* the Federal Government or a third-party beneficiary . . . for the loss caused by that failure.[103]

Finally, the Court held that while *punitive damages* are not recoverable in private suits brought under Spending Clause legislation that incorporates Title VI's private right of action, *compensatory damages* are.[104] Thus, when federally funded public benefits administrators engage in intentional discrimination in violation of Spending Clause anti-discrimination statutes, the victim has a right to bring a private suit seeking compensatory damages.

B. *Statutes Incorporating Title VI's Private Right of Action*

Three subsequent anti-discrimination statutes, resting upon Congress's Spending Clause authority, incorporated Title VI's private right of action.[105] Congress first enacted Title IX of the Education Amendments

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101. *Id.* at 187.

102. *Id.* at 189 (emphasis added) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

103. *Id.*

104. *Id.* at 188–89.

105. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1577 (2022) (Breyer, J., dissenting) ("Using its Spending Clause authority, Congress has enacted four statutes that prohibit recipients of federal funds from discriminating on the basis of certain protected characteristics, including (depending upon the statute) race, color, national origin, sex, disability, or age. See Civil Rights Act of 1964, Title VI, 42 U. S. C. §2000d; Education Amendments Act of 1972, Title IX, 20 U. S. C. §1681; Rehabilitation Act of 1973, §504, 29 U. S. C. §794; Patient Protection and Affordable Care Act (ACA), §1557, 42 U. S. C. §18116.").

Act of 1972 (Title IX).[106] Title IX prohibits sex discrimination in federally funded education programs and activities—most notably, schools. Next came Section 504 of the Rehabilitation Act of 1973 (Section 504).[107] Section 504 prohibits disability discrimination in federally funded programs and activities.[108]

Most recently, in 2010 Congress enacted Section 1557 of the Affordable Care Act of 2010 (Section 1557).[109] Section 1557 prohibits federally funded health programs from discriminating on the grounds covered in Title VI, Title IX, Section 504, and the Age Discrimination Act of 1975 (which, although not cited to above, prohibits age discrimination). Taken together, this "family of statutes" provides important anti-discrimination protections at a federal level to people engaging in federally funded programs or activities across the country.[110]

C. *Emotional Distress Damages Available in Case Law*

Emotional distress damages have historically been available as a form of compensatory damages for violations of Spending Clause anti-discrimination statutes. Below are select examples of such cases, divided into the anti-discrimination statute under which each case was brought.

1. Title VI

The most direct and impactful case on this issue, and the one in direct conflict with *Cummings*, is a Title VI case called *Sheely v. MRI Radiology Network, P.A.*[111] As one law review article explains, *Sheely* was "the first

106. Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 373, 373–74 (codified as amended at 20 U.S.C. § 1681).

107. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794).

108. *Id.*

109. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116).

110. The author of this comment first heard the term "family of statutes" from Mr. Rozynski's oral arguments in front of the Supreme Court. Oral Argument at 22:04, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219 (" . . . amongst all the statutes, Title VI, Title IX, Rehab Act, ACA . . . [t]here have not been huge awards in . . . [that] family of statutes").

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

time a circuit court faced this question [of the scope of emotional distress damages] post-*Barnes* and given the precedential authority this decision [was] likely to have, the stakes were enormous."[112]

In *Sheely*, the petitioner, accompanied by a service animal, was prevented from accompanying her son during his MRI due to a facility policy limiting animals in the building—despite parents typically being allowed to accompany their children.[113] The petitioner is legally blind and uses a guide dog.[114] Afterwards, Sheely claimed that the incident caused her fear and tension about going into public places, and that it resulted in sleep-disrupting anxiety.[115] Sheely sued, alleging, among other things, a violation of Section 504 and seeking emotional distress damages as compensation.

The Eleventh Circuit agreed with Sheely that there was a viable Section 504 claim.[116] It stated in no uncertain terms: "The open question before us today is . . . 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."[117] The *Sheely* court explained that while the Supreme Court had held that victims of intentional discrimination may, under Title VI and Section 504, recover compensatory damages *generally*, "the Court has not spoken to the precise *scope* of available compensatory damages under these statutes."[118] However, the court addressed that gap in this case when it stated, "[a]fter reviewing the Supreme Court's Title VI jurisprudence, we conclude that non-economic compensatory damages are indeed available for intentional violations of [Section 504]."[119]

The Eleventh Circuit looked to various Supreme Court cases to reach its conclusion, including *Guardians Association v. Civil Service Commission*

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112. 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, 2 (2012).

113. *Sheely*, 505 F.3d at 1178.

114. *Id.*

115. Lave et al., *supra* note 113, at 8.

116. *Sheely*, 505 F.3d at 1177.

117. *Id.* at 1198.

118. *Id.* at 1191–92.

119. *Id.* at 1192.

of New York.[120] *Guardians* was a case brought under Title VI in which Justice White, writing for the majority, held that "the victim of the intentional discrimination should be entitled to a compensatory award," but that "compensatory relief . . . is not available as a private remedy for Title VI violations *not* involving intentional discrimination."[121] Notably, the Eleventh Circuit highlighted Justice Marshall's dissent, which in part expressed that denying compensatory relief to all plaintiffs "would often leave Title VI victims remediless."[122] This would then "depreciate[] [Title VI], which was specifically intended to deal with 'the injustices and humiliations of racial and other discrimination."[123] In choosing to include this quote, the Eleventh Circuit showed the essential role that emotional distress damages play not only to fulfill the needs of the individual victim, but to realize the goals of the statute as well.

The Eleventh Circuit also looked to contract law to reach its conclusion. In relation to section 351 of the Second Restatement, the Eleventh Circuit explained that "the frequency and acuteness with which discrimination spawns emotional distress in the victim suggest that emotional distress is a 'probable result' . . . of funding recipients' breach of their promise not to discriminate."[124] As discrimination is particularly likely to cause emotional distress, "[federal funding] recipients have fair notice that, in breaching [their promise not to discriminate], they may be subject to liability for emotional damages."[125] The court ultimately reasoned that contract law establishes that emotional distress damages are recoverable for discrimination victims.[126]

Four years later, a federal district court in the Eighth Circuit agreed with the Eleventh Circuit. In *Scarlett v. School of Ozarks, Inc.*, the plaintiff was a Black man from Jamaica who did not meet the work requirements of his college, and was thus told he no longer qualified to attend college full-time.[127] Although the plaintiff was penalized for missing one week of work,

120. Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582 (1983).

121. *Id.* at 596–97, 602–03 (emphasis added).

122. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1193–94 (11th Cir. 2007).

123. *Guardians*, 463 U.S. at 625–26 (Marshall, J., dissenting) (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess. at 18 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2394).

124. *Sheely*, 505 F.3d at 1199 (cleaned up).

125. *Id.*

126. *Id.* at 1199–1200.

127. Scarlett v. School of Ozarks, Inc., 780 F. Supp. 2d 924 (W.D. Mo. 2011).

the federal court notes that "[a]t least one white student around this same time period was permitted to make up work hours missed" and "[a]t least one white student during this same time period was permitted to make a cash payment to the school in lieu of making up deficient work hours."[128] Further, "the College's written policies governing the work program do not state that a student will be dismissed from the work program if the student is unable to attend the first week of the semester."[129] Ultimately, the court found that while there was no *direct* evidence of discrimination, it held there was sufficient *indirect* evidence.[130]

The Eighth Circuit then went on to consider whether non-economic compensatory damages are available. It explained that while the Supreme Court "has never expressed an opinion whether non-economic compensatory damages are available,"[131] the Eleventh Circuit, as the only federal court of appeals that had addressed this question, "issued a thoughtful and exhaustive opinion holding that they are available."[132] After considering the Eleventh Circuit's analysis, the Eighth Circuit agreed and found that "Scarlett is not precluded from recovering non-economic damages as a matter of law . . . ."[133]

2. Section 1557 of the ACA

Courts have also affirmed the availability of emotional distress damages for disparate treatment claims brought under Section 1557 of the ACA.[134] In *Prescott v. Rady Children's Hospital – San Diego*, the plaintiff's son, Kyler, was assigned female at birth, and due to increasing gender dysphoria, began engaging in self-harm behaviors at age 12.[135] Kyler's mother took him to Rady Children's Hospital, which "held itself out and warranted itself to the public as competent, careful, and experienced in the care and treatment of patients, particularly transgender patients and those

128. *Id.* at 930.

129. *Id.*

130. *Id.* at 931–32.

131. *Id.* at 934.

132. *Id.*

133. *Id.*

134. Prescott v. Rady Child.'s Hosp. – San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

135. *Id.* at 1096 (stating that despite receiving some gender affirming care such as puberty-delaying medication, Kyler still experienced depression and gender dysphoria).

with gender dysphoria."[136] Despite the staff being informed that Kyler was male, he should be addressed with male gender pronouns, and they should "otherwise treat him as a boy," nurses and other hospital staff repeatedly addressed Kyler as a girl and used female pronouns for him. One staff person even told him "Honey, I would call you 'he,' but you're such a pretty girl."[137] As the court explained, "[f]or a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing . . . . For Kyler, being misgendered caused him psychological distress."[138] The hospital discharged Kyler, and after five weeks, he died by suicide.[139]

Kyler's mother filed an action against the hospital that discriminated against her son, alleging various violations, including of Section 1557.[140] The hospital moved to dismiss, in part because the boy had died, and state law precluded recovery for decedents. The court held that, despite the state law that would otherwise preclude recovering damages for a decedent's emotional distress, "[b]ecause the ACA draws on Title IX's prohibition on discrimination on the basis of sex . . . federal common law governs the question of whether Ms. Prescott may recover damages for Kyler's emotional distress. As such, she can recover for emotional distress damages under the ACA."[141]

Damages from settlements also support the availability of emotional distress damages under Section 1557. For example, in *Flack v. Wisconsin Department of Health Services*, each of the four named plaintiffs received over $200,000 in damages from a settlement after being denied gender-affirming care under Wisconsin Medicaid's categorical exclusion of such care.[142] While the damages included compensation for some economic loss each plaintiff experienced, the damages were primarily to compensate the

136. *Id.* at 1096.

137. *Id.* at 1096–97.

138. *Id.* at 1096.

139. *Id.* at 1097.

140. *Id.*

141. *Id.* at 1101 (noting that "the [District] Court is persuaded by the *Lopez* court" regarding how 42 U.S.C. § 1988(a) is read and in deciding whether state law or federal law applies in such a case brought under the ACA (Lopez v. Regents of the Univ. of Cal., 5 F. Supp. 3d 1106 (N.D. Cal. 2013))).

142. *See* Flack v. Wis. Dep't of Health Servs., 395 F. Supp. 3d 1001 (W.D. Wis. 2019); *see also* Partial Settlement Agreement and Mutual Release, Flack v. Wis. Dep't of Health Servs., No. 3:18-cv-00309-wmc (W.D. Wis. Oct. 30, 2019) at *4, https://www.relmanlaw.com/media/cases/668_Partial%20Settlement%20Agreement.pdf.

plaintiffs for "the harms to their short- and long-term health and well-being, including emotional distress."[143]

Other Section 1557 caselaw establishes the gravity of requesting compensatory damages for emotional distress, as it may lead to the introduction of evidence that would otherwise be excluded due to clinician-patient privilege. In *Conforti v. St. Joseph's Healthcare System, Inc.*, a transgender man sued a Catholic Hospital for compensatory damages for emotional distress, stating that his denial of a hysterectomy as gender affirming care violated his rights under Section 1557.[144] In his complaint, Conforti alleged that because of this discrimination, he "suffered emotional distress, humiliation, degradation, embarrassment, emotional pain and anguish, violation of his dignity, loss of enjoyment of life, and other compensatory damages . . . ."[145] The court found that Conforti had "manifest[ed] an unmistakable intent to inject [his] . . . symptoms and diagnoses into the underlying litigation."[146] The court therefore held that, with respect to Conforti's therapist and mental health clinician who had diagnosed him with gender dysphoria and recommended a hysterectomy as medically necessary care, "Conforti ha[d] waived the psychotherapist-patient privilege" and the deposition of his therapist would be allowed in for consideration of his claim for emotional distress damages under Section 1557.[147]

3. Section 504 of the Rehabilitation Act

Notably, amici for *Cummings* found only nine cases in which emotional distress damages were awarded under Section 504 and were not later overturned during post-trial review.

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143. Partial Settlement Agreement and Mutual Release, Flack v. Wis. Dep't of Health Servs., No. 3:18-cv-00309-wmc (W.D. Wis. Oct. 30, 2019) at *2, https://www.relmanlaw.com/media/cases/668_Partial%20Settlement%20Agreement.pdf.

144. Conforti v. St. Joseph's Healthcare Sys., Inc., Civ. No. 2:17-cv-00050-CCC-CLW, 2019 WL 3847994 (D.N.J. Aug. 15, 2019).

145. *Id.* at *2.

146. *Id.* at *5.

147. *Id.* at *4–5.

Case Name[148]	**Noneconomic Damages**
R.W.	$0-$75,000
Pierce	$0-$70,000
Snell	$35,000
M.P.	$47,375
Delano-Pyle	$200,000
Gorman	$150,000
Powers	$0-$560,000
Sumes	$10,000
Howe	$0-$62,0000

In one such case, *M.P. ex rel. K. v. Independent School District*, a sixteen-year-old was discriminated against by a public school because of his disability.[149] The student, M.P., was diagnosed with schizophrenia, and the school district's health paraprofessional disclosed the student's schizophrenia to the school community. Afterwards, the student faced discrimination, including being "called 'druggie,' 'fag,' 'psycho,' 'weirdo,' 'mental kid,' 'special,' 'squealer,' and 'idiot,' among other names. Students also shoved M.P.'s head into the drinking fountain, picked him up by his throat, slammed him into lockers, threw him to the floor, shoved, scratched, spit on, and cut him."[150] Notably, the student had never been treated this way by his classmates before the school staff disclosed his disability.[151] The student filed a complaint under Section 504. On appeal at the Eighth Circuit, the court overturned the district court's grant of summary judgment to the defendants

148. Brief for Amici Curiae Disability Organizations Supporting Petitioner at 19, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) ("The full citations for the cases in this table are as follows: R.W. v. Bd. of Regents of the Univ. Sys. of Ga., No. 1:13-CV-2115, 2016 WL 607395 (N.D. Ga. June 7, 2016); Pierce v. District of Columbia, No. 1:13-cv134, 2016 WL 7225220 (D.D.C. May 11, 2016); Snell v. N. Thurston Sch. Dist., No. 3:14-cv-05786, 2015 WL 9474130 (W.D. Wash. Nov. 21, 2015); M.P. v. Indep. Sch. Dist. No. 721, Civ. No. 01-771, 2006 WL 8444974 (D. Minn. Dec. 14, 2006); Delano-Pyle, 302 F.3d 567 (5th Cir. 2002); Gorman v. Easley, No. 95-0475-CV, 1999 WL 34808615 (W.D. Mo. Oct. 28, 1999), aff'd in part, rev'd in part and remanded, 257 F.3d 738 (8th Cir. 2001), rev'd sub nom. Barnes v. Gorman, 536 U.S. 181 (2002); Powers v. MJB Qcquisition Corp., 184 F.3d 1147 (10th Cir. 1999); Sumes v. Andres, 938 F. Supp. 9 (D.D.C. 1996); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994).").

149. M.P. *ex rel.* K. v. Indep. Sch. Dist. No. 721, 326 F.3d 975 (8th Cir. 2003).

150. *Id.* at 978.

151. *Id.*

with respect to the student's claim for damages under Section 504.[152] Upon remand to the district court, the jury awarded the student damages of $84,675.[153]

Other cases brought under Section 504 as well as various parts of the Americans with Disabilities Act of 1990 (ADA) similarly awarded emotional distress damages for violations of anti-discrimination statutes. In *Worthington v. City of New Haven*, for example, a woman brought a claim against the City of New Haven, claiming that her employer discriminated against her because of her disabilities, in violation of Section 504 (as well as Title II of the ADA and other statutes).[154] The plaintiff was discriminated against when she requested reasonable accommodations for her workplace, such as an ergonomic chair, and her employer failed to provide them.[155] Among other remedies, the plaintiff sought "compensatory damages for pain and suffering" because of the "pain, humiliation, [and] emotional distress" she suffered. The court awarded the plaintiff $150,000 in compensatory damages.[156]

In *Swogger v. Erie School District*, Swogger, the mother of a seventeen-year-old child with disabilities, sued the school district for discriminating against her son who had diagnoses of emotional disturbance and Autism Spectrum Disorder.[157] One day, after the student experienced a meltdown, the school kicked him out, locked the school doors, forced him to leave the school property, and refused to provide him with transportation home.[158] Swogger sued for violations of Section 504, as well as Title II of the ADA, and sought damages in excess of $75,000 for emotional distress.[159] The school district filed a motion to dismiss. The court denied the school district's motion, stating that Title II of the ADA and Section 504 "allow plaintiffs to recover damages for emotional harm where there is evidence of intentional

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152. *Id.* at 983.

153. Brief for Amici Curiae Disability Organizations Supporting Petitioner at 15, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (citing *M.P. v. Indep. Sch. Dist*. No. 721, Civ. No. 01-771, 2006 WL 8444974, at *1 (D. Minn. Dec. 14, 2006)).

154. No. 3:94-CV-00609(EBB), 1999 WL 958627, at *1 (D. Conn. Oct. 5, 1999).

155. *Id.* at *12 ("[T]he Court finds that Worthington's requested accommodations were reasonable and would not have imposed an undue hardship on the defendant.").

156. *Id.* at *16.

157. 517 F. Supp. 3d 414, 416 (W.D. Pa. 2021).

158. *Id.*

159. *Id.* at 417.

discrimination."[160] Further, "[b]ecause the facts alleged in the complaint could plausibly support a claim of intentional discrimination under Title II of the ADA and Section 504 . . . , Plaintiff has stated a plausible basis for the recovery of noneconomic damages."[161]

In *Reed v. Columbia St. Mary's Hosp.*, the lower court had dismissed the plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 8(a)(2).[162] The plaintiff had a neurological disorder that made it difficult for her to communicate, and while inpatient at a hospital, she was not only denied access to the computer she needed in order to communicate but also was thrown into a "seclusion room" when she asked for the computer. The plaintiff sued under Section 504 (as well as Title III of the ADA). The Seventh Circuit held that "Reed's allegations that the hospital, with knowledge of her disability, purposely denied her access to the computer that helps her communicate, permit an inference of intentional discrimination sufficient to support a claim for compensatory damages. That claim is legally sufficient, at least at the pleading stage."[163] The court also held that "Reed may . . . seek compensatory damages under the Rehabilitation Act for retaliation based on her allegation that the hospital threw her into a 'seclusion room' when she asked for her computer."[164]

IV. *CUMMINGS*

The availability of emotional distress damages for disparate treatment claims brought in private suits against federal funding recipients realizes Congressional intent behind the Spending Clause anti-discrimination statutes—and yet, this very remedy was attacked in *Cummings v. Premier Rehab Keller, P.L.L.C.*.

A. *District Court Case*

In *Cummings*, Jane Cummings, the plaintiff, suffered from chronic back pain. Cummings's treating physician referred her to Premier Rehab, a health care facility the physician believed was the best physical therapy

160. *Id.* at 425.
161. *Id.*
162. 782 F.3d 331, 334 (7th Cir. 2015).
163. *Id.* at 337.
164. *Id.*

rehabilitation clinic to treat Cummings's pain. However, each time Cummings contacted Premier Rehab to try to schedule an appointment, when she notified the staff that she would need an ASL interpreter, Premier Rehab refused to provide one. As described by Cummings in her petition, "[w]ithout an interpreter, [Cummings] could not describe the sources of her physical infirmities, ask questions, identify her pain level, or otherwise assist in rehabilitative services."[165] As a result, Cummings could not receive treatment from Premier Rehab. "[H]umiliat[ed], frustrat[ed], and emotional[ly] distr[aught]" for being discriminated against because of her disabilities, Cummings was forced to seek care elsewhere.[166]

Jane Cummings sued Premier Rehab in the Northern District of Texas. In her lawsuit, she alleged violations of multiple statutes, including Section 1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act. Premier Rehab is subject to these statutes because it receives federal financial reimbursement through Medicaid and Medicare. Cummings sought emotional distress damages for the emotional distress she suffered as a result of Premier Rehab's discrimination.[167] Premier Rehab moved to dismiss Cummings's claims, arguing that Cummings (1) suffered no injury and thus lacked standing because she never scheduled the appointment, and (2) was not entitled to the ASL accommodation.[168]

The district court rejected Cummings's argument—and created its own. Judge John H. McBryde wrote, *sua sponte*, that "[d]amages for emotional distress, like punitive damages, do not compensate plaintiffs for their pecuniary losses, but instead punish defendants for the outrageousness of their conduct." [169] In doing so, the district court judge categorized emotional distress damages as punitive damages. This was a fatal blow, because *Sandoval* and *Gorman* established that punitive damages are unrecoverable for private suits that incorporate Title VI's private right of

165. Brief for Petitioner at 10, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219).

166. *Id.* at 11.

167. *Id.*

168. Plaintiff's Response and Brief in Opposition to Defendant's Motion to Dismiss at 1, Cummings v. Premier Rehab, P.L.L.C., No. 4:18-CV-649-A (N.D. Tex. Dec. 6, 2018), 2018 WL 11336942.

169. Cummings v. Premier Rehab, P.L.L.C., No. 4:18-CV-649-A, 2019 WL 227411, at *4 (N.D. Tex. Jan. 16, 2019).

action.[170] The district court ultimately granted Premier Rehab's motion to dismiss, holding that emotional distress damages are unrecoverable for actions brought under Section 504 and Section 1557 and therefore that these two statutes "do not provide [Cummings] a cause of action to pursue damages for emotional harm."[171]

B. *Fifth Circuit Case*

Cummings appealed to the Fifth Circuit, which unanimously affirmed the district court's holding.[172] Judge Edith Brown Clement held that notice to the funding recipient is the central issue, and Premier Rehab was not on notice that it could be liable for emotional distress damages.[173] Thus, the court held that "emotional distress damages are not available for breach of contract" claims, such as those brought under the Spending Clause anti-discrimination statutes.[174]

To reach the conclusion that emotional distress damages are unavailable under the statutes at issue here, the Fifth Circuit adopted the district court's *sua sponte* categorization of emotional distress damages as 'punitive.' But this demonstrated a misapprehension of emotional distress damages and defied the generally accepted distinction between emotional distress damages and punitive damages. As the American Association for Justice's amicus curiae brief in support of Cummings explained, unlike punitive damages, which "are intended to punish and deter, . . . emotional distress damages comprise a species of ordinary compensatory damages . . . that compensate for the suffering of the injured person."[175]

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170. *See* Alexander v. Sandoval, 532 U.S. 275 (2001); *see also* Barnes v. Gorman, 536 U. S. 181 (2002).

171. *Cummings*, 2019 WL 227411, at *4.

172. Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 674 (5th Cir. 2020).

173. *Id.* at 677–78.

174. *See id.* at 677.

175. Brief for Am. Ass'n for Just. as Amicus Curiae Supporting Petitioner at 7, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (cleaned up). The law professors' amici curiae brief in support of Cummings similarly pointed to the faulty conflation of emotional distress and punitive damages by both Premier Rehab and the Fifth Circuit's decision, noting that "the two remedies serve completely different purposes." Brief for Law Professors as Amici Curiae Supporting Petitioner at 22-23, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (cleaned up) (While "[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has

It is additionally noteworthy that the Fifth Circuit adopted the district court's argument, given the precedent of emotional distress damages as an available remedy. As various Law Professors explained in their Amici Curiae in support of Cummings, emotional distress damages "have long been used to compensate plaintiffs for their injuries, provided that those injuries were the 'natural and proximate' consequences of the violation at issue."[176] In the 1800s, for example, documented damages such as "mental suffering,"[177] "indignity,"[178] and "humiliation"[179] were all proper reasons for compensation when they resulted from legal violations.[180] Thus, the Fifth Circuit's decision "is at odds with the well-established legal principle that 'where there is a legal right, there is also a legal remedy,' . . . and the long use of emotional distress damages to vindicate that legal principle."[181]

In addition to support from history, the availability of damages for emotional distress is also supported through the modern law of contracts—which applies since "[t]he Court has 'repeatedly' likened Spending Clause legislation to contract law."[182] Section 353 of the Second Restatement of Contracts states that "[r]ecovery for emotional disturbance will be excluded unless the breach also caused bodily harm *or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result*."[183] The Fifth Circuit referenced comment (a) to section 353, which states that "[d]amages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish

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suffered by reason of the defendant's wrongful conduct . . . [p]unitive damages . . . are aimed at deterrence and retribution against a defendant, rather than making a plaintiff whole.").

176. Brief for Law Professors as Amici Curiae Supporting Petitioner at 4, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (citing to JABEZ SUTHERLAND, TREATISE ON THE LAW OF DAMAGES § 50, at 103 (Chicago, Callaghan, 1893)).

177. *Id.* (citing to JABEZ SUTHERLAND, TREATISE ON THE LAW OF DAMAGES § 95, at 197 (Chicago, Callaghan, 1893)); *see also id.* at 16 (citing Chamberlain v. Chandler, 5 F. Cas. 413, 415 (C.C.D. Mass. 1823) (awarding for "mental suffering")).

178. Brief for Law Professors as Amici Curiae Supporting Petitioner at 4, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (citing to 2 SIMON GREENLEAF, TREATISE ON THE LAW OF EVIDENCE § 267, at 271-2 (2d ed. Boston, Charles C. Little & James Brown, London, Stevens & Norton 1848)).

179. *Id.* (citing Gould v. Christianson, 10 F. Cas. 857, 864 (S.D.N.Y. 1836)).

180. *Id.*

181. *Id.* at 2–3 (cleaned up) (citing Marbury v. Madison, 5 U.S. 137, 163 (1803)).

182. Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 676 (5th Cir. 2020) (citing Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

183. Restatement (Second) of Contracts § 353 (1981) (emphasis added).

and to measure."[184] However, the Fifth Court read selectively because the comment continues to explain there are "two exceptional situations where such damages are recoverable."[185] The second situation (relevant here) is when "the contract or the breach is of such a kind that *serious emotional disturbance was a particularly likely result*."[186] The comment then goes on to list common examples of such contracts, including those for: "carriers and innkeepers with passengers and guests, . . . the carriage or proper disposition of dead bodies, and . . . the delivery of messages concerning death."[187] The comment then states, with no equivocation, "[b]reach of such a contract is particularly likely to cause serious emotional disturbance" and thus there may be "recovery for such disturbance."[188]

C. *Supreme Court Case*

Cummings sought review by the Supreme Court. In her writ of certiorari, Cummings asserted that "[c]ompensation for emotional distress is among the monetary relief available for intentional discrimination under the statutes that incorporate the remedies allowed under Title VI."[189] Cummings also asserted that in *Barnes v. Gorman*,[190] the Supreme Court established that emotional distress damages are available as part of the traditional rule, not an exception, for cases governed by contract law[191]—which these Spending Clause anti-discrimination cases are, since federal funding recipients are effectively in a contract with the government to receive funding in return for

184. *Cummings*, 948 F.3d at 677 (citing Restatement (Second) of Contracts § 353, cmt. a).

185. Restatement (Second) of Contracts § 353, cmt. a.

186. *Id.* (emphasis added) (explaining also that emotional distress damages are available in the first exceptional situation, which is when "the disturbance accompanies a bodily injury").

187. *Id.*

188. *Id.* Illustration 2 is further instructive: "A, a hotel keeper, wrongfully ejects B, a guest, in breach of contract. In doing so, A uses foul language and accuses B of immorality, but commits no assault. In an action by B against A for breach of contract, the element of B's emotional disturbance *will be included* as loss for which damages may be awarded." Restatement (Second) of Contracts § 353, illustration 2 (emphasis added).

189. Brief for Petitioner at 13, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219).

190. Barnes v. Gorman, 536 U.S. 181 (2002).

191. Brief for Petitioner at 4, 9, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219).

complying with certain terms. Cummings also argued that emotional distress damages are a standard form of compensatory damages for disparate treatment claims and that emotional distress damages are therefore recoverable under the Spending Clause anti-discrimination statutes.[192]

On April 28, 2022, the Supreme Court ruled in favor of Premier Rehab.[193]

In *Cummings*, the Supreme Court held that emotional distress damages are not recoverable in private action lawsuits "to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act (ACA)."[194] The majority reasoned that contract law principles apply because of the contracted between the federal government and the funding recipient, and that emotional distress damages were not traditionally available in breach of contract cases and thus not available here.[195] While the majority's reasoning did not adopt the district court's categorization of emotional distress damages as punitive damages, it did seem influenced by the conflation; the majority continually likened the two—stating that just as punitive damages are available only as an exception to the general rule, emotional damages are as well.[196]

Although there were few points of agreement between the Justices, all Justices agreed that there is a private right of action under each of the four Spending Clause anti-discrimination statutes discussed. Additionally, the Justices agreed that federal funding recipients are only subject to liability for specific remedies if they are on notice that those remedies are "traditionally available"[197] in breach of contract suits. The conversation between the majority, concurrence, and dissent then diverged on almost every other point, with the majority utilizing multiple logical and moral errors to reach faulty conclusions. Below are the five biggest flaws in the Supreme Court's majority and concurring opinions, and the corresponding relevant arguments from the dissent.

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192. *Id.* at 19–20, 25–26.

193. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1562–76 (2022). Chief Justice Roberts delivered the opinion of the Court, in which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, joined, *id.* at 1562–76; Justice Kavanaugh wrote a concurrence, in which Justice Gorsuch joined, *id.* at 1577–82 (Kavanaugh, J. concurring); and Justice Breyer wrote the dissent, in which Justices Sotomayor and Kagan joined, *id.* at 1577–82 (Breyer, J., dissenting).

194. *Id.* at 1565 (majority opinion).

195. *Id.* at 1570–72.

196. *Id.* at 1571.

197. *Id.* at 1578 (Breyer, J., dissenting).

1. The Majority Centered Perspectives of Federal Funding Recipients, Instead of Victims

First, from the very beginning, the majority opinion skewed heavily in favor of the federal funding recipient. For example, in explaining the facts of the case, Chief Justice Roberts wrote that after Cummings requested an ASL interpreter, "Premier Rehab *declined* to provide one, telling Cummings that she could communicate with the therapist using written notes, lip reading, or gesturing."[198] Word choice matters. The word "decline" instead of "refuse," along with the list of all the other ways Premier Rehab offered to communicate, painted Cummings as the unreasonable actor.[199] The majority then chose to leave out *any description* of the harm that Cummings experienced because of such discrimination,[200] including the "humiliation, frustration, and emotional distress" she suffered.[201] It seems the Court did not respect Cummings's emotional distress enough to even acknowledge it in the pages of the opinion.

Instead, Chief Justice Roberts focused only on the experience and expectations of the federal funding recipient. Using terms such as "consent" and "voluntarily and knowingly accepts," the Court asked what the federal funding recipient should be expected to know and concluded that the Court cannot "assume that they will know the contours of every contract doctrine, no matter how idiosyncratic or exceptional."[202] The Court also dismissed the idea that federal funding recipients should be expected to know the contractual rules that "govern in the specific context at hand," saying that would "push . . . the notion of offer and acceptance, central to the Court's Spending Clause cases, past its breaking point."[203]

By focusing on the federal funding recipient, the majority ignored the other half of the equation: the victim of discrimination. The dissent, on the other hand, approached the contract law analogy from a perspective that

198. *Id.* at 1565 (majority opinion) (emphasis added).

199. *Id.*

200. *See id.*

201. Brief for Petitioner at 10, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219).

202. *Cummings*, 142 S. Ct. at 1569.

203. *Id.* at 1565.

centers the experiences and expectations of the injured party.[204] For example, Justice Breyer wrote that in discrimination cases, "the major (and foreseeable) harm was the emotional distress caused by the indignity and humiliation of discrimination itself."[205] Justice Breyer then quoted a previous Court case in which the concurrence wrote that these anti-discrimination laws seek "the vindication of human dignity and not mere economics."[206]

Justice Breyer further argued that it is unpersuasive to write off emotional distress damages as something too "fine-grained" for federal funding recipients to be on notice of.[207] Indeed, the recipients of federal funding are sophisticated parties, like hospitals, county-level bureaucrats, and other entities with legal departments that have years of experience contracting with the federal government. It is, therefore, not an unfair expectation that these parties "know the contours" of contract law,[208] and how it applies to the "specific context at hand."[209]

Meanwhile, the *victims* of discrimination—individuals receiving education, health care, food stamps, or other federally funded programs or activities—are, on average, much less prepared to "know the contours" of contract law. Further, some of what is now expected of individuals after *Cummings*—to avoid interactions with federal funding recipients who will discriminate—is an impossible ask. Take, for example, public benefits recipients, who often cannot pick their administrators; additionally, no one can see into the mind of another to what prejudices lie within. As such, it is not only fairer, but also more *feasible*, to place the burden of investigation and research on the federal funding recipient to understand what behavior they may not conduct, rather than on the victim of discrimination to understand which discriminatory federal funding recipients to try to avoid.

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204. *Id.* at 1578 (Breyer, J., dissenting) (citing 3 E. ALLAN FARNSWORTH, CONTRACTS § 12.8, 188 (2d ed. 1998) ("The basic principle for the measurement of those damages is that of compensation based on the injured party's expectation.")).

205. *Id.* at 1579.

206. *Id.* at 1579 (citing Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 291 (1964) (Goldberg, J., concurring)).

207. *Id.* at 1580–81.

208. *Id.* at 1574 (majority opinion).

209. *Id.* at 1572.

2. The Majority Improperly Inflated the Denominator to Use When Examining Which Remedies Are "Traditionally Available"

Second, the majority and dissent disagree about which denominator is proper when deciding whether emotional distress damages are "traditionally available" and thus sufficiently foreseeable to put federal funding recipients on notice. The majority acknowledged that emotional distress damages were available in *some* breach of contract cases (the numerator) but examined those cases against *all* breach of contract cases (the denominator).[210] For example, the majority wrote that "'emotional distress is generally not compensable in contract.'"[211] With a bigger number of cases as the denominator, the resulting percentage of cases compensated with emotional distress damages becomes relatively small. This choice conveniently enabled the majority to paint the availability of emotional distress damages as an outlier, which in turn supported the majority's decision to render them unavailable moving forward.

For Justice Breyer and the dissent, however, the proper denominator was specifically those breach of contract cases "'where other than pecuniary benefits [were] contracted for' or where the breach 'was particularly likely to result in serious emotional disturbance.'"[212] Using this smaller number of cases as the denominator yields a relatively large percentage of cases that have been compensated with emotional distress damages. Thus, Justice Breyer wrote, "contract law traditionally does award damages for emotional distress" in those particular types of cases.[213]

Justice Breyer then turned to examine the type of discrimination in *Cummings*. He wrote, "[d]oes breach of a promise not to discriminate fall into this category [of cases that traditionally award damages for emotional distress]? I should think so."[214] Justice Breyer further explained that "[t]he statutes before us seek to eradicate invidious discrimination" and that "emotional injury is the primary (sometimes the only) harm caused" by such

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210. *See id.* at 1571–72.

211. *Id.* at 1571 (citing DOUGLAS LAYCOCK & RICHARD HASEN, MODERN AMERICAN REMEDIES 216 (5th ed. 2019)).

212. *Id.* at 1579 (Breyer, J., dissenting) (citing 3 SAMUEL WILLISTON, LAW OF CONTRACTS § 1340, p. 2396 (1920); 3 E. ALLAN FARNSWORTH, CONTRACTS § 12.17, p. 895 (2d ed. 1998)).

213. *Id.* at 1579.

214. *Id.*

discrimination.[215] Thus, the purpose of these anti-discrimination statutes "is clearly nonpecuniary,"[216] and a breach of a contract under these statutes fits squarely into the type of fraction with a smaller denominator.

Likely referencing oral arguments, Justice Breyer brought up examples of cases that fit into this type of fraction with a smaller denominator.[217] During oral arguments, Colleen Sinzdak, Assistant to the Solicitor General and advocate as amicus curiae in support of Cummings, fielded a question from Justice Kagan about "the level of generality that we're supposed to consider this [question] at."[218] Justice Kagan asked, "do you view the common carrier-type cases, the innkeeper-type cases, . . . as discrimination cases, or are those somewhat different and we would have to extrapolate from them?"[219] Ms. Sinzdak replied that "those cases are directly analogous" because they include contract terms (be them implicit or explicit) "about protecting . . . emotional interests."[220] Pointing to these common carrier-type cases as proof in his dissent, Justice Breyer wrote that awarding emotional distress damages is "neither obscure nor unsettled, as the [majority] Court claims."[221] Instead, contract law principles for anti-discrimination cases is "sufficiently clear to put prospective funding recipients on notice that intentional discrimination can expose them to potential liability for emotional suffering."[222]

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215. *Id.* During oral arguments, Andrew Rozynski, arguing on behalf of Cummings, made this same point, stating "[e]motional distress damages are the most common and often the only form of compensatory damage remedy for victims of intentional discrimination." Oral Argument at 0:32, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219.

216. *Cummings*, 142 S. Ct. at 1579 (Breyer, J., dissenting).

217. *Id.* at 1579 ("contracts for marriage, . . . contracts by common carriers, innkeepers, or places of public resort or entertainment, . . . contracts related to the handling of a body, . . . [and] contracts for delivery of a sensitive telegram message").

218. Oral Argument at 28:03, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219.

219. *Id.* at 30:03.

220. *Id.* at 30:14.

221. *Cummings*, 142 S. Ct. at 1580 (Breyer, J., dissenting).

222. *Id.*

3. The Majority Made Incorrect Conclusions About Other Jurisdictions

Third, despite purporting to care about the practice in other jurisdictions, the Court looked around the country and then drew faulty conclusions. The Court stated that the "formulation" in section 353 of the Second Restatement of Contracts "does not reflect the consensus rule among American jurisdictions. There is in fact no majority rule on what circumstances, if any, may trigger the exceptional allowance of such damages."[223] The Court later stated that "the only area of agreement is that there is no agreement."[224]

In stating that there is no majority rule, the Court must have understood that its own proposed solution—to bar recovery of emotional distress damages in suits of this kind—is *also* not used by a majority of jurisdictions. And in fact, while there may not be a majority rule on what situations trigger the "exceptional allowance" of such damages—there is a simpler answer: The majority of states allow emotional distress damages in cases regarding state contracts law. During oral arguments, Andrew Rozynski, arguing on behalf of Cummings, explained this point: While approximately *32 states* have explicitly held that emotional distress damages in state contracts law are available, only *four states* have explicitly held they are not.[225] Had the majority applied a more neutral examination of practices in other jurisdictions, Mr. Rozynski's argument would have carried more weight in favor of preserving the availability of emotional distress damages under federal contracts law.

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223. *Id.* at 1565 (majority opinion). Also, note that in its list of examples of states that deny emotional distress damages, the Court states that "[a] good example is New York, which refused to apply the Restatement rule, and denied emotional distress damages, where the defendant hospital breached its contractual duty to return a newborn child to his parents by failing to prevent his abduction." *Id*. at 1574. Sadly, it seems that *these* are the types of actions and decisions that the Court is choosing to protect and hold up, no matter how reprehensible.

224. *Id.* at 1576.

225. Oral Argument at 15:18, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219.

4. The Majority Ignored the True Scope of its Ruling

Fourth, the majority ignored the broad ramifications of its ruling. Namely, in holding that emotional distress damages are not recoverable in a private action lawsuit "to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act,"[226] the majority did not acknowledge that its decision will also affect Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972.[227]

Justice Breyer warned of this flaw in his dissent, stating that the reach of the *Cummings* decision will extend more widely than the majority admits. Although the majority seemingly limited its holding to cases brought under Section 1557 and Section 504, Justice Breyer wrote, all four of the Spending Clause anti-discrimination statutes at issue here have "coextensive" remedies, and so "the Court's decision today will affect the remedies available under all four of these statutes, impacting victims of race, sex, disability, and age discrimination alike."[228]

5. The Concurrence Purportedly Supports the Separation of Powers, While Explicitly Ignoring It

Fifth, in Justice Kavanaugh's one-page concurrence, he wrote that the contract-law analogy is "an imperfect way" to determine remedies for suits brought under the implied cause of action in Title VI.[229] Instead, Justice Kavanaugh would rather examine the question under the Constitutional principle of separation of powers because "Congress, not this Court, creates new causes of action."[230] Further, Justice Kavanaugh wrote, "Congress, not

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226. *Cummings*, 142 S. Ct. at 1565.

227. Luckily, even the attorneys for Premier acknowledge that this ruling should not affect cases brought under the Fair Housing Act or Section 1983. Oral Argument at 1:10:46, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219 ("First, there are statutes, and I think the best examples are Section 1983 and the Fair Housing Act, where emotional distress damages are permitted. Those are statutes with pretty broad language. The Fair Housing Act, for instance, provides for actual damages, and courts have construed that to include emotional distress damages.").

228. *Cummings*, 142 S. Ct. at 1578 (Breyer, J., dissenting).

229. *Id.* at 1576 (Kavanaugh, J., concurring).

230. *Id.*

this Court, should extend [existing] implied causes of action and expand available remedies."[231]

Justice Kavanaugh's argument bears the majority's flaws, albeit under a different approach. Being concerned about the Constitution's separation of powers would require an equal respect for each of the three branches—whereas here, Justice Kavanaugh did not acknowledge the fact that Congress had *already* spoken on the issue of discrimination in the United States. It is then the duty of this Court to interpret what Congress has already enacted. By relegating this question to Congress—a branch of government which is arguably more stagnant and gridlocked than ever before—Justice Kavanaugh revealed his disregard for anti-discrimination efforts, despite attempts to hide it under the guise of Constitutionalism.

V. IMPACT OF *CUMMINGS* TODAY AND REIMAGINING PUBLIC BENEFITS TOMORROW

The outcome of *Cummings* is hugely consequential.[232] Now, the millions of people in North Carolina and nationwide who receive public benefits have little redress beyond potential injunctive relief should they suffer emotional distress due to discrimination. In fact, legal scholars and advocates writing about the effect of *Cummings* on victims of discrimination in health care settings (such as Medicaid recipients at community clinics) have noted that after *Cummings*:

> [e]ven patients denied care outright based on a protected characteristic will be unable to seek recourse in federal court unless they have claims for injunctive relief, economic loss, or noneconomic damages under other federal, state, or local laws. Otherwise, victims of health care discrimination will be limited to seeking administrative enforcement by the Office

231. *Id.* at 1576–77.

232. *The Cost of a Broken Heart: Damages for Emotional Distress Under Civil Rights Statutes*, AARP FOUND. (Sept. 20, 2021), https://www.aarp.org/aarp-foundation/our-work/legal-advocacy/2021-supreme-court-preview/info-2021/civil-rights-abuse-compensatory-damages-for-emotional-distress-supreme-court-case.html; *see also, e.g.*, Katie Keith, *ACA Litigation Round-Up (11/9/21): What's Resolved, What's On Hold, And What's Still Moving?*, HEALTH AFFAIRS (Nov. 9, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20211109.807537/full/.

for Civil Rights at the U.S. Department of Health and Human Services to challenge violations of federal civil rights laws.[233]

Given this negative outcome—in health care and other settings—it is more important than ever that communities and advocates engage in the work of reimagining public benefits through a revitalization of the welfare rights movement.

A. *Impact of* Cummings

The Supreme Court affirmed the Fifth Circuit and held in favor of Premier Rehab. In doing so, the Supreme Court limited the ability of people with protected identities to enforce their civil rights—even when, as one law review article about *Sheely* wrote, they have "suffered a severe, detrimental impact to their quality of life" due to the discrimination they faced.[234]

As a direct result of *Cummings*, many victims of discrimination will be left with a dearth of other redress options. This is in part because plaintiffs bringing discrimination cases under these statutes often lack pecuniary harms.[235] As Ms. Sinzdak explained during oral arguments in support of Cummings, in these discrimination cases "we're just not usually dealing with something where back pay can be a remedy."[236] Moreover, when plaintiffs are suing for a past discriminatory event that is unlikely to happen again with the same defendant, the plaintiff may lack standing to sue for injunctive relief. So, without the availability of emotional distress damages as redress for these cases, the plaintiff may lack standing to bring the lawsuit.

This leaves victims of discrimination with little incentive to sue. As the *Sheely* article explained, removing the availability of emotional distress damages thus "manifestly contradicts Congressional intent because victims

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233. Katie Keith & Joseph Wardenski, *Supreme Court Slashes Remedies for Victims of Health Care Discrimination*, O'NEILL INST. (May 12, 2022), https://oneill.law.georgetown.edu/supreme-court-slashes-remedies-for-victims-of-health-care-discrimination/.

234. Lave et al., *supra* note 113, at 4.

235. Oral Argument at 27:47, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/oral_arguments/audio/2021/20-219 ("Often, we're dealing with children who are being subject to discrimination within a school system. So we don't have the sort of traditional pecuniary harms.").

236. *Id.* at 27:42.

will no longer be encouraged to enforce their rights and the rights of others similarly-situated."[237] The resulting "reduction in suits . . . w[ill] eviscerate the [anti-discrimination legislation's] attempt to deter discrimination and ensure equal treatment," and society as a whole will suffer.[238]

Had the Supreme Court ruled in favor of Jane Cummings, public benefits recipients in North Carolina and nationwide would have emotional distress damages available to them if they decided to bring a disparate treatment claim under any of the Spending Clause anti-discrimination statutes. And this would have a ripple effect. Not only would individual plaintiffs have the availability of remedies for the emotional distress they faced, but other public benefits recipients would know that they too would be able to claim these damages, should they face discrimination. Further, a Supreme Court affirmation of the availability of these damages would hopefully discourage federal funding recipients from discriminating in the first place—an effect which aligns with the goals of Congress back it enacted Title VI in 1964.

While the importance of a favorable ruling—had the Court ruled the other way—cannot be overstated, justice in the face of a favorable ruling would still be unattainable for many low-income North Carolinians. In reality, very few low-income people in North Carolina have access to the legal representation necessary to appeal an unfavorable public benefits decision, and even fewer have legal representation to sue for the emotional distress caused by discrimination in association with public benefits. In fact, one survey of all unmet legal needs across the state indicated that public benefits is the third highest category of unmet legal need—with 86.5% of low-income respondents to the survey indicating that they had unmet legal needs related to public benefits.[239] The current system must be reimagined, and changed.

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237. Lave et al., *supra* note 113, at 24.

238. *Id.*

239. *Civil Legal Needs Assessment,* N.C. EQUAL JUST. ALL.: THE CIV. LEGAL AID CMTY., https://ncequaljusticealliance.org/assessment/ (last visited Oct. 5, 2022).

B. *Reimagining Public Benefits through Revitalization of Welfare Rights Movement*

As North Carolina attorney and advocate Madison Allen said: "Public benefit programs are racist. They are also essential."[240] Many advocates fear that exposing the discrimination that exists within public benefits will lead to further decreases of (already limited) funding. While this fear is warranted, it has unfortunately led to a paucity of policy, legal, and academic writing aimed at better understanding the discrimination that *already exists* within public benefits today—as well as solutions that could be implemented to address this discrimination tomorrow. It is not because these programs are unimportant, a belief most spouted by fiscal conservatives in response to acknowledgment of discrimination in in the welfare system, but rather because they are *essential*, that their weaknesses must be pointed out and addressed. Only by addressing their weaknesses can we both *strengthen* existing protections and *expand* new protections for recipients, to ensure that these vital programs can continue to operate in meaningful ways for low-income families around the state. Which means we must face the central question that Madison Allen asks: "[W]here do we go from here?"[241]

The answer, in short, may seem simple: We must revitalize the welfare rights movement of the past. The welfare rights movement was led by, and for, public benefits recipients in the 1960s who aimed to shift the narrative and public perception around people in poverty.[242] One of the leading organizations in this movement was the National Welfare Rights Organization (NWRO), an organization and movement primarily led and run by Black women. A woman named Johnnie Tillmon was the chairperson. As one NPR story from "Code Switch" explained, both Tillmon and the NWRO argued that "poor women on welfare were the most equipped, by experience,

240. Madison Allen, *Racism in Public Benefit Programs: Where Do We Go from Here?*, CTR. FOR L. & SOC. POL'Y (July 23, 2020), https://www.clasp.org/blog/racism-public-benefit-programs-where-do-we-go-here/.

241. *Id.* (cleaned up).

242. Gene Demby, *The Mothers Who Fought To Radically Reimagine Welfare*, NPR: CODE SWITCH (June 9, 2019), https://www.npr.org/sections/codeswitch/2019/06/09/730684320/the-mothers-who-fought-to-radically-reimagine-welfare. See AI-JEN POO & ELDAR SHAFIR, CHANGING THE NARRATIVE (2018), for more on narrative change strategies such as research into societal perceptions, and investments in public art and community-based organizations.

to know how it needed to be reformed and to know whether they should seek employment outside of the home."[243]

Despite the fact that public benefits recipients generally, and female recipients of color specifically,[244] were and still are the most equipped to lead the reform, a long history of white supremacy in our welfare system has centered the values, desires, and family structures of white wealthy politicians in the design of public benefits. Tillmon recognized that the system had no interest in listening to her or prioritizing her needs:

"I'm a [B]lack woman. I'm a poor woman. I'm a fat woman. I'm a middle-aged woman. And I'm on welfare . . . In this country, if you're any one of those things you count less as a human being. If you're all those things, you don't count at all."[245]

So, moving forward, we must reimagine public benefits to disallow discrimination of any kind, and we must do so in a way that not only engages, but *centers*, the voices of public benefits recipients—particularly, Black women.[246] And this reimagining work is not easy, as it requires "seeking solutions to centuries of systemic exclusion, extraction, and exploitation that have continually undermined economic potential in the US."[247] To engage in reimaging work, more scholars and practitioners must document the experience of public benefits recipients, like the story collection work the Robert Wood Johnson Foundation is currently funding the National Health Law Program and Legal Aid of North Carolina (among other states) to conduct. This work seeks to gather lived experiences of individuals with a particular focus on Medicaid beneficiaries' experiences of unwinding the public health emergency and of structural racism. Another stellar example of this work is the research of Dr. Carolyn Barnes at the Duke Sanford School of Public Policy, who focuses on understanding the experiences and pain

243. Demby, *supra* note 242.

244. *See, e.g.*, Floyd, *supra* note 57.

245. Demby, *supra* note 242.

246. *See* Kendra Bozarth, Grace Western, & Janelle Jones, *Black Women Best: The Framework We Need for an Equitable Economy*, ROOSEVELT INSTITUTE 2 (Sept. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/09/RI_Black-Women-Best_IssueBrief-202009.pdf ("[C]entering Black women in US politics and policymaking in the short and long term will bolster immediate recovery efforts, build durable and equitable institutions, and strengthen collective prosperity."); *see also, e.g.*, Floyd, *supra* note 57.

247. Bozarth et al., *supra* note 246, at 9.

points of North Carolinian public benefits recipients when applying for and using their public benefits.[248]

Subsequent to proposed solutions stemming from the experiences of those directly impacted, there should be suggestions posed by advocates and researchers who have extensive experience in working alongside directly impacted communities. While there are many potential solutions, substantial change is unlikely to occur unless multiple routes to reform are established. Below are a few solutions that are centered in an understanding of anti-racism and collective liberation. They are organized below in order of proximity to the public benefits recipient, starting with solutions that provide in-person support to public benefits recipients today and spanning outward to solutions geared towards administrators at the local, state, and federal levels.

First, NCDHHS must create benefit-specific, peer-led, community-based navigator programs. These navigator programs should be comprised of peers—current or former public benefits recipients—who are trained and paid to help benefits applicants and recipients persist through challenges by knowing and defending their rights. One fantastic example of a successful benefits navigator program is the North Carolina Formerly Incarcerated Transition (NC FIT) Program, which employs people who are formerly incarcerated to be Community Health Workers.[249] These Community Health Workers then work with people recently released from incarceration to, among other things, help them enroll into health insurance coverage through Medicaid or the ACA Marketplace.[250] The strength of navigator programs is also reflected in research. Studies across time have demonstrated unwavering effectiveness of navigator programs for low-income people generally, such

248. *See, e.g.*, Carolyn Barnes, *"It Takes a While to Get Used to": The Costs of Redeeming Public Benefits,* 31 J. PUB. ADMIN. RESH & THEORY 295 (2020); *see also*, Carolyn Barnes & Virginia Riel, *"I don't know nothing about that:" How "learning costs" undermine COVID-related efforts to make SNAP and WIC more accessible,* 54 ADMIN. & SOC'Y 1902 (2022). For more on understanding and reducing administrative burden, see Suzanne Wikle et al., *States Can Reduce Medicaid's Administrative Burdens to Advance Health and Racial Equity*, CTR. ON BUDGET & POL'Y PRIORITIES (July 19, 2022), https://www.cbpp.org/research/health/states-can-reduce-medicaids-administrative-burdens-to-advance-health-and-racial.

249. *See NC FIT Program*, UNC SCH. OF MED.: FAM. MED., https://www.med.unc.edu/fammed/service-to-the-community/clinical-care/formerly-incarcerated-transition-program/.

250. *Id.*

as those for the ACA Marketplace.[251] Additional studies suggest that the creation of benefit-specific navigator programs for benefits beyond the ACA might be particularly helpful for people with disabilities, people with limited or no access to the internet, and people with limited English proficiency.[252]

Second, NCDHHS must create more feedback loops that center beneficiary voices in program design and strengthening initiatives. Currently, those feedback loops exist primarily in the NC Ombudsman Program for Medicaid and other benefits issues that reach a legal services attorney.[253] However, more feedback opportunities are needed, as "the people who are receiving these services are the experts on defining how effective and useful the services are," and feedback loops can "build stronger relationships with communities and ensure that the services being offered are useful and meet their needs."[254] A promising example that already exists in North Carolina is the Parent Advisory Council, comprised of parents and caregivers of children with Medicaid or NC Health Choice (CHIP) who meet regularly with NCDHHS leadership to provide feedback about the two programs.[255] One way to expand opportunities for beneficiary feedback, at least within Medicaid, would be to implement a new requirement that at least 51% of the members of the Medical Care Advisory Committee (MCAC), an advisory body for NCDHHS, be Medicaid beneficiaries.[256] This would mirror the

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251. *See, e.g.*, Rebecca Myerson & Honglin Li, *Information Gaps and Health Insurance Enrollment: Evidence from the Affordable Care Act Navigator Programs*, 8 AM. J. HEALTH ECON. 477 (2022) (finding that "cuts [to the navigator program] did significantly decrease marketplace coverage among low-income adults, and significantly decreased total coverage among low-income adults, adults under age 45, Hispanic adults, and adults who speak a language other than English at home").

252. *See, e.g.*, Rachel Cahill & Hope Lane, *Prioritize Customer Needs in Ohio Benefits System: Findings and Recommendations from the Ohio Benefits User Experience Study*, THE CTR. FOR CMTY. SOLS. (Nov. 16, 2020), https://www.communitysolutions.com/wp-content/uploads/2020/11/111620-Ohio-Benefits-System-2.pdf; *see also, e.g.*, Pratt & Hahn, *supra* note 48.

253. *See About Us*, NC Medicaid Ombudsman, https://ncmedicaidombudsman.org/about-us/.

254. Aluoch, *supra* note 47, at 27–28.

255. *See Parent Advisory Council*, NC CHILD, https://ncchild.org/about-us/our-people/parent-advisory-council/.

256. *See Medical Care Advisory Committee*, NCDHHS, https://medicaid.ncdhhs.gov/meetings-notices/committees-and-work-groups/medical-care-advisory-committee; *see also Department of Health and Human Services Division of Medical Assistance Medical Care Advisory Committee (MCAC) Byaws*, NCDHHS,

federal requirement that at least 51% of governing board members for every Federally Qualified Health Center be patients served by that health center.[257]

Third, the North Carolina General Assembly must allocate more funding to increase salaries for current staff, and to recruit additional staff to administer public benefits at the state and county levels—with a particular aim to hire more staff who come from a historically marginalized community and who are, or have been, public benefits recipients themselves. Increasing the number of staff with lived experience of these benefits, or lived experience as victims of discrimination, will help ensure more empathy and relational building capacity between public benefits administrators, caseworkers, applicants, and recipients. Increased funding for public benefits administrators and caseworkers is vital, because if these staff are overworked and underfunded, there will be higher levels of turnover—a phenomenon exacerbated by the COVID-19 pandemic, which led to the widescale resignation of social services staff statewide.[258]

Fourth, NCDHHS must require all public benefits administrators to receive frequent and ongoing trainings about unconscious biases, historical and present systems of power, anti-Black racism, trauma-informed work, and other areas of diversity, equity, inclusion, and justice. Research on customer experience shows that increased diversity among frontline staff, alone, does not improve the experiences of customers of color.[259] Instead, public benefits

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https://medicaid.ncdhhs.gov/media/4801/download (showing, under Article IV(A), that NCDHHS "desires to . . . ensur[e] a diverse representation by race, gender, consumers, and providers" yet outlining no requirement for a specific percentage of MCAC members to be consumers).

257. *See Health Center Program Compliance Manual: Chapter 20: Board Composition*, HEALTH RES. & SERVS. ADMIN.: HEALTH CTR. PROGRAM, https://bphc.hrsa.gov/compliance/compliance-manual/chapter20#requirements-20.

258. Kate Martin, *NC Counties Struggle to Find Qualified Social Services Workers*, N.C. PUBLIC RADIO (March 30, 2022), https://www.wunc.org/2022-03-30/nc-counties-struggle-to-find-qualified-social-services-workers (calling this period of mass exodus of social services caseworkers during the COVID-19 pandemic "the Great Resignation").

259. Celeste Watkins-Hayes, *Race, Respect, and Red Tape: Inside the Black Box of Racially Representative*

Bureaucracies, 21 J. PUB. ADMIN. RSCH. & THEORY i233–i251 (2011); *see also* Schram et al., *supra* note 61, at 415 ("It is worth noting . . . that we do not find evidence in our experiments that white [TANF] case managers differ from nonwhite case managers in their sanction decisions. White case managers were no more likely to sanction clients overall and no more likely to be influenced by our experimental manipulations of race/ethnicity and client traits. These findings are . . . consistent with models emphasizing how racial

programs must provide frequent trainings to caseworkers as a way to improve customer service for public benefits applicants and recipients.[260] As one publication about an anti-racist vision for SNAP explained, staff trainings must promote a trauma-informed approach which "will assist administrators with creating an environment where individuals receiving SNAP feel respected and cared for by the administering agency and their employees."[261] A trauma-informed approach will not only "improve outcomes for individual benefit recipients and overall program engagement," but could also "lead to a social safety net that genuinely serves, supports, and understands benefit recipients."[262]

Fifth, NCDHHS must develop and provide more educational trainings for county-level public benefits administrators so that they understand the legal repercussions of discrimination. Currently, NCDHHS provides required and optional civil rights trainings to county-level staff who administer public benefits programs—some of which are available online.[263] Most of the online trainings, however, focus on Food and Nutrition Services (including SNAP and WIC), and few focus on other public benefits. Further, given the complexity of these laws, and the constant turnover of county-level staff, additional training would be helpful. However, NCDHHS would need more

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classifications operate in implicit ways—without conscious racism—to generate racial disparities . . . . Race matters in more subtle ways than overt hostility or loyalty; race is built into the cognitive processes that provide the foundation for decisions about how target groups should be treated in welfare policy settings . . . .").

260. *See, e.g.,* Elisabeth Babcock, *Using Brain Science to Transform Human Services and Increase Personal Mobility from Poverty*, U.S. P'SHIP ON MOBILITY FROM POVERTY (March 2018), https://www.mobilitypartnership.org/using-brain-science-transform-human-services-and-increase-personal-mobility-poverty; *see also* JULIA ISAACS, MICHAEL KATZ, & DAVID KASSABIAN, URB. INST., CHANGING POLICIES TO STREAMLINE ACCESS TO MEDICAID, SNAP, AND CHILD CARE ASSISTANCE: FINDINGS FROM THE WORK SUPPORT STRATEGIES EVALUATION (March 29, 2016), https://www.urban.org/sites/default/files/publication/78846/2000668-Changing-Policies-to-Streamline-Access-to-Medicaid-SNAP-and-Child-Care-Assistance-Findings-from-the-Work-Support-Strategies-Evaluation.pdf.

261. Aluoch, *supra* note 47, at 17.

262. *Id*.

263. Email from Carlotta Dixon, Title VI/ADA-Civil Rights Coordinator, NCDHHS, to author (Dec. 20, 2022, 10:49 AM EST) (on file with author); *see Trainings – Program Compliance*, NCDHHS, https://www.ncdhhs.gov/divisions/social-services/county-staff-information/training#program-compliance (last visited March 8, 2023).

funding to develop and provide additional anti-discrimination trainings, as current staff capacity is already stretched thin.

Sixth, federal agencies should issue outreach and enrollment grants that span across agencies and that are intended for multiple programs. Currently, grants are issued by one agency and meant for one specific benefits program. However, "[g]iven the overlap in eligibility between benefit programs, joint grant initiatives between federal agencies would provide states and/or community-based organizations the ability to focus on multiple benefit programs with one funding source."[264]

Seventh, the U.S. Department of Justice's Civil Rights Division should invest federal staff time and resources into the modernization and promotion of educational materials for states to use. The only existing guidance documents from the DOJ Civil Rights Division that explain how anti-discrimination statutes apply to public benefits are two that were issued in 1998 and 1999. One document (the Title VI Legal Manual) has been updated periodically, as recently in 2016.[265] The other document, however, (the Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes) has not been updated since 1998.[266] It is past time for stronger guidance and resources from the federal government—as well as targeted outreach and promotion of these materials from federal officials down to state and county officials.

Lastly, Congress should increase funding for Legal Services Corporation (LSC)-funded public benefits attorneys. To truly realize the goal of meaningful remedies for rights, there must be more funding for public benefits attorneys who can help individuals and communities enforce those

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264. Suzanne Wikle, *Recommendations to Increase Program Participation by Coordinating Outreach and Enrollment Opportunities*, CTR. FOR L. AND SOC. POL'Y 3 (Sept. 2021), https://www.clasp.org/wp-content/uploads/2022/01/2021_Outreach-and-enrollment-coordination.pdf (explaining that cross-agency grants "would drastically simplify the grant writing and reporting work for both state agencies and community-based organizations").

265. U.S. DEP'T OF JUST. CIV. RTS. DIV., TITLE VI LEGAL MANUAL (2016), https://www.justice.gov/crt/book/file/1364106/download.

266. U.S. DEP'T OF JUST. CIV. RTS. DIV., COORDINATION & REV. SECTION: INVESTIGATION PROCEDURES. MANUAL FOR THE INVESTIGATION & RESOLUTION OF COMPLAINTS ALLEGING VIOLATIONS OF TITLE VI AND OTHER NONDISCRIMINATION STATUTES (1998), https://www.enviro-lawyer.com/DOJ%20Investigations%20Procedures%20Manual%20(1998).pdf.

rights in court.[267] A 2020 assessment of civil legal needs in North Carolina showed that 86% of civil legal needs in North Carolina go unmet because of limited resources for civil legal services.[268] Further, the assessment showed that public benefits is the *third highest category* of legal services considered "top needs," as identified by nonprofit legal aid providers in North Carolina.[269] This dearth of public benefits legal services is concerning. As Randal Jeffrey wrote, "protecting the rights of those eligible for welfare necessarily involves increasing their access to attorneys."[270]

Without access to attorneys for public benefits recipients facing discrimination, we have left millions with a right but no remedy. Despite numerous federal statutes protecting public benefits recipients from intentional discrimination, those rights are all too often encroached upon. Without providing legal remedies for the ongoing discrimination that people face through our public benefit system, we are both complicit in and enabling the continuation of such discrimination.

The decision in Cummings directly undermines the ability of all people—regardless of identity—to receive the public benefits to which they are entitled. And since we are living in a time, as Madison Allen explained, "when systemic discrimination and a widening racial wealth gap make it increasingly difficult for families to thrive, now is the time for us to evaluate the ways in which our past efforts have failed, to think beyond incremental reform, and to actively dismantle racism in the safety net."[271] As communities work to navigate the public benefit system in a post-*Cummings* world, we must center the voices of directly impacted individuals and communities in reimagining the future of public benefit programs actively seeking to prevent and redress systemic discrimination. Only then will we be able to realize Congress's intent and honor what our country deserves: public benefits that

267. Congress should also remove the LSC restrictions limiting the ability of LSC attorneys to support actions of collective power and systemic change, such as through organizing, lobbying, and class action lawsuits.

268. NC EQUAL ACCESS TO JUST. COMM'N & EQUAL JUST. ALL., IN PURSUIT OF JUSTICE: AN ASSESSMENT OF THE CIVIL LEGAL NEEDS OF NORTH CAROLINA 3 (June 2021), https://chi027.p3cdn1.secureserver.net/wp-content/uploads/2021/07/NC-LNA-Exec-Summ-June-2021.pdf.

269. *Id.* at 12.

270. Jeffrey, *supra* note 41, at 343.

271. Allen, *supra* note 240.

provide life's essentials in a way that promotes agency, dignity, and power. As Madison Allen said, "I look forward to the work ahead . . . ."[272]

272. *Id.*

APPENDIX

Table 1: Means-Tested Public Benefits Included in this Comment

What is the federal program name?	**What do we call it in NC?**	**What does it provide?**	**For which low-income community?**	**Is it an entitlement or block grant program?**	**Number of North Carolinians who are enrolled in this public benefits program**[273]
Medicaid	Same as federal	Health insurance	12 states without Medicaid Expansion (including NC): aged, blind, disabled, pregnant people, and children[274]	Entitlement	2,004,535 as of October 2022[275]
Children's Health Insurance Program (CHIP)	NC Health Choice	Health insurance	Children	Block grant	294,116 as of October 2022[276]

273. Because of the high rates of turnover in many programs, it is not descriptive to examine enrollment over a year. Instead, it is more descriptive to look at enrollment at a particular point-in-time, such as during a given month.

274. In the 39 states +DC with Medicaid Expansion's "Group VIII" or "New Adult Group," all poor people are eligible. Note, however, that as of March 2, 2023, the House and the Senate of the North Carolina General Assembly finally came to an agreement to move forward with Medicaid expansion; the details have yet to be announced. Will Doran, *Top Republican Lawmakers Reach Deal on NC Medicaid Expansion*, WRAL NEWS (Mar. 4, 2023, 4:25 PM) https://www.wral.com/top-nc-lawmakers-agree-on-medicaid-expansion/20744101/.

275. *October 2022 Medicaid & CHIP Enrollment Data Highlights,* MEDICAID.GOV, https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html (scroll down to the map and click on North Carolina) (last visited Feb. 27, 2023).

276. *Id.*

Supplemental Nutrition Assistance Program (SNAP)[277]	Same as federal	Food stamps	All	Entitlement	1,602,051 as of November 2022[278]
Special Supplemental Nutrition Program for Women, Infants and Children (WIC) [279]	Same as federal	Food stamps	Pregnant people, postpartum people up to 6 months after birth, infants up to age 1, and children up to age 5	Block grant	258,760 participants as of February 2023[280]
Temporary Assistance for Needy Families (TANF)	Work First	Cash	Families with children 18 years or younger, pregnant	Block grant	18,258 participants as of January 2023 [281]

277. Note that the NCDHHS Division of Child and Family Well-Being's Food and Nutrition Services Section, which runs SNAP in North Carolina, includes the USDA Nondiscrimination Statement in 26 languages on the SNAP website. *See Food and Nutrition Services (Food Stamps)*, N.C. DEP'T OF HEALTH & HUM. SERVS., https://www.ncdhhs.gov/divisions/child-and-family-well-being/food-and-nutrition-services-food-stamps (scroll down to "Nondiscrimination Statements") (last visited Oct. 6, 2022).

278. *Supplemental Nutrition Assistance Program: Number of Persons Participating*, USDA FOOD & NUTRITION SERV., https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (follow "Latest Available Month – November 2022 State Level Participation & Benefits: Persons" hyperlink; then scroll down to "North Carolina") (last visited Feb. 27, 2023).

279. Note that the NCDHHS Division of Child and Family Well-Being's Community Nutrition Services Section, which runs WIC in North Carolina, includes a Nondiscrimination Statement as well. *See Nondiscrimination Statement*, NCDHHS, https://www.ncdhhs.gov/usda-nondiscrimination-statement (last visited Oct. 6, 2022).

280. *WIC Program: Total Participation*, USDA FOOD & NUTRITION SERV., https://www.fns.usda.gov/pd/wic-program (follow "Annual State Level Data: Total Participation" hyperlink; then scroll down to "North Carolina") (last visited Feb. 27, 2023).

281. *Work First Caseload Statistics*, N.C. DEP'T OF HEALTH & HUM. SERVS., https://www.ncdhhs.gov/divisions/social-services/program-statistics-and-reviews/work-first-caseload-statistics (follow "Work First Cash Assistance Cases and Participants" hyperlink; then go to "Jan-23") (last visited Feb. 27, 2023).

			people, and children 18 years or younger who are the head of their household		