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* St. Mary's University School of Law, J.D., May 2023. University of the Incarnate Word, M.A., 2017. St. Mary's University, B.A., 2015. To my husband Austin, thank you for being my greatest champion. Your unwavering support and constant reassurances got me through the long nights I spent researching, writing, and editing this comment. I love you and I am proud to be your wife.

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## INTRODUCTION

In the Spring of 2020, while national media was in an uproar over the Supreme Court's leaked draft opinion of *Dobbs v. Jackson Women's Health,* the Court was busy eviscerating civil rights in *Cummings v. Premier Rehab Keller*.[1] As with the nationwide impact felt from the *Dobbs* decision*,* the Supreme Court's decision in *Cummings* is likely to have a sweeping effect on victims of sexual abuse in all fifty states.[2]

Sexual harassment and abuse can drastically alter a person's life.[3] Recently, Simone Biles, one of the most decorated gymnasts in history, spoke out about her mental health after being sexually assaulted by USA Gymnastics coach, Larry Nassar.[4] The horrors that plagued Ms. Biles'

1. *Compare Leaked Draft of US Supreme Court Opinion Would Overturn Roe v. Wade Outright,* GUTTMACHER INST., (May 3, 2022), https://www.guttmacher.org/news-release/2022/leaked-draft-us-supreme-court-opinion-would-overturn-roe-v-wade-outright [https://perma.cc/9KB5-MXMR] (expressing concern regarding the ramifications of *Roe. v. Wade*'s reversal), *with* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022) (holding that emotional distress damages are not recoverable under the Spending Clause anti-discrimination statutes).

2. *Compare Leaked Draft of US Supreme Court Opinion Would Overturn Roe v. Wade Outright, supra* note 1 (outlining the leaked draft's effect on legal precedent on the right to abortion), *with* Sherry Boschert, *Even Before the Leaked Opinion, SCOTUS Gutted Key Civil Rights Remedies,* WASH. POST (May 9, 2022, 6:00 AM), https://www.washingtonpost.com/outlook/2022/05/09/even-before-leaked-opinion-scotus-gutted-key-civil-rights-remedies/ [https://perma.cc/ZAK5-6ZQH] (detailing the history of Title IX and the anticipated effect of *Cummings* on recovery for victims).

3. *See* James Gruber & Susan Fineran, *Comparing the Impact of Bullying and Sexual Harassment Victimization on the Mental and Physical Health of Adolescents*, 59 SEX ROLES 1 (2008) (acknowledging the negative effects of sexual harassment such as depression, reduced enjoyment of life, and low self-esteem).

4. *See* Paulina Dedaj, *Simone Biles Details How Nassar's Abuse Impacted Tokyo Olympics: 'I Never Should Have Been Left Alone,'* FOX NEWS (Sept. 15, 2021, 1:52 PM), https://www.foxnews.com/sports/simone-biles-nassar-abuse-impacted-tokyo-olympics-left-alone [https://perma.cc/V3GR-SCFZ] (suggesting that Simone Biles withdrew from the Tokyo Olympics because of emotional distress from past molestation by Larry Nassar).

mental health during the Tokyo Olympics ultimately led her to withdraw from the Games.[5] In her own words, Ms. Biles shared:

> It is impossibly difficult to relive these experiences and it breaks my heart even more to think that as I work towards my dream of competing in Tokyo 2020, I will have to continually return to the same training facility where I was abused.[6]

This is the reality student-victims across the country face: returning each day to the classroom, office, or locker room where they were sexually harassed with the fear that it will occur again.[7] While victims may not win significant compensatory damages, their emotional distress damages are nearly immeasurable due to the nature of the harm, and these damages often serve as the only form of recovery.[8] According to the CDC, "the lifetime cost of rape [stands] at $122,461 per victim, including medical costs, lost productivity, criminal justice activities, and other costs."[9] Accordingly, emotional distress damages exist to ameliorate the devastating effects sexual assault has on a victim's life.[10] However, *Cummings* calls into question precedent that supports student-victims and their paths to relief.[11]

5. *See id.* (justifying Ms. Biles' unexpected withdrawal from the 2020 Olympic Games).

6. Christian Spencer, *Simone Biles Hints Sexual Abuse Played Role in Shocking Olympics Withdrawal,* THE HILL (July 28, 2021), https://thehill.com/changing-america/enrichment/arts-culture/565319-simone-biles-hints-sexual-abuse-played-role-in/#:~:text=The%20Instagram%20post%20defended%20Biles,competition%20at%20the%20Tokyo%20Games [https://perma.cc/D32J-CC8T].

7. *Compare* Spencer, *supra* note 6 (describing Larry Nassar's sexual abuse of students at Michigan State University), *with* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (outlining student-on-student sexual assault on campus and the relentless cycle of fear faced by victims).

8. *See* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)) (explaining the large impact of humiliation and embarrassment stemming from discrimination).

9. *See Fast Facts: Preventing Sexual Violence*, CDC, https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html [https://perma.cc/B3S4-GR8T] (last updated June 22, 2022) (explaining how there is an objective, numerical figure to the outcome of emotional distress).

10. *See generally* Davis *ex rel.*, 526 U.S. at 643–44 (summarizing over forty years of history and precedent allowing recovery for victims of discrimination).

11. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022) (denying recovery of emotional distress damages for all Spending Clause anti-discrimination statutes that are silent as to forms of recovery).

In *Cummings,* the Supreme Court ruled six-to-three that a victim suing under one of the anti-discrimination statutes, which are silent as to forms of recovery, may not recover punitive damages.[12] In light of *Cummings*, the Court's extreme narrowing of the scope of available remedies is likely to affect those relying on Title IX to recover emotional distress damages.[13] As a nation, Americans will likely feel *Cummings*'s effects on Title IX claims in the form of fewer lawsuits being filed, more modest settlements, or reduced verdicts in the next few years.[14] Unfortunately, the filing of fewer lawsuits does not correlate to fewer victims—it means victims have no path to recovery unless they have out-of-pocket expenses related to their discrimination.[15]

Congress authorizes spending for the general welfare of the American people through the Spending Clause of the United States Constitution.[16] Congress can also restrict how federal funding is used through the Tax and Spending Clause.[17] For example, Congress uses its authority under both clauses to place conditional obligations, such as forcing recipients of federal funding—like school districts—to promise not to discriminate in exchange for federal funding.[18]

12. *See id.* at 1571, 1576 ("For the foregoing reasons, we hold that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here.").

13. *See* CHRISTINE J. BACK, CONG. RSCH. SERV., LSB10755, CIVIL RIGHTS REMEDIES IN *CUMMINGS* AND IMPLICATIONS FOR TITLE VI AND TITLE IX 3–4 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10775 [https://perma.cc/2SHG-KUQ5] (predicting the extension of the Court's rationale in *Cummings* to Title IX and the Age Discrimination Act, 42 U.S.C. § 1604(e)).

14. *See* Derek Teeter & Michael Raupp, *Supreme Court Holds That Emotional Distress Damages Are Not Available Under Title VI, Title IX, and Other Spending Clause Statutes,* HUSCH BLACKWELL (Apr. 29, 2022), https://www.huschblackwell.com/newsandinsights/supreme-court-holds-that-emotional-distress-damages-are-not-available-under-title-vi-title-ix-and-other-spending-clause-statutes [https://perma.cc/7AP8-85H7] (foreshadowing the disparate impact *Cummings* will have on Title IX claims compared to claims under other antidiscrimination statutes).

15. *See generally id.* (differentiating between the Title IX damages available before *Cummings* and the damages that will be available in a post-*Cummings* America).

16. *See* U.S. CONST. Art. I, § 8, cl. 1 (granting Congress the power to " . . . lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and the general Welfare of the United States.").

17. *See generally id.* § 8 (authorizing Congress to spend money however it deems necessary for the benefit of the people).

18. *See id.* cl. 18 (vesting Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

There are several landmark anti-discrimination statutes under the Spending Clause victims rely on: Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181; Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794(a); Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. § 18116; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.[19] These statutes protect several classes of persons, including students, minorities, and disabled persons.[20] Unfortunately, the scope of remedies is left open to the judiciary because each anti-discrimination statute is silent regarding the form of recovery allowed.[21]

Congress authorized the civil rights statutes to prevent using federal resources to support discrimination and provide citizens protection against discriminatory practices.[22] Historically, the Court allowed for enforcement of these statutes through private rights of action.[23] *Barnes v. Gorman* created a notice caveat—if a funding recipient is on notice of the particular type of liability at issue, plaintiffs may secure a remedy.[24] Therefore, if there is no evidence of notice of liability, there is no remedy.[25]

19. *See* Cummings,142 S. Ct. at 1571 (describing the statutes that prohibit federal funding recipients from discriminating based on race, color, sex, and disability); *see also* 42 U.S.C. § 12181; 29 U.S.C. § 794(a); 42 U.S.C. § 18116; 42 U.S.C. § 2000d; 20 U.S.C. § 1681.

20. *See generally Educational Opportunities Section, About the Division*, U.S. DEP'T. OF JUST., https://www.justice.gov/crt/educational-opportunities-section [https://perma.cc/QR3F-HQTW] (describing the genesis of the antidiscrimination statutes).

21. *See* Cummings, 142 S. Ct. at 1571 (noting that statutory silence regarding remedies cloaks courts with freedom to decide the scope of a remedy based on precedent such as in *Barnes v. Gorman*).

22. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 653–55 (1979) (shedding light on the implied right of action necessary to enforce each statute).

23. *See* Barnes v. Gorman, 536 U.S. 181, 185 (2002) ("In *Franklin* . . . we recognized 'the traditional presumption in favor of any appropriate relief for violation of a federal right,' and held that since this presumption applies to suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, monetary damages were available.").

24. *See* Rachel Bayefsky, *Court Rules Against Plaintiff Seeking Emotional Distress Damages for Discrimination,* SCOTUS BLOG (Apr. 28, 2022, 11:36 AM), https://www.scotusblog.com/2022/04/court-rules-against-plaintiff-seeking-emotional-distress-damages-for-discrimination/ [https://perma.cc/AN8J-2F6E] (summarizing the *Cummings* opinion and its impact on future anti-discrimination claims).

25. *See id*. (noting the contract law origin of the "notice" standard utilized by the Court in *Cummings*).

Courts have the discretion to decide the appropriate remedy when a statute is silent on available remedies.[26] On its face, the holding in *Cummings* is narrowed to Title III, Section 504, and the ACA.[27] However, there is fear *Cummings* will extend to every anti-discrimination statute, including Title IX, that is silent on recovery available.[28]

This Comment elaborates on the Court's contract-based denial of emotional distress damages in *Cummings* as they apply to Title IX.[29] Parts IV and V of this Comment discuss why Title IX should not be analyzed under the Court's contract law analogy from *Cummings*.[30] No school board can claim ignorance of Title IX liability at the time they accept federal funding for three reasons: (1) a breach of Title IX is likely to result in serious emotional disturbance, (2) a half-century of precedent allotted punitive damages for Title IX violations, and (3) the Board of Education requires each district to publish its own policies and procedures on how Title IX violations will be handled with outlined penalties for lack of adherence. [31]

Title IX provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[32]

26. *See* Cummings, 142 S. Ct. at 1570 (evaluating how the Court answered whether punitive damages are available in similar causes of action).

27. *See generally* Laura Ahrens & Susan Friedfel, *U.S. Supreme Court Bars Emotional Distress Damages Under Section 504, Title VI, Title IX, ACA,* JACKSON LEWIS P.C. (May 3, 2022), https://www.jacksonlewis.com/publication/us-supreme-court-bars-emotional-distress-damages-under-section-504-title-vi-title-ix-aca [https://perma.cc/6335-QDFN] (discussing the potential impact of *Cummings* on other anti-discrimination statutes).

28. *See id*. ("This ruling is particularly significant for colleges, universities, school districts, charter schools, and healthcare providers, most of whom are federal funding recipients.").

29. *See infra* I. *Cummings v. Premier Rehab Keller* (explaining the purpose of this Comment in relation to the *Cummings* standard).

30. *See infra* IV. Lack of Clear Notice as an Argument Falls Flat Amidst Half a Century of Authorization of Non-Economic Damages for Title IX Discrimination (establishing the shortcomings of *Cummings* to promote new solutions); *see also infra* V. Life after *Cummings* (contrasting opportunities after *Cummings*).

31. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643–44 (1999) (detailing the common law's history of holding recipients responsible for discrimination and the regulatory scheme created by the Department of Education).

32. 20 U.S.C. § 1681.

Since the first Title IX case, *Cannon v. University of Chicago*, three major Supreme Court decisions clarified the rubrics of recovery for victims: (1) *Franklin v. Gwinnett County Public Schools*, (2) *Gebser v. Lago Vista Independent School District*, and (3) *Davis v. Monroe County Board of Education.*[33] This Comment assesses how *Cummings*, if applied to Title IX, could serve to render the statute inoperable after fifty years of progress toward protecting victims.[34] In addition, this Comment will use the Court's contract-law analysis to disentangle the applicability of *Cummings* to Title IX.[35]

The judiciary's ability to accomplish Title IX's goal of preventing sex-based discrimination in a post-*Cummings* world requires distinguishing from the other anti-discrimination statutes.[36] In order to formulate a path toward distinguishing Title IX from the shackles of *Cummings*, Part I of this Comment summarizes the pertinent parts of the opinion.[37] Part II examines the history of judicial and administrative recovery for civil rights violations relating to emotional damages.[38] Part III analyzes the emotional impact of Title IX discrimination, highlighting the importance

33. *See* Cannon v. Univ. of Chi., 441 U.S. 717 (1979) (granting a private right of action under Title IX based on the statutory intent of providing injured persons with a right to relief); *see also* Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 76 (1992) (concluding that a damages remedy is available for Title IX private rights of action); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that damages may not be recovered in those "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."); *see also* Davis *ex rel.*, 526 U.S. at 662 (distinguishing student-on-student conduct as grounds for actionable relief under Title IX where the grantee acts with deliberate indifference to known acts of harassment in the school's activities).

34. *See infra* V. Life after *Cummings* (introducing the negative trajectory for victim protections).

35. *See id.* (criticizing how the Court took the contract-law rubric far enough to deny recovery).

36. *See* Urooba Abid, *Victims of Discrimination Have No Path to Justice Following Supreme Court Decision*, ACLU (July 12, 2022), https://www.aclu.org/news/disability-rights/victims-of-discrimination-have-no-path-to-justice-following-supreme-court-decision [https://perma.cc/WD7Q-CDUS] (noting that *Cummings* may affect Title IX victims' ability to bring causes of action).

37. *See infra* I. *Cummings v. Premier Rehab Keller* (highlighting important lessons from the opinion).

38. *See infra* II. History of Recovery for Victims of Discrimination Causing Emotional Distress (anchoring the Comment by understanding emotional impact).

of emotional distress damages.[39] Part IV applies the Court's "lack of notice" contract law analysis in *Cummings* to Title IX, with particular attention to the elements making Title IX a statutory outlier.[40] Part V outlines several ways Title IX can be distinguished from *Cummings*.[41] Finally, Part VI provides a solution for victims and litigants to maximize recovery despite *Cummings*.[42]

## I. *CUMMINGS V. PREMIER REHAB KELLER*

In October of 2016, Jane Cummings, a legally blind and deaf Texas resident, sought physical therapy services to treat chronic back pain at Premier Rehab Keller, hereinafter referred to as Premier Rehab.[43] Premier Rehab is a relatively small practice located in the Dallas–Fort Worth metroplex that receives reimbursement through Medicare and Medicaid for some of its services.[44]

Ms. Cummings' primary means of communication is through American Sign Language (ASL).[45] Ms. Cummings struggled to communicate effectively with her physical therapists because none of the staff members at Premier Rehab were fluent in ASL.[46] Ms. Cummings asked Premier Rehab to provide an ASL interpreter based on the open and apparent deficiencies in her care.[47] Premier Rehab Keller refused Ms. Cummings' request, and the staff suggested Ms. Cummings, also a

39. *See infra* III. Sex Discrimination Suits Often, if Not Always, Involve Infliction of Emotional Distress Remedied Exclusively Through Pecuniary Damages (introducing the toll of Title IX discrimination).

40. *See infra* IV. Lack of Clear Notice as an Argument Falls Flat Amidst Half a Century of Authorization of Non-Economic Damages for Title IX Discrimination (applying the Court's analysis to Title IX).

41. *See infra* V. Life after *Cummings* (distinguishing *Cummings*).

42. *See infra* VI. (proposing solutions to counter the diminishing of remedies available to Title IX victims).

43. *See* Cummings v. Premier Rehab, P.L.L.C., No. 4:18-CV-649-A, 2019 U.S. Dist. LEXIS 7587, at *2 (N.D. Tex. Jan. 16, 2019) (highlighting that Ms. Cummings faced disabilities since birth due to albinism).

44. *See* Cummings, 142 S. Ct. at 1568 (noting the location of the facility where Ms. Cummings sought treatment).

45. *See id.* (describing the importance of Ms. Cummings' ability to communicate with her therapists through American Sign Language (ASL)).

46. *See id.* (affirming the importance of ASL communication to Ms. Cummings' ability to seek adequate care).

47. *See id.* at 1569 (noting the facility's failure to provide an adequate form of communication for Ms. Cummings).

blind woman, communicate through "written notes, lip reading, or gesturing."[48] The remedies Premier Keller offered appeared to be an offensive attempt at dismissing her as a patient.[49]

Over time, despite acknowledgment that Ms. Cummings' disabilities made Premier Rehab's suggested communication forms ineffective, Premier Rehab continued refusing her requests for interpreter accommodations.[50] In need of treatment, Ms. Cummings sought services elsewhere, though her experiences at other facilities were unsatisfactory.[51] Finally, after reaching out to Premier Rehab two more times, Ms. Cummings realized the facility's decision to deny her accommodations for her disability was absolute.[52]

On August 7, 2018, Cummings filed suit against Premier Rehab for discrimination based on her disability, in violation of Title III of the ADA, 42 U.S.C. § 12182(a), Section 504 of the RA, 29 U.S.C. § 794, Section 1557 of the ACA, 42 U.S.C. § 18116, and Section 121.003 of the Texas Human Resources Code.[53]

After long-winded evaluations of standing and whether Ms. Cummings stated a claim upon which relief could be granted, the District Court dismissed her complaint.[54] Specifically, the District Court held damages are not recoverable under Title III of the ADA, and emotional distress damages are not recoverable in actions seeking enforcement of Section

48. *See id.* (noting Ms. Cummings' allegation that Premier Keller's refusal to provide proper accommodations constituted discrimination).

49. *See* Cummings, 2019 U.S. Dist. LEXIS 7587, at *2 (identifying Ms. Cummings' limited proficiency in English due to her deafness).

50. *See id.* (noting Premier Rehab's continued denial of accommodations).

51. *See id.* (seeking to mitigate the effects of Premier Rehab's discrimination on Ms. Cummings' ongoing care).

52. *See id.* (noting Ms. Cummings' continued attempts to make Premier Rehab her primary treatment facility after finding other providers unsatisfactory).

53. *See id.* at *1, *3 (explaining that Premier Rehab is subject to these statutes as an entity receiving reimbursement through Medicare and Medicaid).

54. *See* Cummings, 2019 U.S. Dist. LEXIS 7587, at *2 (finding Ms. Cummings' only compensable injuries to be humiliation, frustration, and emotional distress).

504 of the RA[55] or Section 1557[56] of the ACA.[57] The District Court drew from *Barnes v. Gorman* to distinguish available damages for violations of the Spending Clause:

> [T]he 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 (as in this case) for the loss caused by that failure.[58] Punitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell v. Hood*.[59]

In its application of *Barnes*, the District Court denied all of Ms. Cummings' claims for emotional distress.[60] Further, the court noted that a lack of foreseeability by federal funding recipients for liability, under the relevant statutes, precluded her recovery under Section 504.[61] Accordingly, the District Court granted Premier Rehab's motion to dismiss.[62]

55. *See* Tex. Educ. Agency, *What is Section 504*, TEA (last updated Jun. 26, 2023), https://tea.texas.gov/academics/special-student-populations/section-504 [https://perma.cc/ZM5Q-CJXW] (establishing that Section 504 of the Rehabilitation Act (RA) prohibits discrimination against individuals with disabilities and is enforced by U.S. Department of Education).

56. Section 1557 "prohibits discrimination on the basis of race, color, national origin, age, disability of sex (including pregnancy, sexual orientation, gender identity, and sex characteristics), in covered health programs of activities." *See* U.S. Dep't of Health & Hum. Servs., *Section 1557 of the Patient Protection and Affordable Care Act*, HHS https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html [https://perma.cc/4TSL-E43R] (last updated Jun. 26, 2023) (publicizing Section 1557 and adding further interpretation into the statute).

57. *See* Cummings, 2019 U.S. Dist. LEXIS 7587, at *11 (highlighting that Ms. Cummings did not have a right to relief for failure to state a claim for which compensatory damages could be sought).

58. *See id.* at *10 (explaining how damages for emotional distress, like punitive damages, do not make victims whole, but instead, are used as a punishment mechanism for defendants).

59. *See id.* (relying on *Bell v. Hood* to hold that while individuals may recover monetary or injunctive relief, punitive damages are not recoverable because punitive damages are not available in breach of contract actions) (citing Barnes, 536 U.S. at 187–89).

60. *See id.* (highlighting that any non-economic damages would compensate her for "outrageousness of . . . conduct" by Premier Rehab rather than pecuniary loss) (citing Barnes, 536 U.S. at 187-89).

61. *See id.* at *11 (noting that such an exposure to would lead to unlimited liability for federal funding recipients).

62. *See* Cummings, 2019 U.S. Dist. LEXIS 7587, at *13 (denying Ms. Cummings the opportunity to replead her case despite her earlier motion for leave to amend).

Ms. Cummings appealed the District Court's decision.[63] She hoped to establish that emotional distress damages are available under the Rehabilitation Act and the Affordable Care Act through the use of almost a century long precedent of recovery for punitive damages.[64] In her brief, Ms. Cummings relied heavily on *Sheely v. MRI Radiology Network, P.A.*, a case in which an MRI facility denied a legally blind woman's guide-dog entrance to its imaging room, preventing her from being able to accompany her son while he underwent an MRI.[65] Staff members told Mrs. Sheely that her dog was too big, that, in the staff members' opinions, her son did not need her to accompany him, and that the MRI Radiology Network was a private facility not subject to the American Disabilities Act.[66] Even after Ms. Sheely called the facility director, who informed her that she was entitled to enter the room with her service animal, staff members denied her entry.[67]

Ms. Sheely brought suit on the basis of the MRI facility's intentional discrimination based on her disability, seeking emotional distress damages under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 et seq., and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[68] Though the MRI facility sought to prove emotional damages were not recoverable under the American Disabilities Act, the court concluded that non-economic damages are available for intentional violations of the Rehabilitation Act.[69] Accordingly, on this basis, the Court of Appeals affirmed the District Court's decision.[70]

63. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 675 (5th Cir. 2020) (explaining the issue on appeal to the Fifth Circuit).

64. *See, e.g.,* Daniel v. Paul, 395 U.S. 298, 307–08 (1969) (quoting H.R. Rep. No. 88-914, at 18 (1963)) (detailing Congress' overriding purpose of addressing the humiliation involved in race-based discrimination in passing the Civil Rights Act of 1964).

65. *See* Brief for Petitioner, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. (2022) (citing Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1178–79 (11th Cir. 2007)) (noting that staff members informed Ms. Sheely that even if she was a patient, her dog would not be allowed to enter the examination rooms).

66. *See* Sheely, 505 F.3d at 1178–79 (elaborating on the facility's excuses for denying Ms. Sheely access to the exam room and forcing her son to enter alone).

67. *See id.* at 1179–80 (identifying a lack of written disability accommodations policies at the facility).

68. *See id.* at 1180, 1189 (describing that the facility had been faced with service animal issues on several occasions, but Ms. Sheely was the first to take her claim to court).

69. *See id.* at 1190–91 (applying previous remedies the Supreme Court allowed private litigants to recover under Title VI).

70. *See* Cummings, 948 F.3d at 680, *aff'd*, 142 S. Ct. 1562 (holding that emotional distress damages are neither available under the RA or the ACA).

On July 2, 2021, the Supreme Court granted certiorari.[71] To justify its denial of emotional distress damages, the Court further bolstered the Court of Appeals' contract law analogy on the limitations of the scope of recovery.[72] Rather than setting its sights on allotting appropriate remedies for victims of discrimination, the Court queried: "Would a prospective funding recipient, at the time it 'engaged in the process of deciding whether [to] accept federal dollars', have been aware that it would face such liability?"[73] In an oversimplification that shocks the conscience, the Court boiled the emotional well-being of victims of discrimination down to a yes-or-no question.[74] Though punitive damages are not unheard of in contract disputes, the court answered "no" to the posed question.[75]

On April 28, 2022, in affirming the Court of Appeals' opinion that emotional distress damages are not recoverable under the Spending Clause, the Court repurposed over fifty years of anti-discrimination laws into its own discriminatory action.[76]

Justice Kavanaugh, joined by Justice Gorsuch, filed a concurring opinion, suggesting a reorientation of the contract law analogy set forth by the dissent and the Court.[77] Regarding the implied cause of action Ms. Cummings's case presents, Justice Kavanaugh would have the Court look to Congress rather than precedent to both extend the causes of action and expand remedies for victims.[78]

71. *See* Cummings, 142 S. Ct. at 1569 (listing the procedural history of the case for contextual understanding).

72. *See id.* at 1570 (noting the Court's regular application of the contract law analogy in defining the scope of liability for funding recipients).

73. *Id.* at 1570–71.

74. *See id.* at 1571 (relying on *Barnes v. Gorman* to conclude that federal funding recipients do not implicitly consent to liability for punitive damages by mere acceptance of funds).

75. *See id.* at 1571 (citing RESTATEMENT (SECOND) OF CONTRACTS § 355, cmt. a (1979)) (providing that punitive damages are recoverable in contract, but ultimately denying recovery of punitive damages because the recognized exception did not provide funding recipients the necessary notice that they may be liable for such damages).

76. *See* Cummings, 142 S. Ct. at 1576 (holding there is no basis in contract law allowing for recovery of punitive damages due to the lack of clear notice by funding recipients of such liability).

77. *See id.* at 1576 (Kavanaugh, J. & Gorsuch, J., concurring) (suggesting the Court rely on the separation of powers to distinguish respective causes of action).

78. *See id.* at 1576–77 (Kavanaugh, J. & Gorsuch, J., concurring) (describing the contract law analogy applied by the Court as imperfect and suggesting an alternative approach of delegating remedy formulation to Congress).

Justice Breyer, joined by Justice Sotomayor and Justice Kagan, authored a stimulating dissent, recognizing the shackles the Court placed on victims in terms of recovery against federal funding recipients.[79] Emphasizing the Court's misguided application of contract law principles, Justice Breyer noted that contracts analogous to Title IX of the Education Amendments Act of 1972, the Rehabilitation Act, the Patient Protection and Affordable Care Act, and Title VI of the Civil Rights Act of 1964 affirmatively allow for recovery of emotional distress damages.[80] He argued that discrimination based on race, color, national origin, sex, disability, or age, is by nature, likely to cause emotional disturbance of a severe nature, calling for recovery where violations are intentional.[81] In agreeance with the contract-based-notice-standard necessary for the subjection of liability, Justice Breyer argued that emotional distress damages—for breaches of contract where a breach was "particularly likely to cause suffering of that kind"—have existed for decades.[82]

Drawing from the Restatement (Second) of Contracts § 353, Justice Breyer directed the Court to examples of contracts that historically have given rise to emotional distress damages.[83] For example, Justice Breyer noted that the Restatement (Second) of Contracts § 353 clarifies that with claims sounding in both contract and tort, if an award of punitive damages would be proper under tort law, contract law does not control.[84]

In sum, although Justice Breyer's contract law analogy supported recovery under the very analysis adopted by the majority, the Court only

79. *See id.* at 1577 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (declaring that the Court misapplied the contract law analogy).

80. *See id.* (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (noting long standing recovery under the responsive statutes for recovery of emotional distress damages).

81. *See id*. (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (distinguishing recovery based on intentional statutory violations).

82. *See id.* at 1578 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) ("'Recovery for emotional disturbance was allowed where 'the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L. INST. 1981)).

83. *See id.* at 1579 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (citing a string of case law treating the responsive statutes as providing coextensive remedies for victims of race, sex, disability, and age discrimination).

84. *See id.* (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (first citing RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. b (AM. L. INST. 1981); then citing RESTATEMENT (SECOND) OF TORTS § 908 (AM. L. INST. 1979)).

extended contract law principles far enough to upset settled expectations for future victims of discrimination.[85]

## II. HISTORY OF RECOVERY FOR VICTIMS OF DISCRIMINATION CAUSING EMOTIONAL DISTRESS

A discrimination victim's right to recovery dates back to *Marbury v. Madison,* where Chief Justice Marshall proclaimed that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[86] For many, Title IX is an assurance of not falling victim to discrimination, or in the event of discrimination, a gateway to a right of recovery.[87]

Congress invoked its authority to prohibit federal funding recipients from acts of discrimination on the basis of sex, race, and disability with Title VI of the Civil Rights Act of 1964.[88] While Title VI by itself did not expressly grant private causes of action against federal funding recipients, the Supreme Court "found an implied right of action . . . and Congress has acknowledged this right in amendments to the statute, leaving it 'beyond dispute that private individuals may sue to enforce' Title VI."[89]

Title IX was modeled after Title VI.[90] Because almost every college and every public elementary, middle, and high school in the county receives federal funding, "these thousands of institutions are all subject to the rules established by the courts and by the Department of Education's Office of Civil Rights (OCR) under Title IX."[91] A product

85. *See generally* Melzer ET AL., *supra* note 34 (criticizing the Court's departure from established contract law principles as they applied to *Cummings*).

86. Marbury v. Madison, 5 U.S. 137, 163 (1803).

87. *See* R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION 4 (2018) (emphasizing Title IX's protective nature and expansive scope).

88. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (explaining Congress' intent in passing this legislation).

89. Barnes v. Gorman, 536 U.S. 181, 185 (2002).

90. *See* Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) (describing the genesis of Title IX as patterned after Title VI); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 719 (1979) (White, J. & Blackmun, J., dissenting) ("[T]he legislative history, like the terms of Title VI itself, makes it abundantly clear the Act was and is a mandate to federal agencies to eliminate discrimination in federally funded programs.").

91. *See* MELNICK, *supra* note 87, at 4 (detailing a half-century's worth of rules, guidelines, and interpretations on Title IX requirements).

of a robust cultural shift, Title IX is a powerful symbol of a national commitment to gender equality in education and a controversial regulatory regime.[92] The Congressional purpose of both statutes is to avoid using federal resources to support discrimination and provide citizens protection against discriminatory practices.[93]

The two primary forms of enforcement for Title IX are: (1) by private rights of action directly against educational institutions that receive federal funds (judicial enforcement) and (2) by federal agencies that provide funding to educational programs, such as the Office of Civil Rights (OCR) (overseeing administrative enforcement).[94] It is only through judicial and administrative enforcement that orderly execution of Title IX is most effectively achieved; while judicial enforcement holds the funds-recipient/school to necessary standards to help prevent violations, administrative enforcement places risk on a recipient's federal funding in the event of the recipient's failure to remedy a known breach.[95]

### *A. Judicial Enforcement of Title IX*

Distribution of Title VI and Title IX funding is contingent on a federal funding recipient's promise not to perform discriminatory acts.[96] Because discrimination based on race and discrimination based on sex may cause long-term emotional damage, it follows that in Title IX, as with Title VI, Congress did not intend to limit the available remedies for Title IX claims.[97] As a result, for over a century, victims of intentional

92. *See id.* at 5 (noting that it was a profound cultural shift in the 1960s and 1970s, which resulted in the near total elimination of all-male colleges in the United States, that prompted Congress to enact Title IX).

93. *See* Cannon, 441 U.S. at 704 (shedding light on the implied right of action necessary to enforce each statute).

94. *See* JARED P. COLE, CONG. RSCH. SERV., LSB10268, TITLE IX AND SEXUAL HARASSMENT: EDUCATION DEPARTMENT PROPOSES NEW REGULATIONS 2 (2019) (differentiating the various ways Title IX can be enforced).

95. *See* Cannon, 441 U.S. at 704 ("Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

96. *See generally* U.S. DEP'T OF JUST., TITLE IX LEGAL MANUAL § 1 (2021), https://www.justice.gov/crt/title-ix#1.%C2%A0%20Scope%20of%20Coverage [https://perma.cc/P5NP-28MA] (describing both the purpose and the legislative history of Title IX).

97. *See* Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 68 (1992) (granting "all appropriate relief" to victims of discrimination); *see also* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1198–99 (11th Cir. 2007) ("We think it fairly obvious—and the case law supports

racial discrimination have recovered non-economic damages for the emotional injuries sustained.[98] More recently, plaintiffs have recovered emotional distress damages against federal funding recipients for intentional violations of Title IX.[99]

In *Cannon v. University of Chicago,* seven years after the passage of Title IX, the Court noted that because Title IX was modeled after Title VI, a private right of action exists for victims of discrimination.[100] Thirteen years later, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that monetary damages are available under a private right of action for victims of intentional discrimination by a school.[101] In *Franklin*, a teacher had begun harassing a female student by making advances toward her and questioning her about her sex life.[102] Eventually, the teacher acted on his advances by pulling her into a private office and raping her.[103] He committed at least two subsequent sexual assaults before she alerted her mother, who notified the school's officials.[104] Unfortunately, the district was not sympathetic—failing to take any action that might prevent subjecting the petitioner to further sexual harassment.[105]

As a result of the school officials' dismissive attitudes, the petitioner's parents filed suit against the district seeking emotional distress damages

the conclusion—that a frequent consequence of discrimination is that the victim will suffer emotional distress.").

98. *See generally* Daniel v. Paul, 395 U.S. 298, 307–08 (1969) (detailing Congress' overriding purpose of addressing the humiliation involved in race-based discrimination in passing the Civil Rights Act of 1964 (quoting H.R. REP. NO. 88-914, at 18 (1963))).

99. *See* Franklin, 503 U.S. at 70–71 (drawing from Congress' vesting of power in federal courts to award any appropriate relief in a cause of action, brought pursuant to a federal statute, to award damages for a Title IX victim of sexual harassment by her teacher).

100. *See* Cannon, 441 U.S. at 694–703 (opining that the congressional view created private actions to enforce Title VI).

101. *See* Franklin, 503 U.S. at 76 (establishing a district's liability for sexual harassment of a student).

102. *See id.* at 63 (highlighting the sexually oriented conversations the teacher had with the petitioner, including whether she would consider having sex with an older man).

103. *See id.* (setting out the progression of the teacher's advances and ultimate sexual assault of the petitioner).

104. *See id.* (expressing the frequency and range of sexually explicit behavior the teacher subjected the petitioner to).

105. *See id.* at 64 (noting that the school's administrators attempted to discourage the petitioner from pressing charges).

on behalf of their daughter.[106] Petitioners succeeded in their claim; *Franklin*'s unanimous Supreme Court decision established a precedent that punitive damages may be awarded in Title IX lawsuits.[107]

A few years after *Franklin* was decided, in March of 1997, The Office of Civil Rights (OCR) published "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," as one of the first clarifications on requirements of Title IX enforcement.[108] Since the publication of the 1997 guidance, the Supreme Court issued two pivotal opinions for sexual harassment causes of action under Title IX: *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*.[109]

In *Gebser*, the Court held that a school could be liable for damages where a teacher sexually harasses a student and a school official, cloaked with authority to address the harassment, has "actual knowledge" of the occurrence but remains deliberately indifferent to the harassment.[110] The Court's basis for this conclusion is that unless a school official with authority to institute measures to correct the violation has notice, there is no actionable liability.[111] As applied to *Gebser*'s case, when the petitioner was in eighth grade, she entered into a sexual relationship with a teacher, Frank Waldrop; however, because she never alerted a school official with the supervisory authority to end the sexual harassment, she was denied recovery under Title IX.[112] Mr. Waldrop made sexually

106. *See* Franklin v. Gwinnett Cty. Pub. Schs., 911 F.2d 617, 619 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992) (detailing the six-month investigation initiated by the complaint through the Office of Civil Right (OCR) in which the teacher was found to have violated Title IX).

107. *See* Franklin, 503 U.S. at 76 ("In sum, we conclude that a damages remedy is available for an action brought to enforce Title IX.").

108. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Off. of C.R. Mar. 13, 1997) (notice) (stating one step in the process of clarifying Title IX requirements and regulations).

109. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school will not be liable under Title IX unless an official with authority to take corrective measures has notice of the harassment and remains deliberately indifferent); *see also* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641–43 (1999) (highlighting the longstanding legal authority establishing that sexual harassment of students is covered by Title IX).

110. *See* Gebser, 524 U.S. at 285 (defining the notice standard to trigger a school district's Title IX liability, and stating the Court's holding requiring "actual knowledge" and remaining indifferent).

111. *See id.* at 280 (affirming the Court of Appeals' distinguishment of how liability may be determined in a Title IX sexual harassment suit).

112. *See id.* at 279 (finding that sexually suggestive comments were the only instances of misconduct reported to the principal).

suggestive comments to students during book club meetings.[113] Eventually, the petitioner became Mr. Waldrop's student, and the teacher's lewd comments turned to sexual contact with the student-petitioner.[114] The petitioner never alerted school officials of the relationship—officials only became aware after someone walked in on an intimate moment between her and Mr. Waldrop.[115] Though parents had complained about Mr. Waldrop's sexual remarks, causing the principal to call a meeting with him, the sexual relationship with the petitioner was not discovered until two months after these complaints.[116] Finding that an official with supervisory authority did not have actual knowledge of the harassment, the Court dismissed the petitioner's suit.[117]

In *Davis*, the Court broadened *Gebser*'s holding to include student-on-student harassment where the other responsive conditions are met.[118] During her fifth grade year, the petitioner's daughter, LaShonda, was harassed by a classmate who repeatedly attempted to touch her breasts and genitalia.[119] LaShonda and her mom reported the incidents to her teacher, who said she would inform the principal.[120] Despite the petitioner's efforts, no disciplinary action was taken against the student-harasser.[121] The behavior continued for months, ending only when the aggressor was charged with and pled guilty to sexual battery.[122] As a result of the intense emotional impact of the exchanges, LaShonda's grades were negatively affected.[123] Her father found a suicide note

113. *See id.* at 277 (noting that the petitioner first met Mr. Waldrop at a book club he led).

114. *See id.* at 278 (describing how Mr. Waldrop pursued the petitioner by isolating her at her own home before physically pursuing sexual contact).

115. *See id*. (highlighting that the petitioner testified she knew Mr. Waldrop's actions were inappropriate, but she did not know how to react).

116. *See id.* (explaining the school did not have a grievance procedure for allegations of sexual harassment at the time).

117. *See id.* at 277 (dismissing the petitioner's claim due to insufficient notice).

118. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)) (extending the holding in *Gebser v. Lago Vista Indep. Sch. Dist.*).

119. *See id.* (outlining the petitioner's allegations).

120. *See id*. at 633–34 (explaining the petitioner's attempts to stop the harassment by notifying school officials).

121. *See id*. at 634 (detailing the continued sexual harassment the petitioner's daughter faced despite school officials' knowledge of the behavior).

122. *See id.* (elaborating on the sexually suggestive behavior that ultimately progressed into physical contact with the petitioner's daughter).

123. *See id.* (describing the severe impact of the harassment on the petitioner's daughter).

written during the ongoing harassment.[124] At no point was action taken against the harasser, nor was LaShonda allowed to change seats to get away from him.[125] Petitioner successfully pled that the Defendants created an intimidating, offensive, and abusive school environment for Lashonda by their deliberate indifference to the unwelcome sexual advances by a peer in violation of Title IX:

> We consider here whether the misconduct . . . amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student . . . We conclude that, in certain limited circumstances, it does.[126]

Highlighting the plain language of Title IX, the Court created a standard to determine whether a school may be liable for a peer's harassment: "If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment . . . ."[127]

The Court further expanded the type of conduct covered by Title IX in *Oncale v. Sundower Offshore Services, Inc.*, decided under Title VII of the Civil Rights Act of 1964.[128] The previously narrow scope of harassment, based exclusively on sexual desire, was broadened to include harassment based on a plaintiff's sex or gender.[129] Petitioner Joseph Oncale, a roustabout on an oil platform, claimed that he was subjected to various sexual activities by his male co-workers in the presence of other men.[130] He informed his employer that a male co-worker had sexually assaulted him and threatened him with rape.[131] After filing multiple

124. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 634 (1999) (alleging, at one point, the petitioner's daughter shared she "'didn't know how much longer she could keep [G. F.] off her.'").

125. *See id.* at 635 (proposing Monroe County had not trained staff members on appropriately handling peer sexual harassment and lacked a sexual harassment policy).

126. *Id.* at 635, 641.

127. *Id.* at 644.

128. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (determining that workplace harassment violates Title VII where the victim and harasser are the same sex).

129. *See id.* at 80 ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

130. *See id.* at 77 (noting that Oncale worked on an eight-man crew).

131. *See id.* (detailing the humiliation Oncale felt when harassed by his crewmates).

complaints to management, Mr. Oncale decided to resign from his job.[132] He voiced his frustrations that if the complaints had been appropriately acted upon and investigated by management, he would not have been subjected to sexual assault.[133] The Supreme Court ruled that sex discrimination, based on sexual orientation, is a form of discrimination covered by Title VII.[134] In addition, the Court clarified that the law protects both women and men from discrimination, and conduct need not be motivated by a sexual desire to qualify as sexual harassment under Title VII.[135] Though *Oncale* pertained to a Title VII claim, the Court's expansion of the range of conduct classified as sexual harassment indicated that gender-related harassment qualifies as sexual harassment.[136]

By nature, sex-based discrimination causes severe emotional distress stemming from lingering humiliation and mental anguish.[137] As expressed by Justice Goldberg in his concurring opinion in *Heart of Atlanta Motel, Incorporated v. United States,* "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is . . .humiliation, frustration, and embarrassment . . . ."[138] While some victims under Title IX may have economic damages in the form of counseling and therapy bills, emotional injuries represent the gravamen of the claims against the respective federally funded recipient.[139]

Because sexual discrimination is one of the most severe harms a person can suffer, courts have recognized that relief is available to victims of

132. *See id.* (highlighting that several of Oncale's assaulters had supervisory authority over him).

133. *See id*. at 77 (providing Oncale's request that his severance documentation reflects he left voluntarily due to sexual harassment and verbal abuse).

134. *See id.* at 82 (reversing the judgement of the Court of Appeals for the Fifth Circuit).

135. *See id.* (distinguishing the need for a commonsense approach in determining whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive).

136. *See generally id.* (finding no justification for a categorical rule excluding certain civil rights statutes but not others from same-sex harassment claims).

137. *See* Jim Duffy ET AL., *Psychological Consequences for High School Students of Having Been Sexually Harassed*, 50 SEX ROLES 811, 812 (2004) (highlighting the loss of self-esteem, anger, isolation, and discomfort that stems from sexual harassment).

138. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)).

139. *See* Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 385 (W.D. Pa. 2008) (detailing the obvious emotional harm caused by a school district's lack of an urgent response to the sexual assault of a student).

intentional violations of Title IX.[140] Most concerning for young student-victims, such discrimination can create "a feeling of inferiority as to . . . status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[141] Due to the emotional impact of sexual subordination and humiliation, the judiciary has carved out a path to recovery over the past 50 years.[142]

### *B. Administrative Enforcement of Title IX*

"Congress authorized the administrative enforcement scheme for Title IX . . . [granting] authorities to utilize] any means authorized by law . . . including the termination of funding to give effect to the statute's restrictions."[143] Further, the Department of Education has repeatedly clarified its authority to enforce Title IX through an investigation and implementation of remedial action.[144] For example, around the time of *Gebser* and *Davis,* the Secretary of Education informed schools that reasonable steps must be taken to prevent and eliminate sexual harassment.[145]

The OCR enforces civil rights laws and mandates prompt and effective investigations of complaints to ensure equal access to education.[146] If a violation is suspected, the OCR monitors a school's compliance with Title IX—sometimes seeking to reach resolution agreements that outline specific actions the federally funded recipient must take to resolve compliance concerns and violations.[147] Only when a federally funded

140. *See* Allen v. Wright, 468 U.S. 737, 755 (1984) (recognizing decades where the Court intervened in racial discrimination situations); *see also* Brown v. Bd. Of Educ., 347 U.S. 483, 494 (1954) (finding noneconomic injury to be one of the most serious consequences of discrimination).

141. Brown, 347 U.S. at 494 (noting the emotional effect of segregating students exclusively on the basis of race).

142. *See id.* (shedding light on the detrimental effect of segregation on the mental and educational development of children).

143. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 638–39 (1999).

144. *See* 34 C.F.R. § 106.3 (2023) (relying upon *Gebser*, 524 U.S. at 288).

145. *See* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) (issuing guidance on the regulatory basis for the 1997 guidance and explaining differences between private suits and administrative enforcement of Title IX).

146. *See generally* U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., CASE PROCESSING MANUAL 2 (2022) https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf#page=23 [https://perma.cc/VM3T-GRAD] (providing procedures to investigate and resolve complaints and assure compliance with civil rights laws).

147. *See id.* (mandating strict adherence for funding recipients to the terms of the resolution agreement and its respective time frame for implementing changes).

recipient fully complies with the terms of a resolution agreement will the OCR conclude its monitoring process.[148] If an agreement is not reached and violations continue, the OCR can seek termination or suspension of a school's funding.[149]

There are extensive guidelines schools must follow upon receipt of a formal complaint—first being that schools are required to provide written notice to the parties involved to allow the accused time to prepare for an interview.[150] Until evidence is gathered and each party presents their case before the school's Title IX investigation staff, schools must presume the accused is innocent.[151] A complaint must be dismissed if "the alleged conduct (1) would not constitute sexual harassment under the definition; (2) did not occur in the recipient's educational program or activity; or (3) did not occur against a person in the United States."[152]

The Congressional Research Service issued three publications in the last several years to provide guidance and summarize the OCR's changes in policies and procedures.[153] Authored by Legislative Attorney Jared Cole, these "Legal Sidebars" detail the shift in the categorization of sexual harassment over the last 20 years.[154] For example, sexual harassment, defined initially as "unwelcome sexual conduct of a sexual

148. *See* COLE, *supra* note 94, at 2–3 (describing ways in which the Education Department can address Title IX violations by a funding recipient).

149. *See id.* at 4–5 (shedding light on the two paramount cases of Title IX recovery: *Gebser.*, 524 U.S. at 274 and *Davis ex rel.*, 526 U.S. at 629).

150. *See* JARED P. COLE, CONG. RSCH. SERV., LSB10479, NEW TITLE IX SEXUAL HARASSMENT REGULATIONS OVERHAUL RESPONSIBILITIES FOR SCHOOLS 4 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10479 [https://perma.cc/M23G-2EXL] (explaining grievance procedures a school must follow upon receipt of a formal complaint).

151. *See id.* (describing the burden of proof and investigatory process of handling formal Title IX complaints).

152. *Id.*

153. *See* COLE, *supra* note 150, at 1 (describing the way in which the May 19, 2020, regulation publication changed the grievance and investigatory procedures for schools faced with Title IX allegations); *see also* JARED P. COLE, CONG. RESCH. SERV., LSB10804, EDUCATION DEPARTMENT PROPOSES NEW TITLE IX REGULATIONS: RESPONDING TO SEX DISCRIMINATION AND HARASSMENT AT SCHOOL 1–2 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10804 [https://perma.cc/6L55-LZ7N] (outlining the Education Department's 2020 regulations which established a clear definition of sex-based harassment and reinforced the categorical prongs of the 2020 publication).

154. *See* COLE, *supra* note 94, at 1 (explaining the ways in which regulations proposed by the Department of Education in 2019 would affect a school's Title IX policies); *see also* COLE, *supra* note 150, at 1 (illustrating significant regulatory changes made to Title IX in 2020 by the Department of Education); *see also* COLE, *supra* note 153, at 1–2 (outlining the changes likely to flow from the Notice of Proposed Rulemaking published by the Department of Education in 2022).

nature," was expanded by the OCR in 2011 to include "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[155] In addition, as of August 2022, sexual discrimination now extends to "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[156]

As with definitional shifts, administrative shifts have led to changes in responsibilities throughout the last few decades when a Title IX allegation is brought before a funded recipient.[157] When first promulgated in 1975, Title IX provided minimal direction regarding obligations for prohibiting sexual discrimination.[158] In 2001, the OCR issued guidance reaffirming compliance standards for Title IX by balancing components such as the age and maturity of students against the judgment and common sense of teachers and administrators.[159] This 2001 publication dictated standards for investigating, adjudicating, and resolving sexual harassment between students.[160]

In 2011, the U.S. Department of Education's Assistant Secretary for Civil Rights, Russlynn Ali, crafted an interim solution to clarifying Title IX requirements, issuing what was called the "2011 Dear Colleague Letter."[161] This letter adopted a "preponderance of the evidence"

155. *Compare* COLE, *supra* note 94, at 2 (reporting the previous definitions of sexual discrimination), *with* COLE, *supra* note 153, at 2 (noting the expansion of the definition of sexual discrimination).

156. COLE, *supra* note 153, at 1–2.

157. *See generally* COLE, *supra* note 94, at 1–2 (summarizing shifts in Title IX interpretation across Congress, the judiciary, and past administrations).

158. *See* 20 U.S.C. § 1681 (requiring federal funding recipients to adopt and publish grievance procedures for addressing sexual discrimination in education programs or activities).

159. *See* U.S. DEP'T. OF EDUC., OFF. FOR CIV. RTS., REVISED GUIDANCE ON SEXUAL HARASSMENT: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 7, 15 (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/9AR2-98TW] (requiring schools to "take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment").

160. *See id.* at 12 (requiring schools to adopt procedures reasonably calculated to eliminate a hostile environment and prevent future harassment of students).

161. *See generally* U.S. DEP'T. OF EDUC., OFF. FOR CIV. RTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1–2 (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/7S86-kXMW], *withdrawn by* U.S. DEP'T. OF EDUC., OFF. FOR CIV. RTS, DEAR COLLEAGUE LETTER 1–2 (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/EQ2B-TQMK] (shedding light on due process concerns arising from the lack of adequate policies and investigative procedures at many universities).

standard and required schools to form an adjudicative and investigative process for approaching Title IX allegations.[162] Of great concern was the lack of adequate investigatory procedures to ensure adherence to the due process rights of students accused of sexual harassment.[163] To date, both the "2011 Dear Colleague Letter" and the 2017 "Question and Answers on Title IX and Sexual Violence" have been rescinded.[164] Finding that the previous guidance was neither legally binding nor sufficient to provide uniform directions for funding recipients, the Department of Education formally overhauled Title IX on May 19, 2020.[165]

Changes within the 2020 overhaul included: (1) specification requirements on how schools treat the person complaining of sexual harassment and the person accused of the misconduct; (2) clarifications on programs and activities covered by Title IX; and (3) adoption of *Gebser* and *Davis's* definitional circumstances for allegation reporting.[166] Of particular note is the Education Department's heightened notice provisions for K-12 and post-secondary schools: only notice given to the "Title IX coordinator or any official with authority to institute corrective measures" can qualify as a school's "actual knowledge."[167] This was a departure from the previous notice standard requiring that a "responsible employee knew, or should have known, of the harassment" to hold a district liable for failure to take corrective measures.[168] In effect, Title IX claims have become more challenging to plead successfully despite

162. *See id.* (attempting to ensure thorough investigative policies were established in schools across the country).

163. *See id.* (insisting on implementation of an appeals process to protect both complainants and accused students).

164. *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., Q&A ON CAMPUS SEXUAL MISCONDUCT 7 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/2VNL-BZS8] (explaining that despite the rescission existing, resolution agreements are still binding on schools).

165. *See generally* 34 C.F.R. § 106.37 (2023) (amending prior regulatory procedures for addressing sexual discrimination to create fair, prompt, and accurate processing of complaints).

166. *SEE* U.S. DEP'T. OF EDUC., OFF. FOR CIV. RTS., NONDISCRIMINATION OF THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (unpacking the Education Department's new Title IX regulations).

167. COLE, *supra* note 150, at 3.

168. *See id.* (contrasting old Department of Education guidance with new guidance which removed the theories of *respondent superior* and constructive notice when dealing with sexual harassment allegations).

increasing occurrences of sexual harassment on school campuses across the country.[169]

## III. SEX DISCRIMINATION SUITS OFTEN, IF NOT ALWAYS, INVOLVE INFLICTION OF EMOTIONAL DISTRESS REMEDIED EXCLUSIVELY THROUGH PECUNIARY DAMAGES.

Social science research sheds light on the psychological, emotional, and health effects of sexual discrimination.[170] Generally, sexual harassment is associated with an increased risk of anxiety, depression, and post-traumatic stress disorder, as well as diminished self-esteem, self-confidence, and psychological well-being.[171] Further, sexual harassment is a chronic stressor—placing the victim under physical and mental stress during day-to-day activities.[172] In the context of school performance, sexual harassment is associated with slipping through the cracks of the American education system due to frequent absences, lower-quality schoolwork, poor grades, tardiness, and truancy among victims.[173]

Although sexual harassment can happen at any stage in a student's academic career and to any student, it disproportionately affects female students.[174] More than one-third of male and half of female college

169. *See id.* (describing the heightened notice standards adopted by the Board of Education post *Gebser* and *Davis*).

170. *See generally* Emily R. Dworkin ET AL., *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLINICAL PSYCH. REV. 65 (2017) (researching associations between psychopathology and sexual assault).

171. *See* John B. Pryor & Louise F. Fitzgerald, *Sexual Harassment Research in the United States, in* BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE, 79, 91–92 (Ståle Einarsen ET AL. ed., 2003) (investigating the impact of sexual harassment in the early occupational career).

172. *See generally* Jason Houle ET AL., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH (2011) (examining stages of vulnerability and the impact of sexual harassment on both men and women in the workplace).

173. *See* Gruber & Fineran, *supra* note 3, at 11 (comparing the effects of bullying to the effects of sexual harassment on student-victims).

174. *E.g.,* JODI LIPSON, AAUW EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL (2011) ("Girls are more likely than boys to experience non-physical or physical harassment, and they are more likely than boys to experience it more frequently.").

students encounter sexual harassment during their first year alone.[175] A study by the American Association of University Women (AAUW) found that 56% of female and 40% of male students experience sexual harassment during their school years—making it a part of everyday life for most middle and high school students.[176] Because sexual violence also disproportionately affects racial and ethnic minorities, Title IX protects the nation's most vulnerable adolescents.[177] The AAUW's assessment found that only 12% of the students surveyed felt their school adequately addressed the harassment they experienced.[178]

Harassment can take many forms, including but not limited to, verbal, nonverbal, direct, or indirect harassment.[179] For example, verbal harassment can manifest as sexual remarks or jokes, nonverbal harassment can involve gestures of obscenity, indirect harassment can appear as a social media smear campaign or rumor spreading, and direct harassment can include coercion into physical touching or forms of physical sexual behavior.[180] While most social scientists study physical sexual harassment, non-physical sexual harassment also drastically and adversely affects a student's well-being.[181] According to a study by the AAUW, a student who faces multiple forms of sexual harassment, such as online (indirect) and in person (direct), faces an increased likelihood

175. *See* CATHERINE HILL & ELENA SILVA, AAUW EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT AT SCHOOL, 2 (2011) (noting that less than 10% of student-victims alert a school official of the sexual harassment they experience); *see also* Duffy ET AL., *supra* note 137, at 812 (analyzing the emotional and academic consequences for student-victims of sexual harassment at school).

176. *See id.* at 2, 11, 22 (conducting a survey on student reactions to sexual harassment in person, online, or both in person and online).

177. *See generally Fast Facts: Preventing Sexual Violence*, *supra* note 9 (outlining the prevalence of sexual violence in the United States and how it affects various gender and racial groups).

178. *See* HILL & SILVA, *supra* note 175, at 30–31 (highlighting the importance of designating a Title IX coordinator and developing strategies to investigate and support students alleging sexual harassment).

179. *See* Bendixen ET AL., *supra* note 39, at 3–4 (observing that non-physical sexual harassment can be associated with negative emotional well-being similar to that of physical harassment).

180. *See id.* (conducting a research study on students and finding peer sexual harassment to be consistently associated with anxiety, depression, and low self-esteem).

181. *See id.* (expressing the importance of designing interventions to deal with sexual harassment among adolescents).

that it will impact their ability to learn.[182] This study revealed that 46% of students who faced both indirect and direct harassment did not want to go back to school, compared to 19% of victims who met direct, in-person sexual harassment.[183]

Sexual harassment by a peer causes uniquely adverse educational impacts.[184] In a 2004 study, the behavior of sixteen to nineteen year-olds, who had recently been harassed, was compared to students who had not been harassed.[185] The study found that while sexual harassment manifests in female student-victims as "poor body image, loss of self-esteem, anger, isolation, mistrust of the other sex, and being uncomfortable when talking about sex," male student-victims' struggles include "trouble talking, feeling hurt emotionally, feeling uncomfortable, anger, and self-hate."[186] The results of the study revealed: (1) students who experienced recent sexual harassment faced both negative psychological and educational consequences as compared to students who were not harassed; (2) that the type of harassment had a relationship with unique consequences; and (3) the psychological and educational consequences were determined by how upset the student being harassed felt.[187]

Overall, sexual discrimination "deprives persons of their dignity and denies society the benefits of wide participation in political, economic, and cultural life."[188] Because direct manifestations of sexual harassment impact student-victims' ability to succeed in school, maintaining a path to recovery is of the utmost importance.[189] Historically, administrators have failed to prioritize the importance of effective sexual harassment

182. *See* HILL & SILVA, *supra* note 175, at 25 (differentiating between the impact of online versus in-person sexual harassment among students).

183. *See id.* (noting the heightened emotional and educational impact for students who face multiple forms of sexual harassment).

184. *See* Davis *ex rel.*, 526 U.S. at 639 (clarifying that districts that failed to respond to student-on-student harassment were liable in private suits for money damages).

185. *See* Duffy ET AL., *supra* note 137, at 813–14 ("[Fifty-seven percent] of students reported experiencing at least one harassing behavior over the 2-week period in the school setting.").

186. *Id.* at 812.

187. *See id.* at 819–20 (revealing the results of the study covering the following categories of harassment: sexual jokes, leering, being called gay/lesbian, sexual graffiti, pulling at clothes, and rumor spreading).

188. Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

189. *See generally* Duffy ET AL., *supra* note 137, at 811 (noting physical and emotional consequences of sexual harassment for student-victims).

policies and enforcement.[190] Therefore, upholding the judiciary's fifty year precedent, allowing for recovery of punitive damages, must be upheld by setting Title IX claims outside the clutch of *Cummings*.[191]

## IV. LACK OF CLEAR NOTICE AS AN ARGUMENT FALLS FLAT AMIDST HALF A CENTURY OF AUTHORIZATION OF NON-ECONOMIC DAMAGES FOR TITLE IX DISCRIMINATION.

There are several reasons why school districts are not able to claim ignorance of the liability that comes with receipt of Title IX funds: (1) Title IX breaches are likely to result in serious emotional disturbance; (2) precedent proves each school district's knowing acceptance of tort liability under Title IX; and (3) legally mandated Title IX policy publications prove each school district's acceptance of tort liability.[192]

### *A. Title IX Breaches are Likely to Result in Serious Emotional Disturbance.*

Most contracts are commercial in nature.[193] Breach of contract claims for commercial contracts serve the purpose of compensating an injured party for economic losses related to the breach.[194] Generally, there are

190. *See* HILL & SILVA, *supra* note 175, at 30–31 (presenting survey results showing student dissatisfaction with current sexual harassment related policies and procedures).

191. *See id.* (calling for action by school administrators to protect students through strengthening policies and actively enforcing sexual harassment).

192. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1578–79 (2022) (Breyer, J., dissenting) (distinguishing between commercial contracts and contracts likely to invoke severe emotional distress in the event of a breach); *see also* Brief for Petitioner at 8, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (arguing that precedent strongly proves that federal funding recipients are aware of liability at the time of contract with the federal government); *see also* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) (requiring formation and publication of Title IX policies and procedures).

193. *See generally* Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions,* 11 TEX. WESLEYAN L. REV. 481 (2005) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 22 (1935)).

194. *See id.* at 491–93 ("It is foreseeable that the aggrieved party will often be unhappy after a breach and the breach may even cause some mental pain and suffering. Notwithstanding such foreseeable results, courts have been particularly reluctant to allow damages for emotional distress in contract actions." (citing JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 123 (4th ed. 2001)).

three subcategories where courts have shown a willingness to award non-economic or punitive damages: (1) personal contracts; (2) contracts surrounding family relations; and (3) contracts under which serious emotional harm is likely.[195] With claims falling under one of these three categories, " . . . courts have frequently allowed non-economic damages in breach of contract actions, despite forging the limiting rule, and clearly 'have not applied it inflexibly.'"[196]

A contract for receipt of federal funds under the Spending Clause falls outside the scope of a standard commercial relationship.[197] Further, contracts promising not to use federal funding in furtherance of discrimination fall squarely within the subcategory of contracts where serious emotional harm is likely.[198] Because similar exceptions have been drawn to provide punitive damages for breaches of contracts related to marriage, handling of a body, or delivery of sensitive information, an exception exists for a funding recipient's breach of its contractual duty not to discriminate under Title IX.[199]

In sum, as expressed by Justice Breyer in his stimulating dissent, *Cummings* indicates the Court should draw from contract law principles to determine whether punitive damages were available; however, the majority conveniently ignored precedent concerning contracts most analogous to the Spending Clause statutes at issue.[200] In other words, though punitive damages are not available for most breach of contract claims, they are available where the breach is likely to result in serious

195. *See id.* at 501 (describing the limited circumstances under which non-economic damages have been allowed).

196. *Id.* at 493.

197. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 347 *(*AM. L. INST. 1981) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a position as he would have been in had the contract been performed.").

198. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1580 (2022) (Breyer, J., dissenting) ("Emotional damages arising from racial or other forms of discrimination are clearly foreseeable. There should be no question about their recovery in a contract action where such conduct is proven." (quoting 16 J. Murray, CORBIN ON CONTRACTS §AG-59.01, p. 855 (2017)).

199. *See id.* at 1578–79 (Breyer, J., dissenting) (presenting categorical outliers to general contract principles).

200. *See id.* at 1580–81 (Breyer, J., dissenting) (explaining the Court's misapplication of contract law principles).

emotional harm.[201] Though an exception to the general rule, Title IX victims with tort actions would fall squarely within this exception.[202] As discussed in Part III of this Comment, emotional distress is almost certain to result from a funding recipient's breach that subjects a student to ongoing sexual harassment.[203]

### *B. Precedent Proves Each School District's Knowing Acceptance of Title IX Liability for Intentional Discrimination.*

Under the Spending Clause, federal funding distribution is both contractual and voluntary.[204] Recipients of federal funds must both knowingly and voluntarily accept the agreed-upon terms to be liable for a violation.[205] In other words, recovery under the Spending Clause is only allowed where "the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to the liability of that nature."[206] This notice enables the recipient to weigh " . . . the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."[207]

As highlighted in the amicus brief submitted by the plaintiff in *Cummings*, federal funding recipients have been cognizant of the remedies intended by Congress for violations of Spending Clause statutes

201. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 *(*AM. L. INST. 1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.").

202. *See id.* ("Courts are sometimes urged to award punitive damages when, after a particularly aggravated breach, the injured party has difficulty in proving all of the loss that he has suffered.").

203. *See infra* III. Sex Discrimination Suits Often, if Not Always, Involve Infliction of Emotional Distress Remedied Exclusively Through Pecuniary Damages (reminding of the expectancy of emotional distress upon victims); *compare* RESTATEMENT (SECOND) OF CONTRACTS § 355 *(*AM. L. INST. 1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."), *with* Duffy ET AL. *supra* note 137, at 812 (examining the negative psychological effects of sexual harassment on student-victims).

204. *See* Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.*,* 463 U.S. 582, 596 (1983) (elaborating that "make whole" remedies are generally not available for a private action of statutory violation).

205. *See generally* Barnes v. Gorman, 536 U.S. 181, 181 (2002) (explaining where Congress' legitimacy of power comes from in enacting Spending Clause legislation).

206. *Id.* at 187 (emphasis added).

207. *See* Guardians Ass'n,, 463 U.S. at 596 (noting the risk of accepting federal funding under the "typical Spending Clause legislation").

since the enactment of the Civil Rights Act of 1964.[208] Of particular note, Cummings' brief distinguished three cases from 1870 and 1951, each of which granted damages for emotional distress to victims of racial discrimination.[209] In all three cases, courts allowed recovery for public humiliation stemming from racial discrimination faced by each of the women.[210]

Courts have differentiated between differences in liability for intentional and unintentional Spending Clause statute violations.[211] More specifically, in *Sheely v. MRI Radiology Network, P.A,* the Eleventh Circuit clarified that while remedies for victims of *unintentional* discrimination may be limited to policy changes that prevent future violations, victims of *intentional* discrimination are entitled to compensation based on the federal funding recipient's past conduct.[212] Courts have reasoned that in cases of intentional discrimination, there is no ambiguity regarding the grantee's obligations or the grantee's awareness of those obligations.[213] Under the Supreme Court's decision in *Davis*, for intentional discrimination, the funding recipient must (1) exclude person from participation; (2) deny persons from participation; or (3) subject persons to discrimination under the recipients programs or activities.[214]

For example, where a school is deliberately indifferent to a student's harassment which transpired within a context directly under the school's

208. *See* Brief for Petitioner at 8, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219) (describing an extensive judicial history of allowing recovery of punitive damages).

209. *See id.* at 8 (citing Chi. & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (Ill. 1870); Solomon v. Pa. R.R. Co., 96 F. Supp. 709, 712 (S.D.N.Y. 1951); Lyons v. Ill. Greyhound Lines, Inc., 192 F.2d 533, 534 (7th Cir. 1951)).

210. *See* Chi. & Nw. Ry. Co., 55 Ill. at 190 (finding a recovery to the plaintiff for damages of "pecuniary losses and 'the indignity, vexation and disgrace to which the [plaintiff] has been subjected."); *see also* Solomon, 96 F. Supp. at 712 (awarding a Black woman $500 in damages for the "public humiliation" she experienced); Lyons, 192 F.2d at 534 (raising a claim in federal court for "physical and mental pain").

211. *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1191 (11th Cir. 2007) ("[V]ictims of intentional discrimination are additionally entitled to retrospective relief[.]").

212. *See id.* (distinguishing that these circumstances arise where the recipient knew or should have known its conduct violated the terms of its governmental agreement).

213. *See* Guardians Ass'n v. Civ. Serv. Comm'n of N.Y., 463 U.S. 582, 597 (1983) (excluding cases of alleged intentional discrimination but no evidence of such discrimination was discovered among the respondents).

214. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640–41 (1999) (listing the elements required for intentional discrimination).

control, the school or recipient can be held liable for intentional discrimination.[215] In *Davis,* the Petitioner sought to hold the school board liable for its decision to remain idle despite known, ongoing peer-on-peer harassment.[216] Due to the school board's failure to take action, and its deliberate indifference toward the documented harassment, the Court determined that it had purposefully violated the explicit provisions of Title IX.[217] The school incurred liability under Title IX due to its deliberate and official decision to disregard the harassment—thereby subjecting the student to continued mistreatment rather than ensuring her protection.[218]

While the Eleventh Circuit in *Sheely*, touched on the "lack of fair notice" argument broadened in *Cummings,* it concluded that in cases of intentional discrimination, the victim should be entitled to a compensatory award that corresponds to the recipient's past conduct.[219] As demonstrated in this Comment, upon accepting federal funds, each grantee school board enters into a contractual agreement pledging to adhere to the applicable statutes and undertake necessary actions to prevent any contract violations.[220] Therefore, as established by longstanding precedent, where an appropriate official, with authority to institute remedial action on behalf of a recipient, knows of a violation and fails to create corrective measures, the contractual terms of Title IX funding have been breached, and liability for punitive damages arises.[221]

215. *See id.* at 645 (outlining how harassment mostly occurs under the roof of the funding recipient).

216. *See id.* at 641 (disagreeing with the respondent's assertion that the petitioner sought to hold the school board liable for a student's actions rather than actions by the board).

217. *See id.* at 641–42 (relying on *Pennhurst* to find Monroe County Board of Education's intentional violation through a failure to react to the known harassment).

218. *See id.* at 643 (describing that liability arises in the face of discrimination by the board).

219. *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1192 (11th Cir. 2007) (relying on Guardians Ass'n, 463 U.S. 582, to conclude that Congress did not intend to limit remedies available under Title IX as evidenced by the subsequent passing of both Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975).

220. *See infra* IV. Section 2. Precedent Proves Each School District's Knowing Acceptance of Title IX Liability for Intentional Discrimination (introducing when schools accept contractual agreements); *see* Guardians Ass'n v. Civ. Serv. Comm'n of N.Y., 463 U.S. 582, 616–17 (1983) (Marshall, J., dissenting) (distinguishing the notice that attaches to recipients upon receiving funds under contractual agreement rather than court intervention).

221. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("An 'appropriate person' under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.").

### *C. Legally Mandated Title IX Policy Publication Proves Each School District's Knowing Acceptance of Title IX Liability for Intentional Discrimination.*

In examining the majority's argument in *Cummings*, which emphasizes the necessity of recipients having notice of potential liability to establish punitive damages, it is essential to highlight that the Department of Education mandates every school district to create and distribute sexual discrimination policies.[222] Where weak policies exist, hostile environments can emerge within programs and activities.[223] Therefore, the Department of Education has noted that "[s]trong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated, to ensure that they know how to report it, and to let students and employees know that students can report harassment without fear of adverse consequences."[224] In addition, schools must have at least one employee designated to coordinate Title IX statutory compliance.[225] Finally, the Department of Education has mandated that the appointed Title IX representative proactively assemble channels for reporting and notifying students, employees, parents, and other relevant parties about the school's response plan.[226]

While a failure to create or publish Title IX grievance procedures would not, in itself, constitute discrimination, as *Gebser v. Lago Vista Independent School District* proves, in the instance of intentional

222. *See* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) ("Schools are required by the Title IX [of the Education Amendments Act of 1972's regulations] to disseminate a policy against sex discrimination and to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment.").

223. *See id.* (describing the ramifications of ineffective policies).

224. *See id.* (noting that inaction and ineffective policies can hamper the early notification process).

225. *See Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School,* U.S. DEP'T. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html#:~:text=Title%20IX%20requires%20schools%20to,address%20complaints%20of%20sex%20discrimination [https://perma.cc/H9CL-N79U] (last updated Dec. 14, 2020) (outlining every school's responsibility in addressing sexual harassment and sexual violence).

226. *See* U.S. DEPARTMENT OF EDUCATION TITLE IX FINAL RULE OVERVIEW, U.S. DEP'T. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf [https://perma.cc/X3J6-VECZ] (providing the guiding principles, process, and regulations of Title IX requirements for schools).

discrimination, these regulations effectively serve as notice of liability.[227] Therefore, logic would indicate that the notice of liability is inherently satisfied, making emotional distress damages justifiable if a victim can demonstrate that the discrimination was intentional.[228]

In conclusion, the most effective method to distinguish Title IX causes of action from *Cummings* is as follows: the Department of Education's promulgation and legal requirement that each district publish policies on sexual discrimination substantiates their awareness of potential liability under Title IX.[229]

## V. LIFE AFTER *CUMMINGS*

Under *Cummings*, "[s]tudents and patients can no longer recover emotional distress damages under [Spending Clause anti-discrimination] statutes, which historically have been a substantial portion of the damages sought in such actions."[230] Fortunately, the Court's ruling in *Cummings,* does not impact the statutes for which Congress has explicitly provided remedies, such as Title VII of the Civil Rights Act.[231] However, the decision will almost certainly affect Title IX and other Spending Clause statutes which are silent as to available remedies.[232] Therefore, there are three avenues of hope for victims: (1) a congressional amendment of Title IX; (2) distinguishment by the Supreme Court; or (3) improved enforcement by school administrators.[233]

227. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 294 (1998) (differentiating between a failure to promulgate Title IX policies and procedures and the failure to address established violations of Title IX).

228. *See id.* at 290 (defining the standard of deliberate indifference to discrimination).

229. *See generally* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) (explaining that each school's grievance procedure must effectively prevent and respond to incidents of sexual harassment).

230. Ahrens & Friedfel, *supra* note 27.

231. *See id*. (differentiating claims derivative of federal antidiscrimination statutes outside Spending Clause legislation); *see also* BACK, *supra* note 13, at 2–3 (examining the ramifications of *Cummings* on other civil rights statutes and ways in which some, or all, statutes may be differentiated from *Cummings*).

232. *See* BACK, *supra* note 13, at 2–4 (predicting the reach of *Cummings* and its implications as a result).

233. *See generally* Kelsey Murrell, *SCOTUS Erodes Progress as Title IX Turns 50,* BLOOMBERG L. (June 22, 2022, 3:00 AM), https://news.bloomberglaw.com/us-law-week/scotus-erodes-progress-as-title-ix-turns-50 [https://perma.cc/3935-69VH] (proposing alternative methods for students to hold school districts liable for Title IX violations).

As Congress holds the authority to determine Section 504, Section 1557, Title VI, and Title IX violation remedies, victims can harbor optimism for a future amendment that provides remedies similar to those available under Title VII.[234] For example, the text of Title VII specifies that courts may order "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[235] If Congress were to add similar language to Title IX outlining available remedies, *Cummings* would have no effect on student-victims' ability to recover non-economic damages.[236] Justice Kavanaugh's concurrence in *Cummings*, opined that Congress, rather than the judiciary, should establish the model of available damages under the Spending Clause.[237] According to Justice Kavanaugh, where a right of action is implied rather than expressed, it is more appropriate to defer the interpretation of remedies to the entity that created the right—Congress, rather than engaging in judicial experimentation with potential outcomes.[238] Similarly, Justice Scalia took a slightly more expansive stance in his concurrence in *Franklin v. Gwinnett County Public Schools*,, suggesting that "[u]nless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied."[239]

Distinguishment by the Supreme Court presents another avenue to ensure a path to recovery for Title IX victims.[240] Several lower courts have already begun to interpret whether *Cummings* extends to Title IX.[241]

234. *See* BACK, *supra* note 13, at 4 (laying the foundation for potential remedial measures by Congress).

235. *See* 42 U.S.C. § 1981a(b)(3) (prohibiting employment discrimination based on race, sex, and national origin).

236. *See* BACK, *supra* note 13, at 3–4 (suggesting additional avenues through which victims under Title VI, Title IX, Section 504, and the Age Discrimination Act may be granted nonpecuniary relief in the future).

237. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1556–77 (2022) (Kavanaugh, J., concurring) (advocating for a shift in the Court's focus towards the separation of powers as a solution to address the matter of available remedies).

238. *See id.* (Kavanaugh, J., concurring) (differentiating between implied and express causes of action and the suggestion of the concurring opinion).

239. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U. S. 60, 77–78 (1992) (Scalia, J., concurring) (highlighting the necessity for congressional action rather than an implied remedy by the Court).

240. *See generally* Boschert, *supra* note 2 (acknowledging the uncertainty surrounding the applicability of *Cummings* to Title IX claims).

241. *Compare Bonnewitz v. Baylor Univ., No. 6:21-cv-00491-ADA-DTG, 2022 U.S. Dist. LEXIS 122572, at *11 (W.D. Tex. July 12, 2022)* (denying recovery of emotional distress damages

While a Texas court held that *Cummings* applies to Title IX claims, an Indiana court reached a contrasting conclusion, finding that *Cummings* does not limit Title IX damages.[242] If the Court granted a writ of certiorari on a Title IX cause of action, the Court could formally establish Title IX as an outlier to the Spending Clause statutes addressed in *Cummings*.[243] Drawing from Justice Breyer's dissenting opinion in *Cummings*, a Title IX victim before the Supreme Court on the issue of punitive damages could plead around the *Cummings* breach of contract argument.[244] To simplify the main argument outlined by Justice Breyer in his dissent, it isn't that the contract law analogy adopted by the majority in *Cummings* was imprudent—the problem lies in the Court's focus on remedies for conventional contracts rather than contracts involving a significant potential for emotional distress in the event of a breach.[245] After all, "[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty."[246] Here, *Cummings* not only obstructs victims from receiving compensation for their injuries, but also significantly undermines the effectiveness of Title IX—leaving victims in a vulnerable position with diminished deterrence against future misconduct.[247]

based on *Cummings'* holding that such damages are not recoverable under the anti-discrimination statutes), *with Doe v. Purdue Univ. ET AL.*, No. 4-18-CV-89-JEM, 2022 U.S. Dist. LEXIS 128601, at *10–11 (N.D. Ind. July 20, 2022) (allowing evidence of emotional distress harm because *Cummings* was not a Title IX cause of action).

242. *See Bonnewitz, 2022 U.S. Dist. LEXIS 122572, at *10* ("On April 28, 2022, the U.S. Supreme Court barred recovery of emotional distress damages under anti-discriminatory legislation such as Title IX."). *But see Doe v. Purdue Univ. ET AL.,* 2022 U.S. Dist. LEXIS 128601, at *11 ("[S]ince *Cummings* does not hold that it limits Title IX damages, it does not justify precluding evidence of Plaintiffs' consequential damages.").

243. *See generally* Troutman Pepper ET AL., *Supreme Court Rules Title IX and Other Spending Clause Statutes Do Not Permit Damages for Emotional Distress,* JD SUPRA (May 5, 2022), https://www.jdsupra.com/legalnews/supreme-court-rules-title-ix-and-other-2609254/ [https://perma.cc/89Z5-EN88] (anticipating the Court's potential issuance of a writ of certiorari for a case that examines whether punitive damages are permissible under Title IX).

244. *See id.* (describing the probable arguments that schools and victims will likely present in forthcoming Title IX litigation).

245. *See generally* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1579 (2022) (Breyer, J., dissenting) (shedding light on the majority's failure to recognize the contract law principles specifically at issue with Spending Clause statutory violations).

246. FOWLER V. HARPER ET AL., THE LAW OF TORTS 490 (Little, Brown and Co. 2d ed. 1986).

247. *See* Abid, *supra* note 36 ("In the past, the strength of these laws has relied on the deterrent effect of lawsuits brought by private actors. Now, many victims will be unable to bring a case, making it all the more difficult to hold violators of these laws accountable.").

If Congress fails to amend the statute to specify remedies, and the judiciary fails to distinguish Title IX as an outlier to *Cummings*, school administrators may be the only hope for safeguarding future victims.[248] As with the Petitioner's situation in *Gebser,* when no proper procedure or a faulty procedure is in place, students lack the knowledge and guidance on how to seek assistance when they fall victim to harassment.[249] The AAUW's 2013 study on sexual harassment in schools highlights the significance of creating reporting mechanisms for student-victims of sexual harassment.[250] As per the AAUW's findings, designating a trained Title IX coordinator equipped with sufficient resources to address complaints effectively enhances students' willingness to report misconduct.[251] If both the judicial and administrative systems continue to fail student-victims, school officials will be among the few empowered individuals left to safeguard the well-being of America's youth.[252]

## CONCLUSION

The survival of Title IX is at stake.[253] Without a path to recovery, victims of Title IX discrimination may no longer recover damages.[254] Moreover, in the absence of punitive damages, the deterrent impact of Title IX becomes negligible.[255] These ramifications flow directly from

248. *See* CATHERINE HILL & HOLLY KEARL, AAUW EDUC. FOUND., CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 30 (2011) (describing measures each school district can take to ensure policies and procedures that allow students a clear and effective way to report misconduct).

249. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 278 (1998) (explaining that Lago Vista failed to institute a grievance procedure at the time the school began investigating the sexual harassment of her teacher).

250. *See* HILL & KEARL, *supra* note 248, at 30–31 (suggesting the implementation and public dissemination of a sexual harassment policy by each school, along with the distribution of copies to students and parents).

251. *See id.* (offering recommendations for schools to transform the campus culture and prioritize sexual harassment prevention).

252. *See id.* at 37 (illustrating methods by which schools can cultivate an environment that encourages students to feel at ease when sharing their stories and expressing their concerns).

253. *See generally* Ahrens & Friedfel, *supra* note 27 (proposing the way in which *Cummings* will extend to other antidiscrimination statutes).

254. *See id.* (foreshadowing that students won't have the ability to seek compensation for emotional distress under Title IX).

255. *See generally* Pepper ET AL., *supra* note 243 (insinuating the "limit [on] what kinds of cases are viable for a plaintiff to bring under Title IX" will fail in its disincentive purpose).

the Supreme Court's decision in *Cummings* which restricts the ability to seek emotional distress damages under Spending Clause statutes.[256] While safeguarding schools against boundless liability for the torts of third parties is essential, holding schools accountable when using taxpayer funds to engage in intentional discrimination is imperative.[257]

"[E]motional distress damages, which simply compensate victims for the foreseeable results of discrimination, are neither unorthodox nor indeterminate and disproportional in magnitude."[258] As emotional distress damages frequently represent the primary form of compensation accessible to victims of sexual harassment under Title IX, the repercussions of *Cummings* on Title IX victims will be more severe compared to the impact on victims with claims under other anti-discrimination statutes.[259]

For instance, Title VII, enacted under the Fourteenth Amendment, provides statutory authorization for workplace discrimination victims to recover emotional distress damages, whereas student-victims, governed by Title IX falling under the Spending Clause as interpreted in *Cummings*, are not afforded such damages by statute.[260] Further, most causes of action under the other anti-discrimination statutes primarily involve economic damages such as loss of earning capacity or lost wages.[261] In contrast, "[prior to] *Cummings*, the most significant element of damage in [Title IX] cases was typically emotional distress resulting from the sexual assault itself, which plaintiffs often asserted should be

256. *See* Bayefsky, *supra* note 24 (observing that in the absence of a congressional statutory amendment, *Cummings* effectively prohibits the recovery of emotional distress damages).

257. *See* Pepper ET AL., *supra* note 243 ("The removal of this category of damages will have significant effects in Title IX cases where parties feel their school's administrative policies for handling sexual assault allegations discriminated against them and seek to recover noneconomic damages associated with emotional distress.").

258. Melzer ET AL., *supra* note 34.

259. *See* Ahrens & Friedfel, *supra* note 27 ("Students and patients can no longer recover emotional distress damages under these statutes, which historically have been a substantial portion of the damages sought in such actions.").

260. *See* Teeter & Raupp, *supra* note 14, (distinguishing which antidiscrimination statutes will remain unaltered by *Cummings*).

261. *See generally Remedies for Employment Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/HW6F-TTT6] (expanding on the forms of assistance accessible to individuals who have experienced employment discrimination, encompassing expenses such as job searching, lost wages, and back pay).

valued in hundreds of thousands if not millions of dollars."[262] Due to the inherent nature of sexual harassment, there are seldom compensatory damages unless the victim incurs direct expenses related to the harassment, such as medical or therapy bills.[263]

Given the boundaries *Cummings* is likely to place on Title IX causes of action, Plaintiff's attorneys must prepare to distinguish Title IX from other Spending Clause statutes.[264] This distinguishment could involve highlighting the flaws of the 'lack of clear notice' standard in light of the requirement that each school board develop and publish a Title IX policy—or it could entail lobbying for the enactment of state law equivalents to Title IX that would remain unaffected by *Cummings*.[265] While a mom-and-pop rehabilitation center, such as the one in *Cummings,* may not be fully aware of its exposure to liability upon receiving federal funding, not a single school board in the country can claim ignorance of such liability.[266] There are over fifty years of precedent outlining the criteria for intentional discrimination causes of action against school districts.[267]

According to estimates by the Center for Disease Control, millions of individuals fall victim to sexual violence annually in the United States.[268] Since the initial allegations emerged in 2015 against Larry Nassar, the number of athletes victimized by him alone has surpassed 200 athletes.[269] In the absence of Title IX's previously potent deterrent of punitive

262. Teeter & Raupp, *supra* note 14.

263. *See id.* (describing *Cummings'* limitation on recovery for Title IX victims).

264. *See id.* (depicting the bleak future created by *Cummings* for Title IX claims).

265. *See generally* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) (mandating each school district's publication of Title IX policies); *see also* Murrell, *supra* note 233 (suggesting the adoption of legislation similar to the state law counterparts of Title IX in New York and California, as a recommendation for other states).

266. *See generally* Notices, 65 Fed. Reg. 213 (Nov. 2, 2000) (outlining publication and policy procedures under Title IX mandated by the Department of Education).

267. *See* Brown v. Bd. Of Educ., 347 U.S. 483, 494 (1954) (noting the importance of the recovery of emotional distress damages in harassment-based causes of action).

268. *See Fast Facts: Preventing Sexual Violence*, *supra* note 9 (estimating the number of victims in the United States per year and their demographics, while acknowledging the numbers underestimate due to unreported cases).

269. *Compare* Spencer, *supra* note 6 (detailing the number of female victims who have come forward with allegations of Nassar's assault from both the U.S. Gymnastics team and Michigan State University), *with Fast Facts: Preventing Sexual Violence*, *supra* note 9 ("Sexual violence affects millions of people each year in the United States.").

damages that posed a threat to offenders, the effectiveness of the statute in the future remains uncertain.[270]

Title IX was created to defend student-victims from sexual harassment.[271] Due to the disparate emotional and educational impact discrimination has on victims, preserving and upholding Title IX is of the utmost importance.[272] Realistically, while the current Supreme Court Justices are unlikely to distinguish Title IX from the reach of *Cummings*, there are other options to safeguard victims.[273] While distinguishment may be an uphill battle given the conservative makeup of the bench, a collective effort by advocates and courageous victims can work together to solidify a path towards recovery.[274]

270. *See* Melzer ET AL., *supra* note 34 (highlighting the contrasting impact that *Cummings* is expected to have on Title IX victims compared to cases of employment discrimination ).

271. *See* 20 U.S.C. § 1681(a) (prohibiting discrimination on the basis of sex in an educational setting).

272. *See* Melzer ET AL., *supra* note 34 (conveying that *Cummings* will deprive vulnerable individuals of a means to seek redress or compensation).

273. *See id.* (criticizing the Court's rationale and application of contract law principals to antidiscrimination statutes referenced in *Cummings*).

274. *See id.* (voicing concern that *Cummings* disrupts established expectations of liability for emotional distress damages under anti-discrimination causes of action).