MUCH ADO ABOUT *CUMMINGS*: THE CURTAILMENT OF CIVIL RIGHTS ENFORCEMENT AND ITS IMPACT ON TITLE IX

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Through Title IX of the Education Amendments of 1972 (Title IX),[1] Congress prohibits sex discrimination in educational settings receiving federal funding. In 1979, the U.S. Supreme Court interpreted Title IX as implying a private right of action.[2] Thereafter, for the last 50 years, plaintiffs have used Title IX to dismantle discriminatory practices at educational institutions that have denied equal access to educational programs and activities based on sex.[3] Recently, in *Cummings v. Premier Rehab Keller, PLLC*,[4] the U.S. Supreme Court prohibited the recovery of emotional distress damages under civil rights statutes enacted under the Spending Clause of the U.S. Constitution. While plaintiffs' attorneys across the country scramble to settle impacted cases, Congress and the public seem oblivious to the civil rights curtailment underway. Without recovery of emotional distress damages, for-profit law firms are not sufficiently incentivized to litigate civil rights cases on a contingency fee basis, and the average individual cannot otherwise afford to litigate.[5] This article analyzes the impact of *Cummings* on Title IX plaintiffs seeking emotional distress damages and the remaining legal arguments to support such claims, if any.

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1. Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, (codified at 20 U.S.C. §§ 1681, *et. seq*.).

2. *See generally* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

3. *See* Elizabeth Tang, *et al*., *Title IX at 50: A Report by the National Coalition for Women and Girls in Education,* THE NAT'L WOMEN'S L. CTR. (June 2022), https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf.

4. 142 S. Ct. 1562 (2022), *rehearing denied* 142 S. Ct. 2853 (2022).

5. *See* Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insights into Court Access* (Feb. 26, 2013), INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., https://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access; *see also* Legal Servs. Corp., *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans,* LEGAL SERVS. CORP. (Apr. 2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1.

I. PRIVATE TITLE IX ENFORCEMENT

A. Implied Right of Action under Title IX

When Geraldine "Gerry" Cannon, a registered nurse, finished raising her young boys, she wanted to attend medical school at the age of 39.[6] However, the University of Chicago and Northwestern University Medical School denied her application for admission based on her age.[7] Thankfully, Ms. Cannon had married an attorney who fought her case all the way to the U.S. Supreme Court, alleging this age discrimination was based on sex because many women's career paths were interrupted by raising children.[8] This case is now the seminal Title IX case, *Cannon v. University of Chicago*.[9] The *Cannon* Court held that Title IX had an implied right of action that allows private enforcement,[10] opening the courtroom doors to more many Title IX claims to come.

When Congress enacted Title IX, it did not expressly authorize a right of action in the statutory language of this civil right.[11] Beyond the substantive rights under 20 U.S.C. § 1681(a), Congress had only provided an express mechanism for administrative enforcement of Title IX by federal agencies providing funding to the recipient educa-

6. *See* Darlene Y. Bruner, *Geraldine Cannon: American Student*, Brittanica, https://www.britannica.com/biography/Geraldine-Cannon; *see also Obituaries – 12-19-2018,* The Islander, https://www.islander.org/2018/12/obituaries-12-19-2018/ (last visited Feb. 2, 2023).

7. *Cannon*, 441 U.S. at 680 (stating the plaintiff's allegations are accepted true for purposes of the Court's decision).

8. *See* Bruner, *supra* note 6.

9. 441 U.S. 677 (1979).

10. *Id.* at 680.

11. *Id.* at 683; *see also* 20 U.S.C. §§ 1681, *et. seq*.

tional program or activity under § 1682. This statutory provision bestowed primary enforcement authority to what is now the U.S. Department of Education.[12] As such, the appellees in *Cannon* argued that the administrative enforcement provision was the exclusive means for enforcement of Title IX.[13] The Court rejected this argument and held instead that Title IX contained an implied right of action based on its four-part analysis under the now-overruled *Cort v. Ash*.[14]

In *Cannon*, the Court cautioned that "[w]hen Congress intends private litigants to have a right of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights;" however, it "has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation."[15] In other words, the Court had authority to find an implied private right of action where no express action had been articulated by Congress in the statutory language. In determining whether that was justifiable in this case, the Court stated: "Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present."[16]

Following the four-part analysis in *Cort*, the Court first scrutinized the key provision of Title IX, which is 20 U.S.C. § 1681(a), containing the following thirty-seven words:

> ***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 . . . .[17]

According to the Court, this statutory framing created an "unmistakable focus on the benefited class."[18] This framework thus satisfied the first part of the *Cort* analysis to affirm that Congress had enacted Title IX "for the benefit of a special class of which the plaintiff is a member."[19]

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12. Previously, the U.S. Department of Health, Education, and Welfare.

13. *Cannon,* 441 U.S. at 683-84.

14. 422 U.S. 66 (1975); *see also* Park Nat. Bank of Chi. v. Michael Oil Co., 702 F.Supp. 703, 704 (N.D. Ill. 1989) (recognizing that the U.S. Supreme Court has effectively overruled *Cort*) (citing Thompson v. Thompson, 484 U.S. 174 (1988) (Scalia, J., concurring)).

15. *Cannon*, 441 U.S. at 717.

16. *Id.* at 717.

17. 20 U.S.C. § 1681(a) (emphasis added).

18. *Cannon*, 441 U.S. at 691.

19. *Id.* at 689-90 ("The dispositive language in that statute – 'no person shall be denied the right to vote for failure to comply with [a new state enactment covered by,

For the second part of the *Cort* analysis, the Court found that Title IX had been patterned after Title VI of the Civil Rights Act of 1964 (Title VI),[20] and it took notice that several circuit courts had also found that Title VI implied a private right of action.[21] The Court therefore concluded, "[w]e have *no doubt* that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private right of action for victims of the prohibited discrimination."[22] It thus stated, "[f]ar from evidencing any purpose to deny a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy."[23]

To complete the *Cort* analysis, the Court found that an implied private remedy would further rather than frustrate the statutory purpose of Title IX.[24] For this third part of the analysis, the Court recognized that Congress had passed Title IX for two purposes: (1) to prevent the use of federal funding in furtherance of discriminatory practices, and (2) to "provide individual citizens effective protection against those practices."[25] The Court found that, while 20 U.S.C. § 1682 (the statutory provision on administrative enforcement) serves the former purpose, the latter purpose is best served by private enforcement with civil remedies: "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with–and in some cases even necessary to–the orderly enforcement of the statute."[26] The Court noted also that the private interest individuals had in ensuring their equal access to educational opportunities and benefits exceeded the state's interest in doing so, thus satisfying the fourth part of the *Cort* analysis.[27]

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but not approved under, § 5]' – is remarkably similar to the language used by Congress in Title IX." (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 554-555 (1969))).

20. *Id.* at 684–85, 694–96 ("Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

21. *Id.* at 696, n. 20 (citing Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967)).

22. *Id.* at 703.

23. *Id.* at 694.

24. *Id.* at 703.

25. *Id.* at 704 (identifying the same purposes for Title VI).

26. *Id.*

27. *Id.* at 708.

Before her passing on December 17, 2020, Ms. Cannon was a retiree living in Florida.[28] She was still a fiery woman who had no idea about the massive impact of her lawsuit on the ongoing struggle to achieve gender equality within the United States.[29] Ms. Cannon did not achieve her dream of becoming a practicing medical doctor because the medical schools had denied her application on the basis of age before civil rights protections existed on this.[30] Exhausted from years of litigation, Ms. Cannon did not pursue medical school. Despite this sad end to her legal battles, *Cannon* has lived on to mold Title IX's legacy into a powerful force for dismantling institutional sex discrimination within the United States. We remain indebted to Ms. Cannon for her courage to fight for gender equality and indebted to her husband for his tenacity during extensive legal battles required for the victory in *Cannon*.[31]

B. Title IX Damages

In *Franklin v. Gwinnett County Public Schools*,[32] the U.S. Supreme Court considered whether Title IX's implied right of action entitles a plaintiff to seek monetary damages.[33] This case involved teacher-on-student sexual abuse that Gwinnett County Public Schools had investigated but failed to take any "action to halt it," while also discouraging the minor victim from pressing criminal charges against the abusive teacher.[34] Gwinnett County Public Schools had ultimately resolved this matter by allowing the teacher to resign.[35] While the Third Circuit had previously found monetary damages available under Title IX,[36] the Eleventh Circuit had not based on its prior Title VI rulings,[37] creating a circuit split for the U.S. Supreme Court to resolve.

The Eleventh Circuit considered whether the recent U.S. Supreme Court decision in *Guardians Association v. Civil Service Com-*

28. *See Obituaries*, *supra* note 6.

29. *See id.*

30. *See id.* Notably, Congress enacted the Age Discrimination Act of 1975 in the midst of her legal battles.

31. *See id.*

32. 503 U.S. 60 (1992).

33. Franklin v. Gwinnet County Public Schools, 503 U.S. 60, 65-66, 69 (1992) (finding the question of whether Title IX implied a private right of action and monetary damages to be "analytically distinct" inquiries (quoting Davis v. Passman, 442 U.S. 228, 239 (1979))).

34. *Franklin*, 503 U.S. at 63-64.

35. See *id*. at 64.

36. *Id.* at 65 (citing Pfeiffer v. Marion Center Area Sch. Dist., 917 F.2d 779, 787–89 (1990)).

37. *Id.* at 64 (citation omitted).

mission of New York City[38] had overruled the circuit court's precedent against damage awards under Title VI, and it claimed that the lack of a majority opinion in *Guardians* left the circuit court without sufficient guidance to make such an award under Title IX.[39] It also held that since Congress had authorized Title IX pursuant to the Spending Clause only equitable relief could be obtained.[40]

The Court resolved the circuit split by unanimously holding that monetary damages are available under Title IX because of a common law principle with "deep roots in our jurisprudence."[41] In support, it cited to *Bell v. Hood*,[42] where the Court described its jurisprudence around statutory rights of action, which "presume[s] the availability of *all appropriate remedies* unless Congress has expressly indicated otherwise" and declared that this legal foundation is "*well settled*."[43] Regarding *Guardians*, the Court also clarified that "a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation."[44]

In addition to *stare decisis*, the *Franklin* Court relied upon an originalist common law-based argument to support its longstanding precedent by stating: "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right."[45] The Court cited several cases in support, including *Texas & Pacific Railroad Company v. Rigsby*,[46] which stated: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . ."[47] In *Rigsby*, the Court had not only found an implied

38. 463 U.S. 582 (1983).

39. *Franklin*, 503 U.S. at 64 (citing Guardians Assn. v. Civil Serv. Comm'n of NYC, 463 U.S. 582 (1983)).

40. *Id.* at 64-65 (citation omitted).

41. *Id.* at 65-66 (citing *Davis v. Passman*, 442 U.S. 228, 246–247 (1979)).

42. 327 U.S. 678 (1946).

43. *Franklin*, 503 U.S. at 66-68 (emphasis added) (citing Texas & New Orleans R. Co. v. Railway Clerks, 281 U.S. 548 (1930)).

44. *Id.* at 70.

45. *Id.* at 66; *see also* Texas & New Orleans R. Co., 281 U.S. at 569–70 ("The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. . . The right is created and the remedy exists") (citing Marbury v. Madison, 5 U.S. 137 (1803))).

46. 241 U.S. 33 (1916).

47. *Franklin*, 503 U.S. at 67 (quoting Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

right of action under the Federal Safety Appliance Act of 1893, but it also had upheld a claim thereunder for monetary damages.[48]

To affirm (without equivocation) that where there is a right of action common law bestows a remedy, the Court quoted Chief Justice John Marshall from its preeminent case on precedent, *Marbury v. Madison*:[49] "[O]ur Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'"[50] The U.S. Supreme Court also unanimously rejected the appellee's arguments that claimed the Court's previous decisions had called this common law principle into question.[51] In short, the Court upheld the common law principle that the "existence of a statutory right implies the existence of all necessary and appropriate remedies"[52] and declared the rule to be that "*absent clear direction to the contrary by Congress*, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[53]

In determining whether Congress intended to limit the "traditional presumption in favor of *all appropriate relief*" for Title IX, the *Franklin* Court considered the state of the law when Congress enacted the civil right.[54] In doing so, the Court found that since the early 19th century jurisprudence had followed the common-law tradition that the "denial of a remedy [w]as the exception rather than the rule."[55] Indeed, the Court cited its cases showing that it had only ever limited available remedies in cases where it had found an expressly enumerated statute limiting available remedies for the right of action.[56]

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48. *Id.* ("[T]he principle that a liability created by statute without a remedy may be enforced by a common-law action" (citing Dooley v. U.S., 182 U.S. 222, 229 (1901))); *see also* Kendall v. U.S. ex rel. Stokes, 37 U.S. 524 (1838) (authorizing a remedy for mail carriers when the statute provided a right but not a remedy stating, "if the remedy cannot be applied by the circuit court of this district, it exists nowhere.").

49. 5 U.S. 137, 165 (1803).

50. *See Franklin*, 503 U.S. at 66 (internal quotations omitted).

51. *Id.* at 68 (citing Bell v. Hood, 327 U.S. 678 (1946), J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and Deckert v. Indep. Shares Corp., 311 U.S. 282, 288 (1940)).

52. *Id.* at 69 (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)).

53. *Id.* at 70-71 (emphasis added) (citing Bush v. Lucas, 462 U.S. 367, 378 (1983) and Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967)).

54. *Id.* at 70-71 (emphasis added) (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982)).

55. *Id.* at 71-72 (citing Court approval of damage remedies in previous implied cause of action cases *J.I. Case Co*., 377 U.S., at 433; *Wyandotte Transp. Co*., 389 U.S. at 207; *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229 (1969) and stating the "same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies.").

56. *Id.* at 69, n.6 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)).

The *Franklin* Court also considered the Rehabilitation Act Amendments of 1986,[57] 42 U.S.C. § 2000d–7.[58] Congress passed this legislation to ensure Title IX abrogated the sovereign immunity held by States under the Eleventh Amendment to the U.S. Constitution.[59] While Congress failed to specify all the types of remedies available under 42 U.S.C. § 2000d–7(a)(2),[60] the provision states "remedies (including remedies both at law and in equity) are available . . . to the *same extent as such remedies are . . . in the suit against any public or private entity other than a State*."[61] As such, the Court "presume[d] Congress enacted this statute with the prevailing traditional rule in mind" regarding the broad availability of damages for a statutory-based right of action.[62]

The *Franklin* Court also considered the Civil Rights Restoration Act of 1987.[63] Here, it noted that when Congress had overturned the Court's narrowing of Title IX in *Grove City College v. Bell*,[64] it "made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act *or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right*."[65] As such, the Court "cannot say . . . that Congress has limited the remedies available to a complainant in a suit brought under Title IX."[66] Justice Scalia specifically acknowledged that these legislative actions "must be read, in my view, not only 'as a validation of Cannon's holding,' but also as an implicit acknowledgment that damages are available."[67]

Having affirmed the presumption that all appropriate remedies are available for the implied right of action under Title IX, the Court then dismissed challenges to this common law principle.[68] First, the Court disagreed with respondents' arguments that this decision violated the separation of powers doctrine, as the legislature provided the

57. Pub. L. 99-506, 100 Stat. 1807 (1986).

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

59. 100 Stat. 1845 (codified at 42 U.S.C. § 2000d7) (providing this abrogation under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975).

60. *Franklin*, 503 U.S at 73 (citing Milwaukee v. Illinois, 451 U.S. 304, 329, n. 22 (1981)).

61. *Id.* at 72-73 (emphasis added) (citing 42 U.S.C. § 2000d–7(a)(2)).

62. *Id.* at 73.

63. *Id.* at 73; Pub. L. 100-259, 102 Stat. 28 (1987); *see also* Leake v. Long Island Jewish Med. Center, 869 F.2d 130, 131 (2d Cir. 1989) (per curiam) (finding that Congress had passed this legislation to overturn two U.S. Supreme Court decisions).

64. 465 U.S. 555 (1984).

65. *Franklin*, 503 U.S at 73 (emphasis added).

66. *Id.*

67. *Id.* at 78 (Scalia, J., concurring).

68. *Id.* at 73-74.

cause of action, and the courts determined the remedy.[69] Second, regarding the "notion that Spending Clause statutes do not authorize monetary awards for intentional violations," the Court said this argument belied its unanimous holding in *Consolidated Rail Corporation v. Darrone*.[70] While *Darrone* awarded backpay as equitable relief, the Court said distinguishing the type of damages is "irrelevant to their underlying objection: that application of the traditional rule in this case will require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes."[71]

The Court also distinguished *Pennhurst State School and Hospital v. Halderman*[72] as only limiting remedies available under the Spending Clause for *unintentional* violations only—not for *intentional* violations. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."[73] The Court found sufficient notice under the Spending Clause that a recipient would be liable for intentional violations of Title IX by citing *Meritor Savings Bank, FSB v. Vinson*,[74] establishing liability for employer-on-employee sexual harassment and abuse.[75]

While appellees argued that Title IX should be limited to equitable relief under the Spending Clause, the Court noted that "the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate."[76] Unlike in Title VII cases, students in Title IX cases do not suffer lost wages, nor is equitable relief always possible when the sexual harasser is no longer within the school's control, such that the Court emphatically declared that there would be "no remedy at all" if Title IX had been so limited.[77] Additionally, the Court acknowledged that while an administrative remedy issued by a federal agency pursuant to 20 U.S.C. § 1682 "helps other similarly situated students," it other-

69. *Id.* at 73-74 (noting that "selective abdication [by the Court] of the sort advocated here would harm separation of powers principles . . . by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available.").

70. 465 U.S. 624 (1984).

71. *Franklin*, 503 U.S at 75.

72. 451 U.S. 1 (1981).

73. *Franklin*, 503 U.S at 74.

74. 477 U.S. 57 (1986).

75. *Franklin*, 503 U.S. at 64.

76. *Id.* at 76 (citing Whitehead v. Shattuck, 138 U.S. 146, 150 (1891)). In *Whitehead*, the Court found that when a court of law provided "a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law." *Whitehead*, 138 U.S. at 151.

77. *Id.*

wise "would leave petitioner remediless."[78] To avoid this, the Court held "that a damages remedy is available for an action brought to enforce Title IX."[79]

II. THE IMPACT OF *CUMMINGS*

In *Cummings*, a physical therapy center had denied the plaintiff's request for an interpreter despite her being deaf and legally blind.[80] The plaintiff sought injunctive relief and damages for such discrimination in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) ("§ 504"), and the Affordable Care Act, 20 U.S.C. § 18116 ("ACA").[81] In adjudicating this case, a Texas-based federal district court denied the availability of emotional distress damages under § 504 and the ACA, which it found were the plaintiff's only "compensable injuries."[82] On appeal, the Fifth Circuit affirmed.[83] Following a grant of *certiorari*, the U.S. Supreme Court broadly ruled in this action to implicate all federal civil rights statutes enacted under the Spending Clause, which includes Title VI and Title IX.[84]

While the *Cummings* Court affirmed the availability of monetary damages under Spending Clause legislation enacted by Congress, it also cited to *Barnes v. Gorman*,[85] claiming that it is "less clear what remedies are available in such a suit."[86] In *Barnes*, the Court had considered whether a jury could award significant punitive damages against the government for mishandling the transportation of an inmate in custody with a pre-existing spine injury under § 504 and § 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, *et seq*.[87] The *Barnes* Court analogized civil rights statutes authorized under the Spending Clause to contract law and held that no punitive damages could be awarded under § 504 or the ADA because it was not a traditional award for a breach of contract.[88] In doing so, it interpreted *Franklin* as granting monetary damages for civil rights author-

78. *Id.*
79. *Id.*
80. Cummings v. Premier Rehab Keller P.L.L.C, 142 S. Ct. 1562, 1568–69 (2022).
81. *See Cummings*, 142 S. Ct. at 1568–69.
82. Cummings v. Premier Rehab, P.L.L.C., No. 4:18-CV-649-A, 2019 WL 227411, at *4 (N.D. Tex. 2019).
83. Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673 (5th Cir. 2020).
84. *See Cummings*, 142 S. Ct. at 1568-69 (citations omitted).
85. 536 U.S. 181 (2002).
86. *See Cummings*, 142 S. Ct. at 1570 (quoting *Barnes v. Gorman*, 536 U.S. 181, 185 (2002)). *But see* Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 68 (1992) (citing Bell v. Hood, 327 U.S. 678 (1946)) (stating the common law principle as authorizing the Court to grant all possible relief absent an express limit established by Congress).
87. Barnes v. Gorman, 536 U.S. 181, 183-84(2002).
88. *Barnes*, 536 U.S. at 187-190.

ized under the Spending Clause without determining the "scope of appropriate relief" (meaning the specific types of monetary damages available).[89] The *Barnes* Court claimed that *Franklin* was decided based on a "contract-law analogy,"[90] despite this being only a portion of its analysis otherwise grounded in *stare decisis* and common law.[91]

In *Franklin*, the plaintiff asked the Court to find that Congress had enacted Title IX under both the Spending Clause and § 5 of the Fourteenth Amendment to the U.S. Constitution ("§ 5").[92] The *Franklin* Court did not do so because it "conclude[d] that a money damages remedy is available under Title IX for an intentional violation *irrespective of the constitutional source of Congress' power to enact the statute*."[93] As such, it did not rely upon a contract law analogy to reach its holding.[94] A few years later, however, during *Gebser v. Lago Vista Independent School District*,[95] the Court held that Congress enacted Title IX pursuant to the Spending Clause.[96] It then stated that the "contractual nature [of Title IX] has implication for our construction of the scope of available remedies."[97] In so ruling, the Court did not specify any limitations on damages, nor did it foreclose the possibility that Congress had also enacted Title IX under § 5.[98]

The Court used *Barnes* as an opportunity to reframe the holding in *Franklin* based around its evolving Spending Clause jurisprudence.[99] In so doing, it extended its "contract-law analogy" to narrow the scope of appropriate remedies available under civil rights statutes authorized under the Spending Clause, first denying the plaintiffs the ability to seek punitive damages in *Barnes*.[100] The Court held that federal funding recipients are liable for monetary damages based either on express notice within the "relevant legislation" or "those reme-

89. *Id.* at 185-86 (failing to cite any specific portion of *Franklin*). *But see* Section I(B).

90. *Id.* at 187 (citing *Franklin*, 503 U.S. at 74-75).

91. *See* Section I(B), *supra*.

92. *Franklin*, 503 U.S at 75, n.8 (emphasis added); *accord* Patterson v. McLean Credit Union, 491 U.S. 164, 197–98 (1989) (Brennan, J, concurring in part) (stating that Congress has authority to pass legislation under multiple Constitutional provisions).

93. *Id.* at 75, n.8 (emphasis added).

94. *Id.*

95. 524 U.S. 274 (1998).

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

97. *Gebser*, 524 U.S. at 287.

98. *Id.*; *cf.* Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998) (quoting Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (holding that abrogation occurred under § 5 even if not expressly invoked).

99. *Barnes*, 536 U.S. at 187 (citing *Gebser*, 524 U.S. at 287). *But see Franklin*, 503 U.S. at 66-68 (citing cases); *see also* Emily J. Martin, *Title IX and the New Spending Clause*, AM. CONST. SOC., 12 (Dec. 2012) [hereinafter *New Spending Clause*].

100. *Barnes*, 536 U.S. at 187 (citing *Gebser*, 524 U.S. at 287).

dies traditionally available in suits for breach of contract."[101] After reinterpreting *Franklin* under its Spending Clause jurisprudence , the *Barnes* Court declared its reasoning to be "consistent" with the common law principle in *Bell*, as relied upon in *Franklin*.[102]

To reverse the punitive damages originally awarded in *Barnes*, the Court ultimately distinguished punitive damages from the compensatory damages authorized by *Bell*.[103] It found that "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract," prohibiting such an award under Spending Clause legislation like § 504 and the ADA.[104] As its sole source of support for this damage limitation, the Court cited the Justice Marshall's dissent in *Guardians*, stating, "when a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate . . . . The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed."[105] However, Justice Marshall's dissent clearly advocated for a "whole remedy" that left the "details of the relief . . . to the sound judgment" of district courts, as articulated by *Bell* and *Franklin*.[106]

As explicitly noted by the concurrence in *Barnes*, the Court's holding ran counter to principles of judicial restraint.[107] The *Barnes* Court could have decided the case based on existing precedent that found punitive damages are not traditionally available against government entities rather than expanding its Spending Clause jurisprudence through a contract law analogy.[108] In their joint concurrence, Justices Souter and O'Connor warned against the Court's increasing usage of "the contract-law analogy" because it "may fail to give such helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation, such as the proper measure of compensatory damages."[109] Contrary to this warning, the *Cummings* Court applied it to limit the scope of compensatory damages available under the Spending Clause.[110] It did so

101. *Id.* at 187.
102. *Id.* at 189 (citing *Bell*, U.S. 327 at 684, and *Franklin*, 503 U.S. at 66).
103. *Id.* 189 (failing to cite any specific portion of *Bell*).
104. *Id.* (citations omitted).
105. Guardians Assn. v. Civil Serv. Comm'n of NYC, 463 U.S. 582, 633-34 (1983) (Marshall, J. dissenting).
106. *See Guardians*, 463 U.S. at 633-34.
107. *Barnes*, 536 U.S. at 1991 (Steven, J., concurring) (citing three alternative ways the Court could have reached its holding based on prior precedent, legislative history, or the limitation of damages to third-party beneficiaries citing Pennhurst State Sch. And Hosp; v. Halderman, 451 U.S. 1 (1981) in support for the latter).
108. *Barnes*, 536 U.S. at 191 (Steven, J., concurring) (citation omitted).
109. *Id.* at 190-191 (Souter, J., concurring).
110. *See Cummings*, 142 S. Ct. at 1570 (citing *Barnes*, 536 U.S. at 186).

counter to longstanding precedent and common law principles that a court may award all appropriate relief available.[111]

To support its holding, the *Cummings* Court distinguished the consent nature of legislative authority under the Spending Clause from the otherwise involuntary imposition of congressional policy on regulated parties under other sources of constitutional authority.[112] Under the Court's Spending Clause jurisprudence, Congress must now unambiguously provide notice to federal funding recipients about the scope of damages available for its intentional violations of civil rights laws so enacted before plaintiffs may seek damages beyond those traditionally available for breach of contract, such as those for emotional distress.[113] To guide future inquiries, the Court posed one simple question to determine the scope of appropriate damages: "[W]ould 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?"[114] In *Cummings*, the Court answered this by looking to contract law and holding that emotional damages are not traditionally available for breach of contract claims.[115] As such, the Court reasoned that they were also not available under § 504 and the ACA because they are federal laws authorized under the Spending Clause.[116]

The Court referred to its contract law analysis in *Cummings* as "straightforward," relying on "hornbook law" to show that emotional distress damages are not compensable by contract.[117] It also rejected any consideration of exceptions,[118] citing *Barnes* as binding the Court to reply only on "traditionally" or "generally available" remedies for contract actions.[119] It claimed that a wider view would undermine the notice requirement for the Spending Clause and push "offer and acceptance past its breaking point" by assuming all recipients will know the "contours of every contract doctrine, no matter how idiosyncratic or exceptional."[120] As such, Spending Clause jurisprudence requires

111. *See generally* Section 1(B).

112. *See Cummings*, 142 S. Ct. at 1570 (citing *Gebser*, 524 U.S. at 274, *Pennhurst*, 451 U.S. at 16, and *Barnes,* 536 U.S. at 186).

113. *See id*. at 1570 (quoting *Pennhurst*, 451 U.S. at 17).

114. *Id.* at 1570-71 (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006)).

115. *Id.* at 1572.

116. *Id.* (speaking only to "statues we consider here"); *accord* Doe ex rel. Doe v. City of Pawtucket, No. 17-365, 2022 WL 4551953, at *2 (D.R.I. Sept. 29, 2022) (finding *Cummings* to be a narrow holding on damages available under § 504 and the ACA).

117. *Id.* at 1571 (citations omitted).

118. *Id.* at 1570-74 (internal citations omitted).

119. *Id.* at 1571 (citing *Barnes*, 536 U.S. at 187-88).

120. *Id.* at 1570-74 (citing *Barnes*, 536 U.S. at 186). Notably, this contrasts with the historical presumption that individuals governed by the law know the law. *See, e.g.*,

that federal funding recipients have notice not merely about damages generally but also the specific types of appropriate relief available when accepting funding.[121] According to the Court, this will ensure recipients "exercise choice knowingly, cognizant of the consequences."[122]

In the wake of *Cummings*, several educational institutions defending against Title IX claims have cited it to dismiss emotional distress damages sought by plaintiffs.[123] Most district courts have relied upon *Cummings* to dismiss emotional distress damages, and there is an unresolved question about whether nominal damages are available.[124] To date, few federal district courts have rejected that *Cummings* prohibits Title IX plaintiffs from seeking emotional distress damages.[125] At least one court did so without articulating much reasoning, stating that "*Cummings* applies only to Rehabilitation Act and Patient Protection and Affordable Care Act claims. Because *Cum-*

Frederick G. McKean Jr., *The Presumption of Legal Knowledge*, 12 WASH. U. L. REV. 2, 96-107 (1972).

121. *Id.* at 1570-71 (citing *Barnes*, 536 U.S. at 187-88).

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

123. *See, e.g.*, *City of Pawtucket*, No. 17- 365, 2022 WL 4551953, *2 (D.R.I. Sept. 29, 2022); Doe 1, et al. v. The Curators of the Univ. of Mo., No. 19-cv-04229, 2022 WL 3366765, *3 (W.D. Mo. August 15, 2022); Bonnewitz v. Baylor Univ., 6:21-cv-00491, 2022 WL 2688399, *3–4 (W.D. Tex. July 12, 2022) (granting a motion to dismiss for a Title IX complaint where only emotional damages have been pled by the plaintiff to be granted without prejudice and leave to amend); Party v. Ariz. Bd. of Regents, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, *2–4 (D. Ariz. Dec. 6, 2022); Doe v. Bd. of Regents of Univ. of Neb., 2022 WL 3566990, *4 (D. Neb. Aug. 8, 2022); Kincaid v. Unified Sch. Dist. No. 500, No. 21-2059-DDC-TJJ (D. Kansas Dec. 9, 2022); J.C. v. Bd. of Regents of Univ. Sys. of Ga., No. 1:20-cv-4445-JPB, at *7 (N.D. Ga. Sept. 19, 2022); Doe v. Purdue Univ., et al., No. 2:17-cv-33-JPK (N.D. Ind. Aug. 11, 2022); Doe v. Purdue Univ., et al., No. 4:18-cv-89, 2022 WL 2828238 at *4 (N.D. Ind. July 20, 2022); Doe v. Duefahrd, Cause No. 4:18-cv-72-JVB-JEM, 2022 WL 17253080, *1 (N.D. Ind. Nov. 28, 2022*);* Doe v. Moravian Coll., No. 5:20-cv-00377-JMG, 2023 WL 1444436, *7–9 (E.D. Penn, Jan 10, 2023); Doe v. Sch. Bd. of Palm Beach Cty., No. 21-81560-CIV-SINGHAL, 2022 WL 17988203, *6 (S.D. Fl. Nov. 22, 2022); Doe v. Fairfax Cty. Sch. Bd., No. 1:18-cv-000614-MSN-IDD, 1012 QL 424265, *3 (E.D. Va. Jan. 25, 2023).

124. *See, e.g., City of Pawtucket*, 2022 WL 4551953, at *4 (denying nominal damages by finding that they are intended to be a substitute for a lack of damages or when there are issues with damages, not when damages could be proven but are not available); K.G. v. Woodford Cty. Bd. of Educ., No. 5:18-555-DCR, 2022 WL 17993127, *3 (Dec. 29, 2022) (citing cases); Fisk v. Bd. of Trs. of Cali. State Univ., No.: 22-cv-173, 2022 WL 16577871 *7 (Nov. 11, 2022)

125. *Purdue Univ., et al.*, 2022 WL 2828238 at *4 (rejecting arguments that the plaintiff had failed to disclose consequential damages pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iii)) (citing *Cummings*, 142 S. Ct. at 1576); Coleman v. Cedar Hill Indep. Sch. Dist.*,* No.3:21-CV-2080-D, 2022 WL 1470957, *3, n.2 (N.D. Texas May 10, 2022); *see also* Asfall v. LA. Unified Sch. Dist., No. 20-5599, No. 20-56259, 2022 WL 2764747, *4 (9th Cir. July 15, 2022) (unpublished) (declining to consider a *Cummings*-based challenge to emotional distress damages on appeal since *Franklin* has not indicated a limit on Title IX damages and Cummings only "signaled the viability of arguments against noneconomic damages, under Spending Clause legislation.") (Internal citations omitted).

mings was not a Title IX action, it does not make evidence of emotional distress or harm inadmissible in this case. Therefore, evidence of such damages will not be precluded."[126] If these first rulings and other *dicta* are any indication,[127] the impact of *Cummings* on Title IX will be profound. To mitigate this, plaintiffs' lawyers must successfully raise other arguments to support their clients' requests for emotional distress damages under Title IX. Such arguments are suggested below.

III. ARGUING EMOTIONAL DISTRESS DAMAGES UNDER TITLE IX

While other forms of compensatory damages are most likely available under Title IX,[128] this section deals with potential arguments challenging emotional distress damages. Each argument should build upon itself to stand a chance of challenging *Cummings*.

A. NARROW SCOPE OF *CUMMINGS*

Plaintiffs' attorneys can and should argue that *Cummings* is *not* a Title IX case.[129] In doing so, they should cite to *Franklin*, which relied upon *Bell* to entitle Title IX plaintiffs to any appropriate remedy based

126. *Purdue Univ., et al.*, 2022 WL 2828238 at *4.

127. *See* C.S. v. Madison Metro. Sch. Dist., 34 F.4th 536, 451 (7th Cir. 2022) (citing *Cummings* when discussing the contractual nature of Title IX's authority); *see also* Doe v. Metro. Gov. of Nashville & Davidson Cty., Tenn., 35 F.4th 459, 469, n.1 (6th Cir. 2022) (Ralph, J., dissenting) ("Although not before us here, the Supreme Court recently held that emotional distress damages are not recoverable in implied private actions to enforce certain antidiscrimination statutes enacted under the Spending Clause."); Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 720 (6th Cir. 2022) (Ralph, J., dissenting) (arguing defendants are not protected under Title IX and, even if they were, suffered only emotional distress not redressable under Title IX) (citations omitted); Roe W.M. v. Devreux Found., No. 21-2655, 2023 WL 173918 (E.D. Penn. Jan. 12, 2023).

128. *See* A.T. v. Ole Valley Sch. Dist., No. 17-4983, 2023 WL 1453143, *4 (E.D. Penn. Feb. 1, 2023). *But see Fairfax Cty. Sch. Bd*., 2022 WL 424265, at *3-6 (awarding only lost educational opportunities that "lie at the heart of Title IX" but otherwise rejecting expenses for medical and psychological care by declaring them "proxies for impermissible emotional distress damages," and denying lost employment opportunity and earning capacity as "too attenuated in time" for a high school-aged sexual assault survivor).

129. *See Purdue Univ., et al.*, 2022 WL 2828238 at *4; *Coleman*, 2022 WL 1470957, *3, n.2; *Cummings,* 142 S. Ct. at 1570, 1572. *But see* Faller v. Two Bridges Reg. Jail, No. 2:21-cv-00063-GZS, 2022 WL 17260763 (D. Maine Nov. 2022) (applying *Cummings* to Title II of the ADA); *Party*, 2022 WL 17459745 at *4 (applying *Cummings* to Title IX); *City of Pawtucket*, 2022 WL 4551953, at *2 ("While the Supreme Court's holding in Cummings was limited to the ACA and RA, the opinion's underlying reasoning forces the same conclusion for Title IX."); Doe v. Bd. of Educ. of Albuquerque Pub. Sch., No. 1:21-cv-01199-LF-SCY, 2022 WL 6582110, *2 (D. N.M. Sept. 13, 2022) (claiming erroneously that *Cummings* itself ruled on Title IX).

on longstanding common law principles.[130] *Cannon* found that Title IX contains an implied right of action, and the *Bell* Court has held (as affirmed by *Franklin*) that any appropriate relief may be granted as a result absent an explicit act of Congress to limit the availability of such damages.[131] "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy to make good the wrong done*."[132] Instead of narrowing all available relief, Congress has confirmed that all "remedies (including remedies both at law and in equity) are available" under Title IX "to the *same extent as such remedies are . . . in the suit against any public or private entity other than a State*."[133] To be successful, as indicated below, this argument will likely need Title IX to have another source of authority beyond the Spending Clause to avoid a district court merely citing *Gebser* and *Cummings* to foreclose the inquiry.

B. Alternative Source of Constitutional Authority for Title IX

Cummings is limited to Spending Clause legislation, which relies upon a recipient's consent for enforcement.[134] *Cummings* does not address the possibility of emotional distress damages being available under Title IX pursuant to § 5 of the Fourteenth Amendment.[135] Plaintiffs' attorneys should therefore argue that Title IX is authorized not just under the Spending Clause,[136] but also under § 5 because Congress has authority to pass legislation under multiple Constitutional provisions.[137] Both the Sixth and Eighth Circuits have recognized Congress' authority to enact Title IX under § 5.[138] To support

130. *Accord* Barnes v. Gorman, 536 U.S. 181, 189 (2002); Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 66-68 (1992).

131. *See Franklin*, 503 U.S. at 66-68 (citing Bell v. Hood, 327 U.S. 678 684 (1946)).

132. *Bell*, 327 U.S. at 684.

133. *Franklin*, 503 U.S at 72-73 (citing 42 U.S.C. § 2000d–7(a)(2) (emphasis added)).

134. *See Cummings*, 142 S. Ct. at 1570 (citations omitted).

135. *See Franklin*, 503 U.S. at 75, n.8 (declining to decide whether Congress used this source of authority without foreclosing the inquiry because damages would be available under either constitutional source for Title IX). *But see Doe 1*, 2022 WL 3366765, at *2–3 (rejecting the § 5 argument based on cases solely analyzing Title IX under the Spending Clause while also rejecting *Crawford* as a basis for such a finding because it only found Title IX "could" have been pursuant to § 5 rather than holding it had been) (internal citations omitted); *Doe*, 2022 WL 17988203, *6; Thomas v. Weber State Univ., Case No. 1:20-cv-00054, *1–2 (D. Utah Mar. 10, 2023) ("Courts across the country have rejected the position that Cummings does not apply to Title IX claims. This court does the same . . . .").

136. *See generally Gebser*, 524 U.S. at 287.

137. *See Patterson,* 491 U.S. at 197–98 (Brennan, J, concurring in part).

138. Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (finding Congress had the authority to pass Title IX pursuant to § 5 of the Fourteenth Amendment); Prinsloo

this argument, plaintiffs' attorneys should note the *Franklin* Court did not rely solely upon a contract analogy, and instead "conclude[d] that a money damages remedy is available under Title IX for an intentional violation *irrespective of the constitutional source of Congress' power to enact the statute*."[139] As evidence of this additional source of constitutional authority, plaintiffs' attorneys should remind courts that § 5 is the source of authority identified by Congress when enacting the Civil Rights Remedies Equalization Act in 1987, 42 U.S.C. § 2000d-7.[140] In further support, attorneys should cite the *Franklin* Court as recognizing that Congress has made no effort either "to restrict the right of action recognized in *Cannon . . . or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right,*" such that the Court "*cannot* say . . . that Congress has limited the remedies available to a complainant in a suit brought under Title IX."[141]

To bolster this argument, plaintiffs' attorneys should cite "a pattern of state constitutional violations" justifying the passage of Title IX in 1972 pursuant to § 5, as traditionally done in support of Fourteenth Amendment-based claims.[142] Thankfully, significant patterns of unconstitutional discrimination on the basis of sex in educational settings have been cited previously to support the enactment of Title IX as a starting point.[143] The U.S. Supreme Court has also previously "taken judicial notice of the 'volumes of history' documenting sex discrimination in education, including unconstitutional discrimination by states" because "[t]he exclusion of women from public education is part of the long history of states' discrimination on the basis of sex."[144] In fact, when Congress passed Title IX in 1972, it had a significant body of evidence showing unconstitutional sex discrimination in public schools that can now be relied upon for § 5 arguments.[145] "[C]lassifications on the basis of sex are presumptively unconstitutional, so evidence of a history of such classifications by states will in general establish a history of constitutional violations," thereby justifying Congress' use of its authority under § 5 to pass Title IX.[146]

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v. Ark. State Univ., 112 F.3d 514 (8th Cir. 1997) (affirming *Crawford*); Franks v. Kentucky Sch. For the Deaf, 142 F.3d 360, 363 (6th Cir. 1998).

139. *Franklin*, 503 U.S. at 75, n.8.

140. *See id.*; *Franks*, 142 F.3d at 363 (finding that § 5 is the only constitutional provision that the Supreme Court recognizes as granting Congress the power to abrogate the states' immunity.").

141. *See Franklin*, 503 U.S at 73, 78 (Scalia, J., concurring) (emphasis added).

142. *See New Spending Clause, supra* note 99, at 12.

143. *Id.*

144. *Id.* (citing Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003) & U.S. v. Virginia, 518 U.S. 515 (1996)).

145. *Id.*

146. *Id.*

C. Notice that Emotional Distress Damages are Available under Title IX

In 1992, the Court gave educational programs and activities notice that if they accept federal funding they would be liable for monetary damages if found to have intentionally violated Title IX.[147] In doing so, the *Franklin* Court cited longstanding common law precedent under *Bell*: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done."[148] Since then, several courts have recognized the availability of emotional distress damages under Title IX.[149] In light of such judicial notice, recipients that continued accepting federal funding year-to-year should not be held to a stagnant understanding of notice from when they first accepted such funding.[150] This interpretation of notice ensures that the second purpose for Congress enacting Title IX is achieved, which is to ensure individuals receive "effective protection against . . . [discriminatory] practices."[151]

Arguably the Court itself gave notice in *Guardians* by stating that recipients may be "held liable for *extraordinary harm due to special circumstances* . . . [it] knew or had reason to know . . . made *such extraordinary injury probable*."[152] Plaintiffs' attorneys should use this reference to argue that a recipient's failure to prevent the known risks of sexual harassment or violence under Title IX authorizes plaintiffs to seek emotional distress damages based on the Court's recognition of such an exception (and notice to recipients of the same) in *Guardians*.[153]

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147. *See Franklin*, 502 U.S. at 75 (citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).

148. *See id.* at 66 (quoting *Bell*, 327 U.S. at 684); *see also Asfall*, 2022 WL 2764747, *3 (citing defendant's admission that the Ninth Circuit indicated pre-*Cummings* that emotional distress damages were recoverable under Title IX to counter any claim of waiver).

149. *See, e.g.*, Doe v. Fairfax Cty. Sch. Bd., 1 F.4th 257, 276-77 (4th Cir. 2021) (*citing* Jennings v. Univ. of N. Carolina, 482 F.3d 686, 699-700 (4th Cir. 2007)).

150. *Accord* Cummings v. Premier Rehab Keller P.L.L.C., 142 S. Ct. 1652, 1573 (2022) (holding recipients to their choices to take federal funding) (citation omitted); Guardians Assn. v. Civil Serv. Comm'n of NYC, 463 U.S. 582, 596-97 (1983). Indeed, the Courts have done something similar for 42 U.S.C. § 1983 claims regarding when a federal or constitutional right is clearly established for purposes of determining the applicability of qualified immunity to suit. *See, e.g.,* Fem. Maj. Found. v. Hurley, 912 F.3d 674, 699-706 (2018). *But see Party*, 2022 WL 17459745 at *4 (arguing that "*Cumming's* notice inquiry does not . . . call for a case-by-case evaluation" and instead "rises and falls on whether the requested category of damages is a '*usual* contract remed[y]' in private suits") (emphasis in original).

151. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

152. *Guardians*, 463 U.S. at 597, n.20 (citation omitted) (emphasis added).

153. *See* Section I(B), *supra*. In Doe v. Charlotte-Mecklenburg Bd. of Educ., No. 3:18-cv-00586-RJC-DSC (W.D.N.C.) (ECF No. 16), this author argued for such a finding

D. Emotional Distress Under Traditional Contract Law

The *Cummings* Court held that appropriate damages available under Spending Clause legislation are limited to those "traditionally available in suits for breach of contract."[154] In doing so, the Court dismissed the plaintiff's argument that emotional distress damages are recoverable when "particularly likely [to] result" from a breach of contract, such as in discrimination cases.[155] The *Cummings* Court also rejected the plaintiff's other arguments around exceptions to the general rule for limited contractual damages by arguing emotional distress damages are available for certain breaches.[156] As noted above, contrary to *Cummings*, which rejected any exceptions by citing *Barnes*,[157] the Court itself previously recognized that a contracting party may be "held liable for *extraordinary harm due to special circumstances* . . . [it] knew or had reason to know . . . made *such extraordinary injury probable*."[158]

Furthermore, the Court has relied upon hornbooks to distill the general rules for damages available under contract law when determining whether federal funding receipt would have notice of available damages pursuant to the requirements of its Spending Clause jurisprudence.[159] According to one hornbook, emotional distress damages may be available as "parasitic elements" to compensatory damages arising out of bodily injury caused by a breach of contract.

> Wrongful conduct that causes bodily injury is nearly always tortious, whether intentional or merely negligent. In actions for this sort of a wrong, the mental distress that accompanies the bodily injury is considered in determining the damages that are awarded. The conduct that causes bodily injury and mental distress, however, may be wrongful not only because the conduct is a breach of the general law of torts, but also because it is a breach of an express contract made by the defendant. *When such is the case, there seems to be no good rea-*

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where the School Resource Officer Bradley Leak and Assistant Principal Anthony Perkins for Myers Park High School in Charlotte-Mecklenburg Schools learned of a kidnapping but failed to intervene, leaving a minor student to be orally raped by a peer in a nearby wooded location off-campus.

154. *See Cummings*, 142 S. Ct. at 1571-72 (quoting *Barnes*, 536 U.S. at 187) (excluding all emotional damages as "generally not available for breach of contract").

155. *See id*. at 1572 (internal citation omitted).

156. *See id*. at 1573-76 (analogizing to its denial of punitive damages in *Barnes*).

157. *See id.* at 1570-74.

158. *Guardians*, 463 U.S. at 597, n.20 (citation omitted) (emphasis added).

159. *See, e.g.*, *Guardians*, 463 U.S. at 597, n.20 (citation omitted); *see Cummings,* 142 S. Ct. at 1572 (internal citation omitted).

> *son for applying a different rule as to the damages to be awarded.*[160]

In such a case, plaintiffs' attorneys should argue that their clients "suffered physical pain by reason of the non-performance by defendant of its contract, and where this exists, a recovery for mental anguish concomitant with the physical pain suffered is a proper element of the plaintiff's damages."[161] Indeed, the "exact line between mental distress and physical pain may be an invisible line, because the former, as well as the latter, may well be a disturbance in the bodily nerve cells, but the courts have thus far made a rough practical distinction between them."[162] Additionally, this summary speaks favorably to emotional distress awards from defamatory conduct accompanying a breached contract.[163] Such arguments should be put forward to ensure that, even if a court applies *Cummings*, contract law is cited to support parasitic emotional distress damages for plaintiffs.

IV. CONCLUSION

As one of the many female attorneys and law professors who has benefited from Title IX,[164] I hope this article raises the alarm about the growing impact of *Cummings* on Title IX enforcement. Without recovery of emotional distress damages, for-profit law firms may not be sufficiently economically incentivized to litigate civil rights cases on a contingency fee basis, leaving most potential plaintiffs unable to afford the cost of such litigation.[165] To prevent the curtailment of civil rights,[166] we must now become guardians of these laws that have pro-

160. 11 Corbin on Contracts § 59.1 (emphasis added); *see Guardians*, 463 U.S. at 587, n.22.

161. *Guardians*, 463 U.S. at 587, n.22 (citing Coffey v. Northwestern Hops. Ass'n, 183 P. 762 (1919), *reh. den*. 189 P. 407 (1920). *But see City of Pawtucket*, 2022 WL 4551953, at *2–3, 4 (recognizing briefly some contract claims allowing emotional distress damages but analyzing the Courts commentary on "special rules" to likely foreclose the same and so declining to awarded "pain and suffering" associated with physical injuries and treatment).

162. *See Guardians*, 463 U.S. at 587, n.22 ("No Doubt, a valid agreement can be made that exceeds the general law of torts and gives a remedy for the causing of a bodily injury for which the general law of torts would give no remedy. In cases where the breach of contract is wanton or reckless, the damages awarded would, by analogy, include mental distress as a parasitic element").

163. *See id.*

164. And as a college rape survivor who would have benefited from Title IX, had there been better compliance by her undergraduate institution, the University of Wisconsin (UW)-Madison. *See, e.g.*, Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUBLIC INTEGRITY (Feb. 25, 2010), https://publicintegrity.org/education/lax-enforcement-of-title-ix-in-campus-sexual-assault-cases/.

165. *See Kauffman, supra* note 5.

166. *See, e.g.*, Pennington v. Flora Comm. Unit Sch., Case No. 3:20-cv-11-MAB (S.D. Ill Jan. 20, 2023); *see also Moravian Coll*., 2023 WL 1444436, *8–9 (citing various civil rights cases where *Cummings* is limiting damage recovery).

tected us for the last 50 years. Otherwise, the next generation may not be so protected. Heroes like Gerry Cannon and her husband led the way, but we must remain vigilant now. While *Cummings* is a limited holding regarding § 504 and the ACA, several district courts are interpreting Title IX damages to be limited by its holding because this civil right has been authorized at least in part by the Spending Clause.[167] While we wait on a politically divided Congress for legislative solutions,[168] plaintiffs' attorneys must raise arguments that distinguish *Cummings* from *Franklin*, which adopted the longstanding common law principle that all appropriate remedies should be available under Title IX unless Congress states otherwise.[169]

167. *See City of Pawtucket*, No. 17- 365, 2022 WL 4551953, *2 (D.R.I. Sept. 29, 2022); Doe 1, et al. v. The Curators of the Univ. of Mo., No. 19-cv-04229, 2022 WL 3366765, *3 (W.D. Mo. August 15, 2022); Bonnewitz v. Baylor Univ., 6:21-cv-00491, 2022 WL 2688399, *3–4 (W.D. Tex. July 12, 2022) (granting a motion to dismiss for a Title IX complaint where only emotional damages have been pled by the plaintiff to be granted without prejudice and leave to amend); Party v. Ariz. Bd. of Regents, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, *2–4 (D. Ariz. Dec. 6, 2022); Doe v. Bd. of Regents of Univ. of Neb., 2022 WL 3566990, *4 (D. Neb. Aug. 8, 2022); Kincaid v. Unified Sch. Dist. No. 500, No. 21-2059-DDC-TJJ (D. Kansas Dec. 9, 2022); J.C. v. Bd. of Regents of Univ. Sys. of Ga., No. 1:20-cv-4445-JPB, at *7 (N.D. Ga. Sept. 19, 2022); Doe v. Purdue Univ., et al., No. 2:17-cv-33-JPK (N.D. Ind. Aug. 11, 2022); Doe v. Purdue Univ., et al., No. 4:18-cv-89, 2022 WL 2828238 at *4 (N.D. Ind. July 20, 2022); Doe v. Duefahrd, Cause No. 4:18-cv-72-JVB-JEM, 2022 WL 17253080, *1 (N.D. Ind. Nov. 28, 2022*);* Doe v. Moravian Coll., No. 5:20-cv-00377-JMG, 2023 WL 1444436, *7–9 (E.D. Penn, Jan 10, 2023); Doe v. Sch. Bd. of Palm Beach Cty., No. 21-81560-CIV-SINGHAL, 2022 WL 17988203, *6 (S.D. Fl. Nov. 22, 2022); Doe v. Fairfax Cty. Sch. Bd., No. 1:18-cv-000614-MSN-IDD, 1012 QL 424265, *3 (E.D. Va. Jan. 25, 2023).

168. *See* Jasmine Aguilera & Mini Racker, *What to Expect from the New Divided Congress*, TIME (Jan. 3, 2023), https://time.com/6244090/congress-2023-first-day/.

169. *See* Section I(B), *supra*.