No. 24-1809

In the United States Court of Appeals for the Ninth Circuit

ROY PAYAN; PORTIA MASON; NATIONAL FEDERATION OF THE BLIND, INC.; AND NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, INC.,

Plaintiffs-Appellants,

v.

LOS ANGELES COMMUNITY COLLEGE DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the remedies guaranteed by statutes like the Americans with Disabilities Act and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination by state and local entities and entitles those injured by that discrimination to compensatory damages. *See* 42 U.S.C. § 12131; 29 U.S.C. § 794. Plaintiffs, including two organizations of blind individuals and two blind students who were denied opportunities afforded to their sighted peers, sued under Title II to redress the Los Angeles Community College District (LACCD)'s failure to provide blind students an equal educational opportunity. They alleged that LACCD, among other things, relied on inaccessible educational technology in and

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

out of the classroom and employed a procurement process that did nothing to ensure that the resources it acquired were accessible to its blind students. As a result, the individual plaintiffs were excluded from online course functions like practice quizzes and video tutorials and forced to adopt a "slower course of study" than their sighted peers. Appellants' Br. 36.

After trial, the jury delivered a verdict for Plaintiffs, finding that LACCD denied blind students an equal educational opportunity in violation of Title II of the ADA and that it acted with deliberate indifference when doing so. 2-ER-143. The jury awarded damages accordingly.

But LACCD sought remittitur of the jury's damages award, arguing that the award was based on "clear legal error" because it "included damages that were precluded by this Court and/or are not recoverable damages under Title II." 2-ER-31, 26. As relevant here, LACCD asserted that the Supreme Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212 (2022), which held that emotional distress damages are not available under Section 504 of the Rehabilitation Act or Section 1557 of the Affordable Care Act, "also precludes general damages in Title II claims under the ADA," 2-ER-31. The district court remitted the jury's damage award and declined to grant a new trial. 1-ER-12. It held that the jury was "only presented with the out-of-pocket expenses, such as the price of inaccessible textbooks," and that the "[p]laintiffs neither argued nor produced evidence in the trial with which the jury could determine the value of the 'lost educational opportunities.'" 1-ER-13-14.

Plaintiffs now argue that they presented evidence of "lost educational opportunities" to the jury, Appellants' Br. 30, and that those opportunities are compensable under Title II of the ADA, *id.* at 23-32 (arguing both that *Cummings* does not apply to claims under the ADA and that lost educational opportunities would be compensable even if it did).

Even assuming that the Supreme Court's Spending Clause jurisprudence applies to Title II, Plaintiffs are correct that damages for lost educational opportunities are compensable under that statute. While the Court held in *Cummings* that emotional distress damages were unavailable in claims arising under the Spending Clause statutes it considered there, 596 U.S. at 230; *see also Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (holding that punitive damages are unavailable in claims arising under Spending Clause legislation), it did not in any way limit plaintiffs' ability to seek *other types of damages* resulting from discrimination outlawed by Spending Clause legislation. To the contrary, it made clear that victims of discrimination can claim from recipients of federal funds "those remedies traditionally available in suits for breach of contract." *Cummings*, 596 U.S. at 220-21 (internal quotation marks omitted). Significantly, those remedies include compensation for all foreseeable injuries, including lost educational opportunities, caused by the defendant's breach.

As an initial matter, the very contract-law authorities that the Supreme Court relied upon in *Cummings* make clear that plaintiffs in contracts actions can recover for all "losses actually suffered," including "incidental or consequential loss[es]," caused by the breach. *See Restatement (Second) of Contracts* § 347 (Am. L. Inst. 1981); 11 Timothy Murray, et al., *Corbin on Contracts* § 56.6 (2024). These authorities emphasize that *all* consequential harms should be compensated, so long as the defendant "had reason to . . . foresee the injury that has occurred." 11 Corbin, *supra*, § 56.6; *see generally Cummings*, 596 U.S. at 224-25 (citing 11 Joseph M. Perillo, *Corbin on Contracts* § 59.1, p. 546 (rev. 11th ed. 2005), and *Restatement (Second) of Contracts*); *Barnes*, 536 U.S. at 187 (citing *Restatement (Second) of Contracts* and 3 Samuel Williston, *Law of Contracts* (1920)).

According to these authorities, lost opportunities, including lost educational opportunities, are the type of consequential harms that can be redressed in a typical contract action. *See Restatement (Second) of Contracts* § 344 cmt. a (noting that courts may "recognize a claim" based on evidence of the plaintiff "foregoing opportunities"); Joseph M. Perillo, *Contracts* § 14.10, p. 524 (2014) (describing compensation for the "value of a chance or opportunity"); 11 Corbin, *supra*, § 55.11 ("the value of opportunities forgone because of the contract"). This means that if a plaintiff suffers from a "lost opportunity [that] would have been offset by defendant's performance, it should be subject to recovery." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* 808 (3rd ed. 2018); *see Cummings*, 596 U.S. at 222 (citing Joseph M. Perillo, *Calamari & Perillo on Contracts* § 14.5, p. 495 (6th ed. 2009)); *id*. at 224-25 (quoting Dan Dobbs, *Law of Remedies* § 12.4, p. 819 (1973)).

Consistent with these authorities, there is a long history of courts compensating plaintiffs for lost profits, lost opportunities, and lost chances, demonstrating that such compensation is "generally available" in contract actions, *Cummings*, 596 U.S. at 233. That principle applies in the education context no less than in any other. Damages for failure to provide a contracted-for education could include, for example, compensation for the future educational opportunities that a plaintiff lost due to the breach. Significantly, this is true regardless of whether the value of those lost opportunities can be easily quantified.

In short, compensation for lost opportunities is neither "unusual," *Barnes*, 536 U.S. at 188, nor "exceptional," *Cummings*, 596 U.S. at 225, after a breach of contract. Rather, it is part of the "normal[]" or "traditional[]" contracts remedy. *Id.* at 221-22. Accordingly, courts should presume that funding recipients are aware that they will be subject to these remedies after breaching their Spending

Clause "contract[s]" with the government. *Id.* at 221. This Court should reject any contention to the contrary.

ARGUMENT

I. Under the Supreme Court's Spending Clause Jurisprudence, Recipients of Federal Funding Are Liable for Remedies Traditionally Available in Breach-of-Contract Actions.

Under Supreme Court precedent, when Congress uses its Spending Clause authority to pass anti-discrimination statutes, courts often apply a "contract-law analogy" to determine the remedies available to plaintiffs bringing claims under those statutes. *Id.* at 219 (quoting *Barnes*, 536 U.S. at 186). *But see Barnes*, 536 U.S. at 186 ("we have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation"); *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 180 (2023) (rejecting contract-law analogy where it would require rewriting of statutory text).

Under this analogy, courts may "presume that a funding recipient is aware that, for breaching its Spending Clause 'contract' with the Federal Government, it will be subject to the *usual* contract remedies in private suits." *Cummings*, 596 U.S. at 221; *see also id.* (referring to the damages "normally available" in breach-of-contract suits).

The Supreme Court applied this mode of analysis in *Barnes*, when it held that plaintiffs seeking compensation for discrimination forbidden by Spending

Clause legislation may not claim punitive damages, because such damages are not "forms of relief traditionally available in suits for breach of contract." 536 U.S. at 187. In that case, the Court considered whether punitive damages should be available in a case involving a claim that municipal police officers violated the Rehabilitation Act, as well as the ADA, by failing to maintain appropriate policies for the arrest and transportation of people with spinal cord injuries. *Id.* at 184. Citing a variety of present-day and historical contract-law authorities, the Court concluded that "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Id.* at 187-88 (citing 3 Edward Farnsworth, *Contracts* § 12.8, p. 192-201 (2d ed. 1998); *Restatement (Second) of Contracts* § 355; and 1 Theodore Sedgwick, *Measure of Damages* § 370 (8th ed. 1891)). Because the "contract-law analogy" determines "the *scope* of damages remedies" under the Rehabilitation Act, the Court explained, punitive damages were unavailable. *Id.*

In *Cummings*, the Court expanded on its holding in *Barnes*, explaining that whether a remedy is "traditionally available" in contract actions should be determined by reference to the "general rules" applicable to all contracts, rather than rules that apply only in "idiosyncratic" or "*unusual*" cases. *Cummings*, 596 U.S. at 223-25 (emphasis in original). There, the Court considered a claim for emotional distress damages stemming from a federal funding recipient's discrimination on the basis of disability, in violation of the Rehabilitation Act and the Affordable Care Act. Once again, the Court reviewed current and historical contract-law treatises, which described emotional distress damages as "generally not compensable in contract," *id.* at 221-22 (citation omitted), and portrayed the unavailability of such damages as "firmly rooted in tradition," *id.* (quoting 3 Farnsworth, *supra,* § 12.17, p. 894). Even the *Restatement of Contracts*, which reflected the most permissive view on the availability of emotional distress damages, *id.* at 227, provided that "[r]ecovery for emotional disturbance will be excluded *unless*" certain conditions were met, *id.* at 224 (quoting *Restatement (Second) of Contracts* § 353).

The Court in *Cummings* also conducted a survey of state contract law to assess whether there was a "consensus rule" providing that emotional distress damages were available in contract actions. *Id.* at 226-27. It found that most states "limit[ed] recovery for mental anguish to only a narrow class of contracts." *Id.* at 228 (internal quotation marks omitted); *id.* at 229 (noting that "[m]any of these cases unsurprisingly mix contract, quasi-contract, and tort principles together"). And more significantly, there was no consensus among the states "[a]s to which 'highly unusual contracts' trigger the exceptional allowance of [emotional distress] damages," meaning that it made "little sense to treat such cases as establishing or evincing a rule of contract law." *Id.* at 229-30. In the Court's view, without evidence of such a rule, a prospective funding recipient would not have "been aware that it would face . . . emotional distress damages" when it accepted federal money, making those damages unavailable. *Id.* at 220.

In short, when acting under its Spending Clause authority, Congress can subject the recipients of federal funds to the remedies available in typical—rather than "highly unusual"—breach-of-contract cases. *Id.* at 229-30. Consequential and lost opportunity damages are available in such cases, as the next Sections make clear.

II. All Foreseeable Damages Caused by the Defendant's Breach, Including Consequential Damages, Are Traditionally Available in Breach-of-Contract Actions.

As contracts treatises explain, a plaintiff should generally be compensated for all foreseeable damages, including consequential damages, caused by a breach of contract. The Restatement, for example, provides that injured parties in breach-of-contract actions should be "award[ed] a sum of money that will, to the extent possible, put [them] in as good a position as [they] would have been in had the contract been performed." *See Restatement (Second) of Contracts* § 347 cmt. a; *id*. cmt. c ("[t]he general principle is that all losses, however described," are recoverable). In a section entitled "Measure of Damages In General," the Restatement explains that the "injured party has a right to damages based on his expectation interest as measured by . . . the loss in the value to him of the other party's performance . . . plus . . . any other loss, including incidental or consequential loss, caused by the breach." *Id.* § 347.

In defining the scope of a plaintiff's damages, many authorities divide expectation damages into "general" damages, which are "said to be the proximate result of a breach," and special or "[c]onsequential" damages, which are "not an invariable result of every breach of this sort," but "were . . . contemplated by the parties at the time the contract was entered into as a probable result of a breach." 24 *Williston on Contracts* § 64:16 (4th ed. 2024). As these authorities explain, both types of damages are recoverable, although some sources emphasize that consequential damages "must meet the requirements of causation, certainty, and foreseeability," such that they "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract." *Id.*; *see also* 11 Corbin, *supra*, § 56.6 (positing that special damages are "injurious consequences that are not deemed as a matter of law to have been foreseen," but noting that the "dividing line between" general and consequential damages is "not capable of exact determination" (citations omitted)). *But see Restatement (Second) of Contracts* § 347 (describing foreseeability as a requirement for all damages, and not distinguishing between "consequential" and "general" damages).

These authorities place consequential damages on a completely different footing than the emotional distress damages that the Supreme Court concluded were unavailable in *Cummings*. For example, far from providing that these types of damages are "not ordinarily allowed," as it does for damages for "emotional disturbance," *Restatement (Second) of Contracts* § 353 cmt. a, the Restatement includes "consequential damages" as a component of the "measure of damages in general," *id.* § 347. And instead of stating that these damages are unavailable *unless* certain circumstances occur, as it does for emotional distress and punitive damages, *see Cummings*, 596 U.S. at 224 (emphasizing this point), the Restatement explicitly provides that an injured party can receive damages based on his "own particular circumstances or those of his enterprise," including the value of future opportunities and the future "realization of profit," subject only to the "limitation of foreseeability," *Restatement (Second) of Contracts* §§ 347, 351.

Likewise, the most recent edition of *Williston on Contracts* states that "mental suffering" is "not generally considered as a basis for compensation in contractual actions." 24 Williston, *supra*, § 64:11. But that treatise makes explicit that "consequential damages" are recoverable so long as they "meet the requirements of causation, certainty, and foreseeability," or, in other words, "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract." *Id.* § 64:16.

Perillo, too, describes the "general rule" that "no damages will be awarded for the mental distress or emotional trauma that may be caused by a breach of contract." Perillo, *supra,* § 14.5, p. 516. But "consequential damages"—or damages "such as may reasonably be supposed to have been in the contemplation of both parties when they made the contract, as the probable result of the breach of it"—are "allowed." *Id.* § 14.4, p. 514.

And in his *Handbook on the Law of Damages*, Charles McCormick makes clear that "consequential losses" are recoverable so long as it was reasonably clear that the contract protected the interest from which the loss stems. Charles T. McCormick, *Handbook on the Law of Damages* 575-80 (1935) (quoting Leon Green, *Rationale of Proximate Cause* 51 (1927)); *compare with id.* at 592 ("[i]t is often stated as the 'general rule' that, in actions for breach of contract, damages for mental suffering are not allowable"); *see also* 11 Corbin, *supra*, §§ 56.6, 59.1 (describing the availability of consequential damages, but noting that "as a general rule, no damages will be awarded for the mental distress or emotional trauma that may be caused by a breach of traditional contract").

In sum, treatises on contract law make clear that plaintiffs are generally entitled to compensation for any reasonably foreseeable harms they suffered as a consequence of a defendant's breach of contract. This includes compensation for lost educational opportunities, as the next Section discusses.

III. For Centuries, Courts Have Awarded Damages for Lost Opportunities Caused by a Defendant's Breach of Contract.

A. American courts have long authorized relief for lost opportunities. Indeed, courts have allowed plaintiffs to recover not only lost profits, but also compensation for injuries that are more difficult to quantify, like lost chances.

At least as early as the mid-nineteenth century, American courts began to award damages for lost profits in breach-of-contract actions, relaxing the once "rigid" rule that such damages were too speculative to garner relief. *See* Note, *Speculative Profits as Damages for Breach of Contract*, 46 Harv. L. Rev. 696, 696-97 (1933) ("The last hundred years have witnessed continual modification of the once rigid rule that anticipated profits, because inherently uncertain, were *per se* not a proper element of damages for breach of contract."); Robert M. Lloyd & Nicholas J. Chase, *Recovery of Damages for Lost Profits: The Historical Development*, 18 U. Pa. J. Bus. L. 315, 316 (2016) (while "the common law rules made little allowance for the recovery of lost profits," that changed with "a series of New York cases" in the mid-1800s); *cf.* McCormick, *supra*, at 563 (arguing that juries in fact had discretion to compensate for lost profits well *before* the middle of the nineteenth century, as judges did not "confine [the jury's] awards within the risks which the judges would believe to be in accord with the expectation of business men").

In *Taylor*, for example, the New York Court of Appeals allowed a jury to estimate the plaintiff's lost profits after the defendant breached a contract in which he had agreed to lease a farm and share the proceeds. *Taylor v. Bradley*, 39 N.Y. 129, 132-33 (1868). The court explained that without recovery for lost profits, the plaintiff would not receive "the value of his contract"—the "opportunity which the contract had . . . secured to him"—and would be "deprived of his adventure." *Id.* at 129, 144; *see Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (citing *Taylor*'s damages holding).

Over fifty years later, in *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360 (9th Cir. 1927), this Court permitted the plaintiff to demonstrate to the jury the profits it lost due to a driller's default on a contract for drilling a well. *Id.* at 362. While it conceded that "remote, uncertain, and speculative damages are not recoverable," it emphasized that such damages could be recovered if "provable" to the satisfaction of the jury. *Id.*; *see also* McCormick, *supra*, at 113; *United States v. Behan*, 110 U.S. 338, 344-45 (1884) (when lost profits are "the direct and immediate fruits of the contract," they are then "part and parcel of the contract itself" and can be recovered).

Today, treatises continue to make clear that there is no "rule of contract law," *Cummings*, 596 U.S. at 229, prohibiting recovery for lost profits. The most recent edition of *Corbin on Contracts*, for example, describes an "illustrative case" in which "it was held that the plaintiff could recover the profit it would have made had the defendant fully performed the contract." 11 Corbin, *supra*, § 55.11; *see also Restatement (Second) of Contracts* § 343 cmt. a (noting that "the expectation interest" ordinarily includes "the injured party's lost profit"); 24 Williston, *supra*, § 64:14 ("if the plaintiff has given valuable consideration for the promise of a performance which would have given it a chance to make a profit, the defendant should not be allowed to deprive the plaintiff of that performance without compensation"). Similarly, contract-law authorities explain that individual plaintiffs can be compensated for the loss of "identifiable professional opportunities" if those losses foreseeably resulted from the defendant's breach. *See, e.g.*, 24 Williston, *supra*, § 66:4; *Restatement (Second) of Contracts* § 350 ("damages for loss of future earnings"); *see also Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910, 921 (9th Cir. 2001) (under California law, jury may award lost profits in breach of contract for "promising business opportunity"); *Klayman v. Jud. Watch, Inc.*, 255 F. Supp. 3d 161, 170 (D.D.C. 2017) (under D.C. law, plaintiff employee could recover "damages for loss of identifiable professional opportunities"); *Doe v. Portland Health Ctrs., Inc.*, 782 P.2d 446, 448 (Or. 1989) (patient could recover "loss of business profits, reputation[,] and opportunity" in a breach of contract action against hospital); *Morehouse Coll., Inc. v. McGaha*, 627 S.E.2d 39, 42-43 (Ga. App. 2005) (expelled student could recover for lost income during the extra time needed to complete his degree in breach of contract action).

Even an opportunity to profit that the contract explicitly *does not* guarantee can merit lost profit damages. *Ace-Federal Reporters v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000). In *Ace-Federal Reporters*, a federal agency breached contracts in which the government had promised that it would purchase only from the contractors listed on a specific schedule. Rejecting the government's argument that damages were too speculative, the Federal Circuit held that the government's promise had "substantial business value," despite the fact that the contract did not "guarantee that any work would be available" because it left agencies free to choose among the contractors on the list. *Id.* at 1332. Instead, the court recognized that the "possibility of obtaining work" was valuable even when it was not guaranteed, *id.*, a proposition that others have deemed "well-settled," *see Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.,* 365 F.3d 435, 482 (6th Cir. 2004); *see also* 24 Williston, *supra,* § 64:14 ("[w]here a breach of contract involves deprivation of a chance that has value in a business sense," courts are reluctant to "deny altogether the recovery of substantial damages"); Dobbs & Roberts, *supra*, at 808 (describing compensation for the loss of "an opportunity to deal in an established market" as a form of general damages).

And even in cases where the opportunity lost is something other than an opportunity for profit, courts will allow the jury "to determine the value of the chance of which plaintiff was deprived." *Mange v. Unicorn Press, Inc.*, 129 F.

Supp. 727, 730 (S.D.N.Y. 1955). Although American courts were "at first hesitant to recognize chances as protected interests" in contract law, in the mid-twentieth century they "followed English cases" and began to permit recovery in cases where the injured party suffered from the loss of an opportunity—even an inherently speculative opportunity—protected by a contract. Howard Ross Feldman, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. Balt. L. Rev. 139, 141 n.14 (1987) (citing *Mange*, 129 F. Supp. at 730); *see* 24 Williston, *supra*, § 64:14 (noting that the "weight of authority" now supports recovery in these cases).

In *Mange*, the court considered a contestant's breach-of-contract action against an encyclopedia publisher that held a contest with over 20,000 contestants. *Mange*, 125 F. Supp. at 728. The court rejected the publisher's contention that the plaintiff's claimed damages were "merely speculative" because, even without the defendant's alleged breach, the plaintiff would not have necessarily won the contest. *Id.* at 730 (describing the thousands of contestants in the tie-breaking stage of the contest). It explained that the plaintiff's "chances of success," although speculative, "had some market value" deserving of compensation. *Id.*; *see also Wachtel v. Nat'l Alfalfa J. Co.*, 176 N.W. 801, 803 (Iowa 1920) (contestant in a magazine contest recovered damages for lost chance to win the contest when the contest was discontinued in her area); McCormick, *supra*, at 117-

23 (describing compensation for the "mere chance" of a specific gain and citing cases); *see* 11 Corbin, *supra*, § 57.2 (describing damages amounting to the "value of the 'chance of winning' or the value of the 'opportunity to compete'"); Perillo, *supra,* § 14.10, p. 524 ("value of a chance or opportunity"); *Restatement (Second) of Contracts* § 347 ("lost-opportunity damages").

In these cases, as one California court summarized, "the absence of certainty of success is not necessarily a reason for refusing to protect [a plaintiff's] non-commercial expectancies." *Youst v. Longo*, 207 Cal. Rep. 447, 458 (Ct. App. 1984) (internal quotation marks omitted); H.L.A. Hart & Anthony Honoré, *Causation in the Law* 320 (2d ed. 1985) (contract law allows for plaintiffs to seek compensation "from a defendant who has failed to provide a stipulated opportunity for gain," in which case "liability must necessarily be assessed by reference to hypothetical gains"). Rather, contract law leaves it to the jury to assess the value of the opportunities the plaintiff lost. *See generally* McCormick, *supra*, at 122 (stating that the "assessment of damages was unquestionably for the jury"); Mark Glick & Avner Kalay, *How to Value a Lost Opportunity: A Real Options Approach*, 11 Geo. Mason L. Rev. 673, 673, 692 (2003) (noting that factfinders "frequently" hear evidence about "damages resulting from the loss of a present or future opportunity"); 10 Corbin, *supra*, § 54.8 ("many contract cases have allowed recovery for future profits prevented or for future wages that might never be earned or might be replaced by another job" because "the existence and the extent of future injury may be uncertain and incapable of immediate proof").

B. These fundamental contract law principles apply to contracts for education just as they do to any other type of contract. Thus, in appropriate circumstances, damages for the violation of contracts to provide educational experiences include compensation for lost opportunities flowing from the breach of contract, including "lost educational opportunit[ies]." *Veling v. City of Kansas City*, 901 S.W.2d 119, 121 (Mo. Ct. App. 1995); *see id.* (plaintiff can claim "damages for lost pay and consequential damages for his lost educational opportunity"); *Gililland v. Sw. Or. Cmty. Coll. Dist. by & through Bd. of Educ.*, No. 23-35028, 2024 WL 1991460, at *1 (9th Cir. May 6, 2024) (applying Oregon law and upholding damage award stemming from student "[h]aving to unenroll and begin a new career path"); *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, No. CIV. 2-03-02591, 2007 WL 3046034, at *13 (E.D. Cal. Oct. 18, 2007) (plaintiffs can allege "lost educational opportunities" as damages in Title IX case); *Doe v. Fairfax Cnty. Sch. Bd.*, No. 18-614, 2023 WL 424265, at *5 (E.D. Va. Jan. 25, 2023) (in Title IX case, denying motion in limine seeking to preclude plaintiff "from presenting evidence related to compensatory damages for lost educational opportunities"); *McGowan v. S. Methodist Univ.*, 715 F. Supp. 3d 937, 955-56 (N.D. Tex. 2024) (declining to "find that compensatory damages for loss of educational opportunities and benefits are precluded as a matter of law" in Title IX case).

Like a plaintiff's lost opportunities to profit, the concept of lost educational opportunities stems from the basic interest in compensating a plaintiff for "all losses, however described." *See Restatement (Second) of Contracts* § 347 cmt. c. As in cases where the defendant promised the plaintiff the "possibility of obtaining work," *Barram*, 226 F.3d at 1332, or the "chance of winning," 11 Corbin, *supra,* § 57.2, defendants who promised to provide certain educational opportunities to students are required to compensate those students for opportunities not provided—the very "expectancy" that they bargained for. Dobbs & Roberts, *supra*, at 808; *see id.* ("if a lost opportunity would have been offset by defendant's performance, it should be subject to recovery"). In those circumstances, the plaintiff would be "deprived of . . . the value of his contract" without proper recovery, *Taylor*, 39 N.Y. at 144-45, and the "jury should be allowed to value" the forgone opportunities, McCormick, *supra*, at 123.

While lost opportunities may sometimes be easily quantified, even non-pecuniary lost opportunities are generally compensable in contracts suits. The Restatement, for example, explains that plaintiffs can be compensated for intangible harms stemming from a breach of contract including the "loss of good will," *see Restatement (Second) of Contracts* § 347 cmt. b, lost litigation opportunities, *id.* § 348 (citing case authorizing relief for the "lost opportunity to bring the products liability action"), and the loss of a chance to enhance one's reputation, *id.* § 344, illus. 3 (the expectation interest for a breached contract to perform in a play would include "the extent to which B's reputation would have been enhanced if he had been allowed to play the lead"); *id.* § 347 cmt. b. illus. 1 (damages for breach of a contract for publication would include the "value to [the injured party] of the resulting enhancement of his reputation"). Other sources similarly describe recovery for non-monetary harms including the "loss of reputation," 24 Williston, *supra*, § 64:16, and "impairment of the injured party's goodwill," *id.* § 64:7; *see* David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 Fordham L. Rev. 1221, 1224 (2012) ("in the majority of American jurisdictions, juries instructed with pattern instructions may be likely to include noneconomic damages for breach as a matter of course").

Consistent with that approach, courts have emphasized that juries can assess the value of non-monetary educational benefits. For example, when students alleged breaches of higher education contracts after the Covid-19 pandemic, courts permitted them to claim damages based on how much the loss of a particular classroom experience was "worth." *King v. Baylor Univ.*, 46 F.4th 344, 369 (5th Cir. 2022) (Duncan, J., concurring) (emphasizing that plaintiff had a valid breach-of-contract claim when she "paid for classes on a physical campus in real classrooms before flesh-and-blood teachers" and "wouldn't have paid as much for zoom classes in the cloud," and that "[m]any courts around the country, faced with similar allegations, have refused to dismiss them"). In these cases, factfinders were entitled to weigh "real-world evidence of the value" of various educational experiences. *In re Univ. of S. Cal. Tuition & Fees COVID-19 Refund Litig.*, 695 F. Supp. 3d 1128, 1149 (C.D. Cal. 2023); *cf. Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 998 (N.D. Cal. 2020) (refusing to dismiss claims that the "qualitative value of the 'campus lifestyle and benefits'" at a certain campus entitled the plaintiff students to damages after the campus closed).

In reaching these results, these courts built upon older cases in which juries evaluated educational services after a breach of contract. *See, e.g.*, *Ottoway v. Milroy*, 144 Iowa 631 (1909) (after breach of a contract to "clothe and educate" a plaintiff's child, the jury must assess the "damage suffered on account of the defendant's failure to give her a reasonable education"); *Vancleave v. Clark*, 118 Ind. 61 (1889) (when a contract provided that the defendant would provide the plaintiff's daughter with "suitable schooling," "the proper measure of damages . . . [wa]s the difference in value between the care and treatment of the daughter actually received and that called for by the contract"); *cf.* 50 A.L.R.2d 613 (1956) (after breach of contract to provide services, "the person to be supported has the right . . . to recover damages not only for the past, but for the future as well," including the value of the "promised support").

* * *

In breach of contract cases, compensation for lost opportunities is neither "unusual," *Barnes*, 536 U.S. at 188, nor "exceptional," *Cummings*, 596 U.S. at 225. To the contrary, juries regularly assess the value of plaintiffs' lost opportunities, including their non-monetary expectancies. Awarding damages for lost educational opportunities is thus clearly permissible in the context of a claim under Title II of the ADA.

CONCLUSION

For the foregoing reasons, if this Court reaches the issue, it should hold that damages for lost educational opportunities are available under Title II of the ADA.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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I hereby certify that on this 8th day of November, 2024, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

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