No. 20-___

IN THE

Supreme Court of the United States

JANE CUMMINGS,

Petitioner,

v.

PREMIER REHAB KELLER, P.L.L.C.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating based on race. Congress has expressly incorporated Title VI's remedies for victims of discrimination into other anti-discrimination laws, including the Rehabilitation Act, 29 U.S.C. § 794a(a)(2), and the Affordable Care Act, 42 U.S.C. § 18116(a). Those remedies include a right to recover "compensatory damages." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). The question presented is:

Whether the compensatory damages available under Title VI and the statutes that incorporate its remedies include compensation for emotional distress.

RELATED PROCEEDINGS

Cummings v. Premier Rehab, P.L.L.C., No. 18-cv-649 (N.D. Tex. Jan. 16, 2019).

Cummings v. Premier Rehab Keller, P.L.L.C., No. 19-10169 (5th Cir. Jan. 24, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jane Cummings respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-14a) is reported at 948 F.3d 673. The district court's opinion and order (Pet. App. 15a-27a) is available at 2019 WL 227411.

JURISDICTION

The court of appeals entered its judgment on January 24, 2020. Pet. App. 1a. The court denied a timely petition for rehearing on March 24, 2020. *Id.* 29a. On March 19, 2020, this Court entered a standing order that extends the time within which to file a petition for a writ of certiorari in this case to August 21, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this petition reproduces the relevant provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18116. Pet. App. 31a-39a.

INTRODUCTION

In a series of statutes beginning with Title VI of the Civil Rights Act of 1964, Congress has exercised its authority under the Spending Clause to prohibit recipients of federal funds from discriminating based on race, sex, or disability. When a funding recipient intentionally violates one of those prohibitions, the victim is entitled to recover "compensatory damages." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). This case presents the question whether those damages may include compensation for one of discrimination's paradigmatic harms: the humiliation, anguish, and other noneconomic injuries known to the law as emotional distress.

The Fifth Circuit held that emotional-distress damages are categorically unavailable under Title VI and the statutes that incorporate its remedies. In so doing, the court acknowledged that it was creating a square circuit split by "disagree[ing]" with the Eleventh Circuit. Pet. App. 12a. In fact, the Fifth Circuit's decision is an even starker departure from practice: Courts around the country have long allowed Title VI plaintiffs to seek and recover emotional-distress damages, usually without controversy.

In the very decision on which the Fifth Circuit relied, for example, this Court reaffirmed that Title VI authorizes "compensatory damages" in a case where the compensatory award included damages for emotional distress. *Barnes*, 536 U.S. at 187. And although the Court has never squarely passed on the question presented, it has sanctioned claims for such damages in three other cases as well: two suits brought by students who suffered sexual harassment and abuse, *Davis v. Monroe County Bd. of Educ.*, 526

U.S. 629 (1999); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), and one brought by a student denied the use of her service dog, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017).

It is no surprise that courts have generally presumed that emotional-distress damages are available under Title VI and related statutes. This Court has held that, because Spending Clause statutes are akin to contracts with the government, funding recipients are subject to the "remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. The common law of contracts traditionally authorized emotional-distress damages if the nature of the contract made emotional distress an especially likely result of a breach—if, for example, the contract protected personal or dignitary interests rather than purely economic concerns. That traditional standard perfectly describes a funding recipient's pledge to the federal government that it will refrain from race, sex, or disability discrimination.

The Fifth Circuit did not question that straightforward application of hornbook contract law. Instead, it simply rejected the common law of contracts in favor of its own judgment about appropriate remedies. In so doing, the Fifth Circuit adopted a rule that would deny compensation for one of discrimination's principal harms—and that would leave many victims, including the plaintiffs in *Davis*, *Franklin*, and *Fry*, with no meaningful remedy at all. This Court should grant certiorari, reject the Fifth Circuit's outlier approach, and restore uniformity to this recurring and important question of federal law.

STATEMENT OF THE CASE

A. Legal background

This case arises under the Rehabilitation Act and the antidiscrimination provision of the Affordable Care Act. Like other antidiscrimination laws, those statutes expressly incorporate the private right of action available to victims of discrimination under Title VI. The contours of that right of action have been defined through judicial decisions that Congress has ratified and extended over several decades.

1. Title VI prohibits "any program or activity receiving Federal financial assistance" from discriminating based on "race, color, or national origin." 42 U.S.C. § 2000d. In the years after its enactment, courts uniformly interpreted Title VI "as creating a private remedy" for victims of discrimination. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979).

Acting against that backdrop, Congress enacted Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in federally funded education programs. 20 U.S.C. § 1681(a). Title IX "was patterned after Title VI," and this Court's decision in *Cannon* confirmed that both statutes create "a private cause of action for victims of the prohibited discrimination." 441 U.S. at 694, 703.

In 1978, Congress incorporated that private right of action into the Rehabilitation Act, which prohibits funding recipients from discriminating based on disability. 29 U.S.C. § 794. Congress directed that the "remedies, procedures, and rights" available under Title VI "shall be available to any person aggrieved" by a violation of that prohibition. *Id.* § 794a(a)(2).

In 1990, Congress incorporated the same right of action into Title II of the Americans with Disabilities Act (ADA), which prohibits disability discrimination by state and local governments. 42 U.S.C. § 12132. Congress specified that "[t]he remedies, procedures, and rights set forth" in the Rehabilitation Act are also available "to any person alleging discrimination on the basis of disability" under Title II. *Id.* § 12133.

Most recently, Congress included a provision in the Affordable Care Act prohibiting federally funded health programs from discriminating on the grounds covered by Title VI, Title IX, and the Rehabilitation Act. 42 U.S.C. § 18116(a). Congress then incorporated "[t]he enforcement mechanisms provided for and available under" those statutes. *Id.*

2. Beyond extending Title VI's private right of action to additional statutes, Congress has also ratified that right of action in other ways. In 1972 and 1976, Congress authorized awards of attorney's fees using language that "explicitly presumes the availability of private suits." *Cannon*, 441 U.S. at 699; *see* Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976). And in 1986, Congress abrogated the states' immunity from suit under Title VI, Title IX, and the Rehabilitation Act, providing that "remedies both at law and in equity" are available in suits against states "to the same extent as such remedies are available" in suits against private entities. 42 U.S.C. § 2000d-7(a)(2).

Individually and collectively, those enactments "ratified" Title VI's implied right of action in express statutory text. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Thus, although this Court has adopted a more restrained approach to implying private rights of action than the one that "held sway . . . when Title VI was enacted," *id.* at 287, the Court has also

recognized that Congress's repeated ratification of its earlier holdings leaves it "'beyond dispute that private individuals may sue to enforce' Title VI" and the statutes that incorporate its remedies. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (Scalia, J.) (quoting *Sandoval*, 532 U.S. at 280).

3. This case concerns the types of relief available in those private suits. It follows two cases in which this Court considered closely related questions and established the governing legal framework.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that victims of intentional violations of Title IX may recover "monetary damages." *Id.* at 63. The Court rested that holding on the longstanding presumption that "[w]here 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." *Id.* at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).[1]

The Court acknowledged that it had previously declined to authorize monetary relief for *unintentional* violations of Spending Clause statutes. *Franklin*, 503 U.S. at 74. But the Court explained that "[t]he point of not permitting monetary damages for an un-

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[1] *Bell* is sometimes associated with this Court's prior practice of implying private rights of action where Congress had not expressly provided them. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). *Franklin* emphasized that the *Bell* presumption at issue here is quite different: It addresses the *scope* of relief once Congress has created a cause of action, not the "analytically distinct and prior" question whether a cause of action exists at all. 503 U.S. at 69 (citation omitted).

intentional violation" is that the funding recipient "lacks notice that it will be liable for a monetary award" for engaging in the relevant conduct. *Id.* The Court emphasized that there is no similar concern in cases of "intentional discrimination" because Title IX "[u]nquestionably" gives notice of the "duty not to discriminate." *Id.* at 75.

In *Barnes*, this Court held that the monetary relief authorized in *Franklin* includes compensatory, but not punitive, damages. 536 U.S. at 187. Writing for the Court, Justice Scalia explained that a Spending Clause statute is "much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Id.* at 186 (brackets and citation omitted). Based on the contractual nature of the statute, the Court concluded that a remedy is appropriate only if the funding recipient is "on notice that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187. And for the same reason, the Court held that "[a] funding recipient is generally on notice" that it is subject to the "remedies traditionally available in suits for breach of contract." *Id.*

Applying that principle, the Court held that punitive damages are not permitted under Title VI because they were not traditionally available for a breach of contract. *Barnes*, 536 U.S. at 187-88. But the Court reaffirmed that Title VI authorizes the traditional contract remedies of "compensatory damages and injunction." *Id.* at 187.

The Court also emphasized that foreclosing punitive damages is consistent with *Bell v. Hood*'s "well settled" presumption in favor of "any available remedy to make good the wrong done." *Barnes*, 536 U.S. at 189 (quoting *Bell*, 327 U.S. at 684). The Court

explained that the "wrong done" by a funding recipient's unlawful discrimination is "'made good' when the recipient *compensates*" the victim for the resulting harm. *Id.* Because punitive damages are "not compensatory," they are "not embraced within the rule described in *Bell*." *Id.*

B. The present controversy

1. Petitioner Jane Cummings has been deaf since birth and is legally blind. Pet. App. 2a. Because those disabilities make it difficult for Ms. Cummings to speak, read, and write in English, she communicates primarily in American Sign Language (ASL). *Id.*

Respondent Premier Rehab is a physical therapy provider that receives federal funds. Pet. App. 1a-2a. In 2016, Ms. Cummings's doctor referred her to Premier to treat her chronic back pain because Premier runs the "best rehabilitation clinic in the area." Am. Compl. ¶ 14, ECF No. 11. When Ms. Cummings contacted Premier to schedule an appointment, she requested an ASL interpreter. Pet. App. 2a. Although Ms. Cummings explained that her disabilities prevent her from communicating through other methods like notes, lipreading, or gestures, Premier refused to provide an interpreter. *Id.* As a result, Ms. Cummings could not obtain treatment. *Id.*

Ms. Cummings later saw a second doctor, who again sent her to Premier because it "provides the best physical therapy services in the area." Am. Compl. ¶ 18. Ms. Cummings contacted Premier twice more over the next few months, each time reiterating that she needed an ASL interpreter because of her disabilities. Pet. App. 2a. Premier still refused to provide that accommodation, and Ms. Cummings was ultimately forced to seek care elsewhere. *Id.*

2. Ms. Cummings sued Premier in the Northern District of Texas. As relevant here, she alleged that Premier violated the Rehabilitation Act, both directly and as incorporated by the Affordable Care Act. Pet. App. 16a-17a; *see* 45 C.F.R. § 84.52(d)(1) and (3) (the Rehabilitation Act requires covered service providers to furnish "interpreters" for "persons with impaired hearing" when "necessary to afford such persons an equal opportunity to benefit from the service"). Ms. Cummings sought damages for the "humiliation, frustration, and emotional distress" she suffered as a result of Premier's actions. Pet. App. 16a.

Premier moved to dismiss, arguing that Ms. Cummings had not adequately established her need for an interpreter. Mot. to Dismiss at 9-11, ECF No. 14. Premier did not challenge the availability of emotional-distress damages, but the district court sua sponte held that "[d]amages for emotional distress are unrecoverable." Pet. App. 23a. The court then dismissed Ms. Cummings's claim because she sought no other damages. *Id.* 25a.[2]

3. The Fifth Circuit affirmed. It recognized that this Court's decision in *Barnes* relied on contract law to define the relief available under Title VI. Pet. App. 6a. The Fifth Circuit thus started with the common law, invoking what it called the "general rule" that "emotional distress damages are not available for breach of contract." *Id.* 8a-9a (citing Restatement (Second) of Contracts § 353 (1981)).

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[2] In a separate holding that is not at issue here, the district court concluded that Ms. Cummings lacked standing to seek injunctive relief. Pet. App. 18a-21a.

The Fifth Circuit recognized that emotional-distress damages *are* traditionally available if the nature of the contract made "serious emotional disturbance" a "particularly likely result" of a breach. Pet. App. 9a (quoting (Restatement (Second) of Contracts § 353 (emphasis omitted)). The court did not dispute that serious emotional disturbance is a particularly likely result of a breach of a promise to refrain from race, sex, or disability discrimination. *Id.* 9a-10a. But the court declined to apply what it called the contract-law "exception" authorizing emotional-distress damages in such circumstances. *Id.* 9a.

The Fifth Circuit declared that it was not bound to follow the common law because "the contract-law analogy is only a metaphor." Pet. App. 9a. Instead, the court relied on its own judgment that funding recipients like Premier are "unlikely to be aware that such an exception exists, let alone think they might be liable under it." *Id.* 10a. The court therefore believed that recipients are not "on notice" of their potential liability for emotional-distress damages. *Id.*

The Fifth Circuit acknowledged that the Eleventh Circuit had reached the opposite conclusion in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). Pet. App. 11a. But the court explained that it was rejecting the Eleventh Circuit's approach because it "disagree[d] with *Sheely*'s reasoning." *Id.* 12a.

4. The Fifth Circuit denied Ms. Cummings's petition for rehearing en banc. Pet. App. 29a-30a.

REASONS FOR GRANTING THE PETITION

This case satisfies all of this Court's traditional certiorari criteria. The courts of appeals are openly divided over the availability of emotional-distress damages under Title VI. That question is recurring and important, defining the relief available under five frequently litigated antidiscrimination laws. And that question is squarely and cleanly presented here, which makes this case an excellent vehicle for resolving the split.

What is more, the Fifth Circuit's decision is both wrong and pernicious. The court's selective use of contract law contradicts this Court's decisions in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002). Barring compensation for emotional distress would also undermine the antidiscrimination laws by denying any meaningful remedy to many victims of discrimination—including students who suffer the sort of sexual harassment and abuse the Court encountered in *Franklin* and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In those cases and many others, "emotional distress is the only alleged damage to the victim and thus the *only* 'available remedy to make good the wrong done.'" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1199 (11th Cir. 2007) (citation omitted).

I. The Fifth Circuit's decision creates a square circuit split and upsets settled practice.

1. As the Fifth Circuit acknowledged, its decision squarely conflicts with the Eleventh Circuit's decision in *Sheely*. In that case, an MRI facility refused to allow a blind mother with a guide dog to accompany

her child during an appointment. *Sheely*, 505 F.3d at 1177-80. Like Ms. Cummings, the mother sued under the Rehabilitation Act and sought compensation only for emotional distress because she had suffered no out-of-pocket losses. *Id.* at 1180-82. The Eleventh Circuit allowed her claim to proceed, identifying three related reasons why "emotional damages are available to make whole the victims of violations of § 504 of the Rehabilitation Act." *Id.* at 1204.

First, the Eleventh Circuit emphasized that it is "fairly obvious" as a matter of "both common sense and case law" that emotional distress is a "predictable, and thus foreseeable, consequence of discrimination." *Sheely*, 505 F.3d at 1198-99. After all, even a cursory review of reported cases confirms that "violations of the [Rehabilitation Act] and other anti-discrimination statutes frequently and palpably result in emotional distress." *Id.* at 1199.

Second, the Eleventh Circuit explained that although contract law does not authorize emotional-distress damages for the breach of run-of-the-mill commercial agreements, "emotional damages will lie" if "the nature of the contract is such that emotional distress is foreseeable." *Sheely*, 505 F.3d at 1200. The court explained that this "notable and longstanding exception" is reflected in leading treatises and more than a century's worth of common-law precedent. *Id.* at 1202; *see id.* at 1200-02 & nn. 28-29.

Third, quoting this Court's decision in *Barnes*, the Eleventh Circuit adhered to the presumption that when Congress provides a right to sue without specifying the available relief, "courts may use any available remedy to make good the wrong done." *Sheely*, 505 F.3d at 1203 (quoting *Barnes*, 536 U.S. at 189). The Eleventh Circuit emphasized that unlike

the punitive damages rejected in *Barnes*, "emotional damages are plainly a form of compensatory damages designed to 'make good the wrong done'" when a funding recipient unlawfully discriminates. *Id.*

2. By "disagree[ing] with *Sheely*'s reasoning," Pet. App. 12a, the Fifth Circuit also rejected the position taken by the overwhelming majority of district courts that have considered the issue. Since *Barnes*, district courts around the country have held that "emotional distress damages are generally recoverable" under Title VI and related statutes. *Roohbakhsh v. Bd. of Trs. of Neb. State Colls.*, 409 F. Supp. 3d 719, 735 (D. Neb. 2019).[3]

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[3] *See, e.g.*, *Toth v. Barstow Unified Sch. Dist.*, 2014 WL 7339210, at *4 (C.D. Cal. Dec. 22, 2014); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1115 n.5 (N.D. Cal. 2013); *Mansourian v. Bd. of Regents*, 2007 WL 3046034, at *14 (E.D. Cal. Oct. 18, 2007), *rev'd on other grounds*, 602 F.3d 957 (9th Cir. 2010); *Luciano v. E. Cent. Bd. of Coop. Educ. Servs.*, 885 F. Supp. 2d 1063, 1075 (D. Colo. 2012); *Wiles v. Dep't of Educ.*, 2007 WL 9710792, at *7 (D. Haw. Nov. 13, 2007); *Reed v. Illinois*, 2016 WL 2622312, at *4-5 (N.D. Ill. May 9, 2016); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 673 (S.D. Ind. 2015); *Scarlett v. Sch. of the Ozarks, Inc.*, 780 F. Supp. 2d 924, 934 (W.D. Mo. 2011); *K.G. v. Santa Fe Pub. Sch. Dist.*, 2014 WL 12785160, at *20-21 (D.N.M. Nov. 17, 2014); *N.T. v. Espanola Pub. Sch.*, 2005 WL 6168483, at *14-15 (D.N.M. June 21, 2005); *Stamm v. N.Y.C. Transit Auth.*, 2013 WL 244793, at *4-7 (E.D.N.Y. Jan. 22, 2013); *Beardsley v. City of N. Las Vegas*, 2007 WL 9728715, at *7 (D. Nev. Nov. 7, 2007); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 383-84 (W.D. Pa. 2008); *Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth.*, 2011 WL 1655810, at *8-9 (W.D. Va. May 3, 2011). It appears that only a few district judges have disagreed. *See Humood v. City of Aurora*, 2014 WL 4345410, at *13 n.9 (D. Colo. Aug. 28, 2014) (dicta); *Bell v. Bd. of Educ. of*

Indeed, the availability of emotional-distress damages has been so uncontroversial that courts have regularly allowed victims of discrimination to seek and recover such damages without questioning their availability. This Court has done so no fewer than four times—including in both *Franklin* and *Barnes*, the very decisions on which the Fifth Circuit purported to rely:

- In *Franklin*, the Court held that Title IX authorizes awards of damages in a case where the plaintiff sought to recover for the "psychological and emotional harm" she suffered after one of her high school teachers sexually harassed and raped her. Petr. Br. at 20, *Franklin*, *supra* (No. 90-918).
- In *Barnes*, the Court's decision reversing an award of punitive damages left standing "more than $1 million awarded in compensatory damages, which included damages for pain and suffering as well as for emotional anguish." U.S. Br. at 13 n.3, *Barnes*, *supra* (No. 01-682).
- In *Davis*, the Court held that a student may bring a "private damages action" under Title IX if her school is deliberately indifferent to severe sexual harassment by other students. 526 U.S. at 633. Like the student in *Franklin*, the plaintiff in *Davis* sought to recover for the "extreme emotional damage" she had suffered. Pet. App. at 100a, *Davis*, *supra* (No. 97-843).

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the Albuquerque Pub. Sch., 652 F. Supp. 2d 1211, 1216 (D.N.M. 2008) (citing an earlier decision by the same judge).

- In *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the Court unanimously held that a student seeking "money damages" for "emotional injury" under the Rehabilitation Act and Title II of the ADA was not required to exhaust the administrative procedures in the Individuals with Disabilities Education Act. *Id.* at 755 n.8.

The courts of appeals have likewise allowed plaintiffs to seek and recover emotional-distress damages without doubting their availability. *See, e.g.*, *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 18 (1st Cir. 2019) (Rehabilitation Act claim based on a school's failure to allow a student to use his service animal); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 672 (2d Cir. 2012) (Title VI claim based on racial harassment); *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015) (Rehabilitation Act claim based on hospital's disability discrimination); *Mark H. v. Lemahieu*, 513 F.3d 922, 930 n.6, 940 (9th Cir. 2008) (Rehabilitation Act claim based on a school's failure to accommodate a disability). The Fifth Circuit thus not only created a square split with the Eleventh Circuit, but also departed from a much broader understanding about the relief available under Title VI.

II. This Court should resolve the split.

1. The question presented is critically important to the effective enforcement of the antidiscrimination laws. The remedies available under Title IX, the Rehabilitation Act, Title II of the ADA, and the Affordable Care Act are "coextensive with the remedies available in a private cause of action brought under Title VI." *Barnes*, 536 U.S. at 185; *see*

29 U.S.C. § 794a(a)(2); 42 U.S.C. §§ 18116(a), 12133. The answer to the question presented thus determines the scope of relief available under all five of those statutes, which are cornerstones of the Nation's commitment to deterring and redressing invidious discrimination.

Title IX, for example, protects millions of elementary, high school, and college students from sex discrimination, harassment, and abuse. *See, e.g.*, *Franklin*, 503 U.S. at 63. Title VI guards against racial discrimination and harassment in the education context and beyond. *See, e.g.*, *Zeno*, 702 F.3d at 672. Title II of the ADA ensures that people with disabilities are not excluded from public facilities. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 513-14 (2004). The Rehabilitation Act provides the same assurance in other activities supported by federal funding. 29 U.S.C. § 794. And the Affordable Care Act extends all of those protections to a broad array of federally funded healthcare programs. 42 U.S.C. § 18116(a).

The meaning of those vital antidiscrimination laws should not depend on the happenstance of geography. But since the Fifth Circuit's decision, it does: Students, patients, and others who have the misfortune to suffer discrimination in Louisiana, Mississippi, and Texas cannot recover for the humiliation, anguish, and other nonpecuniary injuries that would be compensable in the rest of the country. As a result, funding recipients in the Fifth Circuit have a markedly diminished incentive to refrain from unlawful discrimination—especially in the many circumstances where such discrimination is unlikely to cause out-of-pocket losses.

2. The need for this Court's intervention is all the more acute because the Fifth Circuit's decision contradicts the "well-established construction given the statute by the administrative agency charged with its enforcement." Eugene Gressman et al., *Supreme Court Practice* § 4.13 (11th ed. 2019). The Department of Justice (DOJ) "is responsible for coordinating the Title VI implementation and enforcement efforts of federal agencies." DOJ, *Title VI Legal Manual* § 1, at 2 (2017), https://perma.cc/D46X-5FLE. The manual DOJ issued to fulfill that responsibility states that the "compensatory damages" available under *Barnes* include damages for "non-pecuniary injuries" such as "emotional distress." *Id.* § IX, at 4 & n.9. And the Department of Health and Human Services recently reaffirmed that the damages available under the Affordable Care Act "should conform to [DOJ's] Title VI manual." 85 Fed. Reg. 37,202 (June 19, 2020).

DOJ's manual on Title II of the ADA takes the same position. To illustrate the compensatory damages available under that statute, the manual instructs that a person wrongly excluded from jury service because of a disability would be "entitled to compensatory damages," including "for any emotional distress caused by the discrimination." DOJ, *The ADA, Title II Technical Assistance Manual* § II-9.2000 (1994 Supp.), https://perma.cc/359G-7UHQ.[4]

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[4] DOJ has taken the same position in litigation, arguing that the damages available under the Rehabilitation Act and Title II of the ADA "include compensation for the mental and emotional distress" that result from unlawful discrimination. Mem. of the United States as Amicus Curiae at 2, *Galloway v. Superior Ct. of D.C.*, No. 91-cv-644 (D.D.C. May 4, 1993),

III. This case is an excellent vehicle for resolving the split.

This case squarely presents the question that has divided the courts of appeals. Because the case arises from a motion to dismiss, it is free from procedural complications or factual disputes. Pet. App. 1a-2a. Both the district court and the Fifth Circuit rejected Ms. Cummings's damages claim based solely on their conclusion that emotional-distress damages are categorically unavailable. *Id.* 14a, 24a-25a. And there is also no question that the outcome would have been different in the Eleventh Circuit. Like this case, *Sheely* involved a claim for emotional-distress damages under the Rehabilitation Act. 505 F.3d at 1177. And like this case, *Sheely* arose from a medical provider's refusal to accommodate a disability. *Id.* at 1178-81. If Ms. Cummings had been able to sue in Fort Lauderdale instead of Fort Worth, her claim would have been allowed to proceed.

IV. The Fifth Circuit's decision is wrong.

The acknowledged circuit split on a recurring and important question would warrant this Court's review even if the Fifth Circuit's decision were arguably correct. But the Fifth Circuit's decision is wrong—profoundly so. It flouts the legal framework this Court established in *Franklin* and *Barnes*. And it severely undermines a right of action that Congress has repeatedly judged to be a critical tool for preventing and redressing discrimination.

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https://perma.cc/LAK5-SP59; *see, e.g.*, U.S. Br. at 5, 7-8, 29-30, *King v. Marion County Cir. Ct.*, 868 F.3d 589 (7th Cir. 2017) (No. 16-3726) (defending an award of emotional-distress damages).

A. Emotional-distress damages are compensatory relief presumptively available under Title VI.

Both *Franklin* and *Barnes* reaffirmed the "well settled" presumption 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." *Barnes*, 536 U.S. at 189 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see Franklin*, 503 U.S. at 66. *Barnes* thus reiterated that Title VI allows victims of discrimination to recover "compensatory damages." 536 U.S. at 187. And in barring punitive damages, the Court went out of its way to emphasize that "[p]unitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*." *Id.* at 189.

Damages for emotional distress, in contrast, are "plainly a form of compensatory damages designed to 'make good the wrong done.'" *Sheely*, 505 F.3d at 1198. Even the Fifth Circuit did not disagree. Pet. App. 13a-14a. And it could scarcely have done so: This Court has repeatedly recognized that "compensatory damages may include not only out-of-pocket loss and other monetary harms," but also "mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). "Distress is a personal injury familiar to the law," and courts have developed time-tested standards for pleading, proving, and reviewing awards for emotional injuries. *Carey v. Piphus*, 435 U.S. 247, 263-64 & n.20 (1978).

Emotional-distress damages are thus a classic form of compensatory relief that is presumptively

available to "make good the wrong done," *Barnes*, 536 U.S. at 189 (citation omitted), when a funding recipient intentionally violates its duty to refrain from discriminating based on race, sex, or disability.

B. Contract law confirms that emotional-distress damages are available.

In *Barnes*, this Court suggested that even if punitive damages had been covered by the *Bell* presumption, that presumption may have been overcome because Spending Clause legislation is like a contract and punitive damages "are generally not available for breach of contract." 536 U.S. at 187. Here, however, contract law points in exactly the opposite direction: It further confirms that emotional-distress damages are available.

1. This Court has explained that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Title VI, for example, "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient" with potential victims of discrimination as third-party beneficiaries. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

Based on the "contractual nature" of Title VI and Title IX, this Court held in *Barnes* that contract law determines "the *scope* of damages remedies" when those statutes are violated. 536 U.S. at 187. Specifically, the Court reasoned that because Title VI and Title IX are akin to voluntary contracts with the government, "a remedy is 'appropriate relief' only if the funding recipient is on notice that, by accepting

federal funding, it exposes itself to liability of that nature." 536 U.S. at 187 (emphasis and citation omitted). And the Court again invoked contract law to define the *extent* of funding recipients' notice, instructing that "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.*

2. Those traditional contract remedies include damages for emotional distress. To be sure, such damages are not available for a breach of an "ordinary commercial contract," where "pecuniary interests are paramount." *Stewart v. Rudner*, 84 N.W.2d 816, 823 (Mich. 1957). "Yet not all contracts are purely commercial in their nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal." *Id.* And in cases involving the breach of contracts protecting such personal or dignitary interests, "the award of damages for mental distress and suffering is a commonplace." *Id.* Or, as another leading case put it, there is a "definite exception" allowing emotional-distress damages when "the contract is personal in nature." *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949).

That exception is longstanding and firmly established. In *Barnes*, for example, this Court looked to the Restatement and three leading treatises to define the scope of contract damages. 536 U.S. at 187-88. All four of those sources recognize that "[r]ecovery for emotional disturbance" is allowed if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 (1981); *see*

E. Allan Farnsworth, *Contracts* § 12.17, at 895 & n.18 (1982) (collecting cases). Or, put differently, "where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach." 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 45, at 61 (8th ed. 1891) (*Sedgwick*) (citation omitted); *see* 3 Samuel Williston, *The Law of Contracts* § 1340, at 2396 (1920) (similar).

Those traditional common-law standards aptly describe a funding recipient's intentional breach of its promise to refrain from discrimination. No one can deny that emotional distress is a particularly likely result of invidious discrimination, which inflicts a "profound personal humiliation." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). When a person is excluded from an aspect of public life because of race, sex, or disability, that discrimination "denigrates the dignity of the excluded" and "reinvokes a history of exclusion." *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994).

It is likewise undeniable that when Congress insisted that recipients of federal funds pledge to refrain from discrimination, it was contracting for "other than pecuniary benefits." *Sedgwick* § 45, at 61. The Congress that enacted Title VI understood that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race." S. Rep. No. 88-872, at 16 (1964). And in prohibiting disability discrimination, Congress likewise sought to protect "non-economic" interests by eliminating "arbitrary, confining, and humiliating treatment." H.R. Rep. No. 101-485, pt. 2, at 47 (1990).

3. The Fifth Circuit did not deny that a funding recipient's intentional breach of its promise to refrain from discrimination satisfies the traditional common-law standard for emotional-distress damages. Instead, the Fifth Circuit declared that it could depart from the common law because the "contract-law analogy" is "only a metaphor." Pet. App. 9a. The court then embarked on its own inquiry into "whether funding recipients are 'on notice'" of their potential liability for emotional distress. *Id.* 10a. And it presumed that recipients "are unlikely to be aware" of that liability because (in the Fifth Circuit's view) the contract-law exception authorizing emotional-distress damages is "rare and narrow." *Id.* 10a. In taking that approach, the Fifth Circuit asked the wrong question—and then gave the wrong answer in any event.

First, the Fifth Circuit fundamentally misunderstood *Barnes*'s reliance on contract law. This Court adopted a simple rule: Because a funding recipient is effectively entering into a contract with the government, it is deemed to be on notice that it is subject to "those remedies traditionally available in suits for breach of contract." 536 U.S. at 187. The Court never asked, as the Fifth Circuit did, whether funding recipients are actually "aware" of the remedies traditionally available in contract cases. Pet. App. 10a; *see Barnes*, 536 U.S. at 187.

The Court had good reason to eschew such an inquiry. In all sorts of contexts, courts rely on the venerable principle that "[e]very citizen is presumed to know the law." *Georgia v. Public.Resource.Org*, 140 S. Ct. 1498, 1507 (2020) (citation omitted). That means *all* of the law—not just the rules that meet some ill-defined threshold of notoriety. Any other approach would be unworkable. Here, for example,

courts would have no feasible way to determine what tens of thousands of federal funding recipients know about traditional contract remedies. And even if recipients' actual knowledge could somehow be measured—say, with surveys—it would not supply a principled or stable basis for defining Title VI's remedies. By instead relying directly on the common law, *Barnes* adopted an objective, administrable yardstick grounded in legal tradition.[5]

Second, even if funding recipients' actual knowledge of contract law were relevant, there is no basis for the Fifth Circuit's supposition that recipients are aware of the general exclusion of emotional-distress damages described in Section 353 of the Restatement, yet ignorant of the longstanding exception described in the very same sentence. Emotional-distress damages may be "rare," Pet. App. 10a, when measured against the broad universe of commercial contracts. But they are routinely awarded for the breach of contracts that—like a promise to refrain

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[5] Attempting to justify its rejection of the common law, the Fifth Circuit invoked this Court's statement that "contract-law principles" do not apply to "all issues" raised by Title VI. *Barnes*, 536 U.S. at 188 n.2; *see* Pet. App. 9a. But *Barnes* could not have been clearer in holding that contract principles *do* govern the issue here: "the *scope* of damages remedies." 536 U.S. at 187. The Fifth Circuit also asserted that *Barnes* itself departed from the common law by disapproving punitive damages even though "contract law" has "exceptions for awarding punitive damages." Pet. App. 10a. But the very source the Fifth Circuit cited explains that punitive damages are available in contract cases only when they are based on the law of "tort," not contracts. Restatement (Second) of Contracts § 355, cmt. a. Not so with emotional-distress damages, which are available even in pure contract cases. *Id.* § 353.

from discrimination—protect dignitary rather than purely economic interests. *See* pp. 21-22, *supra*.

What is more, decades of experience refute the Fifth Circuit's speculation about funding recipients' understanding of their potential liability. Victims of discrimination have long sought and recovered emotional-distress damages under Title VI and the statutes that incorporate its remedies. *See* pp. 13-15, *supra*. If funding recipients truly lacked notice of their exposure to such damages, they would surely object. Yet for the most part, they have not. In this very case, Premier said not a word on the subject until the district court raised it sua sponte. Given that experience, it strains credulity to maintain that funding recipients like Premier are taken by surprise when victims seek to recover for the emotional distress predictably caused by their discrimination.

4. The Fifth Circuit's criticisms of *Sheely* were no more persuasive than its affirmative arguments.

First, the Fifth Circuit faulted the Eleventh Circuit for emphasizing that emotional distress is a foreseeable—indeed, highly likely—result of discrimination. Pet. App. 12a-13a. Although the Fifth Circuit did not disagree with that premise, it believed that foreseeability alone does not put funding recipients on notice of their potential liability. *Id.* But the contract principles adopted in *Barnes* bridge the gap the Fifth Circuit saw between foreseeability and notice: *Barnes* held that funding recipients are on notice of their liability for contract remedies, 536 U.S. at 187, and contract law authorizes compensation for emotional distress when it is especially foreseeable.

Second, the Fifth Circuit emphasized that *Barnes* treated contract law as a "limitation on liability." Pet. App. 13a (quoting *Sossamon v. Texas*, 563 U.S. 277,

290 (2011)). The Fifth Circuit believed that the Eleventh Circuit used contract law to "expand funding recipients' liability." *Id.* But it did no such thing. The Eleventh Circuit recognized that *Barnes* treated contract law and related principles of notice as a "constraint on the *Bell v. Hood* presumption" in favor of all compensatory relief. *Sheely*, 505 F.3d at 1204. The Eleventh Circuit simply applied that constraint in a manner that was faithful to the law of contracts. The Fifth Circuit, in contrast, purported to apply a contract-law rule (no emotional-distress damages) yet ignored the accompanying contract-law exception (except where, as here, emotional distress is a particularly likely result of breach). By taking that a la carte approach, the Fifth Circuit imposed a limit of its own creation, with no foundation in the common law or in this Court's decisions.

C. Barring emotional-distress damages would undermine the antidiscrimination laws.

The Fifth Circuit's newly minted limit on compensatory relief would frustrate a private right of action that Congress has deemed essential to the enforcement of the Nation's antidiscrimination laws.

1. Over the years, Congress has repeatedly extended Title VI's private right of action to new contexts, incorporating it into the Rehabilitation Act, the ADA, and the Affordable Care Act. Those enactments reflect Congress's judgment that the federal government cannot and should not shoulder the burden of enforcing those laws by itself. Instead, "[the] effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 94-1558, at 1 (1976). And Congress's repeated decision to authorize private

enforcement by incorporating Title VI's remedies reflects a considered judgment that those remedies are the most appropriate method of deterring discrimination and compensating its victims.

2. Categorically denying recovery for emotional distress would frustrate those congressional judgments by denying many victims of discrimination any effective remedy, thereby thwarting meaningful private enforcement. That is because in many cases covered by Title VI and the statutes that incorporate its remedies, "emotional distress is the only alleged damage to the victim and thus the *only* 'available remedy to make good the wrong done.'" *Sheely*, 505 F.3d at 1199 (citation omitted).[6]

Cases of sexual and racial harassment in schools are an obvious example. In *Franklin*, the plaintiff was a high-school student who had been subjected to "continual sexual harassment" and abuse, including rape, by a teacher. 503 U.S. at 63. She suffered severe "psychological and emotional harm," but no out-of-pocket losses. Petr. Br. at 20, *Franklin*, *supra* (No. 90-918). Similarly, the plaintiff in *Davis* was an elementary school student whose school was deliberately indifferent to a "prolonged pattern of sexual harassment" and abuse by another student. 526 U.S. at 633. She suffered severe emotional trauma, includ-

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[6] Title VI also authorizes injunctive relief. *Barnes*, 536 U.S. at 187. But as this Court has explained, injunctive relief is often "clearly inadequate." *Franklin*, 503 U.S. at 76. It is not available at all where, as in *Franklin* and in this case, the plaintiff is unlikely to interact with the defendant again. *Id.*; *see* Pet. App. 20a-21a. And even where injunctive relief is available, it provides no financial deterrent and does nothing to remedy the harms inflicted by past discrimination.

ing thoughts of "suicide." *Id.* at 634. But like the plaintiff in *Franklin*, she had no economic damages to assert. *See* Pet. App. at 100a, *Davis*, *supra* (No. 97-843). Denying recovery for emotional distress would have left those victims—and many others—with "no remedy at all." *Franklin*, 503 U.S. at 76; *see, e.g.*, *Zeno*, 702 F.3d at 672 (upholding an award of emotional-distress damages in a case of severe racial harassment).

The same is true in many cases of disability discrimination. In *Fry*, for example, an elementary school's refusal to accommodate a student's service dog inflicted "emotional distress," "embarrassment," and "mental anguish," but no economic loss. *Fry*, 137 S. Ct. at 752. The same thing often happens when a medical provider refuses to accommodate a potential patient's disability. If, as in this case, the refusal forces the victim to seek treatment elsewhere, it inflicts frustration and humiliation from the discriminatory exclusion—but typically no pecuniary loss.

More acute psychological trauma can result when an emergency compels a patient to accept treatment despite a medical provider's refusal to accommodate her disability. For example, in *Liese v. Indian River County Hospital District*, 701 F.3d 334 (11th Cir. 2012), a deaf patient who needed emergency gallbladder surgery did not understand what was happening to her for more than a day because the hospital refused to provide an ASL interpreter. *Id.* at 338-41; *see, e.g.*, *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 272 (2d Cir. 2009) (hospital failed to provide interpreter for deaf patient who suffered a stroke).

These harassment and failure-to-accommodate cases are paradigmatic violations of Title VI, Title IX,

and the Rehabilitation Act. Congress has deliberately and repeatedly conferred a private right of action to deter intentional violations of those statutes and to allow victims to recover compensation for the resulting harms. Yet in whole categories of cases, denying emotional-distress damages would leave victims with "no remedy at all." *Franklin*, 503 U.S. at 74. In the process, it would also thwart Congress's considered decision to rely on private enforcement by removing any realistic threat of private suits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 21, 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10169

JANE CUMMINGS,

Plaintiff – Appellant

v.

PREMIER REHAB KELLER, P.L.L.C., doing business as Premier Rehab, P.L.L.C.,

Defendant - Appellee

United States Court of Appeals
Fifth Circuit
FILED
January 24, 2020
Lyle W. Cayce
Clerk

Appeal from the United States District Court
Northern District of Texas, Fort Worth Division

Before STEWART, CLEMENT, and HO, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Jane Cummings sued federal funding recipient Premier Rehab Keller, P.L.L.C. ("Premier") for disability discrimination. Cummings sought equitable relief and damages under the Americans with Disabilities Act, the Rehabilitation Act, the Patient Protection and Affordable Care Act, and the Texas Human Resources Code. Premier filed a motion to dismiss Cummings's claims for lack of

subject matter jurisdiction and failure to state a claim upon which relief could be granted. The district court granted Premier's motion, reasoning that, though Cummings had standing to sue, she failed to state a plausible claim for damages under any of the cited statutes, and that she failed to allege facts supporting her standing to seek equitable relief. Cummings appealed. We AFFIRM the district court's judgment.

I.

Cummings has been deaf since birth and is legally blind. She has difficulty speaking, reading, and writing in English; she primarily communicates in American Sign Language ("ASL"). In October 2016, she contacted Premier, which offers physical therapy services, to treat her chronic back pain. She requested that Premier provide an ASL interpreter. Premier refused, but told her that she could communicate with the therapist using written notes, lipreading, and gesturing, or bring her own ASL interpreter. Cummings told Premier she couldn't communicate using those methods, and as a result, she went to another physical therapy provider. She alleged that the other provider's care was "unsatisfactory." Cummings contacted Premier twice more to request an interpreter, for a total of three requests between 2016 and 2017. Cummings also alleged Premier "told her to look for a different physical therapy center that provided interpreters." Although she received treatment at the other facility, Cummings says she was "forced to live with ongoing back pain as a result of her inability to receive quality therapy services," and still wishes to receive treatment from Premier.

Cummings sued Premier for disability discrimination, seeking injunctive relief and damages. She alleged that Premier violated the Americans with Disabilities Act ("ADA") of 1990 § 302, 42 U.S.C. § 12182; the Rehabilitation Act ("RA") of 1973 § 504, 29 U.S.C. § 794; the Patient Protection and Affordable Care Act ("ACA") of 2010 § 1557, 42 U.S.C. § 18116; and the Texas Human Resources Code § 121.003, TEX. HUM. RES. CODE § 121.003.

Premier moved to dismiss these claims, contending that Cummings lacked standing to sue and failed to state a claim upon which relief could be granted.[1] The district court granted Premier's motion. In dismissing her claim for equitable relief for lack of subject matter jurisdiction, the court first observed that "Cummings did not allege standing to seek equitable relief . . . [though] she did allege standing to seek damages." The court then dismissed her damages claims. It first noted that damages are not recoverable under Title III of the ADA.[2] The court then held that emotional distress damages are unavailable under § 504 of the RA and § 1557 of the ACA. Finally, though the court could not definitively conclude that Cummings sought to amend her complaint, it denied her request to amend for failing to comply with the local rules and procedures, and because she had a fair opportunity to plead her best

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[1] In her response to Premier's motion to dismiss, Cummings withdrew her Texas-law claim.

[2] The district court held that "[t]he only compensable injuries that Cummings alleged Premier caused were 'humiliation, frustration, and emotional distress.'"

case. Cummings now seeks review of the district court's judgment that damages for emotional distress are unrecoverable under the RA and the ACA.[3]

II.

We review the district court's grant of a motion to dismiss de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Hines v. Alldredge*, 783 F.3d 197, 200–01 (5th Cir. 2015) (quoting *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009)); *see* FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Further, "[t]he plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (citations omitted).

III.

The issue before us today is whether emotional distress damages are available under the RA and the ACA. There is no controlling Fifth Circuit or Supreme Court precedent on this issue. The district court held that emotional distress damages are "like

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[3] Cummings does not appeal the district court's holding that she failed to allege standing to seek equitable relief or that damages are unrecoverable under Title III of the ADA.

punitive damages," in that damages for emotional distress (i) "do not compensate plaintiffs for their pecuniary losses, but instead punish defendants for the outrageousness of their conduct," and (ii) "are also unforeseeable at the time recipients accept federal funds and expose them to 'unlimited liability.'" *Cummings v. Premier Rehab, P.L.L.C.*, No. 4:18-CV-649-A, 2019 WL 227411, at *4 (N.D. Tex. January 16, 2019) (citations omitted). Cummings argues that this is incorrect.

Section 504 of the RA states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Federal-funding recipients such as Premier "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." 45 C.F.R. § 84.4(b)(2). To state a § 504 claim, "the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits." *Wilson v. City of Southlake*, 936 F.3d 326, 330 (5th Cir. 2019). Further, pursuant to § 1557 of the ACA, "an individual shall not, on the ground prohibited under . . . [§ 504 of the RA], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a).

Section 504 of the RA and § 1557 of the ACA are Spending Clause legislation. *See Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 348 (5th Cir. 2005) (§ 504 of the RA); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–77, 588 (2012) (plurality opinion) (§ 1557 of the ACA). The Court has "repeatedly" likened Spending Clause legislation to contract law—"in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see, e.g., Pennhurst*, 451 U.S. at 17 (holding that Spending Clause legislation is like a "contract," in that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [federal-funding recipient] voluntarily and knowingly accepts [the contract's] terms"). And in cases in "which funding recipients may be held liable for money damages," the Court has "regularly applied the contract-law analogy," including, like here, in "private suits under Spending Clause legislation." *Barnes,* 536 U.S. at 186–87; *see also Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (holding that in addition to injunctive relief, monetary damages can be available as a remedy in private suits under Spending Clause legislation). But the Court has also made clear that not "*all* contract-law rules apply to Spending Clause legislation." *Barnes,* 536 U.S. at 186–87.

In *Barnes v. Gorman*, the Court explained that compensatory damages are available under Spending Clause legislation because federal-funding recipients are "on notice" that accepting such funds exposes

them to liability for monetary damages under general contract law:

> [A] remedy is "appropriate relief," only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies *traditionally available* in suits for breach of contract. Thus we have held that under [a Spending Clause statute], which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages.

Id. at 187 (citation omitted) (second emphasis added). The Court then addressed whether *punitive damages* are available under Spending Clause legislation. It held that, because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract," *id.* at 187, federal funding recipients are not "on notice" that they could be liable for such damages. *See id.* at 188 ("Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition.").

The Supreme Court reiterated that not all contract-law principles apply to Spending Clause legislation in *Sossamon v. Texas*, 563 U.S. 277 (2011). There, the Court again stressed that Spending Clause legislation is merely *analogous* to contract law—they are not one and the same. *See Barnes*, 536 U.S. at 186 ("[W]e have been careful not to imply that

all contract-law rules apply to Spending Clause legislation."). The Court explained

> [Plaintiff] contends that, because Congress enacted [the statute at issue] pursuant to the Spending Clause, the [defendants] were necessarily on notice that they would be liable for damages. [Plaintiff] argues that Spending Clause legislation operates as a contract and damages are always available relief for a breach of contract . . . .
>
> We have acknowledged the contract-law analogy, but we have been clear "not [to] imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." . . . [I]n *Barnes* and *Franklin*, the Court discussed the Spending Clause context only as a potential *limitation* on liability.

Id. at 289–90 (quoting *Barnes*, 536 U.S. at 189 n.2).

Thus, the Supreme Court has made clear that the fundamental question in evaluating damages in the context of Spending Clause legislation is whether "the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes,* 536 U.S. at 187. If funding recipients are not "on notice" for such liability, that remedy is not "appropriate relief." *Id.*

We agree with the district court that Premier was not "on notice" that it could be held liable, under the RA or the ACA, for Cummings's emotional distress damages. Because emotional distress damages, like

punitive damages, are traditionally unavailable in breach-of-contract actions, we hold that Premier was not "on notice" that it could be liable for such damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a ("Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure."); *see also Barnes*, 536 U.S. at 187 (noting that funding recipients are "on notice" for "those remedies traditionally available in suits for breach of contract," and that funding recipients are not "on notice" for punitive damages because they "are generally not available for breach of contract").

Cummings points to two rare exceptions to the general rule that emotional distress damages are not available for breach of contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a ("There are, however, two exceptional situations where such damages are recoverable."). The first exception allows plaintiffs to recover emotional distress damages where the "[emotional] disturbance accompanies a bodily injury"—i.e., a so-called tort exception. *Id.* The second exception, which Cummings argues applies here, permits a plaintiff to recover emotional distress damages when the contract or breach is such that the plaintiff's "serious emotional disturbance was a "*particularly likely* result." *Id.* (emphasis added).

The Supreme Court made clear in *Barnes* and *Sossamon* that the contract-law analogy is only a metaphor. *See Barnes*, 536 U.S. at 187–88; *see also Sossamon*, 563 U.S. at 290. "[C]ontract-law principles [do not] apply to all issues that [suits under Spending Clause legislation] raise." *Barnes*, 536 U.S. at 189 n.2; *see also Sossamon*, 563 U.S. at 290. Thus, that

contract law has exceptions to the general prohibition against emotional distress damages does not mean that we are obligated to apply those exceptions. Indeed, the Supreme Court cautions against it. The issue is whether funding recipients are "on notice."

The Restatement's "exceptional situation" exception that Cummings cites to does not put funding recipients "on notice." Given the general prohibition against emotional distress damages in contract law, funding recipients are unlikely to be aware that such an exception exists, let alone think that they might be liable under it.[4] Further rarefying this exception is its requirement that the emotional damage caused be "serious" and "*particularly* likely." RESTATEMENT (SECOND) OF CONTRACTS § 353 (emphasis added). Thus, funding recipients are not "on notice" that they might be liable for such a rare and narrow exception to the prohibition of emotional distress damages.

Moreover, contract law also has exceptions for awarding punitive damages for breach of contract. *See id.* § 355, cmts. a, b. But *Barnes* nevertheless held that funding recipients were not "on notice" that they might be liable for punitive damages. Despite the existence of such exceptions, *Barnes* stuck to the general rule, which prohibits punitive damages. We see no reason to go down the rabbit-hole of

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[4] We note that we find only three mentions of this exception in case law within the Fifth Circuit. *See Dean v. Dean*, 821 F.2d 279, 281–83 (5th Cir. 1987); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7–12 Litig.*, 517 F. Supp. 2d 832, 850–52 (E.D. La. 2007); *Jones v. Benefit Tr. Life Ins. Co.*, 617 F. Supp. 1542, 1548 (S.D. Miss. 1985).

"exceptions" to the general rule that emotional distress damages are unavailable for breach of contract when the Court in *Barnes* did not do so with regard to punitive damages. Because punitive damages are unavailable for a funding recipient's "breach" of its Spending Clause "contract," despite the existence of exceptions to the general prohibition against such damages, we likewise hold that emotional distress damages are unavailable for a funding recipient's "breach" of the RA or the ACA, despite the existence of exceptions. In neither situation is "the funding recipient . . . *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes*, 536 U.S. at 187.

IV.

Cummings's brief relies heavily on the Eleventh Circuit's decision in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). With *Sheely*, the Eleventh Circuit became the only circuit to address whether emotional distress damages may be recovered under the RA. There, an MRI facility refused to allow a legally blind woman to bring her guide dog with her to a waiting room to accompany her minor son. *Id.* at 1178–79. The court held that "emotional distress is a foreseeable consequence of funding recipients' 'breach' of their 'contract' with the federal government not to discriminate against third parties . . . they therefore have fair notice that they may be subject to liability for emotional damages." *Id.* at 1198. The court first explained that, "[a]s a matter of both common sense and case law, emotional distress is a predictable, and thus *foreseeable*, consequence of [intentional] discrimination." *Id.* at 1199 (emphasis added). And unlike punitive

damages, which the court reasoned "'may range in orders of "indeterminate magnitude," untethered to compensable harm . . .' emotional damages . . . are designed to make the plaintiff whole, and therefore bear a significant and altogether determinable relationship to events in which the defendant . . . participated and could have foreseen." *Id.* at 1199–1200 (citations omitted) (quoting *Barnes*, 536 U.S. at 190–91 (Souter, J., concurring)).

We disagree with *Sheely*'s reasoning, which is based on the supposed "foreseeability" of emotional distress damages. The court claims "foreseeability" is a "basic and longstanding rule of contract law"—"that '[d]amages are not recoverable for loss that the party in breach did not have reason to *foresee* as a probable result of the breach when the contract was made.'" *Sheely*, 505 F.3d at 1199 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 351 (alteration in original) (emphasis added)). While we don't dispute that "foreseeability" may be a general concept of contract law, we find that *Sheely*'s reliance on it is misplaced.

That is because *Sheely* conflates two distinct "foreseeability" issues. The first is whether federal funding recipients were "on notice"—i.e., did they know that, when they accepted their funding, they were agreeing to be liable for emotional distress damages. The second is whether a funding recipient can foresee that a patient might suffer an emotional injury as a result of its actions. Put differently, whether funding recipients can foresee a consequence of a particular "breach" of a Spending Clause "contract" is not the same as whether they are "on notice" that, when they accepted funding, they agreed to be liable for damages of this kind. *Barnes*

addressed the "on notice" issue, finding that federal funding recipients couldn't "foresee" their liability for punitive damages for a breach of Spending Clause "contract," because such damages are generally unavailable under contract law. Nowhere in *Barnes* does the Court condone *Sheely*'s strand of "foreseeability."

As the Court explained in *Sossamon*—decided almost four years after *Sheely*—the contract-law analogy is a "limitation on liability." 563 U.S. at 290. But the "foreseeability" rule *Sheely* applies would expand funding recipients' liability. Thus, we do not believe that it is in our power today to *expand* the Spending Clause contract-law analogy, as Cummings wishes, which would expose federal funding recipients to *greater* liability.

Finally, Cummings echoes *Sheely*'s reasoning that emotional distress damages should be allowed for breach of contract because "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*." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (emphasis added). Although *Barnes* addressed this rule, it did so in order to reconcile the rule with its holding:

> Our conclusion is consistent with the "well settled" [*Bell v. Hood*] rule . . . . When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient *compensates* the

> Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.

Barnes, 536 U.S. at 189. *Sheely* says that, because emotional distress damages are foreseeable where a federal funding recipient engages in intentional discrimination, the "Court's concern with notice in awarding remedies for violations of Spending Clause legislation—which operates as a constraint on the *Bell v. Hood* presumption—is . . . satisfied, and we are obliged to adhere to *Bell*'s presumption that we may award 'any available remedy to make good the wrong done.'" *Sheely*, 505 F.3d at 1204 (quoting *Bell*, 327 U.S. at 684). But, as we have explained, because federal funding recipients are not "on notice" that their "contractual obligation" can expose them to liability for emotional distress damages, the Court's "constraint on the *Bell v. Hood* presumption" applies here. *Id. Sheely* attempts to use the *Bell* rule as an end-run around the Supreme Court's limitations on the contract-law analogy. But *Barnes* accounts for *Bell*, while limiting the remedies available for such suits. In sum, we find that the *Bell* rule is not a vehicle for importing remedies that have already been rejected.

V.

Because emotional distress damages are not available under the RA or the ACA, we AFFIRM the district court's dismissal of Cummings's claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JANE CUMMINGS, Plaintiff,	§	[FILED JAN 16 2019]
vs.	§	No. 4:18-CV-649-A
PREMIER REHAB, P.L.L.C. Defendant.	§	

MEMORANDUM OPINION
and
ORDER

Came on for consideration the motion of defendant, Premier Rehab Keller, P.L.L.C. d/b/a Premier Rehab, P.L.L.C. ("Premier"), to dismiss. The court, having considered the motion, the response of plaintiff, Jane Cummings ("Cummings"), the reply, and applicable authorities, finds that the motion should be granted.

I.

Plaintiff's Allegations

On August 7, 2018, Cummings initiated this action by the filing of her original complaint. Doc. 1.[1] She filed her amended complaint on October 25,

[1] The "Doc. ___ " references are to the numbers assigned to the referenced items on the docket in this Case No. 4:18-CV-649-A.

2018. Doc. 11. Cummings alleged the following in her amended complaint:

She is deaf, her first and primary language is American Sign Language ("ASL"), and, because of her deafness, she has limited proficiency in English. *Id.* at 3 ¶¶ 9-10. Cummings is also legally blind due to albinism, and, as a result, she cannot communicate effectively in writing. *Id.* at 3 ¶¶ 11-12.

On October 27, 2016, Cummings contacted Premier to schedule an appointment for physical therapy and requested an ASL interpreter. *Id.* at 3-4 ¶15. Premier told her that it would not provide an interpreter, but that she could attend her appointment without one or provide one herself. *Id.* at 4 ¶ 16. Premier also offered to communicate with her through written notes, lip reading, and gesturing. *Id.* Cummings explained that such methods were ineffective because of her visual impairment, but Premier again denied her an interpreter. *Id.* at 4 ¶ 17. She received physical therapy from another provider but "received unsatisfactory care." *Id.* at 4 ¶ 17. She contacted Premier to request an interpreter on November 2, 2016, and again on February 28, 2017, but Premier refused to provide her an interpreter each time. *Id.* at 4 ¶ 19-20. Premier's discrimination also caused her "to suffer humiliation, frustration, and emotional distress." *Id.* at 5 ¶ 27. She "still wishes to access Defendant's services and receive care in Defendant's facilities." *Id.* at 5 ¶ 28.

Premier discriminated against her on the basis of disability by denying her an interpreter, in violation of Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12182(a) (*id.* at 7 ¶ 41), Section

504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794 (*id.* at 8 ¶ 49), Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116 (*id.* at 10 ¶ 59), and Section 121.003 of the Texas Human Resources Code ("THRC") (*id.* at 11 ¶ 70).

* * * * * * *

Cummings sought in her complaint a declaratory judgment that Premier, in violation of the ADA, RA, ACA, and THRC, discriminated against her on the basis of disability. *Id.* at 12 ¶ (a). She also requested injunctive relief, compensatory and exemplary damages, and attorney's fees and costs. *Id.* at 12 ¶¶ (b)-(d). Cummings withdrew her claim under the THRC, however, in her response to Premier's motion to dismiss. Doc. 15 at 5 n.3.

II.

Grounds of the Motion

Premier moved to dismiss Cummings's complaint for lack of subject matter jurisdiction, based on its argument that she lacks standing, and for failure to state a claim upon which relief can be granted.

III.

Analysis

A. Standing

For the court to have subject matter jurisdiction over a case, the plaintiff must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At the pleading stage, the plaintiff must allege facts that allow the court to infer that she has standing. *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). Standing consists of three elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Defenders of Wildlife, 504 U.S. at 560 (citations and alterations omitted). The plaintiff must allege standing for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

The court finds that Cummings did not allege standing to seek equitable relief, but that she did allege standing to seek damages. Accordingly, her claims for equitable relief, but not damages, should be dismissed for lack of subject matter jurisdiction.

1. Standing to Seek Equitable Relief Was Not Alleged

To allege standing to seek equitable relief, a plaintiff must allege that the defendant either (1) poses an imminent threat of harm, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), or (2) is currently inflicting harm, *Friends of the Earth*, 528 U.S. at 184-85.

a. Imminent Harm Was Not Alleged

To allege standing based on a future injury, the plaintiff must allege that there is a "real or imminent threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A plaintiff may allege that she faces an imminent threat of harm by alleging facts from which the court can infer that she is likely to return to the public accommodation. *Hunter v. Branch Banking & Trust Co.*, No. 3:12-CV-2437-D, 2013 WL 4052411, at *2 (N.D. Tex. Aug. 12, 2013). In deciding whether to make such an inference, courts consider "(1) the proximity of the defendant's business to the plaintiff's residence, (2) the plaintiff's past patronage of the defendant's business, (3) the definitiveness of the plaintiff's plans to return, and (4) the plaintiff's frequency of travel near the defendant." *Id.; see also Defenders of Wildlife*, 504 U.S. at 564 (holding that " 'some day' intentions" without "concrete plans" do not support finding of "actual or imminent injury"). In evaluating the defendant's proximity to the plaintiff, courts consider the distance between the two and the availability of closer alternatives. *Hunter*, 2013 WL 4052411, at *2.

Here, the court cannot infer that Cummings is likely to return to Premier. The only pertinent fact she alleged is that she "still wishes to. access Defendant's services and receive care in Defendant's facilities." Doc. 11 at 5 ¶ 28. This statement is a " 'some day' intention[ ]," and Cummings alleged no "concrete plans" to return. *See Defenders of Wildlife*, 504 U.S. at 564. Further, the facts alleged do not allow us to infer that she lives in close proximity to Premier, or that there are few closer alternatives.

While the court could conduct research to make such a finding, it is Cummings's burden to allege facts that support an inference of standing. And, based on the facts alleged, the court cannot infer that she has visited Premier before or that she travels frequently to Keller, Texas, where Premier is located. Thus, the facts alleged are insufficient to support a conclusion that Cummings is likely to return to Premier. As a result, Cummings did not allege that she faces an imminent threat of harm for which she has standing to seek relief.

b. Ongoing Harm Was Not Alleged

To allege standing based on an ongoing injury, the plaintiff must allege that "she knows that the public accommodation is noncompliant and that she would visit that accommodation were it compliant." *Hunter*, 2013 WL 4052411, at *3. In determining whether the plaintiff alleged that she would visit the accommodation were it ADA-compliant, courts apply the same four-factor test they use to evaluate the plaintiff's intent to return. *Id.*

Alternatively, the plaintiff may allege that an ADA violation "actually affects his activities in some concrete way." *Frame v. City of Arlington*, 657 F.3d 215, 235 (5th Cir. 2011) (holding that plaintiffs had standing to seek injunction, because they alleged that inaccessible sidewalks forced them to take longer routes); *see also Deutsch v. Annis Enters.*, 882 F.3d 169, 174 (5th Cir. 2018) (en banc) (holding that plaintiff lacked standing to seek injunction for ADA violation, because plaintiff only visited defendant's business once, showed no intent to return, and failed

to show that alleged ADA violation impacted day-to-day life).

Here, Cummings did not allege that Premier is currently harming her in any way. As explained above, we cannot infer, based on the facts provided, that Cummings is likely to return to Premier. For this reason, she did not allege an ongoing harm under the *Hunter* factors. And, she did not allege that Premier's alleged discrimination is currently impacting her daily life. As a result, Cummings did not allege that Premier is causing her an ongoing harm that could serve as the basis for standing.

Because Cummings failed to allege that she faces either an imminent threat of harm or an ongoing harm, she failed to allege an injury for which she can seek equitable relief. For this reason, the court cannot infer that she has standing to seek equitable relief, and her claims for such relief should be dismissed.

2. Standing to Seek Damages Was Alleged

Cummings alleged in her complaint that Premier discriminated against her, and that such discrimination "caus[ed] Plaintiff to suffer humiliation, frustration, and emotional distress." *Id.* at 5 ¶ 27. Unequal treatment, *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984), and emotional harm, *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 168-69 (5th Cir. 2016), are cognizable injuries for standing purposes. She alleged that Premier's discriminatory conduct caused such injuries and, for this reason, the court can reasonably infer that a judgment against Premier would redress such injuries. Therefore, Cummings alleged facts from

which the court can infer that she has standing to seek damages for unequal treatment and emotional harm. For this reason, said claims should not be dismissed for lack of subject matter jurisdiction.

B. Failure to State a Claim

1. Pleading Standards

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action, *Id.* at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.")

Moreover, to survive a motion to dismiss for failure to state a claim, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. *Id.* To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are

insufficient. *Twombly*, 550 U.S. at 566-69. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

2. No Plausible Claim for Damages Was Alleged

Damages are not recoverable under Title III of the ADA. *Frame v. City of Arlington*, 575 F.3d 432, 438 & n.5 (5th Cir. 2009) (citing 42 U.S.C. § 12188(a); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

Damages for emotional distress are unrecoverable in actions brought to enforce Section 504 of the RA. *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 970 (N.D. Tex. 1993); *Witbeck v. Embry-Riddle Aeronautical Univ., Inc.*, 269 F. Supp. 2d 1338, 1340 (M.D. Fla. 2003) (citing *Barnes v. Gorman*, 536 U.S. 181, 187-89 (2002)); *Khan v. Albuquerque Pub. Sch.*, 652 F. Supp. 2d 1211, 1221-25 (D.N.M. 2003) (same). Accordingly, they are also unavailable in actions brought under Section 1557 of the ACA. *See* 42 U.S.C. § 18116(a) (incorporating by reference enforcement mechanisms available under Section 504).

In *Bell v. Hood*, the Supreme Court held, "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." 327 U.S. 678, 684 (1946). But, as the Court later clarified, punitive damages are unavailable in actions brought under anti-discrimination statutes passed pursuant to the

Spending Clause. *Barnes v. Gorman*, 536 U.S. 181, 187-89 (2002). The Court analogized the receipt of federal funds to the formation of a contract with Congress and explained:

> When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure. Punitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*.

Id. at 189.

The rule in *Barnes* "restricts the available damages to actual compensation for pecuniary damages." *Khan*, 652 F. Supp. 2d at 1222 (citing *Witbeck*, 269 F. Supp. 2d at 1340). Damages for emotional distress, like punitive damages, do not compensate plaintiffs for their pecuniary losses, but instead punish defendants for the outrageousness of their conduct. *Id.* at 1224-25. They are also unforeseeable at the time recipients accept federal funds and expose them to "unlimited liability." *Id.* For these reasons, plaintiffs cannot recover such damages in actions brought under Section 504. *Id.* at 1225.

Cummings sought compensatory damages pursuant to Title III of the ADA, Section 504 of the RA, and Section 1557 of the ACA. Doc. 11 at 13 ¶ (i). The only compensable injuries that Cummings

alleged Premier caused were "humiliation, frustration, and emotional distress." *Id.* at 5 ¶ 27. As stated, Title III of the ADA does not provide her a cause of action to pursue any damages. And, Section 504 of the RA and Section 1557 of the ACA do not provide her a cause of action to pursue damages for emotional harm, and she alleged no other statute that does. Therefore, with respect to her damages claims, the court cannot infer from the facts alleged that Cummings has a plausible right to relief. As a result, such claims should be dismissed.

* * * * * * *

In plaintiff's response to the motion to dismiss, plaintiff seems to be suggesting that the court authorize her to file yet another amended complaint. Doc. 15 at 9.

Local Civil Rule LR 5.1(c) requires that any document containing more than one pleading, motion, or other paper "clearly identify each pleading, motion, or other paper in its title." Local Civil Rule 15.1(a) further provides:

> When a party files a motion for leave to file an amended pleading ..., the party must attach a copy of the proposed amended pleading as an exhibit to the motion. The party must also submit with the motion an original and a judge's copy of the proposed pleading.

Plaintiff's request does not comply with any of these requirements. Her response does not identify any motion for leave to amend in its title. Nor did she attach a copy of her proposed amended complaint as

an exhibit, and she did not submit an original or judge's copy of a proposed amended complaint.

Plaintiff can hardly claim ignorance of the Local Civil Rules because she was reminded of them in a memorandum opinion and order the court issued on January 3, 2019, in its case No. 4:18-CV-546-A, which was an action virtually identical to the instant one that plaintiff had filed against an optometrist, styled "Jane Cummings, Plaintiff, v. Total Eye Care, Defendant."[2]

Because of her noncompliance, the court does not consider that she actually made a motion for leave to amend. Moreover, even if the court were to interpret what she said as a motion for leave, the court could not evaluate the merit of such a motion without any knowledge of what another amended complaint might say. In any event, plaintiff has had more than a fair opportunity to plead her best case. Therefore, the court is not granting plaintiff leave to replead again.

IV.

Conclusion and Order

Because Cummings failed to allege facts from which we can infer that she has standing to seek equitable relief, and because she failed to state a claim for damages upon which relief can be granted, this court finds that Premier's motion to dismiss should be granted. Therefore,

---

[2] In the Total Eye Care action, the optometrist's office offered to provide an appropriate interpreter for plaintiff if she came to its place of business, but plaintiff was not satisfied because she insisted that the interpreter be "certified." Case No. 4:18-CV-546-A, Doc. #20 at 4, ¶ 19.

The court ORDERS that Premier's motion to dismiss be, and is hereby, granted, and Cummings's claims in the above-captioned action be, and are hereby, dismissed.

SIGNED January 16, 2019

/s/
JOHN McBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JANE CUMMINGS, Plaintiff,	§	[FILED JAN 16 2019]
vs.	§	No. 4:18-CV-649-A
PREMIER REHAB, P.L.L.C. Defendant.	§	

FINAL JUDGMENT

Consistent with the memorandum opinion and order signed this date,

The court ORDERS, ADJUDGES, and DECREES that the claims of plaintiff, Jane Cummings, against defendant, Premier Rehab Keller, P.L.L.C. d/b/a/ Premier Rehab, P.L.L.C., be, and are hereby, dismissed with prejudice.

The court further ORDERS, ADJUDGES, and DECREES that defendant have and recover its costs of court from plaintiff.

SIGNED January 16, 2019.

/s/
JOHN McBRYDE
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

No. 19-10169

_____

[FILED: 03/24/2020]

JANE CUMMINGS,

Plaintiff – Appellant

v.

PREMIER REHAB KELLER, P.L.L.C., doing business as Premier Rehab, P.L.L.C.,

Defendant - Appellee

_____

Appeal from the United States District Court
Northern District of Texas, Fort Worth Division

_____

ON PETITION FOR REHEARING EN BANC

(Opinion 01/24/2020, 5 Cir., _____, _____ F.3d _____)

Before STEWART, CLEMENT, and HO, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith Brown Clement
UNITED STATES CIRCUIT JUDGE

APPENDIX E

29 U.S.C. § 794

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship-

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

APPENDIX F

29 U.S.C. § 794a

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court,

in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX G

42 U.S.C.A. § 2000d

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d-7

Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

* * *

APPENDIX H

42 U.S.C. § 18116

Nondiscrimination

(a) In general

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) Continued application of laws

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title

29, or the Age Discrimination Act of 1975, or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) Regulations

The Secretary may promulgate regulations to implement this section.