No. 20-219

IN THE

Supreme Court of the United States

JANE CUMMINGS,

Petitioner,

v.

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

Respondent.

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

SUPPLEMENTAL BRIEF IN OPPOSITION

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Pursuant to Rule 15.8, Respondent Premier Rehab Keller, P.L.L.C. submits this supplemental brief to respond to the Brief of the United States as Amicus Curiae.

The United States is correct that there is a circuit split regarding the issue presented. That split is, however, an unusually narrow and undeveloped one. In particular, as both Petitioner and the United States acknowledge, the conflict is limited to the decisions of the Fifth and Eleventh Circuits in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020) and *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). No other circuit has weighed in and there is little analysis in district court opinions rendered before the Fifth Circuit's decision in this case.

The United States, like Petitioner, argues that the many decisions assuming without analysis that emotional distress damages are recoverable for violations of Title VI and the statutes that incorporate its remedies means that conclusion must be correct. United States' Br. at 20; Pet'r's Br. at 13–15 & n.3. In fact, however, all that means is that the issue has not received the careful analysis and consideration it deserves. Assumptions are dangerous and often wrong.

Now that the Fifth Circuit's carefully considered decision in this case has created a conflict with the Eleventh Circuit's decision in *Sheely*, lower courts have begun to address the issue squarely. Contrary to the assertions of Petitioner and the United States, that issue is not a clear-cut or straightforward one; it is difficult and complex. The law will no doubt develop promptly, with other circuits adding the benefit of their careful consideration to the debate. It may be that a consensus will develop one way or the other. Or Congress may choose to exercise its authority to decide the question by legislating specifically regarding whether emotional distress damages are available for violations of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("RA"), and § 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("ACA").

In all events, if this Court does ultimately need to resolve the issue, it will benefit from making the decision in the context of a full examination of the issue by the lower courts rather than with just two circuit court decisions on point, with most other cases merely assuming an answer. Accordingly, the Court should deny certiorari to allow the issue to percolate in the lower courts and to allow Congress an opportunity to act if it is so inclined.

ARGUMENT

A. The extraordinarily undeveloped and narrow circuit split merits further consideration in the lower courts before this Court addresses the question presented.

1. The circuit split is limited to only two decisions from the Fifth and Eleventh Circuits.

In the decision below, the Fifth Circuit held that emotional distress damages are not recoverable under the RA and the ACA because federal funding recipients are not on clear notice that accepting funds may expose them to such liability. *Cummings*, 948 F.3d at 680. That decision conflicts with the Eleventh Circuit's decision in *Sheely*, which held that emotional distress damages are available for violations of the RA because emotional distress is a foreseeable consequence of discrimination and basic contract law allows recovery for emotional distress damages "in the public accommodations context." 505 F.3d at 1204.

The United States and Petitioner both acknowledge that *Cummings* and *Sheely* are the only circuit court decisions to decide the issue. United States' Br. at 20; Pet'r's Br. at 15 (collecting cases).

Indeed, they both acknowledge that virtually all other decisions involving awards of emotional distress damages have simply assumed without analysis that such damages are recoverable. As a result, the circuit split here is undeveloped in the lower courts.

2. Especially when splits are new and undeveloped, this Court benefits from allowing more courts time to consider the issue.

This Court has never suggested that all circuit splits must be resolved, let alone that they must be resolved in the first case to present the split. To the contrary, allowing a split time to develop provides an opportunity for more judges (and legal scholars) to weigh in on the issue, which is important to elucidate varying perspectives and views on important questions. *See, e.g.*, *Maslenjak v. United States*, 582 U.S. --, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) ("[T]he experience of our thoughtful colleagues on the district and circuit benches" can "yield insights (or reveal pitfalls)" that the Court "cannot muster guided only by [its] own lights."); Justice John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) ("It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may

help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.").

Consistent with these principles, this Court often declines to review a case involving a relatively undeveloped circuit split only to take up the same issue later after the lower courts have had more opportunities to address the issue. *See* Justice William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) ("[T]here is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question."). For example, in 2010, this Court denied a petition for certiorari asking the Court to resolve a circuit split regarding the proper interpretation of the Copyright Act. *See* Petition for Writ of Certiorari at i, *IAC/InterActiveCorp. v. Cosmetic Ideas, Inc.*, *cert. denied*, 562 U.S. 1062 (2010) (No. 10-268). Several years later, this Court granted a petition for a writ of certiorari seeking review on the same issue, after the split had more time to develop. *See* Petition for Writ of Certiorari at i, *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, *cert. granted*, 585 U.S. --, 138 S. Ct. 720 (2018) (No. 17-571).

Cases assuming that emotional distress damages are recoverable without discussion or analysis hardly suggest that the Fifth Circuit is wrong. Those cases add nothing whatsoever to the body of law available for this Court's consideration in evaluating the issue. That other decisions have simply assumed the answer to the issue cuts strongly against granting review.

Assumptions are dangerous. They are often based on misconceptions and often turn out on careful examination to be wrong. For example, after this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), lower courts shifted from disallowing recovery of punitive damages to allowing the "full panoply" of remedies, including punitive damages, in cases brought under Title VI and the statutes incorporating its remedies. *See, e.g.*, *Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, 187 F. Supp. 2d 1099, 1107–09 (N.D. Iowa 2002) (collecting cases). Even this Court did not balk at a plaintiff's seeking punitive damages in a Title IX case in which the Court held that a school may be liable for student-on-student sexual harassment. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636 (1999). However, when directly confronted with the issue of whether punitive damages are available, this Court held that they are not. *Barnes v. Gorman*, 536 U.S. 181, 188 (2002) ("In sum, it must be concluded that Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive

damages."). *Barnes* itself thus demonstrates that prior cases assuming the availability of a remedy under Title VI and its related statutes, without squarely addressing the issue, hold little to no value.

Here, prudential considerations weigh heavily in favor of denying review. Many lower courts have gone too far in assuming that funding recipients agree to subject themselves to emotional distress liability just because the "contract" involves a promise not to discriminate against third parties, just like they went too far in assuming the availability of punitive damages after this Court's decision in *Franklin* and before its decision in *Barnes*. Now that the Fifth Circuit has issued a carefully considered opinion explaining why proper application of this Court's precedents compel the conclusion that emotional distress damages are not available, other lower courts should be given the opportunity to consider carefully the issue too.

3. Whether emotional distress damages are available under the Rehabilitation Act and the Affordable Care Act is a complex question that merits the attention of the lower courts.

Petitioner and the United States also suggest that on the merits the issue presented is as simple as

recognizing that emotional distress damages are available in contract cases whereas punitive damages are not, and that the rationale of *Barnes* holding punitive damages unavailable therefore has no application. Pet'r's Br. at 21 (noting that "traditional contract remedies include damages for emotional distress"); United States' Br. at 10 ("Indeed, courts have approved emotional distress damages as a remedy for certain breaches of contract for more than a century."). Further, they suggest that, simply acknowledging that emotional distress damages are compensatory, whereas punitive damages are not, resolves the question. Pet'r's Br. at 19; United States' Br. at 7–9.

That analysis is superficial and wrong. The same considerations that led the Court to conclude that punitive damages are not recoverable come into play with respect to emotional distress damages. The analogy between punitive damages and emotional distress damages is much closer and more compelling than the United States or Petitioner acknowledge.

For starters, as the United States and Petitioner acknowledge, under contract law, allowing recovery of emotional distress damages is the exception not the rule. Pet'r's Br. at 21; United States' Br. at 10. And it is a limited exception. Indeed, neither Petitioner nor the United States cites a single case permitting a third-party beneficiary of a contract to recover

emotional distress damages. Pet'r's Reply Br. at 8; United States' Br. at 11–14.

Like emotional distress damages, punitive damages are available as the exception to the general rule in contract cases. True, for punitive damages to be available, the conduct constituting the breach must also be tortious. But that does not change the fact that punitive damages are available *in a breach of contract action* as an exception to the general rule in some limited circumstances, just like emotional distress damages. Moreover, it is not a huge leap to conclude that at least some conduct constituting intentional discrimination could also be viewed as tortious. Yet, in *Barnes*, this Court held that punitive damages are categorically unavailable because a recipient of federal funds would not be on clear notice that by entering into a contract agreeing not to discriminate it was opening itself up to the exception from the general rule regarding availability of punitive damages in contract cases. *Barnes*, 536 U.S. at 188.

Thus, under *Barnes,* the dispositive issue is whether a recipient of federal funds is on clear notice that by contracting with the government to abide by anti-discrimination laws it was exposing itself not only to traditional contract remedies but also to emotional distress damages. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (viewing the notice issue from the funding recipient's

perspective and asking whether the recipient "would clearly understand that one of the obligations" of accepting the money "is the obligation to compensate" prevailing parties for certain expenses). In *Barnes*, this Court explained that punitive damages are "not normally available for contract actions" and are "of indeterminate magnitude." *Barnes*, 536 U.S. at 188. Refusing to infer an implied punitive damages remedy, the Court stated that, "[n]ot 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." *Id.* (emphasis in original).[1]

In that regard, emotional distress damages share many of the same characteristics of punitive damages that led this Court to hold in *Barnes* that punitive

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[1] Further, *Barnes* itself ultimately counsels judicial restraint before finding a damages remedy available. *Barnes*, 536 U.S. at 188 ("Nor (if such an interpretive technique were available) could an *implied* punitive damages provision reasonably be found in Title VI." (emphasis in original)). This Court's reluctance to imply a punitive damages remedy into the statute was consistent with its shift away from implying private rights of action to enforce statutes in the first instance. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

damages are not recoverable. Emotional distress damages, like punitive damages, are unliquidated, subjective, unlimited and unpredictable. 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*." (emphasis added)); 11 Corbin on Contracts § 59.1 ("Mental distress is not itself a pecuniary harm, and it can scarcely be said to be measurable at all in terms of money."); *Bradford v. Iron Cnty. C-4 Sch. Dist.*, Cause No. 82-303-C(4), 1984 WL 1443, at *7 (E.D. Mo. June 13, 1984) ("Damages for mental suffering and humiliation are difficult to measure at best, are often sizeable, and have been editorialized as gratuitous bonuses or prize money for prosecuting a successful suit.").

The tort reform statutes in various states capping noneconomic damages in various tort actions stem from these very attributes of emotional distress damages. *See, e.g.*, Cal. Civ. Code § 3333.2(b); Colo. Rev. Stat. § 13-21-102.5(3)(a); Haw. Rev. Stat. Ann. § 663-8.7; Idaho Code Ann. § 6-1603(1). Such damages are foreseeable in tort cases, but states have elected to cap them because they create an intolerable, indefinite exposure to liability. *See, e.g.*, Colo. Rev. Stat. § 13-21-102.5(1) ("The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden

the economic, commercial, and personal welfare of persons in this state.").

Thus, emotional distress damages, like punitive damages, are entirely different than typical pecuniary damages for which a contracting party would be on clear notice it was exposing itself by entering into the contract.

Finally, the statement in *Barnes* that "[p]unitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*," indicated only that this Court's decision did not upset the rule that "courts may use any available remedy to make good the wrong done," which means "the recipient *compensates*" the injured party. *Barnes*, 536 U.S. at 189 (emphasis in original) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). It did not mean that all funding recipients are on notice that they may be subject to liability for any form of compensatory damages even if they otherwise present the same concerns as punitive damages.

For these reasons, the issue presented by this case is far more complex and difficult than the United States and Petitioner would have it. There are compelling reasons to hold that recoverable damages should be limited to those allowed as the general rule in breach of contract cases, not those available only under narrow exceptions.

Respondent does not question that the issue is an important and recurring one. Precisely for that reason, however, the Court can be confident that the law will develop quickly now that the Fifth Circuit's decision has teed up the debate. Just recently, the United States District Court for the Western District of Pennsylvania considered the conflict between *Cummings* and *Sheely*, holding that emotional distress damages are available under § 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and the RA. *Swogger v. Erie Sch. Dist.*, --F. Supp. 3d--, 2021 WL 409824, at *4–9 (W.D. Pa. Feb. 5, 2021). The question may go to the Third Circuit in that case, and certainly other district courts and courts of appeals will be required to wrestle with the issue in the short term.

Especially considering how undeveloped the law on this point is, because so many courts simply assumed the answer until the Fifth Circuit issued its decision, this Court would benefit by deferring consideration until more lower court judges have had a chance to provide their judgment and analysis. Those lower courts may well have insights about the proper analysis that have not yet come to light. It may be that a consensus develops one way or the other. There is no compelling need for the Court to step in now, before the issue has had a chance to percolate. If no consensus develops and the Court needs to resolve the

conflict, the opportunity to do so in the context of a fully aired vetting of the issues will arise soon.

B. Congress may act to resolve any uncertainty surrounding the question presented, obviating the need for the Court's review.

Another benefit to allowing a circuit split time to develop is that it provides Congress an opportunity to correct any disagreement it may have with judicial interpretation of a statute. Again, the Court has at times declined to review a decision where Congress may intervene to address the issue. *See, e.g.*, *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106 (2006) (Mem.) ("Despite its technical character, the question has sufficient importance to merit further study, not only by judges but by other Government officials as well. . . . [A]nd Congress of course has the power to clarify the matter.").

Congress undoubtedly has the authority to enact legislation explicitly confirming or denying the availability of emotional distress damages for violations of the RA or the ACA. Because the matter is ultimately one of statutory interpretation, it is appropriate, and warranted, to allow Congress an

opportunity to address the issue before this Court acts.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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