No. 20-219

In the Supreme Court of the United States

JANE CUMMINGS, PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, INDIANA, LOUISIANA, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether damages for emotional distress are available in the implied right of action to enforce Section 504 of the Rehabilitation Act or Section 1557 of the Patient Protection and Affordable Care Act.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Indiana, Louisiana, Mississippi, Oklahoma, South Carolina, Utah, and West Virginia. The last century has seen the dramatic growth of "cooperative federalism," whereby some of our nation's most important policies from healthcare to education to the disposal of nuclear waste are pursued through programs "financed largely by the Federal Government," but "administered by the States." *King v. Smith*, 392 U.S. 309, 316 (1968); *see also, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). Because such programs function like a contract, Amici States have vital interests in the proper interpretation of Spending Clause legislation, including the implied right of action at issue in this case.

Most directly, while this suit is brought against a small, private business within Texas, States face potentially massive exposure to the type of claim that Petitioner seeks to pursue. The implied private right of action under which Petitioner commenced suit has been incorporated in five anti-discrimination federal statutes that apply to Amici as federal funding recipients. Congress has abrogated state sovereign immunity for claims brought under four of these statutes: *See* 42 U.S.C. §§ 12202, 2000d-7(a)(2). One court of appeals recently held that state sovereign immunity has also been abrogated for claims brought under the fifth. *See Kadel v. N.C. State Health Plan for Teachers & State Emps.*, --- F.4th ----, 2021 WL 3891732, at *11 (4th Cir. Sept. 1, 2021). As money is both finite and fungible, money spent on an overbroad interpretation of an implied private right of action cannot be spent on furthering the substantive goals set by Congress or by state legislatures.

This effect is multiplied because businesses situated within Amici States that accept federal funding—including those with whom States contract in carrying out federal programs—also face suit under the implied right of action. Such businesses range from healthcare providers to private schools. Respondent, for example, is a small business within the State of Texas that provides Medicaid services under contract with the State. It does not take a degree in economics to recognize that increasing the scope of Respondent's liability will directly increase the cost of that contract. Multiplying that liability by the thousands of companies with whom Amici States do business can only have a massive effect on their overall budgets.

Finally, States—like the federal government—have adopted civil-rights laws to address discrimination within their borders. While they often work in parallel to the federal provisions incorporating this implied right of action, that is not always the case—particularly when a State has opted to allow administrative remedies rather than judicial ones. Every expansion of an implied private right of action chips away at the function of those administrative systems. And as members of this Court have long recognized, whenever a State is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers).

SUMMARY OF ARGUMENT

Petitioner is asserting a rather remarkable claim: due to her inability to hear and see, she required an accommodation to take advantage of the rehabilitation

services offered by Respondent. Pet. App. 2a. Respondent, a small business, was unable to provide her with her preferred accommodation—an interpreter—but did its best to provide an alternative. *Id.* Unsatisfied with the offered accommodation, she obtained services from an alternative provider. *Id.* There does not appear to be any suggestion that locating such a provider caused her any concrete harm or even significant delay in her treatment. Nevertheless, she was allegedly so offended by Respondent's inability to give her what she wanted, she is entitled to recover for Respondent's alleged failure to comply with the antidiscrimination provision of the Rehabilitation Act, 29 U.S.C. § 794.

Dignitary harms, including emotional distress damages, are "one of the hallmarks of traditional tort liability." *C.I.R. v. Schleier*, 515 U.S. 323, 335 (1995). Even there, however, emotional-distress damages in the "absence of the guarantee of genuineness provided by resulting bodily harm," have been the subject of signficant criticism because (among other reasons), they "may be too easily feigned," and result in virtually uncapped civil liability based "very largely upon the subjective testimony of the plaintiff." RESTATEMENT (SECOND) OF TORTS § 436A cmt. *b* (1965). As a result, this Court has been reluctant to interpret even express statutory private rights of action to enforce federal law to include such damages absent a clear statement from Congress—particularly when questions of sovereign immunity are implicated. *E.g.*, *F.A.A. v. Cooper*, 566 U.S. 284, 298-99, (2012). Nevertheless, Petitioner invites the Courts to expand an *implied* right of action that is applicable to numerous sovereigns to include potentially uncapped emotional-distress damages. The lower courts

were correct to reject that invitation for at least three reasons.

First, this Court's existing test for the scope of any implied right of action attached to Spending Clause legislation does not permit the recovery of damages for emotional distress. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, [recipients] agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Accordingly, this Court has looked to the law of contract in interpreting Spending Clause legislation. *See Barnes v. Gorman*, 536 U.S. 181, 186-87 (2002). Conditions attached to federal dollars must be spelled out clearly before a recipient obligates itself to abide by them—whether that recipient is a private business or a sovereign State. *See Pennhurst*, 451 U.S. at 17. Litigation exposure is a material condition to any contract. And *Barnes v. Gorman* held that the remedies available under the implied right of action loosely tracks with the remedies recognized under the law of contract. Damages for emotional distress have traditionally been unavailable in contract and therefore cannot be recovered by a plaintiff suing under a judicially implied right of action to enforce a piece of legislation passed pursuant to the Spending Clause.

Second, the Court should not expand the scope of the implied private right of action to recognize new forms of liability. Even apart from the notice to which recipients of federal funds are entitled, this Court's recent jurisprudence has repeatedly emphasized that courts "cannot create a cause of action that would let" plaintiffs recover for harms not contemplated by statute. *See Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (plurality op.).

"That job belongs to Congress"—or the States—"not the Federal Judiciary." *Id.* (plurality op.). That applies with equal force in cases like this one where a plaintiff seeks to graft liability that is fundamentally different in kind onto an old cause of action.

It would be particularly inappropriate to expand the present implied right of action because to do so would go beyond the scope of the States' waiver of sovereign immunity without their consent or Congress's approval. Because cooperative federalism requires that States accept federal funds (collected as taxes from the States' citizens), they are subject to the civil-rights legislation at issue in this suit. The States waived sovereign immunity more than 30 years ago by accepting federal funds after Congress made explicit that the receipt of federal dollars would expose States to certain limited forms of private litigation. The implied right of action to which the States assented, however, did not clearly permit recovery of damages for emotional distress, and no statute has expanded it to include such damages. Expanding the scope of potential liability to include forms of relief that are different in kind from the contract claims already recognized and thereby increasing State liability is not the proper role of the federal courts: Congress is the appropriate authority to make any adjustments to the scope of the states' sovereign immunity waiver.

Third, Petitioner cannot overcome the fact that Congress has not chosen to provide such a cause of action by appealing to policy concerns about plaintiffs' inability to fully recover for their supposed harms. Even if they could, there is no need. Many plaintiffs are able to pursue claims for economic damage or injunctive relief under the implied right of action. And additional remedies are available for plaintiffs under state civil rights laws. That

this plaintiff was unable to take advantage of any of these remedies highlights the weakness in her claim, not in the remedial structure.

ARGUMENT

I. The Private Right of Action Currently Recognized Under the Rehabilitation Act Does Not Extend to Claims for Emotional-Distress Damages.

Petitioner's claim fails at the outset because she seeks to recover for a type of injury that does not fall within the scope of the private right of action that this Court has interpreted the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.*, to create. Like all Spending Clause legislation, the Rehabilitation Act operates like a contract. *Pennhurst*, 451 U.S. at 17. And this Court has recognized that contract to permit, under certain circumstances, private parties to sue to enforce the federal law (and thereby the terms of the contract). Because emotional distress of the type alleged is *not* a traditional form of recovery available for breach of contract, it is not incorporated into the contract formed by receipt of federal funds and falls outside the limited scope of this implied right of action.

A. No one disputes that States, local governments, businesses, and other entities that choose to receive federal funding subject themselves to numerous conditions attached to their acceptance of federal dollars. Indeed, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (Rehnquist, C.J., plurality op.).

These conditions can come from a variety of sources and take a variety of forms. For example, they can come from general statutes applicable to all recipients of

federal funds, *e.g.*, 42 U.S.C. § 2000d (prohibiting race discrimination "in any program or activity receiving Federal financial assistance"), or from the particular statute providing specific funds, 42 U.S.C. §§ 1396, *et seq.* (imposing conditions on Medicaid funds). And they may impose requirements that range from mandatory reporting, CARES Act, Pub. L. No. 116-136, § 15011(b)(2), Div. B, Title V, 134 Stat. 281, 540-42 (2020), to filtering Internet material harmful to children, *Am. Library Ass'n*, 539 U.S. at 199.

The obligation underlying this suit is a general one: the Rehabilitation Act provides 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); 42 U.S.C. 18116(a). When Congress enacted section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, it contemplated that it would primarily be enforced through an administrative scheme. *Id.* § 2(11). Because this system relied heavily on the potential cancellation of individual funds, a number of lower courts criticized it as "of little comfort to the individual plaintiff." *Miener v. Missouri*, 673 F.2d 969, 978 (8th Cir. 1982) (collecting cases).

The private right of action through which this suit was brought is thus *not* a creature of statute and arrived through a somewhat circuitous route. The Court created a private right of action under which plaintiffs may sue to recover for violations of Title VI, an entirely separate bar of discrimination on the basis of race by the recipient of federal funds. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). Because another statute made Title VI's

"remedies, procedures, and rights" available to persons aggrieved by violations of the Rehabilitation Act, this judicially created right of action was also applied to the Rehabilitation Act. *See* 29 U.S.C. § 794a(a)(2).[1]

B. This Court's ordinary limitations on Spending Clause legislation require that this judicially created private right of action be read narrowly. "[T]o be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). And federal funding recipients cannot "knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17). In judging the legitimacy of federal funding conditions, this Court asks whether a recipient of federal funds "would clearly understand" the conditions and whether the statute "furnishes clear notice regarding the liability at issue." *Id.*

In the more than 40 years since the current cause of action was created, the only time that Congress has clearly acknowledged a private right of action for the Rehabilitation Act was in 1986, when it passed a statute titled "[c]ivil rights remedies equalization," in which it required States who continued to accept federal funds to agree to be liable under *Cannon* and its progeny as it existed at that time. 42 U.S.C. § 2000d-7; *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Since then, Congress has never addressed—let alone expanded—the remedies available under the Rehabilitation Act or

[1] Petitioner also brought suit under the Patient Protection and Affordable Care Act, which incorporates the "enforcement mechanisms provided for and available under" Title VI, Title IX, and the Rehabilitation Act. 42 U.S.C. § 18116(a).

any other statute incorporating the remedies available under Title VI. *See* 20 U.S.C. § 1681(a); 42 U.S.C. §§ 12132, 12133, 18116(a); *accord Cannon*, 441 U.S. at 694, 703.

C. Recognizing the public notice problems presented by judicially created rights of action, *Barnes v. Gorman* adopted a test for the scope of Title VI's private right of action that turns on the foreseeability of the specific remedy asserted by the plaintiff: "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 (quoting *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992)).

In discerning "appropriate relief," *Barnes* looked to the law of contract as it has long existed in common law. As noted above, Spending Power legislation like the Rehabilitation Act and the Patient Protection and Affordable Care Act are "much in the nature of a contract." 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17). Since at least 1981, recipients of federal funds have understood that "in return for federal funds, [they] agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. Because of the contractual character of the relationship between the federal government and federal funding recipients, federal funding recipients are "generally on notice" that they may face liability under "those remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187.

In *Barnes*, the Court considered whether plaintiffs suing under Title VI's implied right of action may recover punitive damages. The Court examined a number of well-established treatises, noting that under some authorities, "reasonably implied contractual terms"—which, in the absence of congressional authorization,

must include any private right of action—"are those that the parties would have agreed to if they had adverted to the matters in question." 536 U.S. *at* 188 (citing FARNSWORTH ON CONTRACTS § 7.16, at 335 (2d ed. 1998)). Under others, including "[m]ore recent commentary," such implied terms "are simply those that 'compor[t] with community standards of fairness.'" *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. *d* (1981)). Under either approach, the Court concluded, it is not reasonable to imply a remedy "that is of indeterminate magnitude," which might exceed the amount of federal funding accepted by the recipient. *Id.* Because "punitive damages . . . are generally not available for breach of contract," the Court held the implied right of action at issue here did not include them. *Id.* at 187. "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." *Id.* at 188.

D. Under the same reasoning, damages for emotional distress are also unavailable to plaintiffs suing upon Title VI's implied right of action. "Damages for emotional disturbance are not ordinarily allowed" in contract actions. RESTATEMENT (SECOND) OF CONTRACTS, *supra*, at § 353 cmt. *a*; 24 WILLISTON ON CONTRACTS § 64:11 (4th ed.) ("Mental suffering caused by a breach of contract, although it may be a real injury, is not generally considered as a basis for compensation in contractual actions."). Lower courts have generally agreed that "[t]he indeterminate nature of these damages, much like the case of punitive damages, is one of the prevailing characteristics that renders their award in breach-of-contract cases extraordinary." *Bell v. Bd. of Educ. of Albuquerque Pub.*

Schs., 652 F. Supp. 2d 1211, 1215 (D.N.M. 2008) (citing FARNSWORTH ON CONTRACTS § 12.8, at 193-94 (3d ed. 2004)); *see also, e.g.*, *John Hancock Mut. Life Ins. Co. v. Banerji*, 858 N.E.2d 277, 288 (Mass. 2006); *Bossuyt v. Osage Farmers Nat'l Bank*, 360 N.W.2d 769, 777 (Iowa 1985).

Some subset of States recognized that there may be two "exceptional situations" under which emotional-distress damages are recoverable in contract. RESTATEMENT (SECOND) OF CONTRACTS § 353, *supra*, cmt. *a*. This includes an exception for personal-service contracts that Petitioner claims her suit fits within. *See id.* But, as Respondent details at length in its brief (at 21-25), there have long been differences between how States have treated this exception, which does not clearly apply to the facts of this case in any event. To avoid burdening the Court, Amici will not repeat Respondents' analysis here. It is worth noting, however, that the variation of state law on this question means that *at minimum* whether emotional-distress damages are available for a breach of contract was unclear when Congress applied the remedies available under these statutes to the States. *Supra* at 8. Because a condition on Spending Clause legislation must be clearly stated, that ambiguity itself cuts against finding that there is an implied cause of action for emotional-distress damages in the Rehabilitation Act. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (stating that if Congress wishes to impose conditions on the receipt of federal funds it "must do so unambiguously, enabling" recipients "to exercise their choice knowingly, cognizant of the consequences of their participation") (cleaned up).

More fundamentally, as the Fifth Circuit correctly observed, *Barnes* adopted a bright-line rule against the

recovery of punitive damages under Title VI's implied right of action even though exceptions exist in the law of contract to the general bar against punitive damages. Pet. App. 10a (citing RESTATEMENT (SECOND) OF CONTRACTS, *supra*, at § 355 cmts. *a*, *b*). Such a bright-line rule is necessary because those exceptions are highly fact-specific. *E.g.*, *Romero v. Mervyn's*, 784 P.2d 992, 997-1002 (N.M. 1989). To incorporate them into the contract to which federal recipients agreed in accepting funds would cut squarely against the type of clear notice that this Court demands of Spending Clause legislation. *Supra* at 8.

Here too, narrow exceptions to contract's general rule against the recovery of emotional-distress damages should not be engrafted upon Title VI's atextual right of action. The court of appeals was correct to reject Petitioner's contrary arguments to expand the narrow cause of action that it has recognized—and Congress has endorsed—to enforce the terms of Respondent's contract with the federal government by enforcing the terms of the Rehabilitation Act.

II. This Court Should Not Reenter the Business of Creating New Private Rights of Action—Particularly When They Apply to States.

Rather than a remedy to enforce the contract between Respondent and the federal government, what Petitioner really wants is a new cause of action for tortious violation of the Rehabilitation Act. This Court should also not create such a new claim for at least two reasons. *First*, in recent years, this Court has reserved the ability to create new causes of action to that entity in our government empowered to make law—Congress. And Congress has not seen fit to impose a cause of action for the harm of which Petitioner complains. *Second*, it would be

particularly inappropriate for the Court to create a new remedy under Title VI because the one thing we *do* know is that Congress wants the remedies available against States to mirror those available against private parties. 42 U.S.C. § 2000d-7; *see also Alexander*, 532 U.S. at 280. To expose States to uncapped liability for emotional-distress damages to which they did not clearly agree upon accepting federal funds would be contrary to this Court's general rules about how to interpret waivers of sovereign immunity.

A. The Court should not return to its prior practice of creating causes of action not authorized by Congress.

What Petitioner seeks in this case is, in effect, a new cause of action. Rather than enforce the terms of the Spending Clause legislation, she asks to recover under a theory of tort. As members of this Court have recognized, Congress is the entity that typically decides whether to extend tort liability by federal statute. As it has not done so here, no such liability exists.

As discussed above, emotional-distress damages are not creatures of contract law but of tort, *Schleier*, 515 U.S. at 335—and they are fairly controversial, *see* RESTATEMENT (SECOND) OF TORTS, *supra*, at § 436A cmt. *b*. As Justice Stevens noted in his separate concurrence in *Barnes*, joined by Justices Ginsberg and Breyer, whether Congress has authorized "tortious conduct" is a separate question from whether Congress has authorized a cause of action to enforce a piece of Spending Clause legislation. 536 U.S. at 192, 193 n. 2. And it is well established that authorization to bring one claim related to a federal statute does not automatically lead to the ability to bring another. *E.g.*, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981) (stating Congress

would have spoken explicitly if it wished to expose a municipality to punitive damages); *Cooper*, 566 U.S. at 298-99 (interpreting waiver of sovereign immunity not to include emotional-distress damages). That is particularly true where Congress never created the cause of action to begin with. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179-90 (1994) (refusing to extend an implied cause of action to aiding-and-abetting liability under the same statute).

This Court should not extend the liability it found under the Rehabilitation Act beyond its current contract-like limitations. When this Court started on its journey of creating causes of action that were not authorized by Congress, it typically did so on the theory that Congress would have wanted to recognize a private cause of action to ensure adequate enforcement of federal statute. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964). This Court has since abandoned that practice as inconsistent with the separation of powers enshrined in our Constitution. *See Alexander*, 532 U.S. at 287. Petitioner has provided no reason to return to that path, and Amici are aware of none.

B. Expanding the available means of enforcing the Rehabilitation Act is particularly problematic in light of States' limited waivers of sovereign immunity.

It would be particularly inappropriate to create a claim for emotional distress for violation of the Rehabilitation Act because it would broaden the scope of States' waiver of sovereign immunity without their consent or demand by Congress. In addition to private businesses such as Respondent, the implied right of action at issue is frequently asserted against States. And while Congress never created a cause of action to enforce the

Rehabilitation Act, it did explicitly require that remedies available against States mirror those against private parties. 42 U.S.C. § 2000d-7(a)(2). To be true to that congressional requirement, any expansion of remedies for Petitioner would necessarily increase the scope of States' waiver of sovereign immunity. That is the opposite of how this Court typically construes such waivers.

States enjoy sovereign immunity against private litigation until the immunity is waived or abrogated. This promise of state sovereign immunity is "'central to sovereign dignity'" and "enforce[s] an important constitutional limitation on the power of the federal courts." *Sossamon v. Texas*, 563 U.S. 277, 283-84 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246-47 (1985), the Court held that the Rehabilitation Act did not condition the receipt of federal funds upon a waiver of sovereign immunity. Congress responded to *Atascadero* the next year by explicitly abrogating sovereign immunity for claims brought against states under the Rehabilitation Act and other anti-discrimination statutes. Rehabilitation Act Amendments Act of 1986, Pub. L. No. 99-506, 100 Stat. 1807, 1845; *Lane v. Pena*, 518 U.S. 187, 198 (1996) ("By enacting § 1003, Congress sought to provide the sort of unequivocal wavier that our precedents demand."). States, through their choice to accept federal funds, have faced suit under the Rehabilitation Act since then.

As highlighted by *Atascadero*, however, this Court requires Congress to use clear terms whenever it conditions a State's receipt of federal funding on that State's waiver of sovereign immunity and exposure of itself to suit from private parties. "A State's consent to suit must be 'unequivocally expressed' in the text of the relevant

statute." *Sossamon*, 563 U.S. at 284 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). The test is a "stringent one." *Id.* "[T]here can be no consent by implication or by use of ambiguous language." *Libr. of Cong. v. Shaw*, 478 U.S. 310, 318 (1986). Where a waiver is found, its scope is "strictly construed . . . in favor of the sovereign." *Lane*, 518 U.S. at 192.

The States assented to a limited waiver of sovereign immunity more than 30 years ago by choosing to accept federal funds after Congress's post-*Atascadero* amendments. For the reasons discussed above, however, that waiver did not include consent to suit for emotional-distress damages under the Rehabilitation Act. *Supra*, at 11. Indeed, it was not until 21 years after Congress's abrogation of sovereign immunity that the Eleventh Circuit allowed the recovery of emotional-distress damages in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). This Court's embrace of *Sheely*'s rule would upset the States' decades-long understanding of the scope of their waiver of sovereign immunity.

In sum, Congress—not the federal judiciary—is the appropriate branch to expand the Rehabilitation Act's right of action and the corresponding waiver of sovereign immunity. The unmistakable lesson of *Atascadero* is that Congress is capable of broadening the right of action at issue. Congress has—for its own reasons—not authorized a tort-like remedy to enforce the Rehabilitation Act; this Court should refuse to do Congress's work for it.

III. State Civil Rights Laws Supply Additional Remedies For Discrimination Plaintiffs.

The Court should also reject Petitioner's appeal to policy considerations in order to avoid the effect of Congress's choices. Petitioner and her amici insist that if this Court were to decline to increase the scope of its own

cause of action, it would "dramatically undermine deterrence of the very misconduct Congress intended to limit." Disability Orgs. Br. 11; *see also, e.g.*, Pet. Br. 16-17 (implying that absent emotional-distress damages, disabled persons would be left with no effective remedy). Leaving aside the implausibility of such an outcome in light of the 50 years that the Rehabilitation Act has been in place without such a cause of action *and* that policy does not create power that this Court would otherwise lack, they drastically overstate the consequences of an adverse ruling.

If this Court affirms the court of appeals, plaintiffs suing under the Rehabilitation Act, the Patient Protection and Affordable Care Act, and the other statutes incorporating Title VI's remedies will retain the ability to recover damages for economic injuries and to obtain injunctive relief. As one district court noted, "the recognition of emotional damages is not necessary to create a proper incentive to sue." *Bell*, 652 F. Supp. 2d at 1215. Indeed, many plaintiffs obtain judgments under the family of statutes incorporating Title VI's remedies without claiming emotional-distress damages. *Petitioner* might not have been able to claim such remedy due to her apparent ability to obtain the services she sought from Respondent from an alternative provider with minimal difficulty. But the deficiencies in her claims does not mean that she lacked the option to pursue, for example, injunctive relief if that were not the case.

Petitioner sought an injunction against Respondent in the district court, but Petitioner did not allege sufficiently concrete plans to return to Respondent's business. Petitioner alleged that she "still wishes to access Defendant's services and receive care in Defendant's facilities," but the district court ruled it could not "infer"

from this allegation that Petitioner was likely to return. Pet. App. 19a. As a result, Petitioner lacked standing to pursue injunctive relief. *Id.* at 18a-21a. Petitioner sought an opportunity to replead her complaint but the district court rejected the request. *Id.* at 25a-26a. Petitioner did not appeal this aspect of the district court's dismissal. *Id.* at 4a n.3.

Petitioner's additional discrimination litigation further illustrates the availability of other remedies. One month before filing the instant matter, Petitioner filed two other lawsuits in federal district court claiming violations of statues incorporating Title VI's private right of action. *First*, Petitioner sued an optometrist for disability discrimination under the Rehabilitation Act and the Patient Protection and Affordable Care Act. Complaint, *Cummings v. Total Eye Care*, No. 4:18-cv-00546, Dkt. 1, at ¶¶ 53-72 (N.D. Tex. July 3, 2018). Petitioner alleged the optometrist discriminated against her by making available as an interpreter a staff member who knew American Sign Language but was not a certified sign-language interpreter. *Id.* at ¶¶ 18-19, 36. Petitioner declined to attempt to work with the staff member. *Id.* at ¶ 30. In addition to alleging "humiliation, frustration, and emotional distress," Petitioner sought injunctive relief. *Id.* at ¶¶ 4, 36, 60.

Second, Petitioner filed suit against a not-for-profit homeowner's association that allegedly failed to provide a sign language interpreter at workshops. Complaint, *Cummings v. Neighborhood Assistance Corp. of Am.*, No. 3:18-cv-01746, Dkt. 1, at ¶¶ 2, 6 (N.D. Tex. July 3, 2018). Petitioner asserted a claim under the Rehabilitation Act. *Id.* at ¶¶ 42-49. Here too, Petitioner sought injunctive relief in addition to alleging "humiliation, frustration, and emotional distress." *Id.* at ¶¶ 25, 49.

Even if a plaintiff did lack a remedy under the implied right of action, states' civil rights laws may furnish a cause of action. As an example, Texas state law unambiguously prohibits discrimination in public spaces on the basis of disability: "Persons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state." Tex. Hum. Res. Code § 121.003(a). Persons who suffer discrimination because of their disability are deemed to have been deprived of their civil liberties. *Id.* § 121.004(b).

Unlike the Rehabilitation Act and the Patient Protection and Affordable Care Act, the Texas code contains an express private right of action for disability discrimination. Persons who have suffered discrimination may sue the person or organization that discriminated against them under the state law. *Id.* "[T]here is a conclusive presumption of damages in the amount of at least $300 to the person with a disability." *Id.* In addition, disability discrimination is a crime in Texas. The crime is punished as a misdemeanor and is punishable by a fine and 30 hours of community service. *Id.* § 121.004(a).

Indeed, Petitioner asserted violations of the Texas Human Resources Code in all three of her federal disability discrimination lawsuits. *See* Pet. App. 17a; Complaint, *Neighborhood Assistance Corp.*, at ¶¶ 50-58; Complaint, *Total Eye Care*, at ¶¶ 73-81.

The Texas legislature's choice to provide disabled persons with legal protections from discrimination in addition to federal law is not unique among the states. State civil rights laws offer a meaningful additional remedy for victims of discrimination. And as Respondent's brief explains, discrimination may be actionable under state tort law or civil rights laws, which may include recovery for

emotional distress damages. Resp. Br. at 43-44.[2] States' laws vary on what remedies they make available and through what procedural mechanisms. *See* Laura Rothstein, Disabilities & the Law § 5:10 (4th ed.). But that is a feature of our federal system—and particularly of programs that are pursued through cooperative federalism—not a bug. To the extent that Congress thinks a more uniform approach is necessary, it knows how to adopt one. Its decision not to do so is presumed to be intentional. *See Elkins v. Moreno*, 435 U.S. 647, 666 (1978). And it should be respected.

[2] In the extremely rare circumstances that failure to abide by the Rehabilitation Act also violated the Constitution, such relief might also be obtained through a claim under 42 U.S.C. § 1983. *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2021

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