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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Jane Cummings respectfully petitions for rehearing of the Court's April 28, 2022, decision. Specifically, she asks for an order (1) granting rehearing, (2) vacating the judgment, and (3) restoring the case to the calendar for reargument.

GROUNDS FOR REHEARING

Although this Court rarely grants petitions for rehearing, this case warrants such extraordinary relief because a fundamental premise of the Court's decision is in conflict with a provision of the statutory text that the Court and the parties have thus far overlooked. The issue in this case was whether discrimination plaintiffs like Petitioner are entitled to emotional distress damages under the Rehabilitation Act and the Affordable Care Act. The Court ultimately held that "emotional distress damages are not recoverable" based on its view that "the statutes at issue are silent as to available remedies." Slip op. 5, 16.

Yet this premise is incorrect, as the Rehabilitation Act is not silent on remedies; it explicitly authorizes the remedies available under 42 U.S.C. § 1981a. Neither the parties nor the Solicitor General addressed this set of statutory cross-references in their briefing or at argument. Specifically, 29 U.S.C. § 794a(a)(2) provides that anyone bringing claims of discrimination against a recipient of federal funding may avail themselves of the remedies in 42 U.S.C. § 2000e-5(e)(3), which in turn states: "*In addition to* any relief authorized by section 1981a of this title . . . an aggrieved person may obtain relief as provided in subsection (g)(1) . . . ." 42 U.S.C. § 2000e-5(e)(3)(B) (emphasis added). And 42 U.S.C. § 1981a(b)(3) expressly permits compensatory damages for

"emotional pain" and "mental anguish." As a result, neither the Court, the concurrence, nor the dissent considered the fact that the Rehabilitation Act is *not* silent as to remedies because it incorporates those under section 1981a.

Additionally, the Court's ruling appears to be categorical, holding—without any exception—that "emotional distress damages are not recoverable." Slip op. 16. But the Rehabilitation Act offers two sets of remedies: one for discrimination by federal-funding recipients (under 29 U.S.C. §794a(a)(2), as noted above) and one for employment discrimination (under 29 U.S.C. §794a(a)(1)). Section 794a(a)(1) adopts the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964," and when a complaining party cannot recover under 29 U.S.C. § 1981, "the complaining party may recover compensatory and punitive damages as allowed in subsection (b)" in "an action brought . . . under section . . . 717." 42 U.S.C. § 1981a(a)(1); *see also* 29 U.S.C. § 791(f) (discussing the standards used in determining violations, which include violations of the Rehabilitation Act). As noted, 42 U.S.C. § 1981a(b)(3) expressly permits compensatory damages for "emotional pain" and "mental anguish."

Thus, in plain English, those remedies are available to certain plaintiffs under the Rehabilitation Act. But the Court's decision does not mention 29 U. S. C. § 794a(a)(1) and therefore conveys the impression—flatly in conflict with the statutory text—that emotional distress damages are unavailable for § 794a(a)(1).

In light of the extraordinary oversight that has occurred, the parties' collective failure to identify the critical statutory text is no bar to rehearing. This

Court's rules, historical practice, and duty to serve as a faithful interpreter of federal statutes all prioritize reading the statute correctly and completely over the application of waiver principles. As Justice Frankfurter put it, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

The Court should grant this petition for rehearing for both of the reasons below.

I. The statutes at issue are not silent on the availability of damages for emotional distress

This Court premised its decision on its understanding that "the statutes at issue are silent as to available remedies." Slip op. 5. That understanding is incorrect. The Court correctly observed that "the Rehabilitation Act and the Affordable Care Act—the two statutes directly at issue in this litigation—each expressly incorporate the rights and remedies provided under Title VI." Slip op. 7 (citing 29 U.S.C. §794a(a)(2)). At the same time, however, section 794a(a)(2) imports remedies from 42 U.S.C. § 2000e-5(e)(3), which incorporates "emotional pain" and "mental anguish" damages from 42 U.S.C. § 1981a(b)(3).

Beginning, as the Court did, with the text, section 794a(a)(2) provides:

> 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.

Accordingly, it is clear that "*any person* aggrieved by *any act or failure to act by any recipient of Federal Assistance . . . under section 794*" is entitled to the "*remedies*, procedures, and rights" not only in "title VI of the Civil Rights Act of 1964," as discussed by the Court, but also in "subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5)." 29 U.S.C. § 794a(a)(2) (emphasis added). That is true whether the section 794 claims are for discrimination in compensation or not. *See Smith v. Berryhill,* 139 S. Ct. 1765, 1774 (2019) ("Congress' use of the word 'any' suggests an intent to use [the accompanying] term expansive[ly].") (second alteration in original). 42 U.S.C. § 2000e-5(e)(3), in turn, authorizes certain relief "[i]n addition to any relief authorized by section 1981a," and 42 U.S.C. § 1981a(b)(3) expressly permits compensatory damages for "emotional pain" and "mental anguish."

Based on its view that the statutes were silent as to available remedies, the Court relied on a "contract analogy set out in [prior] Spending Clause cases," including *Barnes v. Gorman*, 536 U. S. 181, 186 (2002). Yet *Barnes* could not consider the Rehabilitation Act's adoption of 42 U.S.C. § 2000e-5(e)(3)—and thus the implications of 42 U.S.C. § 1981a(b)(3)—because the language of (e)(3) was not added until 2009 with the Lilly Ledbetter Fair Pay Act. 111 P.L. 2, 123 Stat. 5 (Jan. 29, 2009).

There is no need to turn to contract analogies when the statutory text is unambiguous, nor would

the Court need to undergo additional analysis of legislative history. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020) ("[L]egislative history can never defeat unambiguous statutory text."). Indeed, the Court "would reorient the inquiry to focus on a background interpretive principle rooted in the Constitution's separation of powers." Slip op. 1 (Kavanaugh, J., concurring); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute means.") (cleaned up). Nor should "the limits of the drafters' imagination supply [any] reason to ignore the law's demands." *Bostock*, 140 S. Ct. at 1737.

To be sure, Congress may use statutory language that goes further than it intended, but "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Id.*; *see also id.* at 1749 ("[T]he fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command.") (cleaned up). Given the plain text, rehearing is warranted because of these substantial grounds not previously presented, briefed, or considered by the Court.

II. The Court's ruling, as written, applies to employment claims under the Rehabilitation Act, which expressly permit damages for emotional pain and mental anguish

Even if the Court opts not to reconsider its conclusion that the statutes are "silent" as to

remedies, rehearing would still be warranted to clarify that the Court's holding is limited to 29 U.S.C. § 794a(a)(2) and does not apply to employment discrimination claims under § 794a(a)(1). When the Court stated that "the statutes at issue are silent as to available remedies," the Court referred solely to Title VI through 29 U.S.C. § 794a(a)(2). Slip op. 3 ("As to the Rehabilitation Act and the Affordable Care Act—the two statutes directly at issue in this litigation—each expressly incorporates the rights and remedies provided under Title VI."). There was no discussion of 29 U.S.C. § 794a(a)(1), which provides for remedies for claims of employment discrimination, and yet the Court's holding applied to the entire reach of the Rehabilitation Act. Slip op. 16 ("[W]e hold that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here.").

Pertinently, section 794a(a)(1) adopts the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964." The remedies available to a complaining party under section 717 of the Civil Rights Act of 1964 are as follows:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party

> cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(1). As relevant here, "the complaining party may recover compensatory and punitive damages as allowed in subsection (b)," and at the risk of repetition, section 1981a(b)(3) expressly permits compensatory damages for "emotional pain" and "mental anguish." Thus, in plain English, those remedies are available to certain plaintiffs under the Rehabilitation Act—at a minimum, those bringing claims of employment discrimination—yet the Court never discussed 29 U.S.C. § 794a(a)(1), which does not invoke the Spending Clause consideration of 29 U.S.C. § 794a(a)(2). Slip op. 3. Relatedly, the Court's entire analysis—whether a federal-funding recipient has clear notice—has no application in the employment realm. Slip op. 5 ("Because the statutes at issue are silent as to available remedies, it is not obvious how to decide whether funding recipients would have had the requisite clear notice regarding the liability at issue in this case.") (cleaned up). Accordingly, the Court should grant rehearing to clarify this aspect of its broad categorical holding.

III. The parties' collective failure to identify the critical provisions previously is no bar to reconsideration

The Court's Rule 44.1, governing rehearing of decisions on the merits, does not provide a clear standard for when such a petition should be granted.

However, as the Court announced in *Brown v. Mathias Aspden's Adm'rs,* 55 U.S. 25, 26–27 (1852), rehearing will not be granted unless a Justice who concurred in the judgment of the Court "doubts the correctness of his opinion." Here, without full consideration of the statutory text, there should be plenty of doubt as to the correctness of the opinion.

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Supreme Court Rule 44.1 and articulated in *Ambler v. Whipple,* 90 U.S. 278, 282 (1875), that if "the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument[.]"[1]

In the neighboring Rule 44.2, governing rehearing of orders denying certiorari or extraordinary writs, the Rule authorizes rehearing where there are "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." The latter criterion applies here, and reveals that waiver is not an appropriate ground for denying reconsideration, because the circumstance where waiver would ordinarily apply—where the basis is a ground "not previously presented"—is precisely the circumstance in which the Rule authorizes rehearing. Nor has this Court ever

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[1] *See, e.g., Reid v. Covert,* 351 U.S. 487 (1956), *reh'g granted,* 352 U.S. 901 (1956), *aff'd on reh'g,* 354 U.S. 1 (1957); *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271 (1949), *reh'g granted,* 337 U.S. 910 (1949), *aff'd on reh'g,* 339 U.S. 605 (1950).

denied an otherwise meritorious petition for rehearing on the grounds of waiver.

The Court's prioritization of correctness over technicalities is also embodied in its interpretation of the rules governing waiver at the certiorari stage, which do not obstruct the merits consideration of an issue not properly raised where that issue "is a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting, respectively, *Vance v. Terrazas*, 444 U.S. 252, 258–59 n.5 (1980) and Rule 14.1(a)).

Perhaps most fundamentally, this Court's role requires it to be faithful to the text of congressional statutes. To deny rehearing based on a failure to consider the actual text of the Rehabilitation Act as amended "risks arrogating legislative power." *Hernández* v. *Mesa*, 140 S. Ct. 735, 741 (2020).

Ignoring important text that Congress enacted into law just because the parties missed it would betray the Court's obligation in this regard. Now that the relevant textual provisions and cross-references have been brought to light, it is clear that letting the Court's April 28 decision stand would amount to "amending statutes outside the legislative process reserved for the people's representatives" and "denying the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock*, 140 S. Ct. at 1738. The Court's April 28 decision would, moreover, be inherently flawed from the start and create mischief in the lower courts as judges attempt to reconcile the conflicting commands of Congress—through its duly enacted statutory text—and this Court.

CONCLUSION

These complex issues should be given a full airing through briefing and re-argument. The Court's current opinion as it stands does not address the clear statutory language in section 794a(a); this is a glaring omission, and the Court should grant rehearing to address it. Alternatively, the Court may wish to first seek the views of the Solicitor General of the United States, which had filed an amicus brief, but did not address the issues raised in this petition.

Respectfully submitted,

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May 23, 2022

RULE 44.1 CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

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