NO. 20-219

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

BRIEF IN OPPOSITION OF RESPONDENT PREMIER REHAB KELLER, P.L.L.C.

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RESTATEMENT OF QUESTION PRESENTED

In determining the appropriateness of remedies under Spending Clause statutes, this Court held in *Barnes v. Gorman*, 536 U.S. 181 (2002) 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. The question presented is:

Is the "personal contract" exception to the general rule that emotional distress damages are not recoverable for breach of contract sufficient to put a federal funding recipient on notice that it may be liable for emotional distress damages?

CORPORATE DISCLOSURE STATEMENT

Premier Rehab Keller, P.L.L.C. has no parent corporation, and no public company owns 10% or more of its stock.

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INTRODUCTION

Petitioner seeks review of the judgment below on the basis that the Fifth Circuit's decision squarely conflicts with that of the Eleventh Circuit in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). Both circuits followed this Court's direction in *Barnes v. Gorman*, 536 U.S. 181 (2002) and concluded that a remedy is not "appropriate" unless the federal funding recipient is "on notice," and a funding recipient is on notice of only those remedies traditionally available for breach of contract. The circuits also reviewed the common law of contracts, particularly the Restatement (Second) of Contracts § 353, and recognized that the general (traditional) rule at common law is that emotional damages for breach of contract will not lie. *Barnes* does not prescribe any further inquiry to determine an appropriate remedy, leading to the conclusion that emotional damages are not recoverable.

Petitioner would draw attention to a "personal contract" exception to the general rule prohibiting the recovery of emotional distress damages in contract. Petitioner offers many examples of personal contracts, those in which "serious emotional disturbance was a particularly likely result." The facts of the instant case compare poorly to the typical personal contract case, and it is a hard-sell that Respondent should have foreseen that emotional distress was a particularly likely result from a series of phone calls between its staff and Petitioner. It should be an even taller order for Petitioner to convince this Court that the existence of an uncommon exception to the traditional rule should

put Respondent on notice that emotional distress damages are an appropriate remedy for Respondent's alleged breach of its Medicare agreement. As things stand, the narrow question presented to the court is: Is the "personal contract" exception to the general rule that emotional distress damages are not recoverable for breach of contract sufficient to put a federal funding recipient on notice that it may be liable for emotional distress damages? The Court should answer the question presented in the negative, deny the Petition and leave intact the Fifth Circuit's judgment in favor of Respondent.

COUNTER-STATEMENT OF THE CASE

In her Amended Complaint, Petitioner alleged that she suffered from deafness and albinism, the latter disability which impaired her ability to read written text. (Am. Compl. ECF No. 11, ¶ 12). She also alleged that her visual impairment rendered notes, lip-reading and gestures ineffective means of communication. (Id., ¶ 17). Petitioner's Amended Complaint and her Petition did not allege that her visual impairment impacted her ability to see the gestures of an ASL interpreter, Petitioner's accommodation of choice. Rather, the clear implication of Petitioner's various pleadings at trial and on appeal is that Petitioner contends that she could see an ASL interpreter's gestures, but not the gestures of the Premier Rehab staff.

Petitioner further alleged that, over the course of multiple telephone conversations with Respondent's

staff: (1) Respondent agreed to treat Petitioner, with or without an interpreter (Am. Compl. ECF No. 11, ¶ 16); (2) Respondent offered accommodations and auxiliary aids for effectively communicating with deaf patients (Id.); and (3) Petitioner insisted on the specific accommodation of an ASL interpreter (Id., ¶ 17, 19, 20). Following these calls, Petitioner did not schedule a therapy appointment at Respondent's facility but instead sought treatment elsewhere. (Id., ¶ 17).

REASONS TO DENY THE PETITION

I. FEDERAL LAW HOLDS THAT FEDERAL FUNDING RECIPIENTS ARE ONLY ON NOTICE OF REMEDIES TRADITIONALLY AVAILABLE IN SUITS FOR BREACH OF CONTRACT, AND EMOTIONAL DISTRESS DAMAGES ARE NOT TRADITIONALLY AVAILABLE.

A. There Is No Conflict Between the Circuits as to the Requirement That a Federal Funding Recipient Must Be "On Notice" of Remedies "Traditionally Available" in Order to Be Liable Under the Rehabilitation Act and the Affordable Care Act.

The case before the Court involves Petitioner Jane Cummings' attempt to recover emotional distress damages under The Rehabilitation Act and The Affordable Care Act. Neither statute expressly authorizes Petitioner the relief she seeks, but this Court has previously implied the existence of remedies that were not specifically enumerated in the statute. "[F]ederal

courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). This implied power had limits in Spending Clause litigation, and any "available" remedy became any "appropriate" remedy. "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992).

While the Court was evaluating the availability and appropriateness of implied remedies, the Court was at the same time considering the subject of notice to federal funding recipients. In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Court considered a claim for injunctive and monetary relief for alleged violations of The Rehabilitation Act and the Developmentally Disabled Assistance and Bill of Rights Act. In discussing available remedies, the Court noted that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Relying upon this contract analogy, the Court concluded that federal funding recipients must voluntarily and knowingly accept the terms of the contract, further noting, "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* The Court reaffirmed this notice requirement in the context of other Spending Clause statutes as well. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582,

596 (1983) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt.").

The questions of what is an appropriate remedy and what is adequate notice converged in the Court's decision in *Barnes v. Gorman*, 536 U.S. 181 (2002). *Barnes* clarified that a remedy was "appropriate relief," only if the funding recipient was on notice that, by accepting federal funding, it exposed itself to liability of that nature. *Id.* at 187. A funding recipient is generally "on notice" of only those remedies explicitly provided in the statute and those remedies traditionally available in suits for breach of contract. *Id.* The Court determined that punitive damages were not an appropriate remedy under The Rehabilitation Act, in part because punitive damages were not normally available for contract actions. *Id.* at 188.

Since *Barnes*, the Court has reaffirmed the importance of the notice principle in evaluating the appropriateness of remedies in Spending Clause litigation. In *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), the Court addressed the question of the recovery of expert consultant fees under the Individuals with Disabilities Education Act (IDEA). The Court wrote:

> Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of

> the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006). In evaluating the sufficiency of the notice provided, the Court rejected appellee's argument that Congress clearly intended for prevailing parents to be compensated for expert fees, citing the United States House of Representatives Conference Committee Report. "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* at 304.

The foregoing recitation of case law could have been written by the Eleventh Circuit or the Fifth Circuit. Both have acknowledged that a remedy is not "appropriate" unless the federal funding recipient is "on notice." *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 676 (5th Cir. 2020); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1197 (11th Cir. 2007). The Circuits do not conflict on this critical constitutional point, and this Court need not grant the Petition to address well-settled law that supports the Fifth Circuit's decision.

B. There Is No Conflict Among the Circuits as to the General Rule of Contract Law That Emotional Distress Damages Are Not Recoverable.

Barnes established the procedure for undertaking a contract analysis: look at what is traditionally available in contract cases. *See Barnes*, 536 U.S. at 187.

The Eleventh and Fifth Circuits both followed the Court's guidance in *Barnes* and first looked to the general rule regarding the recoverability of emotional distress damages in contract. The general rule at common law is that emotional damages for breach of contract will not lie. *Cummings*, 948 F.3d at 677; *Sheely*, 505 F.3d at 1200. "Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure." RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) cmt. a. Two "exceptional situations" exist where emotional distress damages are recoverable, only one of which pertains to the facts of this case. This "personal contract" exception permits the recovery of emotional distress damages when the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. *Id.* "Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." *Id.*

The Eleventh and Fifth Circuits agree that a remedy is not appropriate unless the recipient is on notice; to be on notice, that remedy must be one traditionally available for breach of contract. *Barnes*, 536 U.S. at 187. Emotional distress damages are generally

not available. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353. While exceptions to the general rule exists, *Barnes* does not require that a court look any further than the traditional rules of contract, and from this the Court can conclude that emotional distress damages are not recoverable. As the circuits do not conflict as to their understanding of the federal law regarding notice and the common law regarding contracts, this Court should deny the Petition.

II. THE COMMON LAW "PERSONAL CONTRACT" EXCEPTION DOES NOT APPLY TO THE FACTS OF THIS CASE AND DOES NOT PUT RESPONDENT ON NOTICE THAT IT MAY BE LIABLE FOR EMOTIONAL DISTRESS DAMAGES FOR ALLEGED DISCRIMINATION.

The conflict before this Court is narrower than Petitioner has presented and may be appropriately summarized as follows: Is the "personal contract" exception to the general rule that emotional distress damages are not recoverable for breach of contract sufficient to put a federal funding recipient on notice that it may be liable for emotional distress damages? Petitioner's argument that an exception to the general rule is an adequate basis for notice is immediately suspect. When *Barnes* spoke of what was appropriate relief, *Barnes* spoke in terms of what was "general," "traditional" and "normal." *Barnes*, 536 U.S. at 187-188. Petitioner, on the other hand, contends that Respondent is on notice of any available relief, and thus she pleads for relief that is "exceptional" and "personal." An examination of the personal contract exception will show that it is inapplicable to the facts of this case and does not put Respondent on notice that emotional distress damages are recoverable under The Rehabilitation Act and Affordable Care Act.

Sheely acknowledged the general rule: emotional distress damages are not available for contract. Rather than accepting that a federal funding recipient would ordinarily have no obligation or reason to know of the limited exceptions to the general rule, *Sheely* instead charged the defendant funding recipient with knowledge of the exception for breach of a "personal contract." *Sheely,* 505 F.3d at 1201. In describing the personal contract, the Eleventh Circuit wrote, "[T]he contract is personal in nature and the contractual duty . . . is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party . . . [that] it should be known to the parties . . . that [mental] suffering will result from its breach" *Sheely*, 505 F.3d at 1201 *quoting Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949). *Sheely* offered multiple examples of contracts in which the parties could be expected to foresee that emotional distress was a particularly likely result: carriers and passengers; innkeepers and guests; employers and employees; insurance carriers and insureds; lawyers and clients; and homebuilders and homeowners. *Sheely*, 505 F.3d 1173, 1201 n.28.

The foregoing examples are distinguishable from the case before this Court. Unlike Petitioner's examples, Respondent's contract was with the federal government; Petitioner was not a party to Respondent's contract, rather she was a third-party beneficiary.[1] A lawyer

[1] *Sheely* cited contracts between surgeons and patients as examples of personal contracts for which emotional distress was a particularly likely result of the breach. Although these examples pertain to the provision of health care, they do not involve claims by third-party beneficiaries of government reimbursement contracts; the actionable contracts involved promises made by surgeons directly to their patients. *See Sullivan v. O'Connor*, 296 N.E.2d

should be aware of a client's sensibilities, and an employer should anticipate an employee's mental concerns, and both should know of those situations in which emotional distress was a particularly likely result of a breach of a personal contract. In contrast, Respondent would have no reason to foresee that emotional distress would be a particularly likely outcome of contracting with the federal government. Respondent was not acquainted with Ms. Cummings at the time it contracted with Medicare; the same cannot be said of the parties to the personal contracts that make up the limited exception to the general rule.

Barnes held that federal funding recipients were on notice of remedies traditionally available in contract law. Petitioner seeks to have this Court hold that funding recipients are on notice of not only those remedies traditionally available, but also those remedies available in "exceptional situations." A survey of the typical "personal contract" case reveals that they bear little resemblance to the facts of the transaction before the Court. Respondent made no promises to Petitioner, and Respondent can't be said to have had any constructive or actual knowledge of Petitioner's sensibilities and mental concerns at the time Respondent contracted with Medicare. Holding that a federal funding recipient such as Respondent is "on notice" that it is liable for emotional distress damages by virtue of the personal contract exception conflicts with *Barnes*. Moreover, no such personal contract exists between Petitioner and Respondent which could be used to justify such an exception and notice to Res-

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183 (1973) (breach of contract for a botched nose-job); *Stewart v. Rudner*, 84 N.W.2d 816 (1957) (breach of contract for failure to perform a C-section).

pondent. The Court should deny the Petition due to the personal contract exception's poor fit with the facts of this case.

III. THE FACTS OF *SHEELY* AND THIS CASE SUPPORT THE CONCLUSION THAT THE PERSONAL CONTRACT EXCEPTION WILL NOT APPLY.

Both *Sheely* and this case involve alleged discrimination in violation of The Rehabilitation Act. Neither case resembles any of the examples of a personal contract that Petitioner would use to justify her attempts to reverse the Fifth Circuit. *Sheely*'s determination that its defendant should have foreseen that emotional distress was a particularly likely result of its conduct should hold no sway here, as this Court can easily distinguish the two cases on their facts. In *Sheely*, the defendant's employees physically prevented Ms. Sheely from using her guide dog to assist her in accompanying her minor son at his appointment at defendant's MRI facility. *Sheely*, 505 F.3d at 1178. The facility refused to accommodate Ms. Sheely's disability based on the facility's policy regarding service animals. *Id.* at 1179-1180. Ms. Sheely's incident was not the first incident involving the defendant's service animal policy, but rather hers was the third incident within the year and the second that required the involvement of the police. *Id.* at 1180. The facts of *Sheely* were such that the Eleventh Circuit could have easily determined that the defendant MRI facility, having enforced its "no animals policy" on numerous prior occasions with negative consequences, was aware that emotional distress was particularly likely to result. Also, having met Ms. Sheely in person and having assessed her disability before flatly refusing to accommodate it, the defendant likely had an

awareness of Ms. Sheely and her mental concerns and sensibilities that is completely missing in Ms. Cummings' case.

In contrast to Ms. Sheely's interactions with the MRI facility, Ms. Cummings only interacted with Premier Rehab over the telephone. Where the *Sheely* defendant refused to accommodate Ms. Sheely, Respondent offered accommodations and auxiliary aids to Ms. Cummings and agreed to treat her, with or without an interpreter. Ms. Cummings insisted on the specific accommodation of an ASL interpreter and sought treatment elsewhere. The foregoing facts do not resemble those found in cases of personal contracts, and these same facts do not even suggest such a degree of contact that could or should acquaint Respondent with Ms. Cummings' sensibilities and mental concerns. Further these facts do not completely support the conclusion that discrimination occurred; the Court can reasonably conclude from the undisputed facts that Ms. Cummings was simply denied the accommodation of her choice.

Petitioner flatly declared that the Eleventh Circuit would have decided this case in Ms. Cummings' favor, but such declaration ignores significant differences between the fact profile of personal contract cases, the facts of *Sheely* and the facts of this case. *Sheely* and this case differ from personal contract cases in that both Ms. Sheely and Ms. Cummings are third-party beneficiaries to a funding recipient's contract with Medicare. Whereas a funeral home director might be expected to be aware of the emotional fragility of the client sitting across the table from him, there would be no similar justification to impute such knowledge to federal funding recipients such as Respondent. The

difference between the facts before this court and the facts of personal contract cases, and even the differences between the facts of this case and the facts of *Sheely*, argue in favor of the Court denying the Petition.

IV. THE FIFTH CIRCUIT CORRECTLY DECIDED THE QUESTION PRESENTED IN THE APPEAL.

A. The Fifth Circuit Correctly Relied Upon *Barnes v. Gorman* and the Common Law of Contracts to Determine That Emotional Distress Damages Were Not Available to Ms. Cummings as Such Damages Were Not Traditionally Available in Breach of Contract Actions.

The Fifth Circuit reached the correct decision in the case now before this Court. Ms. Cummings had alleged that a few phone calls with Respondent's staff caused her to suffer emotional distress, and she sought damages under The Rehabilitation Act and Affordable Care Act. The Fifth Circuit followed the Court's roadmap in *Barnes* and asked: Are Petitioner's damages "traditionally available" for breach of contract? *Barnes*, 536 U.S. at 187. Like *Barnes*, the Fifth Circuit surveyed the common law of contracts and found its answer: "Damages for emotional disturbance are not ordinarily allowed." RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a. As *Barnes* did not prescribe any further inquiry, the Fifth Circuit properly concluded that Premier Rehab was not "on notice" that it was liable for Ms. Cummings' damages for emotional distress because such damages were not traditionally recoverable in suits for breach of contract.

As she did on appeal, Petitioner urges this Court to hold that a funding recipient is on notice of not only the general rule, but exceptions to the same. She cites the "exceptional situations" of personal contracts. Though usually reserved for contracts between two parties, one of whom knows or should know of the other's sensitivities and mental concerns, Petitioner would have the Court expand the exception to include third-party beneficiaries of government spending contracts. *Barnes* didn't even consider rare exceptions to the general rule prohibiting punitive damages in contract to be worth discussing, much less as the basis to expand the definition of notice.[2] The Fifth Circuit reached the same decision with respect to emotional distress damages, emphasizing that the question was not, does some rare exception to the general rule exist, but rather, is the funding recipient on notice of its liability for the damages in question. When the court considered that the exception in question required that serious emotional disturbance be particularly likely, and this had rarely been addressed in the Fifth Circuit (and never by this Court), the court concluded that Respondent was not on notice of "such a rare and narrow exception."[3] *Cummings*, 948 F.3d at 678.

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[2] Though never discussed in *Barnes*, there is an exception to the general rule that punitive damages are not recoverable in suits for breach of contract. "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355.

[3] Petitioner's representation of this Court's approval of a funding recipient's liability for emotional distress damages is overstated. Petitioner cites four of the Court's cases for the proposition that "courts have regularly allowed victims of discrimination to seek and recover [emotional distress] damages." Petition at 14. One

B. That Petitioner Would Be Left Without "Any Available Remedy" If Her Petition Is Denied Does Not Justify an Expansion of Those Limited Circumstances Under Which a Funding Recipient Is on Notice of Its Liability for Damages Under the Rehabilitation Act and Affordable Care Act.

Petitioner further argues that denying her Petition deprives her of her "only available remedy." Petition at 27. As discussed above, the proper standard is not what remedies are available, but rather what remedies are appropriate. *Barnes*, 536 U.S. at 185; *Franklin*, 503 U.S. at 73. The conclusion to be drawn, and which the Court in *Barnes* drew, is that an available remedy (such as punitive damages) is not appropriate if it's not traditionally available in suits for breach of contract. *See Barnes*, 536 U.S. at 187. While Petitioner bemoans a categorical denial of recovery for emotional distress damages in Spending Clause cases if the Court abides by its holding in *Barnes*, Petitioner exaggerates the effect such a holding will have. *Barnes* and the Fifth Circuit's decision preserve the ability of a claimant to recover all relief traditionally available in suits

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of Petitioner's citations is to *Barnes*, discussed at length herein, which did not analyze a claimant's ability to recover emotional distress damages in the face of the general rule prohibiting same. Two other decisions, *Franklin v. Gwinnett* and *Davis v. Monroe Cty*, were decided before *Barnes* announced its rule that funding recipients were only on notice of traditionally available contract remedies. The fourth opinion, *Fry v. Napoleon*, explicitly acknowledged that it left unanswered the question of whether the plaintiff could obtain relief for emotional distress damages. Further none of these opinions even mention Petitioner's essential argument—that the personal contract exception puts a funding recipient on notice that it is liable for emotional distress damages.

in contract while ensuring that funding recipients are liable for only those remedies for which they are on notice.

Petitioner owes her lack of appropriate remedies to the tenuous nature of her claim, not to an allegedly outrageous decision by the Fifth Circuit. Ms. Cummings' limited contact with Premier Rehab gave rise to no claims for damages other than vague claims of emotional distress. She has no remedy because she arguably has no case. Petitioner's prediction that victims of sexual and racial harassment will be left with no remedy is nothing more than a scare-tactic to persuade this Court to deviate from well-settled law. The Court should not imply notice to Respondent of a remedy not traditionally available in contract just to prevent Petitioner from going home empty-handed.

CONCLUSION

Petitioner attempts to present this case to the court as a broad referendum on emotional distress damages in Spending Clause cases. The actual question presented is much narrower. The Eleventh and Fifth Circuits do not dispute the rule of *Barnes*: a funding recipient is only on notice of those remedies traditionally available in contract. The circuits do not argue over the common law rule that emotional distress damages are not available in contract. The point of contention is what effect does the existence of an uncommon exception allowing for the recovery of emotional distress damages in cases of personal contracts have on *Barnes'* notice rule. Petitioner would have this Court grant

the Petition in order to hold that the existence of an exception to the traditional contract rule, even one that seems out-of-step with the facts of the case at hand, serves as notice to Respondent that it could be liable to Petitioner for emotional distress damages. The Court should conclude that *Barnes'* focus on what is traditional and normal in contract law, rather than what is exceptional or personal, disposes of Petitioner's issue. To the extent this Court chooses to undertake a fact-intensive inquiry, the facts of the instant case bear little resemblance to the prototypical personal contract case or even *Sheely*, and thus Respondent cannot be expected to be on notice of an exception which doesn't apply to it. The Court should deny the Petition and leave intact the judgment of the Fifth Circuit affirming the District Court's dismissal of Petitioner's claims.

Respectfully submitted,

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