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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Fifth Circuit categorically barred awards of emotional-distress damages under Title VI and the other antidiscrimination laws that incorporate its remedies. In so doing, the Fifth Circuit expressly "disagree[d]" with the Eleventh Circuit's decision in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). Pet. App. 12a. It also contradicted the Department of Justice's long-held position and a settled understanding reflected in decisions from courts around the country—including four decisions from this Court alone.

Unwilling to confront that compelling case for this Court's review, Premier tries to change the subject. It begins by reciting the threshold issues on which the Fifth and Eleventh Circuits agree—which only highlights their stark disagreement on the question presented here. Premier then emphasizes trivial factual distinctions between this case and *Sheely*. But those differences played no part in the courts' conflicting decisions. The Eleventh Circuit held, as a matter of law, that the damages available for an intentional violation of Title VI include compensation for any resulting emotional distress. The Fifth Circuit adopted the opposite rule, holding that emotional-distress damages are never available, regardless of the circumstances.

This Court should resolve that square, acknowledged conflict on a recurring and important question of federal law. And Premier's defense of the Fifth Circuit's novel restriction on compensatory relief only underscores the need for this Court's review. Premier concedes, as it must, that this Court has held that the common law of contracts defines the remedies available under Title VI. But Premier offers no

principled justification for the Fifth Circuit's open rejection of the common law. And even Premier ultimately appears to flinch at the consequences of the Fifth Circuit's decision.

I. The Fifth Circuit's decision creates a square circuit split.

Premier devotes much of its brief to a futile effort to deny what the Fifth Circuit itself candidly acknowledged: The decision below squarely conflicts with the Eleventh Circuit's decision in *Sheely*.

1. Premier begins by noting that the Fifth and Eleventh Circuits agree on much of the relevant legal framework. Both courts recognize that a form of relief is available under Title VI if a funding recipient is "on notice that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (emphasis omitted); *see* BIO 3-6. And both courts recognize that a funding recipient is "on notice" of its liability for "remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187; *see* BIO 5.

At least at a high level, the Fifth and Eleventh Circuits also agree on the relevant contract law. As the Restatement explains, emotional-distress damages were not traditionally available for the breach of an ordinary commercial contract, but *were* traditionally available if "the contract or the breach [wa]s of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 (1981) (Restatement); *see* BIO 7-8.

Far from diminishing the circuit split, that agreement sharpens it. Despite asking the same question, the Fifth and Eleventh Circuits gave diametrically opposing answers. The Eleventh Circuit

followed the common law, holding that emotional-distress damages are available because "emotional distress is a 'probable result' of funding recipients' breach of their promise not to discriminate." *Sheely*, 505 F.3d at 1199 (citation omitted). The Fifth Circuit, in contrast, dismissed the common law as "only a metaphor," and instead relied on its own suppositions about funding recipients' notice. Pet. App. 10a.

2. Both this case and *Sheely* were Rehabilitation Act suits arising out of a medical provider's refusal to accommodate a disability. Pet. App. 1a-2a; *Sheely*, 505 F.3d at 1177-80. Nevertheless, Premier tries to distinguish the two cases "on their facts." BIO 11. It notes, for example, that Ms. Cummings suffered her humiliating exclusion by phone, whereas Ms. Sheely endured hers in person. BIO 11-12. But such details had no bearing on the courts' conflicting decisions.

In *Sheely*, the Eleventh Circuit grounded its holding in the nature of funding recipients' contract with the government—not the circumstances of any particular breach. It explained that "[w]hen an entity accepts funding from the federal government, it does so in exchange for a promise not to discriminate." 505 F.3d at 1204. The Eleventh Circuit concluded that such a promise satisfies the traditional common-law standard for emotional-distress damages because "emotional distress is a predictable, and thus foreseeable, consequence of discrimination." *Id.* at 1199. And it therefore held, as a matter of law, that a funding recipient "cannot claim to lack fair notice that it may be liable for emotional damages when it intentionally breaches [its] promise" to refrain from discriminating. *Id.* at 1204.

Nothing about that holding depended on "[t]he facts of *Sheely*." BIO 11. Indeed, the Eleventh Circuit

said not one word about those facts in its fifteen-page analysis of the question presented. 505 F.3d at 1190-1204. Instead, it adopted a categorical legal rule: "[E]motional-distress damages are available to make whole the victims of violations of § 504 of the Rehabilitation Act"—and thus Title VI and the other statutes that incorporate its remedies. *Id.* at 1204.

That is exactly how *Sheely* has been understood. Many district courts inside and outside the Eleventh Circuit have applied *Sheely* or adopted its holding that emotional-distress damages are available under Title VI and related statutes. None of those decisions suggested that the availability of compensation for emotional distress depended in any way on the particular manner in which a funding recipient's discrimination inflicted that harm.[1]

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[1] *See, e.g.*, *Vaughn v. Jacksonville State Univ.*, 2015 WL 4507933, at *6 (N.D. Ala. July 24, 2015); *Toth v. Barstow Unified Sch. Dist.*, 2014 WL 7339210, at *4 (C.D. Cal. Dec. 22, 2014); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1115 n.5 (N.D. Cal. 2013); *Luciano v. E. Cent. Bd. of Coop. Educ. Servs.*, 885 F. Supp. 2d 1063, 1075 (D. Colo. 2012); *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1327 (M.D. Fla. 2018); *Lewellyn v. Sarasota Cty. Sch. Bd.*, 2009 WL 1515737, at *7 (M.D. Fla. June 1, 2009); *Fuller v. Wellington Reg'l Med. Ctr., Inc.*, 2008 WL 11333270, at *4 (S.D. Fla. Feb. 22, 2008); *Wiles v. Dep't of Educ.*, 2007 WL 9710792, at *7 (D. Haw. Nov. 13, 2007); *Reed v. Illinois*, 2016 WL 2622312, at *4-5 (N.D. Ill. May 9, 2016); *Roohbakhsh v. Bd. of Trs. of Neb. State Colls.*, 409 F. Supp. 3d 719, 735 (D. Neb. 2019); *K.G. v. Santa Fe Pub. Sch. Dist.*, 2014 WL 12785160, at *21 (D.N.M. Nov. 17, 2014); *Stamm v. N.Y.C. Transit Auth.*, 2013 WL 244793, at *4-7 (E.D.N.Y. Jan. 22, 2013); *Beardsley v. City of N. Las Vegas*, 2007 WL 9728715, at *7 (D. Nev. Nov. 7, 2007); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 383-84 (W.D. Pa. 2008); *Carnell*

3. Like the Eleventh Circuit, the Fifth Circuit framed the question presented as "whether emotional distress damages are available under the [Rehabilitation Act] and the [Affordable Care Act]." Pet. App. 4a. And it "h[e]ld," as a categorical matter, "that emotional distress damages are unavailable for a funding recipient's 'breach'" of those statutes. *Id.* 11a; *see id.* 14a. Nothing about that holding turned on the particular facts of this case—indeed, like the Eleventh Circuit, the Fifth Circuit did not even mention the facts in its analysis. *Id.* 4a-14a.

Consistent with that holding, courts in the Fifth Circuit have already recognized that the decision below adopted a categorical rule that "emotional distress damages [a]re not available," regardless of the circumstances. *King v. Our Lady of the Lake Hosp., Inc.*, 455 F. Supp. 3d 249, 254 (M.D. La. 2020); *see, e.g.*, *Lockwood v. Our Lady of the Lake Hosp., Inc.*, 2020 WL 3244121, at *1 (M.D. La. June 15, 2020).

II. The Fifth Circuit's decision upsets a settled understanding on a recurring and important question of federal law.

The petition demonstrated that the Fifth Circuit's decision not only created a square split with the Eleventh Circuit, but also upset a broader understanding about the availability of emotional-distress damages. Nearly every district court that has considered the issue has agreed with the Eleventh Circuit. Pet. 13-14 & n.3. Many other courts have simply presumed that emotional-distress damages

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Constr. Corp. v. Danville Redevelopment & Hous. Auth., 2011 WL 1655810, at *8-9 (W.D. Va. May 3, 2011).

are available—indeed, this Court has done so four times. Pet. 14-15. And the Department of Justice, which is responsible for enforcing Title VI, has taken the same position for decades. Pet. 17 & n.4. Premier disputes almost none of this.[2]

Instead, Premier notes that this Court's decisions allowing plaintiffs to seek and recover emotional-distress damages did not squarely address the question presented here. BIO 14-15 n.3. But the petition did not claim otherwise. The point is simply that the availability of emotional-distress damages has been so uncontroversial that this Court has repeatedly taken it for granted.

Nor does Premier deny the importance of this issue. That is no surprise. The answer to the question presented defines the relief available under five oft-litigated antidiscrimination laws: Title VI, Title IX, the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Affordable Care Act. Pet. 15-16. This Court should not tolerate a circuit split on a question of such cross-cutting importance to the Nation's antidiscrimination guarantees.

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[2] Premier asserts without citation that the Court's decision in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), "explicitly acknowledged that it left unanswered the question of whether the plaintiff could obtain relief for emotional distress." BIO 15 n.2. The Court did no such thing. The question it reserved was whether certain *other* plaintiffs seeking "money damages for emotional distress" under the Rehabilitation Act must exhaust the administrative procedures in the Individuals with Disabilities Education Act. *Fry*, 137 S. Ct. at 752 n.4. The very premise of that question—and, indeed, of *Fry* itself—was that the Rehabilitation Act authorizes "money damages for emotional distress." *Id.*; *see id.* at 752.

III. The Fifth Circuit's decision is wrong.

The petition showed that the Fifth Circuit's novel limit on relief contradicts this Court's decisions and denies many victims of discrimination any remedy at all. Pet. 18-29. Premier's response only reinforces that conclusion. Indeed, even Premier ultimately blinks at the consequences of the Fifth Circuit's categorical bar on emotional-distress damages.

1. The common law authorized an award of emotional-distress damages for the breach of a contract protecting personal or dignitary interests, where the nature of the contract made emotional distress "a particularly likely result" of a breach. Restatement § 353. As the Eleventh Circuit explained, a promise to refrain from race, sex, or disability discrimination obviously satisfies that standard. *Sheely*, 505 F.3d at 1199-1202. Even the Fifth Circuit did not disagree. Premier, though, asserts that it had "no reason to foresee that emotional distress would be a particularly likely outcome" because it "was not acquainted with Ms. Cummings at the time it contracted with Medicare." BIO 10.

That misses the point. When Premier "contracted with Medicare," BIO 10, it promised to refrain from intentional race, sex, or disability discrimination. It did not need to know the "sensibilities and mental concerns" of specific potential victims, *id.*, to realize that a breach of that promise was likely to cause emotional distress. As the petition showed, invidious discrimination inflicts a "profound personal humiliation." *Powers v. Ohio*, 499 U.S. 400, 413 (1991); *see* Pet. 22. Both "common sense" and "case law" make it abundantly clear that "emotional distress is a predictable, and thus foreseeable, consequence of discrimination." *Sheely*, 505 F.3d at 1199.

Premier similarly errs in asserting that its promise to refrain from discrimination differs from the contracts that supported awards of emotional-distress damages at common law because it had no relationship with Ms. Cummings before its discriminatory act. In fact, the "[c]ommon examples" of contracts that allowed emotional-distress damages included "contracts of carriers and innkeepers with passengers and guests." Restatement § 353 cmt. a. "[P]ractically all" common-law courts awarded "damages for mental distress and humiliation" in these cases—and extended the same rule to cases involving exclusion from other "places of public resort or entertainment." Charles T. McCormick, *Handbook on the Law of Damages* § 145, at 593 (1935). In an example of particular relevance here, a guest excluded from a hotel restaurant because of his race was allowed to recover compensation for the resulting emotional distress. *Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312, 316 (N.Y. Sup. Ct. 1942); *see, e.g.*, *Woodward v. Tex. & P. R. Co.*, 86 S.W.2d 38, 39 (Tex. 1935).

Innkeepers, common carriers, and places of public accommodation were not liable for emotional-distress damages because they knew specific guests' "sensibilities and mental concerns," BIO 10—often, they did not. Instead, the common law allowed emotional-distress damages in those cases because the contracts protected "interests of *personality*" rather than purely economic matters. McCormick, *supra*, § 145, at 593. So too with a promise to refrain from discrimination.

2. Unlike Premier, the Fifth Circuit did not deny the reality that emotional distress is a particularly likely result of race, sex, or disability discrimination. Instead, the Fifth Circuit held that it was free to

ignore the contract-law principle allowing emotional-distress damages because it is an "exception." Pet. App. 9a. Premier recapitulates argument, likewise asserting that courts applying this Court's decision in *Barnes* are free to disregard "exceptions" to general contract-law rules. BIO 13-14. But as the petition explained, *Barnes* forecloses that a la carte approach to the common law by directing that contract-law principles determine "the *scope* of damages remedies" under Title VI. 536 U.S. at 187.

At common law, for example, an injunction was available for a breach of contract only if damages were inadequate. Restatement § 359. Despite that exceptional status, *Barnes* made clear that Title VI authorizes "injunction[s]." 536 U.S. at 187. Similarly, the general common-law rule was that only the parties to a contract could enforce it; suits by third-party beneficiaries were the exception. Restatement § 302. But as *Barnes* explained, the whole premise of allowing suits by victims of discrimination under Title VI is that a funding recipient "may be held liable to third-party beneficiaries." 536 U.S. at 187. Those examples further confirm that a contract-law remedy qualifies as "traditionally available" under *Barnes* even if it can be framed as an exception. The Fifth Circuit thus erred in asserting the authority to pick and choose among common-law rules—especially because courts would have no principled basis for making such choices.

3. Finally, the petition explained that the Fifth Circuit's rule would deny any remedy to many victims of discrimination—including the student denied the use of her service dog in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), and the students who suffered sexual harassment and assault

in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Pet. 27-29.

Premier's response is puzzling. It suggests that Ms. Cummings's case is different from those cases because her claim is "tenuous." BIO 16. But neither the district court nor the Fifth Circuit expressed any doubt that Ms. Cummings's complaint stated a valid claim for a violation of the Rehabilitation Act and the Affordable Care Act and plausibly alleged that she suffered emotional distress as a result. Instead, the courts below relied solely on their holding that emotional-distress damages are categorically barred. Pet. App. 14a, 24a-25a.

Premier also refuses to face up to the necessary implications of that holding. Premier tries to set to the side the question whether "victims of sexual and racial harassment" will be able to recover for the resulting emotional distress. BIO 16. But there can be no doubt that the Fifth Circuit's categorical holding forecloses that possibility: The Rehabilitation Act and the Affordable Care Act expressly incorporate Title VI's remedies, and the relief available under those statutes (and Title IX) is thus "coextensive with the remedies available in a private cause of action brought under Title VI." *Barnes*, 536 U.S. at 185; *see* Pet. 4-5, 15-16. And the fact that even Premier cannot bring itself to defend the consequences of the Fifth Circuit's rule provides yet more indication that this Court should grant certiorari and reverse.

CONCLUSION

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

Respectfully submitted,

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