No. 20-219

In the Supreme Court of the United States

JANE CUMMINGS, PETITIONER

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an award of compensatory damages against a recipient of federal financial assistance under Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d *et seq.*), or other statutes that incorporate Title VI's remedies may include compensation for emotional distress.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Title VI of the Civil Rights Act of 1964 (Title VI), Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d *et seq.*), prohibits "any program or activity receiving Federal financial assistance" from discriminating "on the ground of race, color, or national origin." 42 U.S.C. 2000d. This Court has recognized a private right of action to enforce Title VI against recipients of federal financial assistance, see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696 (1979), and has observed that money damages are available in such an action, see *Barnes* v. *Gorman*, 536 U.S. 181, 185-189 (2002).

A number of other statutes that prohibit recipients of federal financial assistance from engaging in discrimination incorporate Title VI's remedies—including its private cause of action for damages. For example, Title IX of the Education Amendments of 1972 (Title IX), Pub. L. No. 92-318, 86 Stat. 373 (20 U.S.C. 1681 *et seq.*), prohibits sex discrimination in federally funded education programs, 20 U.S.C. 1681(a), and is patterned after Title VI. *Cannon*, 441 U.S. at 694-696 ("Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class. * * * The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been."). In *Cannon*, this Court confirmed that, like Title VI, Title IX created a private cause of action for victims of discrimination to sue recipients of federal financial assistance. *Id.* at 703. And in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court recognized that, like Title VI, the right of action under Title IX supports a claim for damages. *Id.* at 76.

Likewise, Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, 87 Stat. 394 (29 U.S.C. 794), prohibits discrimination against an individual "solely by reason of her or his disability" in "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). In 1978, Congress amended the Rehabilitation Act to expressly incorporate "[t]he remedies, procedures, and rights set forth in [T]itle VI" for violations of Section 504. 29 U.S.C. 794a(a)(2); see *Barnes*, 536 U.S. at 185.

Section 1557 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, Tit. I, Subtit. G, 124 Stat. 260, additionally bars federally funded health

care programs from discriminating on the basis of any of the grounds prohibited in Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* 42 U.S.C. 18116(a). In adopting the ACA, Congress again incorporated "[t]he enforcement mechanisms provided for and available under * * * [T]itle VI," along with those in Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. *Ibid.*

In addition, Title II of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 337, prohibits discrimination based on disability by public entities, regardless of whether they are recipients of federal financial assistance. Section 202 of Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. In enacting this prohibition, Congress again incorporated Title VI's private right of action and remedies for a violation. See 42 U.S.C. 12133; *Barnes*, 536 U.S. at 185; *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004).

2. a. Petitioner, who has been deaf since birth and is legally blind, primarily communicates in American Sign Language (ASL). Pet. App. 2a. Respondent is a physical therapy provider that receives federal funding. *Id.* at 1a. In 2016 and 2017, petitioner contacted respondent three times seeking physical therapy services and requesting that respondent provide an ASL interpreter. *Id.* at 2a. Respondent refused to provide an interpreter. *Ibid.* Accordingly, petitioner sought and received treatment elsewhere. *Ibid.*

b. In 2018, petitioner sued respondent in the Northern District of Texas, alleging, among other things, that respondent had discriminated against her on the basis of her disability in violation of Section 504 of the Rehabilitation Act and Section 1557 of the ACA, and seeking compensatory damages. Pet. App. 3a, 15a-17a, 25a.

The district court granted respondent's motion to dismiss the case. Pet. App. 15a-27a. Observing that the only compensatory damages that petitioner alleged were damages for "humiliation, frustration, and emotional distress," *id.* at 16a (citation omitted), the court held that such emotional distress damages are not available under Section 504 of the Rehabilitation Act or Section 1557 of the ACA, *id.* at 23a-25a. In reaching that conclusion, the court relied on *Barnes*, which held that punitive damages may not be awarded in private suits under Section 202 of the ADA and Section 504 of the Rehabilitation Act, 536 U.S. at 189. Pet. App. 24a. The court reasoned that emotional distress damages are "like punitive damages" because they "do not compensate plaintiffs for their pecuniary losses, but instead punish defendants for the outrageousness of their conduct," and because such damages are "unforeseeable at the time recipients accept federal funds and expose them to 'unlimited liability.'" *Ibid.* (citation omitted).

c. The court of appeals affirmed. Pet. App. 1a-14a. The court began its analysis by observing that Congress adopted the relevant portions of the Rehabilitation Act and the ACA pursuant to its authority under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1. Pet. App. 6a. The court further observed that this Court has analyzed whether a federal funding recipient may be held liable for money damages by analogy to contract law. *Ibid.* The court of appeals emphasized, however, "that not all

contract-law principles apply to Spending Clause legislation" and stated that "the fundamental question in evaluating damages" in this context "is whether 'the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.'" *Id.* at 7a-8a (quoting *Barnes*, 536 U.S. at 187).

After setting forth that framework, the court of appeals held that emotional distress damages are not an available remedy under Section 504 of the Rehabilitation Act or Section 1557 of the ACA. Pet. App. 8a-11a. The court stated that such damages "are traditionally unavailable in breach-of-contract actions." *Id.* at 9a. The court acknowledged an exception "permit[ting] a plaintiff to recover emotional distress damages when the contract or breach is such that the plaintiff's 'serious emotional disturbance was a[] particularly likely result.'" *Ibid.* (citation and emphasis omitted). But the court reasoned that "funding recipients are unlikely to be aware that such an exception exists, let alone think that they might be liable under it." *Id.* at 10a. The court accordingly concluded that "funding recipients are not 'on notice' that they might be liable" for emotional distress damages. *Ibid.* (observing that *Barnes* "held that funding recipients were not 'on notice' that they might be liable for punitive damages" even though contract law contains "exceptions for awarding punitive damages for breach of contract").

The court of appeals acknowledged that its decision conflicts with the Eleventh Circuit's decision in *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173 (2007), which held that emotional distress damages are available to remedy a violation of Section 504 of the Rehabilitation Act. Pet. App. 11a-14a. The court of appeals "dis-

agree[d] with *Sheely*'s reasoning" that funding recipients have fair notice that they may be subject to emotional distress damages because "'[a]s a matter of both common sense and case law, emotional distress is a predictable, and thus *foreseeable*, consequence of [intentional] discrimination.'" *Id.* at 11a-12a (quoting *Sheely*, 505 F.3d at 1199) (brackets in original).

d. The court of appeals denied rehearing en banc. Pet. App. 29a-30a.

DISCUSSION

The court of appeals erred in holding that emotional distress damages are categorically unavailable for violations of Section 504 of the Rehabilitation Act and Section 1557 of the ACA and, by extension, Title VI and the other antidiscrimination statutes that incorporate its remedies. The breach of a contract not to discriminate is likely to cause serious emotional distress. Thus, under this Court's decisions, which refer to contract-law remedies when determining the scope of damages under Title VI and related statutes, emotional distress damages are available in cases like this one—just as they would be in similar common law breach-of-contract cases. In holding otherwise, the court of appeals misunderstood and misapplied the framework that this Court has repeatedly employed when interpreting Spending Clause legislation.

The court of appeals' decision warrants this Court's review. The decision below directly conflicts with the decision of another court of appeals, and it implicates an important and recurring question of federal law. If left standing, the court of appeals' decision will undermine the ability of both private parties and the federal government to enforce the antidiscrimination protections in Title VI, Title IX, Section 504 of the Rehabilitation Act,

Section 202 of the ADA, and Section 1557 of ACA. And this case provides a suitable vehicle for this Court's review. The petition for a writ of certiorari therefore should be granted.

A. The Decision Below Is Incorrect

1. In a series of decisions, this Court has considered the nature and scope of the remedies available for violations of Title VI and the statutes that incorporate its remedies. Two decisions are of particular importance here. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that Title IX provides a "damages remedy" for victims of intentional discrimination. *Id.* at 76; see *id.* at 74-76. And in *Barnes* v. *Gorman*, 536 U.S. 181 (2002), the Court held that "compensatory damages"—but not punitive damages—are available to remedy violations of Title VI and its analogues. *Id.* at 187; see *id.* at 189.

In reaching these conclusions, the Court provided a framework for analyzing the available remedies under Title VI and other related antidiscrimination provisions. As the Court explained in *Barnes*, these statutes generally were adopted pursuant to "Congress's power under the Spending Clause to place conditions on the grant of federal funds." 536 U.S. at 185-186 (citation omitted). The Court has "repeatedly characterized [such] Spending Clause legislation as 'much in the nature of a *contract:* in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Id.* at 186 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)) (second set of brackets in original); see *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). While the Court has "been careful not to imply that *all* contract-law rules apply to Spending Clause legislation," it has endorsed the

contract-law analogy "in determining the *scope* of damages remedies." *Barnes*, 536 U.S. at 186-187; see *Gebser*, 524 U.S. at 287. The Court has emphasized that "[o]ne of these implications" of the contract-law analogy "is that 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." *Barnes*, 536 U.S. at 187 (quoting *Franklin*, 503 U.S. at 73). "A funding recipient is generally on notice that it is subject * * * to those remedies traditionally available in suits for breach of contract." *Ibid.*

The Court has recognized an additional interpretive principle that applies when determining the existence and scope of Title VI's damages remedy: the "'well settled' rule" articulated in *Bell* v. *Hood*, 327 U.S. 678 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Barnes*, 536 U.S. at 189 (quoting *Bell*, 327 U.S. at 684). As the *Barnes* Court explained, "[w]hen a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary * * * for the loss caused by that failure." *Ibid.*; see *Franklin*, 503 U.S. at 66-76 (applying *Bell*'s "longstanding rule").

This framework dictated the results in *Franklin* and *Barnes*. Applying the *Bell* rule, the Court in *Franklin* concluded that because a right of action exists to enforce Title IX, there was a presumption in favor of a compensatory damages remedy. 503 U.S. at 66-76. *Franklin* also found that in cases in which a funding recipient

engages in intentional discrimination, an award of compensatory damages does not create a notice problem under the Spending Clause. *Id.* at 74-75. *Barnes* in turn declined to authorize punitive damages in such cases, finding that, "unlike compensatory damages," punitive damages "are generally not available for breach of contract" and funding recipients would likely not have "accepted the funding if punitive damages liability was a required condition." 536 U.S. at 187-188 (emphasis omitted). *Barnes* explained that its conclusion did not contradict the *Bell* rule requiring relief that "make[s] good the wrong done." *Id.* at 189 (citation omitted). Because "th[e] wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary" and "[p]unitive damages are not compensatory," the Court found that such damages are "not embraced within the rule described in *Bell*." *Ibid.*

2. The court of appeals' conclusion in this case that emotional distress damages are not available under Section 504 of the Rehabilitation Act or Section 1557 of the ACA is incorrect. That error stems from the court's failure to properly consider the principles laid out in *Franklin* and *Barnes* when determining whether emotional distress damages are "traditionally available in suits for breach of contract" and thus a permissible part of a compensatory damages award under Title VI and its analogues. *Barnes*, 536 U.S. at 187.

a. As a general matter, "[e]very breach of contract gives the injured party a right to damages against the party in breach." Restatement (Second) of Contracts § 346, cmt. a (1981); see 3 Samuel Williston, *The Law of Contracts* § 1338, at 2392 (1920) (*Law of Contracts*) ("[T]he general purpose of the law is, and should be, to give compensation[]—that is, to put the plaintiff in as

good a position as he would have been in had the defendant kept his contract."). While emotional distress damages "are not ordinarily allowed" for breach of contract, courts have long recognized an exception and permitted emotional distress damages if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 & cmt. a; see E. Allan Farnsworth, *Contracts* § 12.17, at 895 (1982) (explaining that an exception to the rule barring emotional distress damages "ha[s] commonly been made" when the breach "was particularly likely to result in serious emotional disturbance"); see also 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 45, at 59-63 (8th ed. 1891) (discussing cases related to this exception); *Law of Contracts* § 1340, at 2396 (noting the existence of this exception).

The recognition that the award of emotional distress damages is permitted in such cases is longstanding and widespread. Indeed, courts have approved emotional distress damages as a remedy for certain breaches of contract for more than a century. See, *e.g.*, *Gregory & Swapp, PLLC* v. *Kranendonk*, 424 P.3d 897, 906-907 (Utah 2018); *Miranda* v. *Said*, 836 N.W.2d 8, 14-24 (Iowa 2013); *University of S. Miss.* v. *Williams*, 891 So. 2d 160, 172-173 (Miss. 2004) (en banc); *Kishmarton* v. *William Bailey Constr., Inc.*, 754 N.E.2d 785, 788 (Ohio 2001); *Erlich* v. *Menezes*, 981 P.2d 978, 987-988 (Cal. 1999); *Francis* v. *Lee Enters., Inc.*, 971 P.2d 707, 713-715 (Haw. 1999); *Decker* v. *Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 448 (Colo. 1997); *Sexton* v. *St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 962 (Ala. 1995); *Guerin* v. *New Hampshire Catholic Charities, Inc.*, 418 A.2d 224, 227-228 (N.H. 1980); *Sullivan* v. *O'Connor*,

296 N.E.2d 183, 188-190 (Mass. 1973); *Stewart* v. *Rudner*, 84 N.W.2d 816, 823-825 (Mich. 1957); *Lamm* v. *Shingleton*, 55 S.E.2d 810, 812-814 (N.C. 1949); *Renihan* v. *Wright*, 25 N.E. 822, 825-826 (Ind. 1890); *Wadsworth* v. *Western Union Tel. Co.*, 8 S.W. 574, 575-579 (Tenn. 1888).

In determining the types of cases in which serious emotional disturbance is a particularly likely result of a breach of contract, courts have generally concluded that the award of emotional distress damages is appropriate when a contract protects personal or dignitary interests, rather than purely economic ones. See *Law of Contracts* § 1340, at 2396 (explaining that "where other than pecuniary benefits are contracted for such damages have been allowed"). Notably, courts have routinely permitted emotional distress damages for breaches of "contracts of carriers and innkeepers with passengers and guests." Restatement (Second) of Contracts § 35 cmt. a; see Samuel Williston & George J. Thompson, *Selections from Williston's Treatise on the Law of Contracts* § 1340A, at 835 (1938) (listing "[u]njustifiable expulsion or mistreatment of passengers by carriers, or of guests by innkeepers" as "illustrations" of breach-of-contract cases in which courts award emotional distress damages). Courts in those cases have recognized that the contracts at issue protect "personal[]" interests—rather than purely economic interests—and thus give rise to a duty not to cause dignitary harm and emotional distress that, when violated, can be remedied by "damages for mental distress and humiliation." Charles T. McCormick, *Handbook on the Law of Damages* § 145, at 593 (1935).

For example, the Tennessee Supreme Court found that a common carrier's "contract to carry passengers

is not one of mere toleration and duty to transport the passenger on its cars, but it also includes the obligation on the part of the carrier to guarant[ee] to its passengers respectful and courteous treatment." *Knoxville Traction Co.* v. *Lane*, 53 S.W. 557, 559 (1899). On that basis, the court upheld a verdict awarding damages to a passenger who had been verbally harassed by the operator of a streetcar, finding that she was entitled to "recover all the damages she may show herself to have sustained[,] * * * including injuries to her feelings and sensibilities." *Id.* at 560. Similarly, the New York Court of Appeals explained that an "essential part" of the contract between guest and innkeeper is the right of the guest to "insist upon * * * respectful and decent treatment." *De Wolf* v. *Ford*, 86 N.E. 527, 530 (1908). When this duty is breached, "[t]he measure of liability * * * will be purely compensatory" and will include relief for "injury to [the plaintiff's] feelings and such personal humiliation as she may have suffered." *Id.* at 531.

b. Given this longstanding contract rule, emotional distress damages are available to remedy intentional discrimination that violates Title VI and its analogues. Because emotional distress damages are "traditionally available" in certain "suits for breach of contract," they are relevant to determining "the scope of damages remedies" under these provisions. *Barnes*, 536 U.S. at 187 (emphasis omitted). The breach of a contract not to discriminate falls squarely within the circumstances where emotional distress damages are an available remedy because both the contract and the breach are "of such a kind that serious emotional disturbance [is] a particularly likely result" of the breach. Restatement (Second) of Contracts § 353 cmt. a. As with cases involving inn-

keepers and common carriers, a service provider's discriminatory conduct is particularly likely to result in humiliation and emotional harm. Victims of intentional discrimination "suffer[] a profound personal humiliation." *Powers* v. *Ohio*, 499 U.S. 400, 413-414 (1991); see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 413 (1982) (Marshall, J., dissenting) ("Exposure to embarrassment, humiliation, and the denial of basic respect [caused by racial discrimination] can and does cause psychological and physiological trauma to its victims.") (citation omitted). As this Court has recognized, the "stigmatizing injury often caused by racial discrimination," although it is a "noneconomic injury," "is one of the most serious consequences of discriminatory * * * action." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984).

Indeed, in common law breach-of-contract cases, courts have awarded emotional distress damages where the breach involved intentional discrimination. For example, in *Aaron* v. *Ward*, 96 N.E. 736 (N.Y. 1911), the New York Court of Appeals affirmed the award of emotional distress damages for breach of contract where a ticketed bathhouse guest was denied access and referred to by a derogatory term for a person of Jewish ancestry. *Id.* at 738; see *Aaron* v. *Ward*, 121 N.Y.S. 673, 673-674 (N.Y. App. Div. 1910), aff'd, 96 N.E. 736 (N.Y. 1911) (describing the facts of the case). The court noted that a state civil-rights statute prohibited such discrimination and found that emotional distress damages are recoverable in such cases "not merely because the defendants are bound to give the plaintiffs accommodation, but also because of the indignity suffered by a public expulsion." 96 N.E. at 738. Other decisions have en-

dorsed the award of emotional distress damages in similar circumstances. See, *e.g.*, *Odom* v. *East Ave. Corp.*, 178 Misc. 363 (N.Y. Sup. Ct.), aff'd, 264 A.D. 985 (N.Y. App. Div. 1942) (denying motion to dismiss because the plaintiffs, a group of African-American hotel guests who were denied service at the hotel restaurant because of their race, had stated a claim for mental distress damages from the denial of service).

The remaining considerations this Court looks to in determining the available remedies for violations of Spending Clause legislation likewise support permitting emotional distress damages here. Because emotional distress damages are "traditionally available in suits for breach of contract[s]" similar to those that federal funding recipients enter into when agreeing not to discriminate—in which serious emotional disturbance is a particularly likely result of breach—"[a] funding recipient is generally on notice" that emotional distress damages may be awarded against it. *Barnes*, 536 U.S. at 187 (emphasis omitted). And unlike punitive damages, which are neither intended to compensate nor limited to the actual harm suffered by the victim, see *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001), emotional distress damages are compensatory in nature and designed only to make plaintiffs whole for emotional harms. Thus, under *Bell*'s general rule that "federal courts may use any available remedy to make good the wrong done," 327 U.S. at 684, emotional distress damages are permissible to remedy intentional discrimination committed in violation of conditions of Spending Clause legislation because such damages "*compensate[]* * * * a third-party beneficiary * * * for the loss caused by that failure," *Barnes*, 536 U.S. at 189.

c. i. The court of appeals' conclusion that emotional distress damages are nevertheless unavailable under Title VI and its analogues reflects several errors. As an initial matter, the court misunderstood the role that notice plays when determining the scope of the damages remedy. Instead of applying the framework articulated in this Court's cases—considering whether emotional distress damages are "traditionally available in suits for breach of contract" and inferring notice from such availability, *Barnes*, 536 U.S. at 187—the court of appeals turned the notice requirement into a freestanding inquiry focused on whether "funding recipients are []likely to be aware" of the contours of a common law rule or "think that they might be liable under it." Pet. App. 10a. But this Court has never considered the likelihood of *actual* notice when determining the scope of appropriate relief in this context. Instead, because the funding recipient effectively enters into a contract with the government, contract principles provide the relevant framework, and notice of background contract principles is presumed. See *Barnes*, 536 U.S. at 187. As relevant here, black-letter contract-law principles provide that (1) the relief granted should put the plaintiff in the position she would have been in had the defendant not breached the contract, and (2) in cases involving breach of a contract that protects nonpecuniary interests, emotional distress damages play an important role in making the plaintiff whole. The longstanding and prevalent recognition that emotional distress damages may be awarded to remedy breaches of contracts like those here is all that is needed under this Court's notice requirement.

The court of appeals likewise erred in ignoring the established rule that emotional distress damages may

be available to remedy a breach of contract because those cases involve "exceptions to the general prohibition against emotional distress damages." Pet. App. 10a. The court reasoned that although "contract law also has exceptions for awarding punitive damages for breach of contract," *Barnes* found punitive damages unavailable. *Id.* at 10a-11a. But the punitive damages exception that the court referenced merely provides that punitive damages are available when the breach of contract is "*also* a tort for which punitive damages are recoverable." Restatement (Second) of Contracts § 355 & cmt. a (emphasis added). Because a "complaint may not show whether the plaintiff intends his case to be regarded as one in contract or one in tort," the general rule against punitive damages in breach-of-contract cases "does not preclude an award of punitive damages in such a case if such an award would be proper under the law of torts." *Id.* § 355 cmt. b. The exception accordingly does not apply in a case solely involving a breach-of-contract claim; instead, punitive damages are available only when a contract claim may equally be pleaded and categorized as a tort claim—in which punitive damages are traditionally available to punish certain types of actions by the defendant. See Restatement (Second) of Torts § 908 (1979).

Because *Barnes* instructs that the scope of damages for violations of Spending Clause antidiscrimination provisions is determined by analogy to contract law, the availability of punitive damages when the conduct constituting the breach is also a tort does not illuminate the remedial inquiry. The contract-law analogy dictates a different outcome here, however, because the exception permitting emotional distress damages for breaches of certain types of contracts is grounded in contract law

itself, and does not require reliance on tort claims or theories. See pp. 9-14, *supra*.[*]

ii. Respondent's defense of the court of appeals' judgment is likewise flawed. Respondent initially contends (Br. in Opp. 8-11) that breach-of-contract cases awarding emotional distress damages assume that the common carriers or innkeepers have personal knowledge regarding their passengers or guests—placing the defendants on notice that their conduct may be injurious. But a recipient of federal funds who intentionally discriminates on the basis of protected characteristics likewise should foresee that its conduct may be injurious; indeed, that is what makes "serious emotional disturbance * * * a 'particularly likely result.'" Pet. App. 9a (citation and emphasis omitted). In any event, *Barnes*'s contract-law analogy does not turn on the knowledge that a particular recipient of federal financial assistance has regarding a particular individual seeking services. Rather, because the recipient promises not to engage in discrimination in exchange for receiving federal financial assistance, the recipient's intentional discrimination breaches that contract and requires the payment of all appropriate damages under contract law.

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[*] Courts have separately recognized that emotional distress damages may be awarded for breach of contract where the breach "accompanies a bodily injury" because "[i]n such cases the action may nearly always be regarded as one in tort." Restatement (Second) of Contracts § 353, cmt. a; see Pet. App. 9a. This exception, which is similar to the punitive damages exception, is not instructive when determining the contours of the damages remedy for violations of Title VI and related statutes because it is based on tort-law principles rather than contract law and so does not bear on the scope of remedies available under Spending Clause legislation.

Respondent further suggests (Br. in Opp. 12-13) that a notice problem exists because the victims of intentional discrimination are not parties to the contract between the government and the funding recipient and instead are analogous to third-party beneficiaries of such contracts. That argument misunderstands the appropriate analysis when the victim of discrimination brings suit for violations of Spending Clause legislation. In *Barnes*, this Court recognized that a recipient of federal financial assistance "may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute" and confirmed that "the contract-law analogy * * * defin[es] the scope of conduct" for which funding recipients may be held liable to third parties. 536 U.S. at 186-187. The Court has never suggested that because a damages award will be paid to the victim of discriminatory conduct—rather than to the government—a recipient of federal financial assistance will be subject to more limited liability under the contract-law analogy. Cf. *ibid.* Nor would respondent's approach accord with normal contract-law principles, which generally do not provide for different or more constricted remedies when an intended third-party beneficiary sues for breach of contract. Cf. Restatement (Second) of Contracts § 307 & cmt. a; *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship* v. *JPMorgan Chase Bank*, 671 F.3d 1027, 1033 (9th Cir. 2012).

B. The Decision Below Conflicts With The Decision Of Another Court Of Appeals

1. As the court of appeals recognized, Pet. App. 11a-14a, its decision squarely conflicts with the Eleventh Circuit's decision in *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173 (2007). In *Sheely*, a medical facility refused to allow a parent who was blind to bring her

guide dog past a main waiting area, which meant that the parent was unable to further accompany her minor child during his examination. *Id.* at 1177-1180. The parent filed suit and sought compensation for emotional distress under Section 504 of the Rehabilitation Act. *Id.* at 1180. In contrast to the court of appeals below, the Eleventh Circuit held that emotional distress damages are available under Title VI and statutes that incorporate its remedies, such as Section 504 of the Rehabilitation Act. *Id.* at 1190-1204.

In reaching that conclusion, the Eleventh Circuit rejected the argument that recipients of federal financial assistance are not on notice of their potential liability for emotional distress damages. Instead, the court observed that "it [is] fairly obvious—and case law supports the conclusion—that a frequent consequence of discrimination is that the victim will suffer emotional distress" and that recipients of federal financial assistance "have fair notice that, in breaching, they may be subject to liability for emotional damages." *Sheely*, 505 F.3d at 1198-1199. While *Sheely* noted that emotional distress damages are not generally available for breach of ordinary commercial contracts, it relied on the well-established exception that permits such damages where the nature of the contract or breach is of a kind likely to result in a serious emotional disturbance. *Id.* at 1200-1202. And *Sheely* rejected the argument that emotional distress damages are similar to punitive damages and concluded that the general rule set forth in *Bell* supported the conclusion that emotional distress damages are available to compensate for intentional discrimination. *Id.* at 1203-1204.

Respondent's effort (Br. in Opp. 11-13) to distinguish *Sheely* on its facts is unavailing. Respondent merely reiterates the flawed claim that a defendant's personal knowledge regarding a plaintiff is relevant to the notice inquiry. See p. 17, *supra*. Respondent does not—and cannot—dispute that *Sheely*'s holding that emotional distress damages are available to remedy violations of nondiscrimination statutes directly conflicts with the holding of the court of appeals below.

2. The court of appeals' conclusion that emotional distress damages are categorically unavailable to remedy intentional discrimination further conflicts with the results in other cases and with Department of Justice guidance. The decision below departs from the ordinary practice of the federal courts, which routinely award or assume the availability of emotional distress damages in a wide variety of cases involving the antidiscrimination provisions in Title VI and related statutes. See Pet. 13-15 & n.3 (collecting cases). Indeed, while this Court has not directly addressed the availability of compensation for emotional distress under the relevant antidiscrimination provisions, it has repeatedly permitted damages awards including such compensation to stand. See Pet. 14-15 (collecting cases).

Department of Justice guidance likewise recognizes the availability of emotional distress damages to remedy violations of antidiscrimination statutes. For example, the Department's *Title VI Legal Manual* states that a recipient of federal financial assistance is subject to suit for compensatory damages, which "traditionally includes damages for both pecuniary and nonpecuniary injuries." Civil Rights Div., U.S. Dep't of Justice, *Title VI Legal Manual*, Pt. IX.A.2., at 4-5 (2017), https://go.usa.gov/xsaMb. The manual further observes that

"[c]ourts applying *Barnes* and *Franklin* generally have interpreted these decisions to permit the award of the full range of compensatory damages, including damages for emotional distress." *Ibid.* The Department's Title II Manual takes the same position. See U.S. Dep't of Justice, *Americans with Disabilities Act: Title II Technical Assistance Manual 1994 Supplement* § II-9.2000, https://go.usa.gov/xASwc (noting that an individual who is excluded from a jury "because of his blindness" is "entitled to compensatory damages for any injuries suffered" which may include "any emotional distress caused by the discrimination"). The decision below runs counter to these authorities as well.

3. Absent this Court's intervention, the circuit split created by the decision below will persist. The court of appeals declined to rehear this case en banc. Pet. App. 29a-30a. And the court's decision has already affected district court litigation involving the relevant antidiscrimination provisions throughout the Fifth Circuit, resulting in dismissals of claims for emotional distress. See, *e.g.*, *King* v. *Our Lady of the Lake Hosp., Inc.*, 455 F. Supp. 3d 249, 254 (M.D. La. 2020); *Labouliere* v. *Our Lady of the Lake Found.*, No. 16-785, 2020 WL 1435156, at *2 (M.D. La. Mar. 23, 2020). These differential results warrant this Court's review.

C. The Question Presented Warrants Review In This Case

The question whether violations of Title VI and statutes that incorporate its remedies permit the award of emotional distress damages is important. In a wide variety of cases—such as those involving sexual harassment, race-based mistreatment, or the denial of accommodations for individuals with disabilities—a victim of intentional discrimination may experience significant emotional distress but not suffer any pecuniary harm.

As the Eleventh Circuit recognized in *Sheely*, emotional distress damages thus may be "the *only* 'available remedy to make good the wrong done,' and the *only* way to 'put private parties in as good a position as they would have been had the contract been performed.'" 505 F.3d at 1203 (quoting *Franklin*, 503 U.S. at 66, and *Barnes*, 536 U.S. at 189).

The availability of emotional distress damages has particular significance for the effectiveness of the private enforcement mechanisms in antidiscrimination statutes. While the federal government has the authority to enforce these antidiscrimination provisions, see 20 U.S.C. 1682 (Title IX); 29 U.S.C. 794a(a)(2) (Rehabilitation Act); 42 U.S.C. 2000d-1 (Title VI); 42 U.S.C. 12133 (ADA); 42 U.S.C. 18116(a) (ACA), the private enforcement mechanisms play an important role in ensuring that recipients of federal financial assistance do not intentionally engage in discriminatory conduct—and that they fully compensate their victims when they breach this duty. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 705-706 & n.40 (1979) (explaining that "[t]he award of individual relief to a private litigant" in some cases is "necessary to * * * the orderly enforcement of" Title IX, and noting that "private suits had become an important and especially flexible part of [the enforcement] procedures" under Title VI). For this reason, too, the court of appeals' flawed decision merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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