No. 19-10169

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JANE CUMMINGS,

Plaintiff-Appellant,

v.

PREMIER REHAB KELLER, P.L.L.C., doing business as Premier Rehab, P.L.L.C.

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division.

BRIEF OF DISABILITY RIGHTS TEXAS, AARP, AARP FOUNDATION, THE CENTER FOR PUBLIC REPRESENTATION, DISABILITY RIGHTS LOUISIANA, AND THE NATIONAL DISABILITY RIGHTS NETWORK AS AMICI CURIAE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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Pursuant to Fifth Circuit Rule 29.2 and Rule 28.2.1, amici curiae make the following supplemental statement of interested parties to fully disclose all those with an interest in this brief.

Amici Curiae

Disability Rights Texas
AARP and AARP Foundation
The Center for Public Representation
Disability Rights Louisiana
The National Disability Rights Network

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INTEREST OF AMICI CURIAE

Disability Rights Texas is the agency designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities in the State of Texas, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041, et seq., the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801, et seq., and the Protection and Advocacy of Individuals Rights Program, 29 U.S.C. § 794e. As the P&A agency for Texas, Disability Rights Texas is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities to be free of discrimination based on their disabilities, and it is authorized to take action to enforce those rights.

The Panel's decision compels amici to offer their views: that the Rehabilitation Act allows compensatory damages. Disability Rights Texas is joined by several additional organizations identified in Appendix A of this brief that share its commitment to protect the rights of those with disabilities.

INTRODUCTION

By creating a novel, bright-line rule that emotional distress damages are *never* available in Rehabilitation Act cases, the Panel's opinion greatly weakens enforcement of disability rights in a way that breaks the basic bargain that Congress has made with recipients of federal funds. The Panel appears to believe its opinion follows the Supreme Court's holding in *Barnes v. Gorman*, 536 U.S. 181 (2002), but the opposite is true.

Barnes held that, in Spending Clause cases, a private plaintiff may recover all "compensatory damages." 536 U.S. at 187. The author of that opinion, Justice Scalia, surely chose those words with the greatest care. As he put it, "words have meaning." *See* Megan Garber, THE ATLANTIC, *The Distinct Vocabulary of Antonin Scalia*, June 26, 2015. Courts have always understood "compensatory damages" to include a wide range of noneconomic damages, including damages for emotional distress. To be sure, plaintiffs must plead and prove such damages—not an easy task. But there is no rule excluding emotional distress damages from the broad catch-all category of compensatory damages. Quite the opposite: emotional distress is a standard type of harm that can remedied by compensatory damages, including in *Barnes* itself.

The Panel's opinion appears to have been driven by concern that parties accepting federal funds from the government, and agreeing to follow the Rehabilitation Act's requirements in return, would not have notice of their potential

liability for such damages, as *Barnes* requires. But *Barnes* stands for the proposition that such notice exists.

Further, given the kinds of personal services commonly supported by Rehabilitation Act funding, noneconomic damages are frequently (as here) the only relief that makes sense. This Court should not worry that allowing emotional damages will open the floodgates to unexpected liability, the way permitting punitive damages might, because Rehabilitation Act plaintiffs already face many roadblocks to obtaining any damages at all (including a high scienter bar). The question here is not whether defendants will be unfairly overwhelmed, but whether private plaintiffs will have *any* ability to enforce their Rehabilitation Act rights in cases like this one.

This Court should reconsider the Panel's decision en banc to preserve the existing balance of the law, which already is carefully calibrated to make available compensatory damages—including emotional distress damages—only where defendants engage in intentional discrimination and are thus afforded ample notice of the risk of monetary liability.

ARGUMENT

I. The *Barnes* holding allows Rehabilitation Act plaintiffs to recover compensatory damages, which include noneconomic damages.

In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Supreme Court held that a plaintiff in a Rehabilitation Act case may recover "compensatory damages," which

it differentiated from "punitive damages." *See also Sossamon v. Texas*, 563 U.S. 277 (2011) (citing *Barnes* for the proposition that "compensatory damages" are available in Spending Clause cases).

The Supreme Court used the term "compensatory damages"—rather than some other measure of available relief—carefully. "Compensatory damages" are properly understood to include non-pecuniary damages, including damages for "such injuries as 'impairment of reputation …, personal humiliation, and mental anguish and suffering.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). In this Court's words, the term "compensatory damages" encompasses "all the ordinary elements of compensatory damages, e.g., mental depression as well as physical injury." *Johnson v. Department of Treasury, IRS*, 700 F.2d 971, 985 (5th Cir. 1983). Such damages differ from "consequential damages," which do not necessarily include non-pecuniary harms. *See Bohac v. Dep't of Agric.*, 239 F.3d 1334, 1339 (Fed. Cir. 2001). And they especially differ from punitive damages, which are not compensatory.

Indeed, in finding that punitive damages are not anticipated as part of the Spending Clause bargain, *Barnes* cited a section in the Restatement (Second) of Contracts that explicitly contemplates the recovery of noneconomic damages as compensatory damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355, cmt. A,

illus. 1 (noting that A cannot recover punitive damages, but "A can recover *compensatory damages … , including any damages for emotional disturbance*") (emphasis added). And while the *Barnes* Court held that punitive damages could not be awarded, it kept intact the district court's compensatory damages award, which included $150,000 "for pain and suffering." *See Gorman v. Easley*, No. 95-0475-CV-W-3, 1999 WL 34808615, at *1 (W.D. Mo. Oct. 28, 1999).

Against that background—reviewing a damages award that included pain and suffering, and citing materials that contemplate such damages as part of compensatory damages—the *Barnes* Court did not limit damages any further than its holding on punitive damages. To the contrary, when *Barnes* applied the contract-law analogy, it explained that, because federal fund recipients are on notice of contract remedies, "a recipient of federal funds is … subject to a suit for compensatory damages." *Barnes*, 536 U.S. at 187.

Taking the Supreme Court at its word, emotional distress damages and other non-pecuniary harms are compensable in Spending Clause cases. The Panel's contrary finding is not faithful to *Barnes*. This Court should therefore fix the error in the Panel's opinion to avoid creating a rift with the Supreme Court.

II. There is a well-established right to recover for noneconomic damages in contract.

The Panel's holding appears to be based in large part on its finding that noneconomic damages are unavailable in contract—in its view, the exceptions to

that "general prohibition," Op. at 8, are so "rare and narrow" that no participant under the Spending Clause could have anticipated they would be held liable. But this conclusion ignores a rich history of noneconomic damages being available in contract.

The leading American treatises have long agreed that noneconomic damages are recoverable under contract, if only in some cases—some of which involve contractual rights and obligations that bear resemblance to those involved in Rehabilitation Act cases. *See, e.g.*, CORBIN ON CONTRACTS § 59.1 (2005); 3 ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.17 (2004); 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 64:7 (4th ed. 2002). Indeed, the Restatement (Second) of Contracts states that "recovery for emotional disturbance" may occur when "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353.

Many cases underlie these treatises. Indeed, a survey has found noneconomic damages allowed in all sorts of circumstances, such as cases of burial-related and funeral-related contracts, cosmetic-surgery contracts, entertainment contracts, contract for consumer products, film, and photography contracts, shipping contracts, vocational-training contracts, and other services contracts. Gregory G. Sarno, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Breach of Service Contract*, 54 A.L.R.4th 901 (1987). When it comes

to noneconomic harm, "there is no general rule barring such items of damage in actions for breach of contract." *Sullivan v. O'Connor*, 296 N.E.2d 183, 188 (Mass. 1973).

The Restatement identifies two particularly relevant common historical examples of contract emotional-damages allowances: cases of common carriers against their passengers and innkeepers against their guests. RESTATEMENT (SECOND) OF CONTRACTS § 353, cmt. a. "Breach of such a contract is particularly likely to cause serious emotional disturbance." *Id.* This is especially so because, whether explicit or implied, such contracts include the right to "respectful and decent treatment at the hands of the innkeeper [or carrier] and his servants." *De Wolf v. Ford*, 86 N.E. 527, 530 (N.Y. 1908).

An old Texas opinion adopted by the Texas Supreme Court shows how such damages are allowed under the state law of this case's forum. In *Woodward v. Texas & P. R. Co.*, the plaintiff sued under breach of contract after an employee kicked him off a train with some particularly harsh accompanying words. 86 S.W.2d 38, 39 (Tex. 1935). As the plaintiff was ejected, he was called "a hard-boiled negro." *Id.* The Court held this was sufficient evidence for mental-suffering damages because the conduct directed "towards the plaintiff which was of a humiliating, insulting and threating nature to him." *Id.* The Court also explained as follows:

> We think it well settled by our own decisions as well by the great weight of authority that if a passenger on a railway train is wrongfully

> subjected to insults, abuse, or ill treatment by the agents or servants of the railway company, and is thereby caused to suffer humiliation and mental distress, he is entitled to damages, notwithstanding he may not have suffered any physical or property damage.

Id. After all, mental suffering is a logical and expected result from "insults, abuse, or ill treatment" in a contract breach.

This logic persists within the Rehabilitation Act and other Spending Clause laws. Spending Clause statutes are compared to contract because "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (alteration in original). In particular, the Rehabilitation Act "prohibits discrimination against the disabled" in exchange for federal funds. *Id.* at 186. Just like the historical promise by innkeepers and common carriers to treat their customers with dignity, this promise is one for which noneconomic damages are the primary damages for which the promisor has notice. Indeed: "[N]ot all contracts are purely commercial in their nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal." *Stewart v. Rudner*, 84 N.W.2d 816, 823 (Mich. 1957).

Contract law thus confirms what the Panel held was the requirement for noneconomic damages: that a recipient of funding is "'on notice' that it *could* be held liable, … for [a plaintiff's] emotional distress damages." Op. at 7. By agreeing

not to discriminate on the basis of disability in exchange for federal funds, that is precisely the type of remedy the recipient would and should expect.

III. The Panel's decision creates an unnecessary circuit split and sends ripples across civil rights law.

The Panel's ruling will likely have broad consequences. In brief, the opinion would favor a new rule for many other statutes enacted under the Spending Clause, including Title VI Civil Rights Act claims and Title IX sex discrimination claims, which all have almost identical language and are analyzed similarly. *Compare* 29 U.S.C. § 794, *with* 42 U.S.C. § 2000d, *and* 20 U.S.C. § 1581(a); *see also Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (noting analytical similarities). The opinion also would skew the remedies available under Title II of the Americans with Disabilities Act (ADA), which has an "identical remedial scheme" to the Rehabilitation Act. *Miraglia v. Bd. of Supervisors of La. St. Museum*, 901 F.3d 565, 574 (5th Cir. 2018).

In doing so, the Fifth Circuit now stands alone in a split not only with the Eleventh Circuit's opinion in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), but also with other circuits that have allowed noneconomic damages under Spending Clause statutes or related cases. *See Pandazides v. Va. Bd. of Ed.*, 13 F.3d 823, 830 (4th Cir. 1994) (holding that more recent Supreme Court precedent abrogated prior decision that "compensatory damages in the form of pain and suffering were unavailable under § 504"); *see Johnson v. City of Saline*, 151

F.3d 564, 572-74 (6th Cir. 1998) (allowing pain-and-suffering damages under Title II of the ADA); *Ferguson v. City of Phoenix*, 157 F.3d 688, 675 n.4 (9th Cir. 1998) (noting that emotional distress damage in ADA Title II case would be compensable if intentionally inflicted). *See also Mark H. v. Lemahieu*, 513 F.3d 922, 930 (9th Cir. 2008) (Rehabilitation Act plaintiffs allowed to seek "the full panoply of remedies" except for punitive damages); *Bruneau ex rel. Schofield v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998) (allowing a Title IX plaintiff to seek the "full panoply of remedies"), *abrogated on other grounds by Fitzgerald Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *Rodgers v. Magnet Cove Public Schs.*, 34 F.3d 642, 644-45 (8th Cir. 1994) (allowing Title VI and Rehabilitation Act plaintiffs to access "a full spectrum of remedies"); *Waldrop v. S. Co. Servs.*, 24 F.3d 152, 156-57 (11th Cir. 1994) (same).[1]

The unnecessary split and jurisprudential waves created by the Panel's decision are yet more reason to rehear this case and ensure proper application of *Barnes*.

IV. Better limits on liability already exist.

The Panel cited an important contract-law principle from the Restatement: "Damages for emotional disturbance are not ordinarily allowed. Even if they are

[1] Although *Bruneau*, *Rodgers*, and *Waldrop* were all decided before *Barnes*, the Ninth Circuit's decision in *Lemahieu* shows the continued availability of "full panoply of remedies," except for punitive damages, after *Barnes*.

foreseeable, they are often particularly difficult to establish and to measure." Op. at 7 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a). But it did not correctly apply this principle to Spending Clause legislation. That very same Restatement section specifically contemplates noneconomic damages for breach of contract in appropriate cases. And it opines on the general difficulties a plaintiff has in proving such damages: they must generally be foreseeable, and they must be established by a preponderance of the evidence.

Courts have already imposed these limits—and more—on damages recoveries under the Rehabilitation Act and other Spending Clause anti-discrimination laws. This Court has, for example, affirmed the proximate causation requirement under the Act. *Taylor v. City of Shreveport*, 798 F.3d 276, 287 (5th Cir. 2015). And it very recently reaffirmed that plaintiffs may only recover money damages under the Rehabilitation Act if the defendant has "actual notice of a violation." *Miraglia v. Bd. of Supervisors of La. St. Museum*, 901 F.3d 565, 575 (5th Cir. 2018). This scienter requirement ensures that a recipient of federal funds is not held liable for damages in a way inconsistent with the bargain made with the federal government. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641-45 (1999). Further restrictions on recovery, such as those embraced by the Panel, do not serve to enforce that bargain; rather, they undermine it by leaving many violations effectively without remedy.

These existing restrictions on recovery may or may not prevent the plaintiff here from obtaining the relief she seeks. But that is no reason to impose onerous new barriers to plaintiffs' securing deserved compensatory damages for illegal intentional discrimination against them.

CONCLUSION

The Panel's judgment should be vacated and the case submitted to the en banc Court, or in the alternative, the Panel should withdraw its opinion and substitute one that reaffirms—or does not reach whether—emotional damages can be recovered under either the Rehabilitation Act or the ACA.

Dated: March 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 9(a)(5) because this brief contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft 2010 in Times New Roman 14-point font.

Dated: March 12, 2020

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on March 12, 2020.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 12, 2020

/s/ Raffi Melkonian
Raffi Melkonian

APPENDIX A

Statements of Amici Curiae

The following organizations respectfully submit this brief as amici curiae in support of respondents.

Disability Rights Texas is the agency designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities in the State of Texas, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041, et seq., the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801, et seq., and the Protection and Advocacy of Individuals Rights Program, 29 U.S.C. § 794e. As the P&A agency for Texas, Disability Rights Texas is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities to be free of discrimination based on their disabilities, and it is authorized to take action to enforce those rights.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, **AARP Foundation ("Foundation")**, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and the Foundation are dedicated to addressing the needs and interests of older persons, a disproportionate share of whom live with one or more disabilities. Through education, advocacy, and service, amici seek to enhance the quality of life for older persons by promoting their independence and dignity. Amici litigate and file briefs to address practices that threaten the rights of older persons with disabilities, under the Rehabilitation Act of 1973 ("RA") and Title II of the Americans with Disabilities Act of 1990 ("ADA"), to live in settings with minimal restrictions on their autonomy. In particular, in *Brown v. District of Columbia*, No. 1:10-cv-02250-ESH (D.D.C.), the Foundation now is litigating, under the RA and the ADA, to fulfill the promise of *Olmstead v. L.C.*, 527 U.S. 581 (1999) (unjustified segregation of disabled individuals is a form of disability discrimination).

The Center for Public Representation (CPR) is a public interest law firm that has assisted people with disabilities for more than 40 years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR is both a statewide and a national legal backup center that provides assistance and support to public and private attorneys representing people with disabilities in Massachusetts and to the federally funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with disabilities in more than 20 states and submitted amici briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other laws.

The State of Louisiana receives funding from the federal government and in return must designate a protection and advocacy system for people with disabilities pursuant to multiple federal statutes.[1] **Disability Rights Louisiana ("DRLA")** has been Louisiana's P&A system since 1978. Consistent with federal law, DRLA has authority to pursue legal and administrative remedies to protect and advocate for the rights of persons with disabilities. In exercising that authority, DLRA's core mission is to ensure that the rights guaranteed under law to persons with disabilities are protected, and that they are free from neglect, abuse, and exploitation. In its over 4o years of existence, DRLA has provided direct legal assistance to thousands of persons with disabilities and their families throughout Louisiana and has utilized its extensive experience in educating policy makers about issues that impact the rights and services for people with disabilities. Based on this experience, DLRA has concluded having rights expressed in laws is not enough to protect the rights and interests of persons with disabilities; that in order for these rights to be meaningful, persons with disabilities should have available to them the full panoply of remedies available at law, including non-economic compensatory damages.

[1] The statutes are: the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. §§ 10801 *et seq.*; the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("PADD Act"), 42 U.S.C. §§ 15001 *et seq.*; and the Protection and Advocacy of Individual Rights Program ("PAIR Act"), 29 U.S.C. § 794e.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.