No. 20-219

In the
# Supreme Court of the United States

JANE CUMMINGS,
*Petitioner*,

v.

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

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF RESPONDENT


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The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the United States and across the globe. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on

[1] Pursuant to SUP. CT. R. 37.3(a), Amici certify that all parties have consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than Amici, their members, or their counsel made such a monetary contribution.

behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases, like this one, before federal and state courts, including this Court.

The American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The National Federation of Independent Business ("NFIB") is the Nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases, like this one, that will impact small businesses.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case arose when Petitioner sought physical-therapy services from Respondent, a small, local physical-therapy practice that receives federal financial

assistance in the form of Medicare and Medicaid reimbursement for the cost of its therapeutic services to some of its patients. Petitioner is deaf and legally blind, and she requested that Respondent provide an American Sign Language interpreter to facilitate communication during her clinic visits. Respondent declined the accommodation but offered to communicate with Petitioner through her own interpreter or through written notes and other visual forms of communication. After receiving physical therapy from another provider, Petitioner sued Respondent under the disability discrimination protections found in Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Patient Protection and Affordable Care Act, seeking injunctive relief and compensatory damages, including damages for the emotional distress caused by Respondent's failure to provide an interpreter.

I. The Court of Appeals for the Fifth Circuit held that, although this Court has permitted the imposition of compensatory damages to remedy violations of the antidiscrimination protections contained in Spending Clause statutes providing federal funding for certain programs and activities, damages for emotional distress are categorically unavailable to remedy such violations. The Fifth Circuit relied on this Court's decision in *Barnes v. Gorman*, 536 U.S. 181 (2002), which held that federal funding recipients lacked notice that they would be exposed to liability for punitive damages and that such damages are therefore categorically unavailable to remedy discrimination in violation of such Spending Clause laws. The court below held that the same prohibition applies to emotional distress damages.

Amici firmly oppose discrimination on the basis of disability. Amici believe, however, that the decision below correctly applies this Court's precedent concerning the *scope of damages* available to remedy a violation of Spending Clause antidiscrimination laws. The case also raises another, narrower, threshold categorical issue: whether a failure to provide an *accommodation*—that is, a failure "to treat an individual with a disability . . . preferentially," *US Airways, Inc. v. Barnett,* 535 U.S. 391, 397 (2002)—falls within the *scope of conduct* that warrants imposition of monetary damages. Providing an accommodation is required only under the relevant federal funding statutes prohibiting disability discrimination, not under those prohibiting racial and sex discrimination. And a failure to provide a requested accommodation is qualified by subjective criteria; it is unlawful only if the requested accommodation is both reasonable and not unduly burdensome.[2]

This Court's "cases defining the scope of conduct for which funding recipients may be held liable for money damages," *Barnes*, 536 U.S. at 187, establish a "high standard" for the type of intentionally discriminatory conduct that is "capable of supporting a private damages action," *Davis v. Monroe County Board of Education*, 526 U.S. 629, 643 (1999). And a failure to provide a requested accommodation is simply not the

[2] Whether Petitioner's requested accommodation was reasonable and not unduly burdensome to Respondent was not reached by the courts below and is not at issue here. Amici take no position on that liability question and address only the remedies available for a failure to make a requested accommodation.

kind of deliberate and clear violation of an unequivocal nondiscrimination command that is required under this Court's cases for the imposition of a damages remedy.

II. If, however, the Court determines that monetary damages are available to remedy a funding recipient's failure to accommodate, it nonetheless should not impute notice about the potential for *emotional distress* damages liability to funding recipients. As *Barnes* made clear, funding recipients are not reasonably deemed to be on notice about the potential for damages liability if it is questionable whether, had they known about their potential liability to that remedy, they would still have accepted the funding. 536 U.S. at 188. Clearly, the indeterminate and potentially massive size of emotional distress damages puts acceptance of potential liability for that kind of damages in question.

And knowing acceptance of such liability is particularly in doubt for those like Respondent who receive funding in the form of Medicare and Medicaid reimbursement. Because that reimbursement generally falls short of the actual cost of serving Medicare- and Medicaid-insured patients, it is likely that recipients of such funding would have rejected it rather than accepted it on condition of exposure to vast emotional distress damages awards.

Federal funding recipients represent a remarkably broad class of public and private organizations today. In the face of reasonable doubt about whether they are on notice that their acceptance of federal funds subjects them to potentially crippling liability,

this Court's precedent counsels that it forbear and leave to Congress the difficult policy question that emotional distress damages liability presents.

## ARGUMENT

In *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court held that punitive damages are categorically unavailable to remedy violations of the antidiscrimination protections contained in federal laws providing funding for certain public and private programs and activities. Specifically at issue in *Barnes* were the disability antidiscrimination protections of Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") and Section 202 of Americans with Disabilities Act of 1973 ("ADA"), both of which incorporate the remedies for racial discrimination available in private actions to enforce Title VI of the Civil Rights Act of 1964.

By the time of *Barnes*, the Court had long viewed these and other Spending Clause statutes as " 'much in the nature of a contract: in return for federal funds, the [recipients] agreed to comply with federally imposed conditions.' " *Id.* at 186 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Noting that it had "regularly applied the contract-law analogy in cases defining the *scope of conduct* for which funding recipients may be held liable for money damages," *id.* (emphasis added), the *Barnes* Court held that "the same analogy applies . . . in determining the *scope of damages* remedies," *id.* at 187 (emphasis in original and added). And the scope of available damages under the contract-law analogy, like the scope of conduct that will support an award of

damages, depends on *notice*: "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." *Id.* at 187 (quoting *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (2002)). Because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract," *id.* at 187, the Court reasoned, "it must be concluded that Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages," *id.* at 188.

The issue in this case is whether an award of compensatory damages for a violation of the antidiscrimination protections of two Spending Clause statutes—specifically Section 504 of the Rehabilitation Act and Section 1557 of the Patient Protection and Affordable Care Act ("ACA")—may include damages for emotional distress. The Court of Appeals, relying on *Barnes*, held that because emotional distress damages are generally not available as a remedy for breach of contract, funding recipients are not "on notice" that accepting federal funds will expose them to liability for such damages. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 677–78 (5th Cir. 2020). Emotional distress damages are therefore not within the "scope of damages remedies," *Barnes*, 536 U.S. at 187, available to remedy a violation of Spending Clause laws like the Rehabilitation Act and ACA.

Amici believe that the Court of Appeals' reasoning is sound and that Respondent has made a compelling case for affirmance on this ground. But Amici also

believe that there is an alternative, and narrower, ground for affirming the judgment below, one that focuses on the nature of Respondent's *conduct* here—declining to make a requested accommodation.

All of the antidiscrimination protections in the relevant Spending Clause statutes here forbid, absolutely and unequivocally, invidious discriminatory denial of participation in, access to, and benefits of federally funded programs and activities. These protections apply to discrimination based on race, sex, and disability. But the statutory obligation of funding recipients to make an affirmative "accommodation"—which is "[b]y definition . . . treat[ing] an [individual] with a disability differently, *i.e.*, preferentially," *US Airways, Inc., v. Barnett*, 535 U.S. 391, 397 (2002)—is unique to Spending Clause legislation protecting against disability discrimination. And this Court's "cases defining the scope of conduct for which funding recipients may be held liable for money damages," *Barnes*, 536 U.S. at 186, make clear that a funding recipient cannot reasonably be deemed to be on notice that a failure to make a requested accommodation—which is unlawful only if the requested accommodation is both "reasonable" and not unduly burdensome[3]—would expose the funding recipient to an

[3] *E.g.*, *Alexander v. Choate*, 469 U.S. 287, 300 (1985) ("[W]hile a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412–13 (1979)); *id.* at 301, 309; *Southeastern Community College*, 442 U.S. at 412–13 ("[R]efusal to modify a program" with

indeterminate, and potentially crushing, award of compensatory damages.

## I. Funding Recipients Lack Notice of Potential Damages Liability for Failure to Accommodate.

The Court has defined the scope of discriminatory conduct that warrants imposition of monetary damages on federal funding recipients in a series of four cases. A brief survey of those cases reflects the "high standard" the Court has set for damages liability. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 643 (1999).

A. The Court's application of contract-law principles to spending power legislation originated in the seminal *Pennhurst* case, where the Court announced the "rule of statutory construction . . . that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the [recipients] can knowingly decide whether or not to accept those funds." 451 U.S. at 24. The Court rejected a claim that the Developmentally Disabled Assistance and Bill of Rights Act ("Act") "imposed affirmative obligations on the states" receiving federal grants "to assume the

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"[t]echnological advances [that] can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment . . . without imposing undue financial and administrative burden . . . might become unreasonable and discriminatory."); *see also* 45 C.F.R. § 84.52(d)(1); 45 C.F.R. § 92.102; U.S. Br. 3 (accommodation required "at least where . . . necessary . . . and where the provision . . . does not pose an undue financial and administrative burden").

high cost of providing 'appropriate treatment' in the 'least restrictive environment' " to their citizens with developmental disabilities. *Id*. at 16, 18. The "clear notice" requirement "applies with greatest force" when this type of "largely indeterminate" affirmative obligation is demanded of a funding recipient, and nothing in the Act spoke clearly enough to provide notice that a failure to provide the requested "appropriate treatment" would expose the state to damages liability. *Id*. at 24–25.

The Court relied on *Pennhurst* in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that the presumptive authority of federal courts to order "any appropriate relief for violation of a federal right," *id*. at 73, includes the power to award compensatory damages in an action brought under Title IX of the Education Amendments of 1972 by a high school student to recover for her repeated sexual harassment and rape by a teacher. The school's administrators were aware of but took no action to halt the teacher's abuse of the student, and they discouraged the student from pressing charges.

The Court first explained that its prior decisions denying monetary damages for *unintentional* violations of Spending Clause statutes were based on a lack of notice: "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Id*. at 74. But there is no such lack of notice, the Court held, when a funding recipient deliberately engages in the very type of

"intentional actions [Congress] sought by statute to proscribe." *Id.* at 75.

The Court elaborated on the type of intentional actions necessary to warrant a damages award for a violation of Title IX in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*. Similar to *Franklin*, the plaintiff in *Gebser* involved an eighth-grade student who sought damages for her sexual harassment and abuse by a teacher. The teacher's conduct, however, was unknown to school authorities, and the question was whether compensatory damages could be awarded against the school district. Noting that the student sought "not just to establish a Title IX violation but to recover *damages*," *Gebser*, 524 U.S. at 283 (emphasis in original), the Court was mindful that the private right of action brought by the plaintiff had not been established by Congress but had been "judicially implied" by the Court, *id.* at 284; *see Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979). And given that the private cause of action was itself a judicial creation, the Court determined that it had "a measure of latitude to shape a sensible remedial scheme" concerning the availability of a damages remedy. *Gebser*, 524 U.S. at 284.

In light of "Title IX's contractual nature," the Court's "central concern" in determining the propriety of a damages remedy for violations of Spending Clause statutes is "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.' " *Id.* at 287 (quoting *Franklin*, 503 U.S. at 74). And it is clear that a funding recipient cannot

reasonably be deemed to have notice that it will bear damages liability for the hidden and unknown acts of its agents. Only if the funding recipient's own conduct clearly and intentionally violates the statute—that is, if it has actual notice of the teacher's sexual abuse of a student and, with deliberate indifference, it does nothing to stop it—will the recipient be subject to damages liability. *Id.* at 290.

*Davis* addressed the question "whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher." 526 U.S. at 643. The Court held that it can, although "the high standard imposed in *Gebser*" for damages liability was raised higher still. *Id.*

The Court concluded that a funding recipient can reasonably be charged with having "adequate notice that [it] could be liable [in damages] for the conduct at issue," *id.* at 640, only if the recipient's conduct "is clearly unreasonable in light of the known circumstances," *id.* at 648. And a funding recipient's conduct is clearly unreasonable only if "it exercises substantial control over both the harasser and the context in which the known harassment occurs" (e.g., on school grounds), *id.* at 645; the recipient has actual knowledge of the student-on-student sexual harassment but is deliberately indifferent to it, *id.* at 650; and the harassment "is so severe, pervasive, and objectively offensive, and [it] so undermines and detracts from the victims' educational experience, that

the victim-students are effectively denied equal access to an institution's resources and opportunities," *id.* at 651.

B. It is clear from these cases "defining the scope of conduct for which funding recipients may be held liable for money damages," *Barnes*, 536 U.S. at 186, that not every violation of the antidiscrimination protections of Spending Clause statutes is "capable of supporting a private damages action," *Davis*, 526 U.S. at 643. Compensatory damages cannot be awarded for an unintentional violation. Nor are compensatory damages available to remedy even an intentional violation unless the funding recipient's discriminatory conduct is such a clear, deliberate, and certain violation that there is no doubt that the recipient was "on notice" that such conduct would expose it to damages liability. In short, to justify an award of monetary damages, a funding recipient's intentionally discriminatory conduct must be "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

Regardless of whether Respondent's decision to decline Petitioner's requested accommodation is a statutory violation, a failure to accommodate is not the sort of intentional discriminatory conduct that will support an award of monetary damages.

1. Petitioner devotes a number of pages to her claim that Respondent's conduct in this case "reinvokes a history of exclusion," Pet. Br. 26, when racial and other minorities were shamefully "told, in effect, 'your kind is not welcome here,' " *id.* at 23. Petitioner points to sickening examples of minorities being "denied access to an available residence," *id.*, "denied a

seat" in movie theaters, *id.* at 24, barred from attending public school with white children, *id.* at 25–26, and denied lodging at whites-only motels, *id.* at 25.

But Respondent's conduct here is not even close to this kind of intentional, exclusionary discrimination. To the contrary, far from excluding Petitioner from its physical therapy clinic, Respondent welcomed Petitioner and offered to accommodate her hearing disability by communicating through an American Sign Language ("ASL") interpreter of her provision or through written notes, lip reading, and gesturing. Respondent's decision to decline Petitioner's request that Respondent accommodate her disability by providing, at its expense, an ASL interpreter for her clinic appointments plainly was not tinged with any animus for Petitioner or people with disabilities generally.

This Court has long recognized the patent difference between invidious discriminatory action intended to *exclude* and a failure to take affirmative action to *include*. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367–68 (2001) ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.").

It is simply not reasonable to compare invidiously discriminatory acts of exclusion, like those recounted by Petitioner, with a failure to provide a particular requested accommodation. And a funding recipient

cannot reasonably be deemed to be "on notice" that declining to provide a requested accommodation is a type of invidiously discriminatory conduct that would subject the recipient to liability for monetary damages.

2. Petitioner claims that the "harassment" cases—*Franklin*, *Gebser*, and *Davis*—and the "failure-to-accommodate cases are paradigmatic violations of Title VI, Title IX, and the Rehabilitation Act," Pet. Br. 43, but the reprehensible conduct condemned in the harassment cases is far from a failure to accommodate. Indeed, neither Title VI nor Title IX obligate funding recipients to provide an "accommodation" of any kind based on race or sex. The statutory obligation to accommodate is unique to the Rehabilitation Act among these Spending Clause statutes, and it applies only to persons with disabilities.

The obligation to accommodate a person with disabilities requires a funding recipient to "treat an individual with a disability . . . preferentially," *US Airways*, 535 U.S. at 397, in contrast to the paradigmatic nondiscrimination command to treat people the same. And the accommodation obligation is also qualified, not absolute like the prohibitions in the Spending Clause statutes on discriminatory denial of participation in, access to, or benefits of federally funded programs and activities. A funding recipient is required to provide an accommodation only if it is reasonable and does not pose an undue financial or administrative burden. *See supra* note 3.

And the question whether an accommodation is reasonable is contextual: providing an ASL

interpreter for a patient with a hearing disability, for example, may be a reasonable accommodation to require of a large regional hospital, but would place an undue burden on a small local health care practice. *See, e.g.*, *United States v. Board of Trustees for University of Alabama*, 908 F.2d 740, 749 n.5, 751 (11th Cir. 1990) (evaluating the proposed accommodation in terms of the likely cost as a proportion of the relevant operating budget); *Schwarz v. The Villages Charter School, Inc.*, 165 F. Supp. 3d 1153, 1208–10 (M.D. Fla. 2016), *aff'd sub nom. Schwarz v. Board of Supervisors ex rel. Villages Community Development Districts*, 672 F. App'x 981 (11th Cir. 2017) (isolating the revenues of the particular activity to be participated in and the overall financial position of the particular covered entity as factors in evaluating the burden of providing hearing aids); *National Ass'n of the Deaf v. Harvard University*, No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *7 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (isolating the effect of the recipient's operations as relevant for determining ultimate reasonableness of providing hearing aids); *see also Fulton v. Goord*, 591 F.3d 37, 44 (2d Cir. 2009) (holding that evaluating an accommodation under Section 504 "requires 'a fact-specific, case-by-case inquiry,' 'not only into the benefits of the accommodation but into its costs as well' " (citations omitted)); 45 C.F.R. § 84.12 (specifying in employment context that a reasonable accommodation under Section 504 takes into account the size of the program or activity and its budget, the type of operation, and the nature and cost of the accommodation).

A funding recipient's refusal to provide a requested accommodation in the good faith belief that it is unreasonable or unduly burdensome is simply not the type of intentional violation that this Court has required as a necessary predicate for imposition of a damages remedy. And this is true even if the dispute over the reasonableness of the requested accommodation is ultimately resolved in favor of the patient and against the funding recipient. A contrary rule, one permitting the imposition of monetary damages against the funding recipient in such a case, would effectively eliminate the reasonableness qualification to the obligation to accommodate, making it absolute, no matter how burdensome. As the Court said in *Franklin*, monetary damages are not an available remedy for such unintentional violations because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." 503 U.S. at 74.

But even when confronted with intentional conduct in violation of the nondiscrimination commands of Spending Clause legislation, the Court has set a "high standard" for imposition of monetary damages against a funding recipient. *Davis*, 526 U.S. at 643. Take *Gebser* for example. Even in the egregious context of a schoolteacher's sexual harassment and rape of an eighth-grade student, the Court carefully limited the circumstances that would give rise to damages liability on the part of the funding recipient—the school district.

The *Gebser* Court rejected the argument that the district should be liable in damages for the acts of its agent under respondeat superior principles, requiring

instead that the district bear responsibility only for its own conduct. 524 U.S. at 287–88. The Court also "declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known." *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 283). The Court held instead that "the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge." *Id.*

By requiring actual notice and a deliberate decision not to take action, the Court in *Gebser* thus limited its judicially crafted damages remedy to the extraordinary situation in which a Court is confronted with "an *official decision* by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290 (emphasis added). This is indeed a high standard, and rightly so in light of the Court's justified determination that imposition of a damages remedy is warranted "only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640.

The type of conduct at issue here, Amici submit, simply does not satisfy this high standard. It is one thing to hold a funding recipient liable in damages for intentionally discriminatory conduct that constitutes a deliberate and clear violation of a federal funding statute. It is quite another to impose monetary damages on a funding recipient for failing to provide a requested accommodation, especially given that a

requested accommodation is required only if it is reasonable and not unduly burdensome under the circumstances. A funding recipient can reasonably be deemed to be on notice of the former but not, Amici submit, of the latter.

## II. Funding Recipients Also Lack Notice of Emotional Distress Damages in General.

If the Court determines that monetary damages are, contrary the foregoing, available to remedy a funding recipient's failure to accommodate, it should nonetheless affirm the Court of Appeals' decision that a damages award should not include recovery for emotional distress. As *Barnes* made clear, a court should not impute notice about the potential for damages liability to funding recipients if it is questionable whether, had they known about their potential liability to that remedy, they would still have accepted the funding. 536 U.S. at 188. There is cause for doubt that potential recipients would accept federal funding in the face of liability for emotional distress damages of "indeterminate magnitude." *Id.* To ignore that doubt by imposing emotional distress damages as a remedy for Spending Clause violations would both run afoul of *Barnes* and jeopardize service to certain Medicare- and Medicaid-insured patients, as well as other beneficiaries of federal funding whom funding recipients could no longer afford to serve.

*Barnes* "acknowledged that compensatory damages alone 'might well exceed a recipient's level of federal funding.' " *Id.* (citation omitted). Indeed, emotional distress damages could well pose an existential

threat to certain funding recipients for violation of a Spending Clause antidiscrimination provision. *See, e.g.*, *Fitzgibbons v. Integrated Healthcare Holdings, Inc.*, No. G048413, 23–26, 33 (Ct. App. Cal. Apr. 30, 2015) (unpublished), https://bit.ly/3oklx9w (reversing district court judgment and reinstating jury's $5.2 million award for emotional distress damages); *Rael v. Sybron Dental Specialties,* No. B292599, 2021 WL 631463, at *1 (Cal. Ct. App. Feb. 18, 2021) (reversing on appeal only for evidentiary error in liability phase underlying $3 million emotional distress damages award); Jackson Lewis PC, *Former Winery Employees Awarded $11 Million*, LEXOLOGY (Feb. 14, 2019), https://bit.ly/3A0x6Vq (reporting $2.5 million emotional distress damages award in *Meadowcroft v. Silverton Partners, Inc.*, No. BC 633239 (L.A. Cnty. Sup. Ct. 2019)); *Anderson v. American Airlines*, 352 F. App'x 182, 183 (9th Cir. 2009) (affirming district court's denial of remittitur of $1 million award for emotional distress damages from termination based on perceived mental disability); *Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 144 (1st Cir. 2009) (affirming award of $500,000 in emotional distress damages for failure to accommodate); *Jenkins v. Southeastern Michigan Chapter, American Red Cross*, 141 Mich. App. 785, 799 (1985) (affirming $500,000 noneconomic damages award for discriminatory constructive discharge); *Moussa v. Pennsylvania Department of Public Welfare*, 289 F. Supp. 2d 639, 666 (W.D. Pa. 2003) (affirming award for national-origin discrimination at statutory cap of $300,000 where jury awarded $750,000); Resp. Br. 39 (collecting cases). That funding recipients, at least the smaller ones,

would knowingly take on such risk is, to say the least, questionable.

And it seems highly likely that many recipients would not be willing to run the risk of incurring emotional distress damages in exchange for the funding at issue in this case—Medicare and Medicaid funding. Resp. Br. 7 ("Because respondent receives reimbursement through Medicare and Medicaid for the provision of some of its services, it qualifies as a recipient of federal 'financial assistance' for purposes of the Rehabilitation Act and the ACA."(citation omitted)). As of 2016, private insurers were paying 50 percent more than Medicare, and Medicaid is paying still less, for average inpatient hospital stays. Thomas M. Selden, *Differences Between Public and Private Hospital Payment Rates Narrowed, 2012-16*, 39 HEALTH AFFAIRS 94, 94 (2020). According to the American Hospital Association, in aggregate, "[f]or Medicare, hospitals received payment of only 87 cents for every dollar spent by hospitals caring for Medicare patients in 2019," and "for Medicaid, hospitals received payment of only 90 cents for every dollar spent by hospitals caring for Medicaid patients in 2019." American Hospital Ass'n, *Underpayment by Medicare and Medicaid Fact Sheet* (Jan. 2021), https://bit.ly/3urQxp6.

Such underpayment is a significant obstacle to serving Medicare and Medicaid patients, and while nonprofit institutions may have no choice but to overcome that obstacle if they are to retain a federal tax exemption conditioned on accepting Medicare and Medicaid patients, for-profit institutions, such as Respondent, do not have such a benefit to lose. Thus,

some for-profit health providers, at least, are surpassingly unlikely to accept Medicare or Medicaid funding if they know that it is accompanied by exposure to indeterminate and potentially massive damages liability, including for failure to accede to any telephonic request for a costly accommodation, as Petitioner alleges. If such liability should be added as a condition to Medicare and Medicaid funding, that would powerfully incentivize recipients, including those who may "provid[e] the best . . . services in the area," *see* Pet. Br. 10 (regarding Respondent), to forgo such federal reimbursement altogether. In other words, exposing federal funding recipients to emotional distress damages is likely to leave many Medicare and Medicaid patients with fewer healthcare provider options.

It is also worth noting just how widely federal funding is now distributed in the American business community. In 2020, for example, 650,000 companies received Paycheck Protection Program funds. *See Treasury Names 650,000 Companies That Got U.S. Small Business Loans*, CBS NEWS (July 8, 2020, 6:56 AM), https://cbsn.ws/3zVowY5. All such companies and other funding recipients will inevitably be at risk, under Petitioner's theory, of potentially large damages liability for emotional distress. Assuming that this type of liability roughly tracks tort liability, the burden will fall disproportionately on small businesses. *See* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Businesses* 13 (Oct. 2020), https://bit.ly/3F6b07A (finding that small businesses account for only 19 percent of revenue, but bear 53 percent of commercial tort liability costs and that businesses with under $1 million in annual revenues

account for only 7 percent of revenues and yet bear 39 percent of the commercial tort liability costs). And eventually, such costs fall on consumers through higher product prices. *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 314 (1998).

None of that is necessarily to say that the broad societal costs entailed by liabilities established and accommodations required under antidiscrimination policies outweigh the societal benefit of preventing and redressing discrimination in federally funded programs. But the costs are real and substantial, and they require careful policy evaluation. Such policy-making is properly within the ambit of the legislative, not the judicial, branch and thus something this Court need not, and indeed should not, undertake. *See, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) ("To the legislative department has been committed the duty of making laws; . . . to the judiciary the duty of interpreting and applying them in cases properly brought before the courts." (quoting *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923)); *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015) ("[I]t is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course.").

If Congress wishes to extend liability for violations of Spending Clause provisions to include emotional distress damages, it knows precisely how to provide such a remedy. It did so for Section 501 of the Rehabilitation Act in the Civil Rights Act of 1991, *see* 42 U.S.C. § 1981a(a)(1), (b), and it would be within its

authority to do so for Section 504. Until Congress acts, however, federal funding recipients such as Respondent cannot reasonably be deemed to be on notice that they face emotional distress damages, least of all for failure to provide a requested accommodation.

## CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

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