

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* DISABILITY
ORGANIZATIONS IN SUPPORT OF
PETITIONER**

RAFFI MELKONIAN
Counsel of Record
MICHAEL ADAMS-HURTA
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
(713) 572-4321
melkonian@wrightclosebarger.com

Counsel for Amici Curiae

August 30, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

IDENTITY AND INTEREST OF
AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF
ARGUMENT 8

ARGUMENT 10

I. Denying damages for mental anguish would
leave some people with disabilities with no
remedy at all, even for egregious violations of
the law. 10

II. Emotional distress damages, though crucial, are
hard to prove and reasonable in scope. 16

CONCLUSION. 22

TABLE OF AUTHORITIES

CASES

<i>Barnes v. Gorman</i> , 536 U.S. 181 (2002)	17, 19
<i>Bolden v. Se. Pa. Transp. Auth.</i> , 21 F.3d 29 (3d Cir. 1994)	18
<i>Brady v. Fort Bend County</i> , 145 F.3d 691 (5th Cir. 1998)	18
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978)	12, 20
<i>C.G.A. v. Iredell-Statesville Sch. Dist. Bd. of Educ.</i> , No. 5:20-CV-00192-KDB-DSC, 2021 WL 3423763 (W.D.N.C. June 17, 2021) . .	10
<i>City of Hollywood v. Hogan</i> , 986 So. 2d 634 (Fla. Dist. Ct. App. 2008)	21
<i>Davis v. City of Chicago</i> , 2020 IL App (1st) 182551-U, 147 N.E.3d 687 (Ill. 2020)	21
<i>Davis v. Monroe County Bd. Of Ed.</i> , 526 U.S. 629 (1999)	17
<i>Delano-Pyle v. Victoria Cty.</i> , 302 F.3d 567 (5th Cir. 2002)	14, 19
<i>Doucette v. Georgetown Public Sch.</i> , 936 F.3d 15 (1st Cir. 2019)	13

<i>Francois v. Our Lady of the Lake Hospital</i> , No. 20-30707, ___ F.4th ___, 2021 WL 3465006 (5th Cir. Aug. 6, 2021)	17
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 524 U.S. 274 (1998).	17
<i>Gorman v. Easley</i> , No. 95-0475-CV, 1999 WL 34808615 (W.D. Mo. Oct. 28, 1999).	19
<i>Gunby v. Pennsylvania Electric Co.</i> , 840 F.2d 1108 (3d Cir. 1988)	18
<i>Hetzel v. County of Prince William</i> , 89 F.3d 169 (4th Cir. 1996).	18
<i>Howe v. Hull</i> , 873 F. Supp. 72 (N.D. Ohio 1994)	19
<i>Linder v. Bos. Fair Hous. Comm'm</i> , 84 Mass. App. Ct. 1125, 999 N.E.2d 502 (2013)	21
<i>M.P. v. Indep. Sch. Dist. No. 721</i> , Civ. No. 01-771, 2006 WL 8444974 (D. Minn. Dec. 14, 2006).	15, 19
<i>M.P. v. Independent School District No. 721</i> , 326 F.3d 975 (8th Cir. 2003).	9
<i>Orkin Exterminating Co., Inc. v. Jeter</i> , 832 So.2d 25 (Ala. 2000).	21
<i>Pierce v. District of Columbia</i> , No. 1:13-cv-134, 2016 WL 7225220 (D.D.C. May 11, 2016)	19

<i>Powers v. MJB Acquisition Corp.</i> , 184 F.3d 1147 (10th Cir. 1999)	19, 20
<i>Prakel v. Indiana</i> , 100 F. Supp. 3d (S.D. Ind. 2015)	12
<i>Reed v. Columbia St. Mary’s Hosp.</i> , 782 F.3d 331 (7th Cir. 2015)	11, 12
<i>R.W. v. Bd. of Regents of the Univ. Sys. of Ga.</i> , No. 1:13-CV-2115, 2016 WL 607395 (N.D. Ga. June 7, 2016)	19
<i>Snell v. N. Thurston Sch. Dist.</i> , No. 3:14-cv-05786, 2015 WL 9474130 (W.D. Wash. Nov. 21, 2015)	19, 20
<i>Suffolk Cty. Cmty. Coll. v. N.Y. State Div. of Human Rights</i> , 75 A.D.3d 513, 904 N.Y.S.2d 753 (2010)	21
<i>Sumes v. Andres</i> , 938 F. Supp. 9 (D.D.C. 1996)	19, 20
<i>Thomas v. Tex. Dep’t of Criminal Justice</i> , 297 F.3d 361 (5th Cir. 2002)	20
<i>Trainor v. HEI Hosp., LLC</i> , 699 F.3d 19 (1st Cir. 2012)	20
STATUTES	
42 U.S.C. § 1983	12
42 U.S.C. § 12101(a)(2)	8

OTHER AUTHORITIES

Amended Complaint, <i>Weiss v. Bethesda Health, Inc.</i> , No. 9:15-cv-80831 (S.D. Fla. Aug. 6, 2015)	14
Complaint, <i>Blum v. Univ. of Tex. Med. Branch</i> , No. 1:95-cv-00170 (E.D. Tex. Mar. 29, 1995)	14
Complaint, <i>Gaina v. Northridge Hosp. Med. Ctr.</i> , No. 2:18-cv-177 (C.D. Cal. Jan. 8, 2018)	14
First Amended Complaint, <i>Beyer v. Ascension Health</i> , No. 2:20-cv-12942 (E.D. Mich. April 26, 2021)	14
First Amended Complaint, <i>McGee v. Tregre</i> , No. 2:18-cv-03341 (E.D. La. April 16, 2018)	12
Jury Instructions, <i>Snell v. N. Thurston Sch. Dist.</i> , No. 3:14-cv-05786 (Nov. 12, 2015)	19
Jonathan Lave, Maggie Sklar, Avra Van der Zee, <i>A right without a remedy: an analysis of the decisions by the district court and Eleventh Circuit in Sheely v. MRI Radiology Network and the Implications for Disabled Americans' Ability to Receive Emotional Damages under the Rehabilitation Act and the ADA</i> , 4 SETON HALL CIRCUIT REVIEW 1 (2007)	11
Second Amended Complaint, <i>Sampson v. Beth Israel Deaconess Med. Ctr.</i> , No. 1:06-cv-10973 (D. Mass. June 13, 2007)	13
Verdict Form, <i>Snell v. N. Thurston Sch. Dist.</i> , No. 3:14-cv-05786 (Nov. 12, 2015).	19

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The Fifth Circuit’s decision—that compensatory damages for mental and emotional harm are unavailable under a wide range of statutes—threatens serious harm to the rights of persons with disabilities, as well as protected classes under other Spending Clause statutes and federal laws whose remedies are defined by Title VI. Amici, including among others The Arc of the United States, the Paralyzed Veterans of America, and the National Association of the Deaf, share a commitment to protect the rights of those with disabilities.

The National Association of the Deaf: The National Association of the Deaf (NAD), founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States. As a non-profit serving all within the USA, the NAD has as its mission to preserve, protect, and promote the civil, human, and linguistic rights of at least 48 million deaf and hard of hearing people in this country. The NAD is supported by affiliated state organizations in 49 states and D.C. as well as affiliated nonprofits serving various demographics within the deaf and hard of hearing community. Led by deaf and hard of hearing people on its Board and staff leadership, the NAD is dedicated to ensuring equal access in every aspect of life: health care and mental health services, education,

¹ No counsel for any party has authored this brief in whole or in part, and no person other than the *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this amicus brief.

employment, entertainment, personal autonomy, voting rights, access to professional services, legal and court access, technology, and telecommunications. These efforts rely on utilizing all tools of enforcement available to our community including the longstanding option of pursuing federal damages for mental distress and emotional injury.

The Arc of the United States: The Arc of the United States (the Arc), founded in 1950, is the Nation's largest community-based organization of and for people with intellectual and developmental disabilities (IDD). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with IDD and actively supports their full inclusion and participation in the community throughout their lifetimes.

Paralyzed Veterans of America: Paralyzed Veterans of America (PVA) is a national, congressionally-chartered veterans service organization headquartered in Washington, DC. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of armed forces veterans who have experienced spinal cord injury or a disorder (SCI/D). PVA seeks to improve the quality of life for veterans and all people with SCI/D through its medical services, benefits, legal, advocacy, sports and recreation, architecture, and other programs. PVA advocates for quality health care, for research and education addressing SCI/D, for benefits based on its members' military service and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and non-veterans with

disabilities. PVA has nearly 16,000 members, all of whom are military veterans living with catastrophic disabilities. To ensure the ability of our members to participate in their communities, PVA strongly supports the opportunities created by and the protections available through federal disability civil rights laws, including Section 504 of the Rehabilitation Act of 1973, as amended.

The Center for Public Representation: 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 Disability Rights Education & Defense Fund: The Disability Rights Education & Defense

Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws, and has participated as amicus in numerous high court matters involving those laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including broad legal remedies, necessary to vindicate their right to be free from discrimination.

The National Disability Rights Network: The National Disability Rights Network (NDRN) is the nonprofit 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.

The Association of Late Deafened Adults: The Association of Late Deafened Adults (ALDA) is a nationwide nonprofit organization comprised largely of people who lost some or all of their hearing after acquiring spoken language. Virtually all ALDA members require some form of assistance, such as ASL interpreters or real-time captioning, to communicate effectively. As part of its mission to empower and enrich the lives of its members, ALDA has been a leader in advocating for captioning at movie theaters and live theaters, both through persuasion and education and, if necessary, through legal action. Much of its advocacy work is undertaken in cooperation with other organizations, including the National Association of the Deaf, the Hearing Loss Association of America and Telecommunications for the Deaf, Inc.

Judge David L. Bazelon Center for Mental Health Law: Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including health care, community living, employment, education, housing, voting, parental and family rights, and other areas. The Americans with

Disabilities Act and Section 504 of the Rehabilitation Act are central to the Center's litigation.

The National Health Law Program: The National Health Law Program (NHeLP), founded in 1969, protects and advances health rights of low-income and underserved individuals and families, including people with disabilities. NHeLP advocates, educates, and litigates at the federal and state levels to advance health and civil rights in the U.S. NHeLP has participated in numerous systemic litigation to enforce the rights of people with disabilities to be free from discrimination under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Section 1557 of the Affordable Care Act, and other laws. NHeLP also serves as a legal backup center for attorneys and advocates across the country representing people with disabilities. Throughout its history NHeLP has consistently defended and fought to expand health and civil rights of those most in need, including ensuring equal access for people with disabilities.

Council of Parent Attorneys and Advocates: Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts

to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

INTRODUCTION AND SUMMARY OF ARGUMENT

Americans with disabilities rely on the protections of federal statutes that incorporate the remedies of Title VI to help make their way in the world. Without these statutes, these individuals would be unable to get medical care, attend school, or access other public facilities and services on the same terms and conditions as non-disabled Americans. As Congress recognized in passing the Americans with Disabilities Act, society has a “tendency to isolate and segregate individuals with disabilities” such that discrimination “continues to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2) (2000).

The Fifth Circuit here eliminated an entire class of damages that those who have been subjected to unlawful discrimination can obtain—remedies for their mental distress and emotional injury. The Fifth Circuit insisted it was preventing plaintiffs from making “an end-run around the Supreme Court’s limitations” on damages. And Respondent warned of serious widespread consequences if plaintiffs were allowed to obtain such damages. As detailed in Petitioner’s brief, neither contention is supported by law or experience.

Amici write to make two important points. First, without the availability of damages for mental distress and emotional injury, some individuals who have been denied a legal right in violation of federal law will have no remedy. Often, violations of the relevant statutes do not cost individuals with disabilities money, nor do they impose physical harm. Instead, they are humiliated, singled out, mocked, or made to go

without regular access to the service to which they are entitled. Those are all serious harms that cannot be disregarded as mere annoyance or passing embarrassment that might not justify recovery. Such core harms to human dignity are the very injuries that the Rehabilitation Act, Title VI, Title IX, and the Affordable Care Act are meant to prohibit. Taking away an important remedy for these harms would rob our civil rights statutes of their force.

Second, Amici write to emphasize that plaintiffs seeking damages for emotional injury face significant obstacles already. Experience shows that it is very difficult to prove emotional distress damages, and there are sufficient protections in place, including evidentiary and other standards carefully applied by vigilant trial and appellate courts, to ensure that these damages are awarded under proper circumstances and in reasonable amounts. Indeed, where a remedy is available there is little indication that courts or service providers are overrun by large damages awards for emotional distress. Amici's experience and research illustrate the point: when plaintiffs successfully bring claims based on emotional distress, the sums awarded are generally modest. This is because the standards for proving the kind of emotional harm that justifies damages are rigorous, and courts carefully analyze awards for adherence to the law and the evidence. Although it is extremely important that individuals with disabilities have access to a monetary remedy for violations of the statutes enacted to protect them from discrimination, this Court need not worry that the consequences of ruling in their favor would be an

unstoppable freight train of emotional distress liability. Nothing could be further from the truth.

ARGUMENT

I. Denying damages for mental anguish would leave some people with disabilities with no remedy at all, even for egregious violations of the law.

Amici agree with the arguments made by Petitioner that Title VI's text, structure, and history support awarding damages for emotional distress to plaintiffs. As a result, all of the statutes incorporating Title VI's analytical framework, properly understood, also allow recovery of this remedy under this Court's well-established precedent.

In some cases, a damages award for emotional distress is the *only* remedy available to person with a disability who is discriminated against. The consequence of the Fifth Circuit's rule in this case—that a plaintiff bringing one of a number of statutory claims can never, under any circumstances, recover mental anguish damages, is that those statutes will provide a right without any meaningful remedy for some people with disabilities. Yet, those damages compensate for real injuries, addressing real harm suffered by real people. *See, e.g., C.G.A. v. Iredell-Statesville Sch. Dist. Bd. of Educ.*, No. 5:20-CV-00192-KDB-DSC, 2021 WL 3423763, at *1–2, (W.D.N.C. June 17, 2021) (court held claim that allegations that school district failed to investigate teacher who abused student with autism by repeatedly placing him in a trash can, causing the student to develop PTSD, stated

a claim under Section 504 and the ADA). This is especially so because other potential remedies under the relevant statutes are often unavailable—for example, injunctive relief is unavailable once a patient with a disability is no longer in need of the originally sought-after treatment.

To deny recovery for plaintiffs in this situation would be to dramatically undermine deterrence of the very misconduct Congress intended to limit. *See, e.g., Jonathan Lave, Maggie Sklar, Avra Van der Zee, A right without a remedy: an analysis of the decisions by the district court and Eleventh Circuit in Sheely v. MRI Radiology Network and the Implications for Disabled Americans' Ability to Receive Emotional Damages under the Rehabilitation Act and the ADA*, 4 SETON HALL CIRCUIT REVIEW 1, 23 (2007).

Some individuals who have been denied services because of their disabilities do not have any significant out-of-pocket or pecuniary damages. This very case illustrates the problem. Ms. Cummings was able to find another service provider that *did* provide interpreters, but their work was unsatisfactory. She suffered no physical injury because of Respondent Premier Rehab's refusal to serve her, nor did she spend extra money. Instead, she suffered "humiliation, frustration, and emotional distress," Pet. App. 25a, all serious and substantive injuries that frequently arise when persons are discriminated against based on their disability or another protected status.

Other cases in which emotional damages were held to be available are similar. In *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 334 (7th Cir. 2015), for

instance, a patient with a variety of disabilities was thrown into a “seclusion room” while seeking treatment. *Id.* And in *McGee v. Tregre*, police officers refused to provide an interpreter for a deaf woman who contacted them about home-theft and domestic-abuse issues, instead forcing her untrained children to interpret for her. *See* First Amended Complaint, *McGee v. Tregre*, No. 2:18-cv-03341 (E.D. La. April 16, 2018). The domestic-violence disputes, which involved another person who was not deaf communicating with the police, twice led to the plaintiff’s arrest—including once where she was Mirandized and then questioned without the use of an interpreter. *Id.* The plaintiffs in these cases did not suffer any particular pecuniary injury under the Rehabilitation Act—but there is no question they suffered a serious wrong that is recognized in many other parts of the law. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 265 (1978) (holding that “mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983”).

There are also cases in which individuals suffer relatively small pecuniary harms—like having to pay twice for the same service—but much greater emotional harms. Those cases, under the Fifth Circuit’s rule, would, in essence, result in a defendant’s misconduct being sanctioned. For instance, a plaintiff may have hired an interpreter to help them understand their criminal proceeding—a relatively small sum—but have suffered much greater emotional distress at having been deprived the fundamental right to participate in their own defense. *See Prakesel v. Indiana*, 100 F. Supp. 3d 661 (S.D. Ind. 2015) (holding that a

plaintiff could recover emotional distress damages for having to attend criminal hearings without an interpreter and could recover reimbursement for an interpreter she hired). Or a child may have suffered serious damages that cannot easily be separated into physical and emotional categories, as in a case where denial of an accommodation of a service animal that alerted caretakers to impending seizures caused a dangerous health risk. *See Doucette v. Georgetown Public Sch.*, 936 F.3d 15, 32 (1st Cir. 2019). Or a person with psychiatric disabilities may have suffered intertwined physical and emotional harms due to forced strip-searches and disrobing by a hospital's security guards. *See Second Amended Complaint, Sampson v. Beth Israel Deaconess Med. Ctr.*, No. 1:06-cv-10973 (D. Mass. June 13, 2007). And yet under the Fifth Circuit's rule, none of these cases would likely be brought given the disparity between the relatively small amount of physical harm versus the significantly larger amount of emotional harm.

These emotional or mental distress claims do not involve mere embarrassment or worry or anxiety. In contrast, emotional distress claims that result in damages arise from moments of extreme humiliation, isolation, and anguish that no person should have to endure. Examples abound, especially, as in this case, in the context of discrimination against people who are deaf or hard of hearing:

- A deaf son is the primary caretaker of his mother who has been diagnosed with cancer. His mother receives hospice care, but the care provider refuses to provide him with an

interpreter, preventing him from communicating about the final care for his dying mother. *See* First Amended Complaint, *Beyer v. Ascension Health*, No. 2:20-cv-12942 (E.D. Mich. April 26, 2021).

- A deaf person is involved in a minor car accident. Because he is unable to understand the police officer's instructions without an interpreter, he fails his field sobriety tests and is wrongfully arrested, suffering significant emotional distress in the process. *See Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 570–72 (5th Cir. 2002).
- A deaf person needs emergency medical care. The hospital provides them no accommodation, and they suffer extreme humiliation during their care because of their inability to express their needs through any means other than handwritten notes, which are a much less effective means of communication. *See* Complaint, *Gaina v. Northridge Hosp. Med. Ctr.*, No. 2:18-cv-177 (C.D. Cal. Jan. 8, 2018).
- A deaf woman with a high-risk pregnancy asks for an interpreter to help her communicate during childbirth. She is simply dismissed and suffers embarrassment and humiliation during her delivery. *See* Amended Complaint, *Weiss v. Bethesda Health, Inc.*, No. 9:15-cv-80831 (S.D. Fla. Aug. 6, 2015); Complaint, *Blum v. Univ. of Tex. Med. Branch*, No. 1:95-cv-00170 (E.D. Tex. Mar. 29, 1995).

Individuals with disabilities use Section 504 to obtain remedies for disability-based harassment that often causes exclusively (or mainly) emotional distress damages. For example, in *M.P. v. Independent School District No. 721*, 326 F.3d 975, 982 (8th Cir. 2003), the court held that a student had stated a claim that school administrators acted with bad faith or gross misjudgment when “they failed to take appropriate action to protect M.P.’s academic and safety interests” after a school nurse had disclosed to other students that he had schizophrenia, resulting in months of harassment by classmates. The harassment included, among other things, calling him “weirdo” and “psycho” and spitting on him and slamming him into lockers. *Id.* at 978. A jury ultimately awarded the student damages of \$84,675. *See M.P. v. Indep. Sch. Dist. No. 721*, Civ. No. 01-771, 2006 WL 8444974, at *1 (D. Minn. Dec. 14, 2006).

As set forth in Part II of this brief, there is no serious danger of excessive damage awards for non-compliance with anti-discrimination law. Awards of emotional distress damages to plaintiffs are limited, hard to come by, and difficult to sustain on appellate review. But eliminating the remedy would undermine enforcement, and leave some harmed individuals with no remedy at all. If the Fifth Circuit’s judgment is affirmed, that would be the result, to the great detriment of individuals with disabilities throughout the country.

II. Emotional distress damages, though crucial, are hard to prove and reasonable in scope.

Allowing courts to impose emotional distress damages will not open a floodgate of damages that could incapacitate health-care providers or other economic actors that are covered by the Rehabilitation Act or any of the other relevant statutes. We know this because emotional distress damages have been available in many jurisdictions for a long time, and damages awarded for emotional harms have been modest and backed by robust evidence. As explained further below, the law and courts already cabin excessive verdicts.

First, as Petitioner has explained, almost the *entire* United States is covered by circuits where emotional distress damages are recoverable under the Rehabilitation Act and the related statutes. *See* Pet. Br. at 3–4 (collecting cases). And this has been the case for many years. This Court itself has allowed victims of discrimination to seek and recover emotional distress damages *four times* without questioning their availability. *See* Pet. at 14. The Fifth Circuit stands alone, in other words, in subjecting plaintiffs in Texas, Louisiana, and Mississippi to this exceptionally harsh rule. And despite this overwhelming imbalance in the authorities, there is no evidence of any flood of claims in states where emotional or mental distress harms are compensable under Title VI and the statutes that incorporate its remedies. As explained further below, Amici have reviewed available data and have found few sizeable judgments or settlements arising from discrimination against disabled persons based on

emotional distress. In fact, in many cases, the damages awarded for emotional distress are less than \$10,000.

On top of that, Title VI and the cases interpreting it impose limitations on the damages a plaintiff may receive. Of course, no punitive damages are available, under *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). And in order to recover any damages at all, a plaintiff must show that the conduct was intentional— there is no simple negligence standard in Title VI or any of the related statutes.

Most courts to consider the issue define intentional conduct as requiring a showing of deliberate indifference. This imposes liability upon a funding recipient only for its own misconduct—i.e., deliberate indifference in the face of known acts of discrimination. See *Davis v. Monroe County Bd. Of Ed.*, 526 U.S. 629, 640–41 (1999). A funding recipient’s liability for damages therefore is limited to those circumstances in which an “appropriate person[,] * * * an official of the recipient entity with authority to take corrective action to end the discrimination[,] * * * has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see *Davis*, 526 U.S. at 641–42. See also *Francois v. Our Lady of the Lake Hospital*, No. 20-30707, ___ F.4th ___, 2021 WL 3465006 (5th Cir. Aug. 6, 2021) (holding that plaintiff could not survive summary judgment because “the evidence is not sufficient for a reasonable jury to determine that the Hospital had *actual knowledge* of [plaintiff’s] need for an on-site interpreter”).

And even if that were not so, emotional distress damages are hard to prove. A court may not award speculative damages; there must be “direct and substantial evidence of humiliation or emotional injury.” *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1121–22 (3d Cir. 1988); *see also Hetzel v. County of Prince William*, 89 F.3d 169, 171 (4th Cir. 1996) (rejecting award because plaintiff “presented no evidence corroborating the existence” of her emotional distress); *Brady v. Fort Bend County*, 145 F.3d 691, 719 (5th Cir. 1998) (requiring “sufficiently articulated” evidence of mental anguish); *Bolden v. Se. Pa. Transp. Auth.*, 21 F.3d 29, 33–34, 36 (3d Cir. 1994) (requiring evidence of actual injury to recover mental anguish damages).

A review of final awards around the United States shows precisely how difficult such damages are to prove. Amici have conducted an extensive search of jury verdicts under the Rehabilitation Act. While many viable Rehabilitation Act claims end in settlement before trial, the handful of verdicts that have been won do not involve runaway emotional distress damages. Amici have identified only the following Rehabilitation Act awards that were not overturned under post-trial review:

Case Name²	Noneconomic Damages
<i>R.W.</i>	\$0–\$75,000 ³
<i>Pierce</i>	\$0–\$70,000 ³
<i>Snell</i>	\$35,000 ⁴
<i>M.P.</i>	\$47,375
<i>Delano-Pyle</i>	\$200,000
<i>Gorman</i>	\$150,000
<i>Powers</i>	\$0–\$560,000 ⁵
<i>Sumes</i>	\$10,000
<i>Howe</i>	\$0–\$62,000 ⁵

² The full citations for the cases in this table are as follows: *R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:13-CV-2115, 2016 WL 607395 (N.D. Ga. June 7, 2016); *Pierce v. District of Columbia*, No. 1:13-cv-134, 2016 WL 7225220 (D.D.C. May 11, 2016); *Snell v. N. Thurston Sch. Dist.*, No. 3:14-cv-05786, 2015 WL 9474130 (W.D. Wash. Nov. 21, 2015); *M.P. v. Indep. Sch. Dist. No. 721*, Civ. No. 01-771, 2006 WL 8444974 (D. Minn. Dec. 14, 2006); *Delano-Pyle*, 302 F.3d 567 (5th Cir. 2002); *Gorman v. Easley*, No. 95-0475-CV, 1999 WL 34808615 (W.D. Mo. Oct. 28, 1999), *aff'd in part, rev'd in part and remanded*, 257 F.3d 738 (8th Cir. 2001), *rev'd sub nom. Barnes v. Gorman*, 536 U.S. 181 (2002); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999); *Sumes v. Andres*, 938 F. Supp. 9 (D.D.C. 1996); *Howe v. Hull*, 873 F. Supp. 72 (N.D. Ohio 1994).

³ Some of the jury verdicts discovered by Amici were decided under broadform or general damages questions that, as far as counsel can tell, may have included both economic and noneconomic damages.

⁴ Although the verdict form asked for damages in a general or broadform format, the jury instructions on damages listed pain and suffering as the only factor to consider for determining compensatory damages. Compare Verdict Form, *Snell v. N. Thurston Sch. Dist.*, No. 3:14-cv-05786 (Nov. 12, 2015), with Jury Instructions, *Snell v. N. Thurston Sch. Dist.*, No. 3:14-cv-05786 (Nov. 12, 2015).

⁵ Some other verdict forms in cases identified by Amici are unavailable on PACER, and the total compensatory damages are known only from

Although it is certainly possible that additional jury verdicts exist, the table above of every upheld verdict found by Amici speaks for itself. Indeed, in the two cases where Amici could confidently ascertain that the only compensatory damages were emotional distress damages—*Snell* and *Sumes*—the damages were \$35,000 and \$10,000, which are each eminently reasonable numbers.

On the rare occasions in which large emotional distress damages are awarded in Title VI and related cases, they are frequently remitted or entirely eliminated by trial courts or courts of appeals as being excessive or being unsupported by the evidence. This Court has made that clear in analogous Section 1983 cases, for instance. *See Carey*, 435 U.S. at 249 (rejecting emotional distress damages as unsupported by the evidence). Federal courts of appeals also carefully police such awards, examining the proven facts to ensure that mental distress damages are strictly limited to what the evidence will bear. *See, e.g., Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 367 (5th Cir. 2002) (remitting future emotional distress damages from \$100,000 to \$75,000); *Trainor v. HEI Hosp., LLC*, 699 F.3d 19, 32 (1st Cir. 2012) (remitting emotional distress damages in employment discrimination case from \$500,000 to \$200,000).

a published decision or docket-sheet note that did not indicate any breakdown of economic and noneconomic damages. However, the *Powers* verdict may have included a large amount of economic damages, given that the discrimination led to further injury that consigned him to using a wheelchair. *See Powers*, 184 F.3d at 1150.

This is just as true in state courts, which of course have concurrent jurisdiction over Title VI and the other related statutes. The Alabama Supreme Court, for example, “has not hesitated to remit compensatory damages where there is a lack of evidence indicating that the plaintiff suffered *significant* mental anguish.” *Orkin Exterminating Co., Inc. v. Jeter*, 832 So.2d 25, 37 (Ala. 2000) (emphasis added). Other state courts take a similar attitude. See *Davis v. City of Chicago*, 2020 IL App (1st) 182551-U, ¶ 3, 147 N.E.3d 687 (Ill. 2020) (remitting \$2,000,000 emotional distress verdict to \$100,000); *Linder v. Bos. Fair Hous. Comm’m*, 84 Mass. App. Ct. 1125, 999 N.E.2d 502 (2013) (remanding emotional distress award to trial court because evidence was not clear that distress was caused by the tort rather than by other factors in the plaintiff’s life); *Suffolk Cty. Cmty. Coll. v. N.Y. State Div. of Human Rights*, 75 A.D.3d 513, 515, 904 N.Y.S.2d 753, 755 (2010) (award of \$50,000 in emotional distress damages in a racial discrimination case was “excessive” and needed to be remitted to \$5,000); *City of Hollywood v. Hogan*, 986 So. 2d 634, 649 (Fla. Dist. Ct. App. 2008) (noting that an award of \$150,000 for “emotional distress should be viewed as an upper threshold”).

Although this case presents the Court simply with a question about the *availability* of emotional distress damages under the Rehabilitation Act, rather than the standard to achieve them, cases throughout the country illustrate how courts are equipped to prevent unsupported awards. This Court should reverse the Fifth Circuit and allow the type of damages most fitting to redress all of the injuries incurred by plaintiffs in Rehabilitation Act cases and cases under

the related statutes, knowing full well that the lower courts will keep these awards reasonable as each case requires.

CONCLUSION

This Court should reverse and remand this case for trial on the merits.

Respectfully submitted,

RAFFI MELKONIAN

Counsel of Record

MICHAEL ADAMS-HURTA

WRIGHT CLOSE & BARGER, LLP

One Riverway, Suite 2200

Houston, Texas 77056

(713) 572-4321

melkonian@wrightclosebarger.com

Counsel for Amici Curiae

Dated: August 30, 2021