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IN THE SUPREME COURT OF THE UNITED STATES

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KAY BARNES, ETC., ET AL., :
Petitioners :
v. : No. 01-682
JEFFREY GORMAN. :
- - - - -X

Washington, D.C.
Tuesday, April 23, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:12 a.m.

APPEARANCES:

LAWRENCE S. ROBBINS, ESQ., Washington, D.C.; on behalf of
the Petitioners.
GREGORY G. GARRE, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Petitioners.
SCOTT L. NELSON, ESQ., Washington, D.C.; on behalf of the
Respondent.

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1 P R O C E E D I N G S

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-682, Kay Barnes v. Jeffrey Gorman.

5 Mr. Robbins.

6 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

7 ON BEHALF OF THE PETITIONERS

8 MR. ROBBINS: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 The Eighth Circuit held in this case that a
11 private plaintiff may obtain punitive damages in an action
12 brought against municipal government defendants under
13 section 504 of the Rehabilitation Act of 1973 and title II
14 of the Americans with Disabilities Act.

15 Although the court of appeals identified
16 substantial evidence in the legislative record that
17 Congress never intended this result, it thought that this
18 Court's decision in Franklin against Gwinnett County
19 Public Schools left it little or no choice in the matter.
20 As the Eighth Circuit read Franklin, once a cause of
21 action has been created or inferred, it presumptively
22 carries with it all common law remedies, including
23 punitive damages, unless Congress has specifically said
24 otherwise.

25 QUESTION: Mr. Robbins, did any -- did the

1 petitioners raise the Newport case at any time below?

2 MR. ROBBINS: No.

3 QUESTION: Why not?

4 MR. ROBBINS: The -- the party --

5 QUESTION: I mean, it looks like the most
6 obvious source of law on this topic. What's going on
7 here?

8 MR. ROBBINS: In the lower court, my client took
9 the position that it was, in fact, an arm of the State,
10 not an arm of the municipal government. For various
11 factors -- it cited various factors that in its view
12 warranted an Eleventh Amendment immunity, not a City of
13 Newport immunity. The court of appeals, in the decision
14 being reviewed before this Court today, rejected that
15 argument. We have not separately sought certiorari on
16 that decision.

17 But I -- I do want to add on that point, Justice
18 O'Connor, that in our view it would be a mistake to take
19 respondent's suggestion that because my client took that
20 position in the lower court, that this Court should
21 therefore turn a blind eye to the City of Newport
22 doctrine. It seems to us that it's quite analogous to a
23 situation in which a litigant, for example, decided to
24 argue only legislative history in the lower court and then
25 before this Court -- and then someone said, well, you're

1 therefore constrained not to look at the words of the
2 statute. That seems --

3 QUESTION: It doesn't change the issue, I take
4 it.

5 MR. ROBBINS: It does not change the issue. The
6 position the client took below was always that punitive
7 damages are unwarranted for a variety of reasons,
8 including a reason that we are now urging by virtue of the
9 client having lost the Eleventh Amendment immunity issue
10 below.

11 QUESTION: Was there a reason?

12 QUESTION: And I suppose it's not like an
13 immunity from suit that can be waived. It's -- we use the
14 term immunity, but it's not that sort of immunity.

15 MR. ROBBINS: Exactly. It -- it is exactly the
16 sense in which it was used in City of Newport as a
17 background principle of law that Congress is assumed to
18 have taken into consideration in enacting the actual test.
19 And we --

20 QUESTION: Doesn't the Eighth Circuit allow you
21 to argue in the alternative? I mean, you couldn't have
22 said we have Eleventh Amendment immunity and -- and if we
23 don't, we're a municipality, and therefore Newport
24 applies. You could have done that, I suppose.

25 MR. ROBBINS: I -- I think counsel could have

1 taken that measure. They didn't, but I don't think that
2 it -- that that amounts to a waiver.

3 QUESTION: What are we supposed to do then?
4 Because it seems to me that you're arguing there are two
5 possibilities. One possibility is no one gets punitive
6 damages no matter who he sues, and the second is that,
7 anyway, a person who sues a municipality can't get
8 punitive damages. Your second argument may be a lot
9 stronger than the first. So, am I supposed to go to the
10 second argument that nobody has argued in the courts below
11 at all, bypassing them, or am I supposed to go to the
12 first argument which has enormous implications well beyond
13 this case?

14 MR. ROBBINS: Well, I think the answer, Justice
15 Breyer, is that we have urged both arguments. I think we
16 -- we could prevail on the basis of either presumption.

17 I -- I would, however, tell you why I think the
18 Court ought to address the broader issue and that is
19 because, given the construction of Franklin that the
20 Eighth Circuit took in this case, there is no good reason
21 to believe that were City of Newport called to their
22 attention, they would have come out any differently. The
23 Eighth Circuit took Franklin to say that unless -- given
24 that there's a cause of action, whether explicit --
25 whether express or implied, that must necessarily carry

1 with it all common law remedies unless Congress has said
2 otherwise, which it rarely does --

3 QUESTION: Well, the Eighth Circuit said
4 appropriate remedies. So, don't we have to look at what
5 appropriate means in this context?

6 MR. ROBBINS: Well, I think that -- that's the
7 language from Franklin.

8 QUESTION: Yes.

9 MR. ROBBINS: And we think Franklin is properly
10 confined to compensatory remedies for the reasons we've
11 said in the brief. The Eighth Circuit's view of
12 appropriate, however, Your Honor, was that it is
13 synonymous with whatever the common law has traditionally
14 made available by virtue of State law, by virtue of
15 Federal law, by virtue of the entire corpus of law. And
16 whatever you can find on the books is, therefore,
17 appropriate within the meaning of Franklin, as the Eighth
18 Circuit saw it, and that, Justice Breyer, to return to
19 your question, is a doctrine of enormous capacity.

20 QUESTION: Mr. Robbins, I don't understand why
21 you say if this Court says Newport or Fact Concepts,
22 whatever you want to call it -- it says, a municipality is
23 immune. Period. That takes care of your case, and if the
24 Court -- this Court were to say, Eighth Circuit, you
25 overlooked the fact that municipalities are immune and

1 therefore in -- in this case you are wrong, and we
2 reverse, now, that takes care of your client. Right?

3 MR. ROBBINS: Well, I -- I think it does. If --

4 QUESTION: And why should we in your case, where
5 there is a clear ground, not decide it on that basis? Why
6 should we go to the next case that doesn't involve a
7 municipality?

8 MR. ROBBINS: Let me say two things with respect
9 to that, Justice Ginsburg. First of all, the last thing I
10 want to do is talk the Court out of ruling for my client
11 on any ground.

12 (Laughter.)

13 MR. ROBBINS: So, if the Court believes City of
14 Newport is sufficient -- and we think it's quite powerful
15 -- we'll certainly be glad of that result. But let me say
16 two more things about it.

17 The first is even City of Newport requires
18 looking to the next step and asking, okay, that's the
19 presumption. It's a strong presumption. Is there
20 specific evidence in the statute that overcomes it? For
21 all the reasons we've said in the brief and I'd be glad to
22 turn to, the evidence in this statute is quite
23 extraordinarily compelling that, to the contrary, punitive
24 damages were foreclosed.

25 Second, I -- I wish I could be as confident as

1 the Court's -- as Your Honor's question suggests, that
2 were this case to return to the Eighth Circuit with
3 nothing but a ruling about City of Newport, you know, in
4 its sails, that the Eighth Circuit would take that mandate
5 and take it and -- and come out differently. I'm not
6 quite so confident about that because of the sweep of how
7 they read Franklin.

8 QUESTION: If the Court --

9 QUESTION: We would -- the -- the broader
10 position would be -- would be taking the case on the same
11 basis that the Eighth Circuit decided it. Right? On the
12 broader ground.

13 MR. ROBBINS: I think that's correct.

14 QUESTION: And there -- this is not a
15 constitutional matter.

16 MR. ROBBINS: No.

17 QUESTION: So, the doctrine of -- of observing
18 the narrowest possible constitutional ground does not
19 apply here. Right?

20 MR. ROBBINS: No. Quite -- quite the contrary.
21 The question presented is what do these statutes mean
22 after all.

23 QUESTION: So, this would be an opportunity to
24 -- to do what the Court is supposed to do, and that is
25 clean up confusion below on the meaning of a statute, and

1 the broader confusion is certainly much -- much more worth
2 clearing up than the narrower confusion.

3 MR. ROBBINS: Right, and I might say one of the
4 matters we've pointed to in the petition for certiorari
5 is, in fact, that this misconstruction of Franklin is not
6 confined to this case, to this statute, and certainly to
7 the Eighth Circuit. It is a wide-ranging, I think, over-
8 reading of what this Court said -- not just meant, but
9 said -- in Franklin itself. And perhaps I might just turn
10 briefly to that initial question.

11 It seems to us, for several reasons, the Eighth
12 Circuit has badly misunderstood what Franklin says. It
13 doesn't cover punitive damages. That's the short of the
14 matter. Punitive damages were, after all, not sought by
15 the plaintiff in Franklin, but more to the point, the
16 premise of Franklin against Gwinnett County was drawn from
17 Bell against Hood and the cases that underlie Bell against
18 Hood, and that is an explicitory, compensatory rationale.
19 The idea in Bell was that courts have an authority --

20 QUESTION: Explicitory?

21 (Laughter.)

22 MR. ROBBINS: I'm sorry?

23 QUESTION: Did you say explicitory?

24 MR. ROBBINS: Good heavens, I hope not.

25 (Laughter.)

1 QUESTION: I like it though. It's good.

2 (Laughter.)

3 MR. ROBBINS: Well, what -- what I certainly
4 meant to say is that Bell and Hood stem from a line of
5 authority that says that courts have the authority, the
6 inherent authority I -- I had meant to say, when -- when
7 charged with the construction of a statute to make good
8 the wrong done. And that is about as clear a statement of
9 a compensatory rationale as you could have.

10 Franklin did not suggest that a plaintiff who
11 has been made whole, as Mr. Gorman was to the tune of \$1
12 million in compensatory damages, including \$150,000 in
13 pain and suffering, has a right inferable through a
14 statute that speaks not a word to the matter, to an
15 additional presumption of punishment.

16 QUESTION: Well, did the compensatory damages in
17 this case include damages for humiliation, or am I wrong
18 about that?

19 MR. ROBBINS: I -- I do not -- I have not seen
20 an indication that it included that. I --

21 QUESTION: In -- in this -- is the jury
22 instructed in this jurisdiction that compensatory damages
23 include damages? Of course, pain and suffering, but is
24 that also humiliation? I thought humiliation was covered
25 as part of the compensatory award.

1 MR. ROBBINS: I -- we have included the
2 instruction, Justice Kennedy, at page 72 of the joint
3 appendix, and I do not find a specific reference to that.
4 I'd be glad to see if I can --

5 QUESTION: Well, I guess it -- it goes to the
6 make-whole point. Assume a jurisdiction where humiliation
7 is not part of the compensatory award, could the argument
8 be made, well, in order to make the person whole, you must
9 give punitive damages because it includes damages for
10 humiliation?

11 MR. ROBBINS: Well, I guess I'd be inclined to
12 -- to think about that in a case in which somebody had
13 argued that below or here.

14 QUESTION: But it wouldn't achieve that.

15 MR. ROBBINS: But -- but --

16 QUESTION: It wouldn't achieve that. Would it,
17 Mr. Robbins? I mean, you -- you would not tell the jury,
18 you know -- you're telling the jury, punish this person if
19 you think he deserves punishment. You're not telling the
20 jury, by the way, humiliation damages are not available,
21 and therefore give this fellow as -- as much humiliation
22 damages, calling them punitive damages, as --

23 QUESTION: But I want you to assume -- and I
24 believe this is the law in many jurisdictions -- that
25 punitive damages are given in part to ease the -- the --

1 it's smart money in order to ease the -- the pain that the
2 person suffers, et cetera.

3 MR. ROBBINS: Right. I -- I don't want to
4 quarrel with the hypothetical, Justice Kennedy. It may
5 very well be that pain and suffering already embraces that
6 concept. In many jurisdictions, pain and suffering is not
7 compensable as a compensatory damages. And it may be that
8 in the jurisdictions to which Your Honor adverts, punitive
9 damages are used to supplement a compensatory regime that
10 falls short of pain and suffering, which is not the case
11 here. This man received \$150,000 --

12 QUESTION: I understand.

13 MR. ROBBINS: -- for the category called pain
14 and suffering and he was made whole. And there's no
15 suggestion that he wasn't made whole.

16 The suggestion is that my clients should be
17 punished, and that is something as to which the statute
18 provides absolutely no --

19 QUESTION: Well, that's true, but the statute
20 doesn't say specifically about whether to give an
21 injunction, about whether you could give a trademark
22 remedy. I mean, normally what the decisions have been of
23 the Court under Franklin -- I'm simply focusing you on
24 their main argument. Under Franklin, the courts decide
25 there either is an ordinary private right of action, et

1 cetera, or there isn't. And if there is, you take it as
2 it is, ordinarily. And if there isn't, there's nothing.

3 MR. ROBBINS: Well --

4 QUESTION: Why should we divide up, in other
5 words -- there's this amount of the common law action, but
6 not that amount. There's -- why -- how do we know that we
7 have the two-witness rule or the -- or the parol evidence
8 rule? I mean, there are lots of controversial things in
9 common -- in common law actions --

10 MR. ROBBINS: Yes.

11 QUESTION: -- that private people can bring.
12 So, why separate out from that whole package suddenly
13 punitive damages? That's --

14 MR. ROBBINS: Precisely because this is not a
15 common law action. This is a Federal statute --

16 QUESTION: All right.

17 MR. ROBBINS: -- as to which --

18 QUESTION: So, which one shall we separate out?
19 Just punitives or what?

20 MR. ROBBINS: Well, as to which Congress has
21 spoken. It has adopted title VI remedies that are quite
22 robust, which come with title VI regulations that are
23 enormously detailed, freighted with due -- levels of due
24 process that are quite unusual. And yet, we propose to
25 overlay a punitive damages remedy that comes with none of

1 those protections. It would work an extraordinary anomaly
2 to layer punitive damages on a regime like this. This is
3 not, after all, a question that is committed to the courts
4 like some of those doctrines. The parole evidence rule
5 may in some jurisdictions have originally been enacted or
6 not.

7 But the fact is this is a statute, and Congress
8 spoke rather clearly to what it -- it wanted the statute
9 to accomplish. And some of the things it expressly said
10 cannot live with the things that respondent proposes to
11 import into it.

12 And let me just say one other thing, and I
13 noticed that my white light on, as -- I do want to reserve
14 some time for rebuttal.

15 This is also a Spending Clause statute, and I
16 know this gets back to a -- a threshold issue that both
17 Your Honor and Justice Ginsburg suggested perhaps the
18 Court could pretermite. I think it would be a mistake,
19 given that the task is to construe the statute, to ignore
20 the fact that it was enacted pursuant to a contractual
21 regime in which punitive damages historically and for a
22 variety of sensible reasons are especially inappropriate.

23 And if there are no questions, I -- I would like
24 to reserve the balance of my time for rebuttal.

25 QUESTION: Very well, Mr. Robbins.

1 Mr. Garre, we'll hear from you.

2 ORAL ARGUMENT OF GREGORY G. GARRE

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

5 MR. GARRE: The statutes at issue in this case,
6 section 504 of the Rehabilitation Act and title II of the
7 ADA, do not sanction the award of punitive damages which
8 are, by their definition, damages in excess of that
9 necessary to make good any wrong done.

10 Now, there are several -- both section 504 and
11 title II derive their remedies expressly from title VI of
12 the Civil Rights Act of 1964, which operates as a
13 condition on the receipt of Federal financial assistance.
14 And it seems to me that -- to us that there are several
15 facets of the title VI statutory scheme which make it
16 particularly inappropriate to infer a punitive damages
17 remedy.

18 The first is, is that title VI, although it's
19 silent with respect to a compensatory remedy, expressly
20 provides for punitive and regulatory measures in the event
21 that the violation of its nondiscrimination provision. In
22 particular, the statute provides for a termination of
23 Federal funding, which this Court has itself recognized is
24 a very severe -- severe remedy that can have a powerful
25 deterrent effect.

1 In addition, the statute authorizes
2 administrative enforcement actions, actions that -- in
3 which the regulatory agencies, who have responsibility for
4 enforcing section 504 and title II, can take remedial
5 action, order remedial action, short of funding
6 termination.

7 Now, the second aspect of title VI and title VI
8 statutory scheme it seems to us to be quite pertinent is
9 that punitive damages are themselves antithetical to
10 Spending Clause legislation like title VI because the
11 availability of unbounded punitive damages awards can
12 actually have the effect of diverting resources from
13 achieving the important objectives of the underlying
14 spending programs.

15 QUESTION: Tell me. I just can't recall. Have
16 we held that punitive damages are available on the Bivens
17 action?

18 MR. GARRE: We think the Court addressed that in
19 passing in the Carlson v. Green case, and we think that
20 that -- the discussion of punitive damages in that case is
21 properly regarded as -- as dictum in that case. But --
22 but --

23 QUESTION: So, do -- do I infer from your --
24 from your response that it is the position of the
25 Department that punitive damages should not be awarded in

1 Bivens cases?

2 MR. GARRE: Yes, but there are two distinctions
3 between Bivens and this case.

4 First, in the Bivens context, there aren't
5 statutory penal and regulatory measures that can be used
6 like funding termination or administrative enforcement
7 actions to take deterrence measures when -- when needed to
8 deter violations.

9 And second, in the Bivens context, this Court is
10 giving effect to a constitutional tort that it alone has
11 recognized. In -- in this context, the Court is
12 purporting to ascertain Congress's intent in enacting
13 section 504 in title II.

14 QUESTION: What about 1983? This Court has said
15 that punitive damages are available.

16 MR. GARRE: That -- that's correct, Justice
17 Ginsburg. And -- and first of all, if I can make two
18 points -- first, in that context, again, there is no
19 express statutory penal or regulatory measures that
20 Congress created to provide deterrence as it did under
21 title VI, the remedies at issue in this case.

22 And secondly, what's important, we think, about
23 the Smith case, in which this Court recognized a punitive
24 damages remedy under section 1983 -- is that in that case,
25 the Court didn't start with the presumption that punitive

1 damages were available and simply look to see if Congress
2 had said otherwise. And that's the presumption that the
3 court of appeals applied in this case.

4 Instead, the Court purported to engage in an
5 inquiry of Congress's intent and -- and focused on the
6 fact that when -- when Congress enacted section 1983, it
7 made very clear that it was adopting a special species of
8 tort liability looking to the -- the State common law at
9 the time which provided for punitive damages there. So,
10 we think that the section 1983 case is quite different
11 than this case. The Court --

12 QUESTION: But you -- and you rely on the heavy
13 gun in statutes like title VI, title IX. That heavy gun
14 is so heavy that it's never used. I mean, in the case
15 that we will hear tomorrow, the statement was made, well,
16 yes, it would be a drastic sanction to withdraw Federal
17 funds, but in 30 years it hasn't happened.

18 MR. GARRE: Well, first of all, it does happen.
19 It happened in the Grove City case that came here, and I
20 could point Your Honor to additional examples in which the
21 termination funding mechanism has been used. Now, to be
22 sure, it -- it's an unusual remedy and it's a harsh
23 remedy, and simply because it's not used in more cases
24 doesn't mean that it doesn't have a deterrent effect.

25 QUESTION: Under the Rehabilitation Act, it has

1 been used under 504?

2 MR. GARRE: Yes. I could point you to -- to one
3 case. It's -- it's not a case cited in the brief. It's a
4 court of appeals case, Freeman v. Cavassos, 939 F.2d.
5 1527, which is one example.

6 But -- but again, the -- the Federal Government
7 -- Congress gave the Federal Government and the Federal
8 agencies authority to enforce these provisions short of
9 funding termination. The -- the agencies receive
10 thousands of complaints each year under title II and
11 section 504. And they investigate those complaints
12 commensurate with the seriousness of the allegations
13 raised in those complaints, and they are successful in
14 negotiating compliance agreements, ranging from informal
15 agreements to formal settlement agreements, in which those
16 alleged to -- to have engaged in discrimination agree to
17 take corrective measures to eliminate discrimination and,
18 in some cases, to pay monetary sums.

19 Now, the -- the Federal agencies have entered
20 into more 300 of those agreements under title II alone in
21 the past 8 years. So, there is an administrative process
22 in place. It's statutory -- statutorily created by
23 Congress, and we think that that process itself counsels
24 heavily against judicial inference of punitive damages.

25 Or in addition, to return to the -- the Court's

1 Franklin case, the Franklin case is grounded on the notion
2 that the Federal courts have the authority to provide a
3 remedy when necessary to make good the wrong done. That
4 principle has no application to and has never been
5 extended to punitive damages. It would be a quantum leap
6 for this Court to extend the Franklin principle to
7 punitive damages.

8 Punitive damages, the Court has recognized, are
9 both quasi-criminal, unpredictable, and at times have a
10 devastating effect. Those characteristics of punitive
11 damages make them uniquely suited for careful legislative
12 judgment. Congress in section 504 and title II has not
13 made any legislative judgment that punitive damages should
14 be available, and therefore, this Court should reverse the
15 decision below.

16 If there are no further questions.

17 QUESTION: Thank you, Mr. Garre.

18 Mr. Nelson, we'll hear from you.

19 ORAL ARGUMENT OF SCOTT L. NELSON

20 ON BEHALF OF THE RESPONDENT

21 MR. NELSON: Mr. Chief Justice, and may it
22 please the Court:

23 This case presents the issue of whether Congress
24 foreclosed awards of punitive damages when it enacted the
25 rights of action to enforce section 504 of the

1 Rehabilitation Act and title II of the ADA which together
2 prohibit discrimination against people with disabilities
3 in the provision of public services.

4 The text, structure, policies, and legislative
5 history of the ADA disclose no prohibition on the award of
6 punitive damages. Absent such a prohibition --

7 QUESTION: Well, if -- now that the Eleventh
8 Amendment immunity issue is gone, don't we have to deal
9 with City of Newport?

10 MR. NELSON: Well, I think the answer to that,
11 Justice O'Connor, is no. Had the defendants wished to
12 preserve the ability to argue for immunity on City of
13 Newport, they were free to do so in the lower courts.

14 QUESTION: Well, do you say that we are
15 precluded from considering that authority as we resolve
16 this case?

17 MR. NELSON: No, I don't say --

18 QUESTION: No.

19 MR. NELSON: -- you're precluded from it. It's
20 -- it's a --

21 QUESTION: No. So, are you going to deal with
22 it then?

23 MR. NELSON: Yes. I -- I do intend to deal with
24 that.

25 I'd like to start by dealing with -- with the

1 issue of whether there's a punitive damages remedy at all
2 because I think then the Newport issue really is secondary
3 to that.

4 And the starting point with respect to the
5 availability of punitive damages I think has to be this
6 Court's decision in Franklin. And it's useful I think to,
7 instead of looking at -- at arguments about what underlies
8 Franklin, to look at what Franklin said. Quote: "the
9 general rule, therefore, is that absent clear direction to
10 the contrary by Congress, the Federal courts have the
11 power to award any appropriate relief in a cognizable
12 cause of action brought pursuant to a Federal statute."

13 QUESTION: Franklin wasn't dealing with punitive
14 damages, was it?

15 MR. NELSON: That's right, Mr. Chief Justice.
16 Punitive damage was -- was not the form of relief that was
17 being addressed in Franklin.

18 QUESTION: And appropriate relief does not sound
19 to me to be consistent with your beginning premise which
20 was that unless Congress forecloses the remedy, we must
21 give it.

22 MR. NELSON: Well, I certainly don't mean to say
23 that -- that in any particular case, the Court must give
24 it unless Congress forecloses it, but if Congress has not
25 foreclosed it, it's potentially available if, in view of

1 the policies of -- of the particular statute, it's an
2 appropriate remedy and in view of the conduct that's being
3 addressed. Specifically, under this Court's decisions,
4 punitive damages are an appropriate remedy where there's
5 willful -- a willful violation or reckless disregard of --
6 of the legal entitlements of the plaintiff.

7 QUESTION: Well, what do you make of the -- the
8 argument that the whole touchstone for damages here is
9 504, which is essentially the -- the spending power -- the
10 -- the -- a statute resting on the spending power? The
11 closest analogy to that is with contract, and you don't
12 get punitive damages from contract.

13 MR. NELSON: Well, there -- there are two
14 answers to that. The first is that the touchstone is not
15 simply 504, but also the ADA, which is not a Spending
16 Clause enactment at all. The second is that --

17 QUESTION: But that referred to 504 for -- for
18 -- in effect, for its remedial scheme.

19 MR. NELSON: To the extent that -- that what it
20 -- what it says is that the remedies available, the
21 remedies being a private right of action -- and that does
22 not necessarily, however, import a limitation imposed on
23 that remedy from above by the Spending Clause that doesn't
24 inhere in the -- in the nature of the statute itself,
25 assuming that the Spending Clause does impose that

1 limitation, which I don't concede, and I'll get to in a
2 moment.

3 But this Court actually addressed a similar
4 situation in the Darrone case. The issue there was the
5 remedies available under section 504 for a case of
6 employment discrimination, and 504 in turn incorporates
7 the remedies available under title VI. Title VI said
8 there is no remedy available for employment discrimination
9 under title VI except with regard to a Federal program
10 where the funding is for employment purposes. This Court
11 said that by incorporating the title VI remedies, section
12 504 did not incorporate that limitation on the remedial
13 scheme that had nothing to do with the policies underlying
14 section 504 which were to eliminate discrimination against
15 the handicapped more broadly.

16 Similarly, under the Americans with Disabilities
17 Act, the -- the purpose of that act is to extend even
18 further than 504 the prohibition on and the remedies for
19 discrimination against persons with disabilities. And to
20 import into that statutory scheme a limit on relief that
21 -- that would pull it back and -- and restrict it to
22 what's appropriate on a Spending Clause measure would be
23 inappropriate under, I think, the mode of analysis this
24 Court used in Darrone.

25 But in any event, even if one looks only at

1 section 504, the Spending Clause analogy to contract
2 doesn't limit remedies available to contractual remedies.
3 This Court I think made clear, both in Franklin and then
4 more recently in Davis v. Monroe County, that although the
5 obligation that an entity may undertake under the Spending
6 Clause is contractual in the sense that it's voluntary and
7 it has to be clearly stated what the substantive
8 requirements you're subjecting yourself to when you accept
9 Federal funding are, that that does not carry with it the
10 notion that you're limited to a, quote, "contract" remedy.

11 In Davis, what the plaintiff sought in her
12 complaint was punitive and compensatory damages for
13 injuries that had been inflicted on her. She, of course,
14 was not a party to any contract. What she was seeking was
15 quintessentially a tort recovery, and this Court held in
16 Davis that as long as the requirement that the conduct was
17 intentional, it was a violation that was -- that -- that a
18 person in authority had knowledge of and had -- had
19 allowed the situation to go forward, that if those
20 conditions, which were Spending Clause conditions under
21 the Gebser decision -- if those conditions were met, you
22 could go forward and obtain the type of tort remedial
23 relief that the plaintiff was --

24 QUESTION: Well, you say -- you say she wasn't a
25 party to the contract. She -- she was a beneficiary of

1 the contract, surely. I mean --

2 MR. NELSON: Well, you could, I suppose,
3 analogize her to a third party beneficiary, but to suggest
4 that --

5 QUESTION: And contract actions were original
6 tort actions. It's easy to characterize a contract action
7 as a tort action. Right? It's just assumpsit.

8 MR. NELSON: Well, and in fact --

9 QUESTION: I -- I'm not sure a whole lot hangs
10 on --

11 MR. NELSON: -- that -- that argument can go the
12 other way, too, because the States are broadly recognizing
13 that -- that malicious and bad faith breaches of contract
14 carry with them tort remedies.

15 But I'll give another example. This Court in a
16 couple of decisions, Wright v. Roanoke Housing Authority,
17 and Wilder v. Virginia Hospital Association, held that
18 under Spending Clause enactments, obligations can be
19 imposed on the recipients of funds that are enforceable
20 that create enforceable rights under section 1983.

21 And this Court has repeatedly held, most
22 recently I think in City of Monterey v. Del Monte Dunes,
23 that 1983 is ever and always a tort remedy.

24 QUESTION: Mr. -- Mr. Nelson, why don't we look
25 specifically at this context, which is the ADA, and the

1 anomaly that when Congress thought about punitive damages,
2 as we know it did in the employment part, it provided for
3 them with qualifications and with caps on amount. So, it
4 would be passing strange, would it not, that when Congress
5 is explicit about punitive damages, it contains them, and
6 it when it says not one word one way or another, they are
7 unlimited because that's -- as I take your argument to be,
8 under part 3, there are the caps and the qualifications,
9 but under part 2, it's public service, no limitation.

10 MR. NELSON: It's under title I that the caps
11 apply, Justice Ginsburg, and I think that what that
12 illustrates is not -- not the point that -- that Congress
13 didn't intend to provide these remedies. You have to look
14 at -- at the timing of the enactments and the background
15 of those changes to the -- in the Civil Rights Act of
16 1991.

17 As the ADA was originally enacted, title I,
18 consonant with title VII, didn't provide a damages remedy
19 of any kind. It didn't provide an entitlement to any
20 legal forms of relief. It was limited to equitable relief
21 following the -- the title VII model.

22 No such limitation has ever been placed on title
23 II. In title II, Congress simply incorporated by
24 reference an action for legal remedies that this Court had
25 already recognized to exist.

1 Now, then in 1991, Congress expanded the relief
2 under title I of the ADA, as well as under title VII of
3 the Civil Rights Act for the first time ever to allow a
4 damages remedy, either compensatory or punitive, for
5 employment discrimination to which those statutes applied.

6 And what that illustrates is simply the history
7 that Congress has been very wary about providing broad
8 damages remedies in the employment discrimination area and
9 in 1981, it relaxed that unwillingness to some degree, but
10 then placed a cap on it. But in title II, it's quite
11 clear, from the original 1990 legislation, that Congress
12 didn't impose that circumscribed set of employment
13 discrimination remedies on title II. So, by expanding
14 title I, that doesn't either limit title II or imply that
15 title II was ever intended to be limited.

16 QUESTION: Am I right that title III says no
17 punitive damages?

18 MR. NELSON: Title III says no punitive damages
19 at all as part of a -- of a remedial scheme that is
20 similarly circumscribed to -- to title I, although in
21 somewhat different ways, a remedial scheme that under
22 title III doesn't make a private right of action for
23 damages of any kind available to an individual plaintiff.
24 Under title III, it's only the Attorney General who can
25 ever sue for any damages, and then when Congress -- it --

1 having made a -- a damages remedy available to the
2 Attorney General, it then went on to say, and under this
3 statute, damages doesn't include punitive damages.

4 I think to the extent that sheds any light on
5 title II at all, we know that in title II, Congress knew
6 that it was creating a damages remedy. That it didn't
7 limit those damages, as it did in title III, when it
8 created that limited damages remedy through the Attorney
9 General, is, if anything, an indication that no limitation
10 was intended.

11 QUESTION: Why? Why? Because -- why -- why
12 would somebody want to -- title II has to do with actions
13 against a government basically, doesn't it?

14 MR. NELSON: That's correct.

15 QUESTION: So -- so, I thought punitives are
16 primarily designed to compensate an individual who's not
17 going to be compensated. It's just a way of wielding a
18 very big club against the people who behaved badly.

19 MR. NELSON: Well --

20 QUESTION: Now, why would you want that big club
21 to be wielded against private people in limited amounts,
22 but when you get to a government which, after all,
23 represents the entire public, you say the sky is the
24 limit? Newport would suggest where the government is
25 involved it's less reasonable to assess punitives than

1 where a private individual is.

2 MR. NELSON: Well, I think the -- part of the
3 answer to that is the whole structure of the ADA remedial
4 scheme indicates an intention to make broader remedies
5 available against public entities than private entities to
6 begin with. That's why, when the ADA was originally
7 enacted, there were all these limits placed on title III,
8 no compensatory damages even, limits on title I against
9 private and public employers, not even any compensatory
10 damages. Clearly, in title II, everyone agrees that
11 Congress made available a remedy there that is much more
12 extensive than it made against private employers or
13 private offerors of public accommodations.

14 Now, why Congress did that I think is -- is
15 perhaps somewhat obscure, but it seems to relate back to
16 the entire history, starting with the 1964 Civil Rights
17 Act, where Congress was very hesitant about imposing broad
18 remedies against private actors, possibly in part due to
19 the -- the effectiveness of their lobbyists, which --
20 which may have been greater in this instance than those of
21 -- of public employers and entities.

22 But for whatever reason Congress did it, it's
23 clear that Congress did enact broader remedies under title
24 II than under those titles that are applicable to --

25 QUESTION: But that's an anomaly too because in

1 title -- title III, which is the -- the title that imposes
2 -- title I is the one -- employment. Right?

3 MR. NELSON: Correct.

4 QUESTION: And are government employers liable
5 for punitive damages under title I?

6 MR. NELSON: No, they are not.

7 QUESTION: So, your -- your notion that -- that
8 the government is not well representative in the
9 legislature -- here is a title that says, private sector,
10 you're going to be stuck. You're going to be subject to
11 punitive damages, but not government entities.

12 MR. NELSON: Well, that -- that was -- that was
13 what happened in the 1991 round. Presumably the -- the
14 Congress there obviously did made -- make a considered
15 choice not to impose those remedies on -- on public
16 actors.

17 But I think, you know, to step back even
18 further, one has to look at the fact that both section
19 504, by virtue of the 1986 Rehabilitation Act amendments,
20 and the ADA, by virtue of -- of section 502, are subject
21 as a general rule to the principle that -- that Congress
22 very deliberately said public entities, and in particular
23 States, are going to be subject to the full range of
24 remedies that are available against private defendants.
25 Congress did that explicitly in both those -- both those

1 statutes.

2 And I think what that indicates is that there
3 has been a considered judgment in these statutes that,
4 especially in the area of the provision of public
5 services, Congress wants broad remedies to be made
6 available against the public entities that are subject to
7 it. It's true that Congress made a different judgment in
8 1991 when it extended the -- the remedies for employment
9 discrimination. But except for that provision of the
10 statute where public employers were given a special
11 exemption, the rest of the statute evinces an -- an
12 intention by Congress that public entities not get special
13 exemptions.

14 QUESTION: But doesn't that seem rather
15 perverse?

16 MR. NELSON: Well, I think it -- it seems -- it
17 seems to me that -- that one can look at it either way.
18 It's perverse if you're a public entity; it's not perverse
19 if you're a business entity that feels like anti-
20 discrimination laws trench on the -- the freedom of
21 businesses to operate in the way they want to operate.

22 I think what Congress has done with respect to
23 discrimination against persons with disabilities, first in
24 making the 504 remedies available against recipients of
25 Federal funds, and then in making the title II remedies

1 available against public entities, is -- is Congress has
2 made a judgment that says, we think discrimination against
3 persons with disabilities is particularly objectionable
4 when engaged in by the government, just as in the
5 fourth --

6 QUESTION: But -- but your -- your Newport case
7 certainly suggests that traditionally public entities are
8 treated differently than private entities for the same
9 conduct if you're talking about punitive damages.

10 MR. NELSON: That's certainly true. And -- and
11 what I think is distinctive about Newport, to begin with,
12 here I do believe that -- that if the Court were to
13 considered that under these statutes there is a punitive
14 damages remedy available generally, and then the question
15 is should these particular defendants be freed from it
16 under a City of Newport rationale, that -- that it's fair
17 for this Court to hold the -- the defendant to the rule
18 that it generally applies, which is that if you want to
19 argue something like that, raise an issue like that, you
20 should do it in the lower courts.

21 But even looking beyond that, what we have in --
22 in these statutes is in the --

23 QUESTION: About the issue, are you -- are you
24 suggesting that it is not included in the question
25 presented?

1 MR. NELSON: No, I'm not making that argument.

2 QUESTION: Then -- then did you in your brief in
3 opposition point out that this was not properly raised in
4 the lower courts?

5 MR. NELSON: Yes, that was pointed out in the
6 brief in opposition.

7 QUESTION: I want to be sure you -- suppose that
8 we did look at the Newport issue. I'm not saying that we
9 should, but suppose we did. And suppose that you lost on
10 your point that it should be waived or deemed waived.
11 What would your -- is there any response to their claim on
12 the merits that -- that Newport makes clear that they are
13 not liable in punitive damages?

14 MR. NELSON: Yes. I think -- I think that --
15 that the first response is that through the Rehabilitation
16 Act amendments of 1986, which are codified at 42 U.S.C.,
17 section 2000(d)(7), and also in section 502 of the ADA,
18 which is codified at 42 U.S.C., section 12202, those
19 provisions are fundamentally incompatible with the notion
20 of Newport immunity.

21 And I want to just start by expressing my
22 understanding of what Newport immunity is in light of this
23 Court's decision in -- in the Vermont Natural Resources
24 case. It's not specifically an immunity that is municipal
25 immunity. It's an immunity or a -- or a general

1 presumption against awards of punitive damages against
2 State and local governments as a class. And -- and what
3 it says where it operates is that those defendants as a
4 class have an exemption against a particular form of
5 relief that is otherwise available against private actors.

6 In the Rehabilitation Act amendments and in
7 section 502 of the ADA, what Congress said expressly is
8 that as to remedies against States, which are one of the
9 entities entitled to the Newport presumption, they're
10 subject to the same remedies under the statutes as are any
11 other private or public entities, meaning if you can get
12 it against a private entity, you can get it against a
13 State. And that takes away the fundamental premise of
14 Newport, which is that governmental entities as a class
15 are entitled to a special exemption. What these statutes
16 say is that governmental entities as a class are entitled
17 to no special exemption. And the City of Newport issue I
18 think simply goes away.

19 I'd also suggest that one of the fundamental
20 premises of City of Newport is not present under these
21 statutes, and that is that there's an adequate alternative
22 deterrent. And -- and in this case, what we're talking
23 about when we're talking about punitive damages as a
24 deterrent, to answer Justice Kennedy's question earlier of
25 Mr. Robbins, in this case the compensatory damages award

1 did include pain, suffering, humiliation, and mental
2 damages. So, we're not talking about punitive damages
3 here as a surrogate for some component of compensatories.
4 We're talking about it as a remedy designed to provide a
5 deterrent that will assist in -- in Congress's goal of
6 eliminating discrimination against persons with
7 disabilities.

8 And in -- in Newport, this Court looked at the
9 1983 remedy and said, yes, punitive damages are an
10 important element of deterrence with respect to civil
11 rights violations that are subject to section 1983. But
12 we have a better deterrent which is the availability of
13 punitive damages against individual defendants who
14 actually make the decisions to carry out the -- the
15 wrongful acts that 1983 is responding to. Now, whether
16 that judgment is -- as to which is more effective, is
17 correct or not, that's the line the Court drew in Newport.

18 But under these statutes, that remedy is not
19 available because section 504 and title II of the ADA make
20 quite clear that they provide remedies only against the
21 entities. There's no right of action against a -- an
22 individual under title II of the ADA or under section 504
23 of the Rehabilitation Act. So, with respect to these
24 statutes, deterrence against the entity is all you've got
25 and all you can rely on.

1 And that's yet another reason why Newport's
2 policies are inapplicable here. And Newport was very
3 clear that beyond looking at the immunity, as -- as it
4 used the term, of municipalities as a -- as a sort of
5 standard to try to determine what the legislature was
6 thinking about when it enacted the statute, the Court was
7 also going to look at the policies of the particular
8 statutes to determine whether or not immunity from
9 punitive damages accorded with those policies. And given
10 the distinctions between the ADA and section 504, those
11 policies are not served here by immunizing the -- the
12 defendants against punitive damages on -- under a Newport
13 rationale.

14 I'd also like to get back for a moment, if I
15 could, to the -- the notion that what's going on in
16 Franklin is limited to compensatory remedies and that --
17 that the idea of -- of punitive damages as one of the
18 normal modes of relief offered by the Federal courts is
19 not really what the Court was talking about in Franklin.
20 I think that's inconsistent not only with Bivens where in
21 Carlson v. Green this Court, I think, held that punitive
22 damages are available in Bivens actions because, as one of
23 the ordinary remedial mechanisms available to the Federal
24 courts, they were particularly appropriate for the redress
25 of constitutional violations.

1 The reason I say that that's a holding is the
2 issue in Carlson was not whether there was a -- a right of
3 action for any relief at all under the Eighth Amendment.
4 It was conceded that -- that the plaintiff could get
5 injunctive relief against an Eighth Amendment violation if
6 there was a pervasive --

7 QUESTION: Mr. Nelson, last year in -- in the
8 Alexander case and this year in the Malesko case, we've
9 indicated that we're taking a much more critical look, I
10 think, at these kind of claims than we ever did in
11 Carlson.

12 MR. NELSON: Well, Mr. Chief Justice, I don't
13 think that that's -- that that's quite right with respect
14 to -- with respect to the evolution of this Court's
15 doctrine. I think what the Court said, in -- in
16 particular in Sandoval, was that -- that the Court had
17 backed away from the notion that for every right, there
18 has to be a remedy and had gone to the -- the Court v. Ash
19 notion, that what we're looking for when we're trying to
20 determine whether a right of action exists is
21 congressional intent.

22 But that was true at the time of -- of Franklin
23 as well and the Court in Franklin said that's a separate
24 question from what relief you get when it's conceded that
25 there is a right of action to begin with.

1 And similarly, in Malesko, this Court said,
2 we're not going to recognize a right of action against
3 this particular entity. The question, when it's clear
4 that Congress has made a right of action available, as it
5 is here, and what form of relief is appropriate, is a
6 different matter.

7 QUESTION: Well, but what -- what you're arguing
8 basically is that every one of these things is fixed in
9 time permanently not just as to its holding, but as -- as
10 to language in it. And what I'm trying to suggest is that
11 that is not always necessarily so, that the Court may take
12 a slightly different view some -- now than it did 10 years
13 ago.

14 MR. NELSON: Well, Mr. Chief Justice, I think
15 that's clearly -- that's clearly true. And the question
16 that -- that we as -- as lawyers are trying to -- to deal
17 with is -- is how, in light of changes in precedent and --
18 and changes in evolution of the Court's doctrine over
19 time, what aspects can we pull out and -- and hold
20 constant or -- or use to make arguments as to what the
21 rule remains.

22 And to me, looking at Franklin, which was a case
23 that -- first of all, all nine Justices concurred in the
24 holding at the time. Second, it came at a point where
25 this Court had already evolved far away from the every

1 right must have a remedy doctrine and was looking very
2 specifically at whether or not Congress had intended to
3 allow a right of action. But what the opinion for the
4 Court said and even the concurrence said was when it's
5 crystal clear that Congress said there's a right of action
6 here, does -- do we infer limits on our ability to provide
7 appropriate relief when Congress hasn't given us guidance
8 on that subject?

9 QUESTION: And didn't say anything about whether
10 punitives would be appropriate relief because all Franklin
11 involved was compensatory damages. Before that, it was
12 thought that there were no compensatory damages under
13 spending statutes. To clarify that, they used the phrase
14 appropriate relief. So, we've never had any holding that
15 under Franklin punitive damages would be appropriate.

16 MR. NELSON: That's correct, Justice Ginsburg.
17 On the other hand, the Court has certainly held that
18 punitive damages are appropriate in implied statutory
19 rights of action, the most notable being section 1981
20 which, unlike section 1983, is an implied right of action.
21 Section 1981 doesn't say anything about creating a right
22 for anybody to go in and get enforcement, and the Court
23 has held not only is there a right of action there, but
24 held as recently as the Pollard case, which I believe was
25 last year, that under 1981 the scope of relief includes

1 punitive damages.

2 I think that what that reflects is the Franklin
3 principle, that when there's a cause of action, when it's
4 a cause of action such as these, that is, essentially a
5 tort remedy, that the traditional range of relief that's
6 appropriate for such rights is provided. And that range
7 of relief includes punitive damages.

8 And -- and again, the issue in this case is not
9 whether on the facts punitive damages are appropriate,
10 because that hasn't yet been decided, but whether ever
11 punitive damages are appropriate under this statute. And
12 I think Franklin speaks to the question not in its express
13 holding but its rationale which -- which I believe has
14 survived down to the present.

15 Unless there are any further questions, I will
16 leave it at that.

17 QUESTION: Thank you, Mr. Nelson.

18 Mr. Robbins, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

20 ON BEHALF OF THE PETITIONERS

21 MR. ROBBINS: Thank you, Mr. Chief Justice.

22 Let me turn -- go back for just a moment to the
23 1991 act because I think its -- its significance here is
24 terribly important and quite a bit different from
25 respondent's characterization.

1 The 1991 act amended title I of the ADA and also
2 the Rehabilitation Act to provide a capped punitive
3 damages remedy available only to -- only to
4 nongovernmental entities. This case obviously involves an
5 uncapped award, indeed an award four times the size of the
6 cap, applied only to governmental entities and not in an
7 employment setting. That's more than simply anomalous.
8 It is, I think, completely implausible for reasons that I
9 think go beyond what -- what Mr. Nelson has described to
10 you.

11 The fact is title I was enacted in its original
12 form at the very same time that Congress was considering
13 the 1991 legislation. Everyone in Congress knew that when
14 they enacted in title I that there shall be the same
15 remedies as title VII -- everyone knew that at that very
16 moment laying before another committee in Congress was the
17 very legislation that is being characterized as the 1991
18 legislation, as if it happened much later. These happened
19 simultaneously and everyone knew that punitive damages
20 were around the corner. In my view, when you look at what
21 Mr. Nelson called the timing of the enactments, you really
22 have to read title I as if it enacted a punitive damages
23 and capped and targeted and calibrated.

24 Title III also has a penalty provision.
25 Although it forbids punitive damages, to go back to

1 Justice Ginsburg's question, it has a civil penalties
2 provision. So, the thing that is remarkable about
3 respondent's position and the position you would be urged
4 to adopt is that although title I of the ADA has a limited
5 punitive damages provision applicable only to employment
6 cases and exempting the government, and although title III
7 has a civil penalties provision applicable only to public
8 accommodations, title II, which is silent, shall have an
9 unlimited punitive damages provision which can be applied
10 against governmental entities. And it is against
11 governmental entities and only governmental entities that
12 title II applies.

13 And City of Newport, I should add, doesn't
14 change just how anomalous that is. The Rehabilitation Act
15 amendments go not one step in the direction of overturning
16 City of Newport. The Rehabilitation Act amendments say
17 only this, that the States shall be liable for whatever
18 remedies are applicable to other public entities or
19 private entities. It doesn't tell us what those shall be,
20 and in our view punitive damages aren't available against
21 anybody under title II. So, it -- it hardly advances
22 respondent's position to say that there shall be
23 applicable to the States whatever is applicable to anyone
24 else.

25 The other thing is, what are those other public

1 entities if not, among other things, municipal governments
2 like my client? By carving out, in other words, municipal
3 governments, the 1986 amendment is a very strange way to
4 overrule the doctrine in -- in City of Newport, and I
5 would respectfully suggest that it does no such thing.

6 Let me -- let me end with this point. And we
7 haven't -- we haven't mentioned the history of judicial
8 interpretation of title VI and section 504, which had
9 never -- never, not once -- ever been construed to permit
10 punitive damages at any of the times in history that these
11 statutes were meticulously amended and -- and previous
12 remedy provisions incorporated going forward.

13 But I do want to end with where Mr. Nelson
14 began.

15 QUESTION: Thank you, Mr. Robbins.

16 MR. ROBBINS: Perhaps not.

17 (Laughter.)

18 CHIEF JUSTICE REHNQUIST: You've already ended.

19 (Whereupon, at 12:08 p.m., the case in the
20 above-entitled matter was submitted.)

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