IN THE SUPREME COURT OF THE UNITED STATES

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KAY BARNES, ETC., ET AL., :

Petitioners :

v. : No. 01-682

JEFFREY GORMAN. :

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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.

C O N T E N T S

P R O C E E D I N G S

(11:12 a.m.)

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

Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

ON BEHALF OF THE PETITIONERS

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

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

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

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

petitioners raise the Newport case at any time below?

MR. ROBBINS: No.

QUESTION: Why not?

MR. ROBBINS: The -- the party --

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

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

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

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

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

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

QUESTION: Was there a reason?

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Yes.

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

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

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

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

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

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

(Laughter.)

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

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

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

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

QUESTION: If the Court --

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

MR. ROBBINS: I think that's correct.

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

MR. ROBBINS: No.

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

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

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

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

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

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

QUESTION: Explicitory?

(Laughter.)

MR. ROBBINS: I'm sorry?

QUESTION: Did you say explicitory?

MR. ROBBINS: Good heavens, I hope not.

(Laughter.)

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

(Laughter.)

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

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

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

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

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

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

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

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

QUESTION: But it wouldn't achieve that.

MR. ROBBINS: But -- but --

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

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

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

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

QUESTION: I understand.

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

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

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

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

MR. ROBBINS: Well --

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

MR. ROBBINS: Yes.

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

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

QUESTION: All right.

MR. ROBBINS: -- as to which --

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

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

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

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

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

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

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

QUESTION: Very well, Mr. Robbins.

Mr. Garre, we'll hear from you.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

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

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

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

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

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

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

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

Bivens cases?

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

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

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

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

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

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

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

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

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

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

QUESTION: Under the Rehabilitation Act, it has

been used under 504?

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

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

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

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

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

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

If there are no further questions.

QUESTION: Thank you, Mr. Garre.

Mr. Nelson, we'll hear from you.

ORAL ARGUMENT OF SCOTT L. NELSON

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

QUESTION: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But in any event, even if one looks only at

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

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

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

the contract, surely. I mean --

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

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

MR. NELSON: Well, and in fact --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NELSON: That's correct.

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

MR. NELSON: Well --

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

where a private individual is.

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

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

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

QUESTION: But that's an anomaly too because in

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

MR. NELSON: Correct.

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

MR. NELSON: No, they are not.

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

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

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

statutes.

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

QUESTION: But doesn't that seem rather perverse?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

punitive damages.

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

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

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

QUESTION: Thank you, Mr. Nelson.

Mr. Robbins, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

The other thing is, what are those other public

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

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

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

QUESTION: Thank you, Mr. Robbins.

MR. ROBBINS: Perhaps not.

(Laughter.)

CHIEF JUSTICE REHNQUIST: You've already ended.

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