A. J. T., BY AND THROUGH HER PARENTS, A. T. & G. T., Petitioner, v. OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279, ET AL., Respondents

Oral Argument - April 28, 2025

John G. Roberts, Jr.

We will hear argument first this morning in Case 24-249, A.J.T. versus Osseo Area Schools. Mr. Martinez.

Roman Martinez

Mr. Chief Justice, and may it please the Court: The district has conceded Ava's question presented.

Both sides now agree that the ADA and the Rehabilitation Act apply the same legal standards to all plaintiffs and that it's wrong to impose any sort of uniquely stringent test on children facing discrimination at school.

That concession fully resolves this case. The Eighth Circuit rejected Ava's claims under Monahan's two-tiered asymmetric approach.

That ruling can't stand.

The district wants to preserve its victory under a new theory it invented after dropping the indefensible two -tiered approach it defended below.

Now they say that the statutes apply a bad-faith or gross-misjudgment test to all plaintiffs, not just schoolchildren protected by the IDEA.

That's exactly the opposite of what they told you at the cert stage, where they said that no bad faith or intent is required outside the IDEA context. The district's new theory violates the text, history, and purpose of both statutes.

It contradicts decades of regulations.

It defies at least five precedents of this Court and decisions from virtually every circuit.

It would also revolutionize disability law, stripping protections from vulnerable victims and gutting the reasonable accommodations needed for equal opportunity. If you address this new argument, you should reject it out of hand.

But you shouldn't address it because it's so clearly procedurally barred many times over.

Whether you look at this through the lens of judicial estoppel or waiver or Rules 15 and 24, one thing is clear: The district can't win this case based on a radical new theory that goes beyond Ava's question presented and directly contradicts what they told the lower courts and this Court at the cert stage.

Instead, you should follow regular order and procedure, you should answer the limited question presented, and you should vacate the decision below. I welcome the Court's questions.

Clarence Thomas

Isn't there an argument, though, that we should -- that some would think is embedded or included in the question presented, and that is what is the standard?

Roman Martinez

I don't think so, Your Honor.

I don't think that question is embedded in the question presented.

I think our question presented was very clear that we were asking whether the uniquely stringent test that Monahan required only in the educational context, whether that was the correct rule. And that's clear not just from the framing of the question presented and the paragraphs, the introductory paragraphs, leading into it but also from what we said in the -- the rest of the petition, where we used that "uniquely

stringent" phase 10 different times to talk about what issue we were putting before the Court.

We said that on pages 2, 3, 15, 13, 16, 22, 24, 27, and 39. It's not just us, though.

We understood our question presented that way.

The other side also understood it the same way.

So, when they responded to our petition and they responded to our question presented in their cert papers, they took the case on exactly those terms.

They argued about the circuit split, they argued about the merits.

They said this case was narrow and was only going to affect a sliver of plaintiffs who were in Ava's position, children facing discrimination at school. Now, though, they're trying to make this case about everyone, about 44 million Americans with disabilities who are protected by reasonable accommodations and who would suffer under the bad-faith-and-gross-misjudgment test that they're putting before the Court for the first time.

John G. Roberts, Jr.

Well, if that's true, counsel, then nobody is defending the position that you challenged, is that right?

Roman Martinez

I think, at this point, the other side has conceded that that position is indefensible, and then -- and, therefore, they aren't defending it.

I think they have one amicus who filed a brief that seems to be defending the Monahan test.

John G. Roberts, Jr.

Well, and yet that position that you're attacking was the majority position, right?

Roman Martinez

That was the position adopted by five circuit courts.

That's right.

John G. Roberts, Jr.

Well, what do we normally do in a situation like that? Normally, we appoint an amicus to defend the judgment below.

And we're saying we should just hand you a victory even though no one's challenging your understanding of what the conflict was about.

Roman Martinez

Your Honor, I think that it's fully presented to this Court, the issue of whether that Monahan test is right. And the fact that the other side couldn't even come up with an argument at the merits stage to defend that standard is a reason why you should set that standard aside.

It's not a reason to kind of have a do-over or appoint an amicus. I think it's true you sometimes do appoint an amicus in that circumstance.

I think you usually do it when the other side is -- is -- is no longer defending the judgment as opposed to the reasoning of the opinion, so I don't think that that sort of situation applies here. But we certainly don't think there's an impediment for -- to you coming in and resolving the question presented.

You, of course, can look at the Eighth Circuit's rationale and the rationale of the four other circuits that have adopted this erroneous rule.

Brett M. Kavanaugh

If -- if we do what you say and say that there's no unique standard in the schools context, it'll still be open to the court on remand to decide which standard is appropriate throughout, correct?

Roman Martinez

I think the Eighth Circuit would have to apply its own precedent to that question, but I think what you should say --

Brett M. Kavanaugh

Or it could rethink that precedent.

In other words, you're saying to leave open the question of whether the proper standard is deliberate indifference or, instead, is bad faith or gross misjudgment and that that can be considered on remand and can be considered by other courts of appeals, to the Chief Justice's question, that have this carveout or separate rule for schools?

Roman Martinez

I think, in theory, it could be considered on remand either by the Eighth Circuit or in other cases by other courts.

I do think that in this case, it can't because, in this case, we think the other side is judicially estopped from changing positions on which they, you know, successfully avoided en banc review in the Eighth Circuit.

Brett M. Kavanaugh

Point taken on that.

And then what -- can you explain the delta between, on the one hand, "deliberate indifference" at least as the Solicitor General defines it and "bad faith" or "gross misjudgment" on the other hand? Because the way they define "deliberate indifference" sounds a lot like someone acting in bad faith.

Roman Martinez

Your Honor, could I just add one additional comment on your earlier question and then --

Brett M. Kavanaugh

Mm-hmm.

Roman Martinez

-- answer that one? I think the other thing is, when we're asking you to get rid of the Monahan two-tiered approach, I think it would be valuable and important for you to say not only that that approach is wrong but that the rationale under which it was adopted, the rationale being that the IDEA context requires this sort of special rule in this context, is wrong.

And I think that would help provide guidance to the Eighth Circuit and other courts. With respect to what the test is, you know, it's a little hard to fully understand the other side's test because they've characterized it in so many different ways.

They kind of seem to flip-flop depending on what court they're in and what brief they're writing.

As I understand their current theory --

Brett M. Kavanaugh

No, just put aside what they're -- what is the difference between deliberate indifference and bad faith?

Roman Martinez

So I think their bad -- as they -- as I understand their bad-faith test, it requires motive, which, in their brief, they describe in various places as requiring a sinister state of mind or something, you know, approximating a bare desire to harm.

And so I think that's an animus -type test that requires more than the knowledge that there's a substantial likelihood of a violation --

Brett M. Kavanaugh

But deliberate indifference, as the Solicitor General at least is articulating it -- and I don't know if you agree or disagree -- you would have to know that you have a legal obligation to do something or substantially likely and still not act.

Roman Martinez

So I think --

Brett M. Kavanaugh

And if you know you're supposed to do something as a matter of law and don't act, that's -- you know that --

Roman Martinez

I --

Brett M. Kavanaugh

-- sounds like that.

Roman Martinez

I think you can ask the Solicitor General to elaborate on their theory. As I understand their test, which -- which we think is the majority test, you don't have to know the law.

You don't -- it's -- a mistake of law is not a defense.

You have to know the facts that would constitute a violation of the law, and then you have to be indifferent to those facts. And I think it's -- it's a fair question to ask the SG what -- what they -- how they would characterize it, but that's certainly how I understand the test.

Sonia Sotomayor

I'm not sure where any of these tests come from, because mens rea is generally willfulness, which requires knowing what the law is, but the statute doesn't talk about willfulness.

Motive, in -- intent -- we don't care about motive.

We've said that repeatedly in a bunch of different contexts. It's do you know you're doing the act and are you intending to do the act.

If it violates the law, you're guilty.

Pardon the pun.

This is a tort, but you're responsible.

Or you do it knowingly, knowing that you're doing the act. So I don't know where the bad faith comes from.

I don't know where the gross indifference comes from.

I don't know where the deliberate indifference comes from. Have you figured that out?

Roman Martinez

So --

Sonia Sotomayor

I think that that's part of the question that would have to happen if a court takes the other side's point that it should be intentional with respect to all claims, injunctive -- injunctive and/or damages. So I take their point that maybe you need intentional conduct for an -- an injunction, but I don't know why you need anything else.

Roman Martinez

Right.

Justice Sotomayor, we agree with that -- the impulse underlying that question.

I think those are some great questions for the other side. I think what I would say on this is that, cert --

Sonia Sotomayor

Yeah, but you're here, so --

Roman Martinez

Well, let me take a shot at it.

Sonia Sotomayor

Okay.

Roman Martinez

I think, cert -- certainly, with respect to liability and whether the statute is violated, there's no intent requirement.

It's not in the statute.

What the statute has is a causation requirement which is satisfied in circumstances where a person's disability means that they're being excluded from a building or a program or a service.

So there's just no way to -- to gin up a -- an intent requirement out of that. I think what some courts have done in the context of damages is that -- is they've sort of read the damages provisions and the -- the damage -- the remedies that are available through the lens of the Spending Clause and said: We -- we require something more, and because we require actual notice to the recipient of federal funds before we cut off federal funds, we should require some form of notice. And so, in the Title IX context, courts have applied a deliberate indifference-type standard, and we think that -- that that's sort of the -- the uniform rule or at least the almost uniform rule that's applied by nine circuits in this context. What the other side has, though, is a bad-faith-and-gross-misjudgment rule that is literally -- it comes out of nowhere, like nowhere.

There -- no court has ever embraced that test as a standard under -- other than the five circuits that we're arguing about here, no court has ever embraced that test in any other context under the discrimination laws, and we think that's a very high standard to meet.

Sonia Sotomayor

I think you're going too far, though, meaning I don't know why you can't have an intentional failure to reasonably accommodate, because that's what discrimination is. And accommodation is: I'm not letting you use a program that you're otherwise qualified for because I'm not letting you get to the program.

Either you're not providing a ramp or you're not providing an instrument that I could use.

By its own definition, that's intentional conduct, isn't it?

Roman Martinez

Well, I -- I don't think so, Your Honor.

I think the reasonable accommodation problem arises in a context where there's no intent. And I totally agree with what the other side said on page 30 of their brief in opposition and what this Court said in the

Choate decision, where it recognized -- it recognized that the statutes provide -- and this is page 30 in their brief -- the statutes prescribe at least some unintentional yet harmful conduct, and talked about Choate, which itself recognized that the Rehabilitation Act targets unintentional discriminatory acts like architectural barriers.

Sonia Sotomayor

Got it.

Roman Martinez

So those do not require intent and have never been understood to require intent.

Ketanji Brown Jackson

Mr. Martinez --

Neil Gorsuch

Mr.

--

Ketanji Brown Jackson

Oh.

Neil Gorsuch

-- Mr. Martinez -- I'm sorry -- just to follow up on that, I -- I take your point that we don't have to address any of this on your theory of the case, but deliberate indifference is often deliberately indifferent to somebody else's discrimination. It's usually a supervisory -type liability. And -- and, as Justice Sotomayor suggested, and maybe I just missed it, when we think of discrimination in many contexts, causation, you're -- you're right, but the act of discrimination is to treat someone else differently because of their disability, right? And I would have thought that that might have meant I -- I intend to treat someone differently.

It doesn't matter about my further motive.

I agree, I -- I take that point, bad faith.

But why wouldn't that be the test?

Roman Martinez

So, Your Honor, two things on that.

First of all, I guess what I would say is, with respect to the -- the need for intent in every context, what actually helped this whole area of law click for me was reading your decision for -- in the Cinnamon Hills case, which was addressing -- explaining sort of the theory of reasonable accommodation statutes.

Neil Gorsuch

I'm glad you remember that, because I'm not sure I do.

Roman Martinez

Well, it -- it was actually a very thoughtful opinion that -- that really kind of teased out the differences -- (Laughter.)

Roman Martinez

-- between disparate -- intentional treatment and reasonable accommodation claims, and what -- what you said in that opinion was that sometimes formal equality isn't enough.

And in the disability context, it isn't.

Neil Gorsuch

Mm-hmm.

Roman Martinez

And the reason for that is that you can have people discriminated and excluded by reason of their disability even though there's no -- there's no intent. And -- and so, because you have a disability --

Neil Gorsuch

I see.

Roman Martinez

-- you're not able to take advantage of a program.

And so, even when there's not animus when there's not a bad actor on the other side, you know, you imagine someone rolls up --

Neil Gorsuch

I -- I follow you.

Roman Martinez

Okay.

Neil Gorsuch

I got it.

Thank you.

That's helpful to me.

Roman Martinez

Sure.

Ketanji Brown Jackson

Mr.

--

Neil Gorsuch

And thank you for the reminder. (Laughter.)

Neil Gorsuch

I do have one -- one other question.

Roman Martinez

Yes.

Neil Gorsuch

And that is that you're right that a lot of the courts have looked at these things through the Spending Clause, really, the spending power, and -- and, therefore, states have to be on -- on clear notice, and they've distinguished between damages and injunctions on that basis. But I'm kind of curious why, because I would have thought in a contract scenario I might be more on notice that my violations would incur damages than they would an injunction requiring specific performance, which is an unusual remedy for a contract breach. Thoughts?

Roman Martinez

So I think, on that one, I think that with respect to the injunction, if -- if the recipient of federal funding doesn't like the injunction, they can just stop receiving the funding.

So they have the ability to get out of -- out of the deal, and so it doesn't put them on the hook to spend money in the same way that a damages remedy would.

Amy Coney Barrett

Mr. Martinez, has any other circuit taken the view or is this argument that the other side is pressing, is that one that's kind of a live issue in the lower courts?

Roman Martinez

No.

Amy Coney Barrett

Has any other court taken it?

Roman Martinez

No.

We have 12 -- 12 circuits, all -- every single geographic circuit across the country says that you don't have to show intent to establish a violation of this statute, outside of the context of children with education claims.

So the baseline rule that applies everywhere is no intent for liability. You then have 10 circuits that have said you do have some form of intent requirement for damages, and nine of those 10 circuits say that the test is deliberate indifference. There's a little bit of uncertainty about the Fifth Circuit about what kind of intent is required.

The Fifth Circuit has suggested that deliberate indifference might not be enough, but they haven't really clearly adopted a different intent standard. But I think the other side says that there would be disarray if you didn't resolve, like, every last issue in this case.

That's just not right. If you say the IDEA context doesn't create a special rule disfavoring kids in the education context, what's almost certainly going to happen is that the circuits out there are just going to apply their baseline rule, and all 12 of the geographic circuits are going to say that intent isn't required.

Amy Coney Barrett

Well, it might also be that this sparks percolation on this issue. I mean, maybe what will happen is that there will be pushback of the sort that your friend on the other side is advocating.

Roman Martinez

I -- I would doubt that because of the fact that the reason these five courts have applied this Monahan test is really because, and as they explained it very well in their brief in opposition, it's all about the I mean, look at their brief in opposition.

The first paragraph is all about, like, this is an IDEA case, and they're basically trying to interpret these statutes in circumstances where kids have protections under the IDEA to give them fewer protections under the ADA and Rehabilitation Act.

Ketanji Brown Jackson

So --

Elena Kagan

I understand, Mr. Martinez, why they did that before Smith v. Robinson and the congressional response to that. It's basically the same rationale that the Court used in Smith v. Robinson. But, once that happened, Smith v. Robinson and then Congress's repudiation of it, why didn't those courts go back and take a look at their own precedent?

Roman Martinez

So -- so Monahan was, of course, before Smith versus Robinson.

I don't know the answer to that, Your Honor.

I think it's hard because you have to get en banc review. We tried our best to get en banc review in this case, and when we did that and we resurfaced this issue to the Eighth Circuit in an effort to get them to overturn their precedent, the other side came in and said -- they didn't just say follow this because it's your precedent, they said follow it because it's right, and they won a denial of en banc review in part based on their argument that there is this two-tiered approach and a special rule needs to apply with kids who have IDEA rights. And so now they're coming into this Court flip-flopping on that and trying to kind of play -- have it both ways and play both sides, even though now they realize that that -- that earlier argument is indefensible.

Ketanji Brown Jackson

So, Mr. Martinez, can you just speak very clearly -- Chief, should -- can I go forward?

John G. Roberts, Jr.

Sure.

Ketanji Brown Jackson

Can you just speak very clearly to why they're wrong about that? In other words, they said Monahan is correct for this particular context.

Roman Martinez

Yeah.

Ketanji Brown Jackson

And I'd invite you to just --

Roman Martinez

So --

Ketanji Brown Jackson

-- tell us why they're wrong.

Roman Martinez

-- I think there are two main reasons, which I'll summarize very quickly. Number one, there's nothing in the text of either the ADA or the Rehabilitation Act or the statutes it cross-references that sets up a two-tiered standard under which different plaintiffs seeking relief under the same provisions have different standards apply to them. If that weren't enough -- we think it is enough -- you have an express statutory language, 1415(l), in the IDEA that was enacted to overturn Smith versus Robinson and the -- the erroneous reasoning that it embraced, and 1415(l) specifically says -- I'm not going to quote it, but it base -- it says that you can't use the IDEA to limit people's rights under the other statutes like the ADA or the Rehabilitation Act.

John G. Roberts, Jr.

Thank you, counsel. Justice Thomas? Justice Alito?

Samuel A. Alito, Jr.

This is not exactly related to the question that's before us, so perhaps it's unfair, but I think it might have some relationship to what the court below was getting at. So this is the question.

What difference, if any, do you see between the cost that a school district must be required to -- the extra costs a school district must be required to shoulder under the IDEA and the extra costs that would constitute a reasonable accommodation under the ADA --

Roman Martinez

I --

Samuel A. Alito, Jr.

-- or the Rehabilitation Act?

Roman Martinez

-- I think it's going to depend in any particular case.

And the way to think about this is these are really different statutory regimes. You have the IDEA that gives you an affirmative right to a FAPE, the ADA in Section 504, which eliminate discrimination. Depending on the case, it may be that the IDEA gives you more than the other statutes in one context, and the other statutes might give you more than the IDEA in a different context. Here, I think, with respect to the -- the monetary relief that's at issue, it -- it really -- you know, the -- the -- the statutes overlap to some extent, but they don't overlap with respect to the statute of limitations.

And so we're trying to take advantage of the statute of limitations that Congress gave us with respect to the ADA and the Rehabilitation Act, which allows us to go back further in time than the two-year statute of limitations under the

Samuel A. Alito, Jr.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor? Justice Kagan? Justice Gorsuch? Justice Kavanaugh?

Brett M. Kavanaugh

A couple follow-ups.

You agree that there's an intent requirement for damages claims, but you say it's deliberate indifference, correct?

Roman Martinez

Your Honor, in our opening brief, we did not take a position on that.

We did not take a position on whether there was an intent requirement, but we certainly are not fighting that.

We didn't fight that below.

I think the Eighth Circuit and nine other circuits say it's deliberate indifference.

Brett M. Kavanaugh

That sounds close to a yes. (Laughter.)

Roman Martinez

Close -- close -- close to a yes.

We -- you know, we would have taken a position on it if we thought that was the question presented, but it isn't, so we -- we didn't have to.

Brett M. Kavanaugh

And then --

Roman Martinez

But I think that's fair.

Brett M. Kavanaugh

-- do you agree with the SG's formulation of deliberate indifference? Any problems with how they formulate it in their brief?

Roman Martinez

As I understand their formulation, I agree with it.

I think substantial likelihood is an appropriate way of -- of thinking about, you know, substantial likelihood of a violation.

I think the one thing I just want to be very clear on is you don't have to know the law.

You have to know the facts that would give rise to the violation. And I think that's an important caveat.

Brett M. Kavanaugh

Well, on that point, in my last question, there's a lot of line drawing that has to go on in this context, I think, with school districts deciding whether to provide services to 4:30 p.m. or until 6 p.m. And that's a very fact -intensive judgment on which the district court found that the district officials exercised professional judgment, convened multiple IEP meetings, extended the school day beyond the school day of her peers, implemented many of Dr. Reichle's suggestions. Failure to provide extended schooling until 6 p.m. at home was, at most, negligent, is what the district court found. And I guess it's hard to know how you say -- where do you find the line for deliberate indifference or you know that it's substantially likely to be a violation when it's this fact-intensive reasonableness --

Roman Martinez

Right.

Brett M. Kavanaugh

-- kind of inquiry? So how should a court think about that? In other words, the court on remand, if it's applying deliberate indifference, how should it think about it as related to these facts?

Roman Martinez

Well, I think the first thing I would say is we -- we love the fact that we have appellate courts, and the Eighth Circuit in this case said, looking at those same facts, that we may well have established deliberate indifference.

So it took a different view.

We think, certainly, on the summary judgment record in this case, we would get past, you know, the other side's motion for summary judgment on whether there was deliberate indifference. Obviously, it's going to be a -- a fact-bound analysis.

It's going to require close attention.

And the sensitivity that this Court has -- has often said is very important in the IDEA context should, of course, apply in this context too.

But we think that we have good arguments and good facts for us that we can prevail on deliberate indifference properly understood if this goes back down below.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Barrett?

Amy Coney Barrett

No.

John G. Roberts, Jr.

Justice Jackson?

Ketanji Brown Jackson

And, of course, your overall point is that courts already consider deliberate indifference on facts in other contexts?

Roman Martinez

That's right.

They -- they -- they consider it on other facts in other contexts.

An d Justice Gorsuch asked, isn't it only the case when you're talking about supervisor -- supervisory-type liability? And we -- I would just say -- I should have said this earlier, Justice Gorsuch, but I'll say it's also true in other contexts, like the prison context.

When you're assessing Eighth Amendment claims dealing with the, you know, medical treatment or conditions of confinement, when you're looking at the prison's own conduct, you apply the deliberate indifference standard there.

And so, yes.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel. Ms. Reaves.

Nicole F. Reaves

Mr. Chief Justice, and may it please the Court: There is no sound basis for applying different intent requirements to Title II and Section 504 claims brought in the school context.

The texts of those provisions apply to qualified individuals and provide relief to any person and do not distinguish among different contexts.

And if there were any doubt, 20 U.S.C. 1415(l) makes clear that Title II and Section 504 rights are not restricted or limited in the education context. Respondents no longer dispute these points.

Instead, they ask this Court to adopt a breathtakingly broad rule and hold that a plaintiff cannot bring a Title II or Section 504 claim in any context without proving intent to discriminate.

No court of appeals has ever adopted that rule, which would entirely eliminate all Title II and Section 504 reasonable accommodation claims. This Court should reject Respondents' attempt to belatedly insert such wide-ranging issues into this case and instead merely hold that students are not required to satisfy heightened intent standards in the

school context. And Respondents' arguments are wrong on the merits in any event.

The text, context, history, and purpose of Title II and Section 504 do not require a plaintiff to prove intent to discriminate to bring a claim. I welcome the Court's questions.

Clarence Thomas

So the -- I think you argue that intent is required in a damages context?

Nicole F. Reaves

Yes, Justice Thomas.

Clarence Thomas

But not injunctive relief?

Nicole F. Reaves

Yes.

Clarence Thomas

Now what's your explanation for the difference?

Nicole F. Reaves

So I think the explanation comes primarily from this Court's recognition in the Spending Clause context and particularly in Davis and Gebser, where the Court has walked down a lot of this road, that there needs to be particular notice when there's going to be an expenditure of funds under Spending Clause statutes. And, in contrast, when an entity incurs liability but is only potentially going to have to be on the hook for injunctive relief, the entity has a choice.

They can reject ongoing spending in exchange for not having continuing injunctive relief.

And that's not the case with backward -looking damages. And I think it's also not unusual for the Court to draw these types of lines in this area.

In Lane v. Pena, the Court held that the Rehabilitation Act and Section 504 in particular, that the United States had not waived its sovereign immunity with regard to damages claims but recognized that it had waived its sovereign immunity with regard to injunctive relief claims.

Neil Gorsuch

Well, I -- I get the -- the -- the sovereign immunity overlay, but, I mean, the -- the strength of the argument from Petitioners and -- and the government is that the statutes here don't draw any distinction of the sort that Respondent proposes -- proposed below.

And, here, you're asking us to draw a distinction that the statute doesn't have on its face between damages and injunctive relief and apply a higher standard when it comes to injunctive relief.

So could you address that oddity? And then again, I asked the question of Mr. Martinez, if -- if you're looking at it through a contract-type lens through the Spending Clause, why wouldn't a -- a state be on notice more that a breach would incur damages than specific performance, which is an extraordinary remedy in contract at least? So one might think, if -- if the state were on notice of anything, it might be injunctions before damages rather than the other way around. Thoughts?

Nicole F. Reaves

So, as to the first part of your question, I don't think we're asking the Court to draw a new line here because I think both Gebser and Davis already strongly suggest this line between damages and injunctive relief.

Neil Gorsuch

Well, but textual -- I understand that point, but I was focusing on the statutory text.

The strength of the argument here is the statute doesn't draw the distinction that Respondent proposed.

And now you're asking us to do a similar thing, and I'm -- I'm just wondering about its consistency with contract-type analogies.

Nicole F. Reaves

Right.

And so, as far as the contract analogy goes, I think that the -- the contract analogy obviously isn't perfect because the focus here is -- is notice --

Neil Gorsuch

Mm-hmm.

Nicole F. Reaves

-- as to liability going forward.

And if you've already had a violation of the statute and you're automatically liable without any sort of intent requirement, that would weigh -- raise real notice problems.

But, unlike a traditional contract, a state can or a funded entity can withdraw and -- to forgo ongoing injunctive relief.

That's not necessarily true of a contract, but I think, because of the way the Spending Clause contract overlay works in this context, the notice concerns are just less there. And I would also like to just briefly respond to Respondents' suggestion that injunctive relief is always going to be significantly more burdensome.

Plaintiff still is going to need to prove both the violation and that they are entitled to injunctive relief, and that means they're going to need to show that the on -- the violation is ongoing and that but for injunctive relief, the violation is not going to fall --

Neil Gorsuch

Does the government think that intent is required or that it -- it -- it -- it's just noticing that -- that it might be suggested by our cases? Or would deliberate indifference be the appropriate standard for both damages and injunctive relief?

Nicole F. Reaves

So we think that -- and I think this is consistent with what we said in our brief -- intent is not required to state a violation of the statute.

Neil Gorsuch

No, I understand, but for -- for damage --

Nicole F. Reaves

And it is not required for injunctive relief.

Neil Gorsuch

-- for damages.

Nicole F. Reaves

It absolutely is required for damages.

Neil Gorsuch

You think it is? Okay.

Nicole F. Reaves

Yes.

Ketanji Brown Jackson

But you're not -- your argument doesn't turn on that today, right? I mean, isn't -- I'm trying to understand whether, to rule in favor of Petitioner or the government today, we have to take a position on deliberate indifference or whether there's a difference between damages or injunctive relief. I didn't understand the question presented in this case as it currently exists to require us to rule on any of that.

Nicole F. Reaves

That's correct.

We don't think the Court has to rule on any of that. Because we do think this was teed up on the assumption that there are baseline standards, the Court doesn't need to get into those, and the question is just whether there's a heightened intent standard that applies to all claims in the school context.

John G. Roberts, Jr.

In that regard, do you have any concerns that no one is here defending the position of the majority of circuits who addressed this question below, or am I the only one? (Laughter.)

Nicole F. Reaves

Mr. Chief Justice, I don't have any concerns about that.

I do think you have the reasoning of the decision below, you have the reasoning of Monahan, you have the reasoning of one of the amicus briefs in support of Respondents.

You have Respondents' brief in opposition, which actually did take this head-on. And I honestly don't think there's a lot more to be said for the bad-faith-or-gross- misjudgment standard.

It -- it just -- there's no basis for it in the text, particularly in light of Section 1415(l). And I -- I think there's perhaps a reason that Respondents have shifted positions because it is so hard to defend, so I don't think this is a situation in which there's a close question that this Court should be worried about that no one is actually defending.

Amy Coney Barrett

Why do you think no circuit has changed its position? If it's so obvious that Respondent has just completely given it up and jumped overboard, why are all these circuits sticking with it?

Nicole F. Reaves

I honestly think that's a good question.

Having read all of these cases post-Monahan and then post Section 1415(l), it really just seems like courts of appeals haven't grappled with it, and maybe it's because of how some of these cases were litigated and 1415(l) wasn't pointed out to the courts. I do find it somewhat surprising, but I don't think that's a reason for the Court to, you know, suggest that the bad -faith-or-gross- misjudgment heightened standard is appropriate.

Brett M. Kavanaugh

You --

Amy Coney Barrett

Then I'll ask you the question -- oh, sorry.

Brett M. Kavanaugh

Go ahead.

Amy Coney Barrett

-- the question that the government always gets asked: The difference between your position and Mr. Martinez's?

Nicole F. Reaves

I think the primary difference is that, you know, while we don't think the Court has to resolve this in this case, we absolutely believe that intent is required for damages claims under the ADA and title -- and Section 504.

And we think that deliberate indifference is a way to prove that intent. And I think -- I -- I took my friend to not be taking a clear position on that here or in -- in -- in his briefing.

Brett M. Kavanaugh

How would you describe the difference between deliberate indifference and bad faith?

Nicole F. Reaves

So I'd like to take this in a couple parts both as to the whole standard and then each part of the bad-faith-or-gross- misjudgment standard. So deliberate indifference requires actual knowledge of -- that a federally protected right was substantially likely to be violated and failure to act.

That we think is just a standard intent requirement.

It doesn't require any sort of animus. So look at the bad-faith-or-gross - misjudgment standard.

I think, first of all, as a whole, it's been rarely applied.

It's only been applied in this Monahan line of cases, and for that reason, I think it's a little bit undertheorized, whereas deliberate indifference has been applied across the board to Title II and Section 504 cases, other than some circuits in this context. And then, if you break out the two parts of the standard, I think that bad faith appears to have an animus requirement, which we just don't think is consistent with the text of these statutes.

It's not consistent with things the Court has said in cases like Murray versus UBS Securities that discrimination generally doesn't require animus.

So we think that's, you know, too high of a standard.

Brett M. Kavanaugh

Is -- is --

Nicole F. Reaves

And then, if you get to the gross misjudgment part, I think that's very unclear.

You know, Respondents suggested in their brief in opposition that just looking at it on its face, it doesn't require intent at all, and that would be a problem. And then Respondents in their merits brief cite two cases that are over a hundred years old that don't even use "gross misjudgment." They use "gross mistake."

Brett M. Kavanaugh

Well, to Justice Barrett's question about the circuits, is there a case out there that failed under the bad-faith standard that you think would have succeeded under the deliberate-indifference standard?

Nicole F. Reaves

Well, the court of appeals below here thought that it probably made a difference, so I think that's a good example. I think I can give you an example of a case sort of going the opposite direction. So we cite the Eleventh Circuit's decision in Liese in our briefing, and in that case, the issue was whether there was failure to provide a reasonable accommodation in the form of a sign language interpreter for a patient at a hospital, and the court found that there was enough to go to trial because there was deliberate indifference because these individuals had repeatedly requested an interpreter. But there was no indication in that decision that any of those choices made by the hospital were backed by some sort of -- of animus on behalf -- you know, animus discriminating against individuals with disabilities. So I think that case, while it got to go to trial, under our standard wouldn't necessarily get to go to trial --

Brett M. Kavanaugh

Thank you.

Nicole F. Reaves

-- under Respondents.

John G. Roberts, Jr.

Thank you, counsel. Justice Thomas? Justice Alito?

Samuel A. Alito, Jr.

What do you think was the impulse that led so many lower courts to adopt the standard that you find to be completely unsupported?

Nicole F. Reaves

So I think the initial rationale was the one the court laid out in Monahan, the Eighth Circuit laid out, which was this desire to harmonize the IDEA with the -- with Section 504 and Title II. And I think that might have been understandable, but -- and, obviously, this Court found that logic compelling in Smith, but I think, once Congress adopted 1415(l) and said that nothing in the IDEA shall be construed to restrict or limit the rights, procedures, and remedies available under the ADA or Rehabilitation Act, it was just abundantly clear that that harmonization is inappropriate. And I think there also might have been a little bit of a misunderstanding about some of the daylight between these type of claims. I mean, my friend laid out very well, I think, that -- different protections under the IDEA and Title II and Section 504, but there are some claims you just can't bring under the IDEA. So, if an individual is on grade and they don't

need any special education, they're not going to get anything under the IDEA.

But, if they're using a wheelchair, they are going to potentially need a reasonable accommodation under the ADA.

Samuel A. Alito, Jr.

Well, don't these two statutes proceed along very different lines? Under the IDEA, the school district must provide a free appropriate public education.

That can be extremely expensive, right?

Nicole F. Reaves

Yes.

Samuel A. Alito, Jr.

The antidiscrimination statutes, the ADA and the Rehabilitation Act, start from the baseline that people with disabilities are supposed to be treated the same as people without disabilities.

But they depart from the baseline because employers, for example, in the employment context, must make a reasonable accommodation.

But there's a limit to the expense that an employer, for example, must be -- is required to bear under the ADA. So is there a substantial difference in that respect between the financial burden that these two statutes impose on the regulated parties?

Nicole F. Reaves

No, I -- I don't think so because the reasonable accommodation limitation and particularly the "reasonable" part of that is baked into both Title II and Section 504. That's been recognized since the 1970s, shortly after the Rehabilitation Act was adopted. And then Congress, when it enacted the ADA, said in Section 12201(a) that nothing in the ADA shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act or the regulations issued by federal agencies pursuant to such title. So the reasonable accommodation limitation is baked into these Title II claims that can be brought against public schools.

And so the public school is going to be able to come forward and say: This is not reasonable because we can't afford it because it's not the sort

of thing that is a normal accommodation or because it would require a fundamental alteration in the programs that we -- we give to students.

Samuel A. Alito, Jr.

Well, let me just give you one other example.

I don't want to belabor this too much because it's a little -- it's a side point. Suppose an employer in -- a -- a place of employment is open from 9 to 5.

Let's say it's a store.

For some reason, it's open from -- it closes at -- at 5 p.m.

And there's an employee with a disability similar to -- to the -- to A.J.T.'s disability here who can't work in the morning but could work later in the day. Would that employer be required under the ADA to allow this employer -- employee to work after closing time instead of during the normal hours when this -- when this business is providing a service to the public?

Nicole F. Reaves

No, because, under the reasonable accommodation framework, the employer would be able to say: Well, this isn't a sort of accommodation that's reasonable on its face or used in a variety of cases.

This isn't a sort of accommodation we've seen before.

And that's a defense courts often recognize. And then they'd also say: Well, this would be a fundamental alteration to our business. And I think, Justice Alito, one thing I would just point out is I actually think that underscores some of the differences between the IDEA and Title II and Section 504 in the education context. You know, we have not taken a position on this, but just because after-hours education is required under the IDEA does not mean that that's a required reasonable accommodation under Title II and Section 504.

Samuel A. Alito, Jr.

All right.

That's what I was asking about.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor? Justice Kagan?

Elena Kagan

Ms. Reaves, if we decide that this dual- track approach is incorrect and if we say nothing about the appropriate standards with respect to either damages or injunctions, what's your understanding of what could properly happen below?

Nicole F. Reaves

So I think below, without any other urging, presumably, the Eighth Circuit would apply its general precedent to those two questions.

And the Eighth Circuit has generally held that to state a violation of Title II or Section 504, you don't have to prove an intent. That's also true for injunctive relief.

But you -- the plaintiff would have to prove deliberate indifference for damages. We haven't taken a position on whether, you know, Respondents could try to raise these broader arguments on remand.

I think -- I think there's some good arguments that those have been forfeited and that there are judicial estoppel, but that would obviously be a question for the lower courts to sort out.

Elena Kagan

And you said without any urging on our part or without any encouragement.

I mean, is -- is -- is there an argument for encouragement? Is there -- is the better approach not to do that? What -- do you have a position on that?

Nicole F. Reaves

We don't think that there's any basis for courts to start reconsidering the reasonable accommodations framework that all courts of appeals have signed off on.

I mean, this Court has recognized it since the mid-1970s.

The entirety of the Rehabilitation Act and Title II have been built up aro und that.

And so I don't think there's a good basis for that, and there would -- there wouldn't be any reason to encourage it.

Elena Kagan

Thank you.

John G. Roberts, Jr.

Justice Gorsuch? Justice Kavanaugh?

Brett M. Kavanaugh

You said that clear notice was important, I think, in this context in damages claims.

And the other side says that your framing of deliberate indifference, in particular, actual knowledge that a federally protected right was substantially likely to be violated -- they focus on substantially likely -- that that does not give in this context school districts clear notice of what they have to do, particular -- you know, something like this, 4:30 p.m. or 6 p.m., and that it's therefore -- and you're talking about reasonable accommodations and line drawing to Justice Alito's question. How do we deal with that?

Nicole F. Reaves

Well, as an initial matter, I think the deliberate indifference standard is significantly clearer and gives more notice than the proposed bad-faith-or-gross - misjudgment standard, where we don't even know if the second component requires intent or not. And deliberate indifference is much more well established.

Brett M. Kavanaugh

Well, just on the question, though, this standard is not exactly crystal-clear.

At least that's what the other side says.

School districts, to Justice Alito's point, are going to be on the hook for substantial expenditures, and they want just notice, tell us whether we're substantially likely to violate the law.

How are they supposed to determine that?

Nicole F. Reaves

So a couple of responses to that.

So, first of all, I do think, you know, this is an actual knowledge requirement, and it is failure to act, a deliberate choice not to act.

And when it comes to --

Brett M. Kavanaugh

You say actual knowledge of your legal obligations, correct?

Nicole F. Reaves

So it's not actual knowledge of the law, but it's actual knowledge -- and, I mean, I think this is consistent with normal intent standards -- that, you know, your actions are -- are illegal and -- or your actions are, you know, likely to violate someone's rights.

So it's not that you have to know --

Brett M. Kavanaugh

That's pretty --

Nicole F. Reaves

-- the precision of -- and, I mean, this is a tricky area in many areas of law, but I do think that with the substantial likelihood standard, as this Court has described it in Davis and Gebser, it is going to require, you know, a more than 50 percent assurance that a violation's going to occur, and that means that you've kind of made a mistake as to the whole reasonable accommodation framework. And I would just point out that because we're just talking about injunctive relief, the kind of worst-case scenario here is, if the entity mistakenly, you know, denies a reasonable accommodation and it turns out they should have granted it, they'll just have to grant it going forward unless there is, you know, this high level of deliberate indifference.

Like, the standard builds in the ability for school districts to make significant mistakes and not be held liable for damages.

Brett M. Kavanaugh

Sorry to belabor it.

One last question.

If -- if a school district says I don't know whether -- the counsel for the school district says I don't know whether the law would require us to go to 6 p.m. or 4:30 p.m., I just don't know, I don't know how that will be assessed, can a -- can a court then say that they acted with knowledge that a federal right was substantially likely to be violated?

Nicole F. Reaves

I don't think so.

I think that would fall into the kind of bureaucratic inaction or negligence buckets, which are not high enough to be actual knowledge.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Barrett? Justice Jackson?

Ketanji Brown Jackson

So, in your exchange with Justice Kavanaugh, it seemed like the intent factor or element was taking on a lot of work in terms of figuring these kinds of claims out, and I really thought that in the reasonable accommodations framework that it's an interactive kind of engagement that when a person has a disability and they say I need this accommodation, there's, like, a back-and-forth between the employer, the school district, or whomever, and so it's not really like a surprise coming out of nowhere and it's all about intent. It's really, I thought, about arguments related to whether or not this particular accommodation is reasonable under the circumstances.

Nicole F. Reaves

So I do think the bottom -line inquiry is going to be intent, but I think you're absolutely right that in a school context in particular with a disabled child, there's going to often be a lot of back-and-forth between the school district and the student, and that may often, you know, be relevant to showing intent.

And I think some of these cases that we've cited, like the Liese case I cited earlier, you know, intent there was possibly shown by the repeated requests for reasonable accommodation and failure to grant those requests or to --

Ketanji Brown Jackson

So let me just ask this.

Nicole F. Reaves

-- consider them seriously.

Ketanji Brown Jackson

If -- if we say there's no heightened standard here and that the regular standards apply, and let's say the Eighth Circuit has adopted deliberate indifference in this context, the ADA claim could then proceed in the sense that it's not barred because we don't have this animus. Would there be then some engagement around whether or not this particular accommodation was reasonable?

Nicole F. Reaves

Yes.

I think that would be appropriate on remand.

So we obviously haven't taken a position on how this should come out.

Ketanji Brown Jackson

Yes.

Nicole F. Reaves

But I think what would happen on remand is, as to Petitioner's injunctive relief claim, the court would need to go through the analysis and see, you know, whether this was, in fact, a request -- a reasonable accommodation request that was denied and then, if yes, whether the requirements for injunctive relief are met.

Ketanji Brown Jackson

Mm-hmm.

Nicole F. Reaves

And then, if yes, to -- the liability question would also need to go through deliberate indifference as to her request for damages.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel. Ms. Blatt.

Lisa S. Blatt

Mr. Chief Justice, and may it please the Court: This Court should affirm Monahan. Bare IDEA violations do not support liability under Section 504 or the ADA.

Instead, the defendant must have acted with discriminatory intent.

Monahan correctly described that intent as bad faith, which is the longstanding term for actions done for an improper reason, here, disability. 504 and Title II require discrimination by reason of disability.

This Court has held that the nearly identical text in Title VI requires intent to discriminate. Petitioner acknowledges that because the law

here expressly incorporates Title VI rights and remedies, discriminatory intent must be shown to get damages.

But Petitioner departs from that intent requirement for liability and injunctions. That's wrong.

When Congress wanted intent -free liability, it said so expressly.

In ADA's Title I and III, Congress spelled out reasonable accommodations intent-free claims and barred damages without intent for employers and altogether for hotels and hotdog stands. Congress did not plausibly disfavor states and localities in Title II. This Court should decide the correct standard.

The petition ends with: "What standard should apply under the ADA and Rehab Act is a pure question of law.

It should be resolved in this case." That's a quote.

We agree. And reversing Monahan would expose 46,000 public schools to liability when, for 40 years, they have trained teachers, allocated budgets, and obtained insurance, all in reliance on Monahan.

Every good-faith disagreement would risk liability or even the nuclear option, the loss of federal funding, which is over a hundred billion dollars. The district cares deeply about Ava and gave her more service than any other student even before this litigation started.

Such good-faith efforts should not support discrimination liability. I welcome questions.

Clarence Thomas

Is this the same argument that you made below?

Lisa S. Blatt

Yes.

So let me take you through -- again, I had an out -of -body experience listening to what we argued, but in the rehearing petition on page 1, the school district argued Monahan is required by the text. On page 26 of the brief in opposition, we said Monahan is required by the text.

We quoted the text, and we said it requires discrimination intent.

We -- we cited Title VI because this statute expressly incorporates the rights and remedies of Title IV's intent was required.

We cited Sandoval, which is your seminal case under Title VI, which holds the nearly identical language requires discriminatory intent. Now,

to be sure, page 27's ongoing and the rehearing petition and the red brief still argues from the top of the mountain that this standard makes particularly good sense in the school context because the other side in their complaint -- and this goes directly to Justice Alito's question -- on paragraphs 118 and 133 say just because you violate the IDEA, that is ipso facto a violation of the ADA and Rehabilitation Act. So we've always said that you owe deference to schools and this standard makes sense. And I can talk about how Monahan arrived.

Monahan makes complete sense.

It's a caricature and not an accurate description of that case.

It starts with the language of the statute and said: When you have a mere violation of the requirement to provide a free and appropriate education, that is not necessarily discrimination, "the statute solely by reason of discrimination." Something else was required. Now the Court chose bad faith for a reason.

Bad faith by definition means an improper purpose.

The only purpose that is prohibited by this statute is -- is disability. No one, no case, no cite has ever said that's animus.

Again, that's made up, hence, out-of-body experience.

Ketanji Brown Jackson

Ms. Blatt, I -- I'm --

Lisa S. Blatt

Yes.

Ketanji Brown Jackson

-- I'm over here trying to really figure out what you argued below --

Lisa S. Blatt

Sure.

Ketanji Brown Jackson

-- and the many, many times that I understood you to be pegging your argument to the unique elements of this particular environment.

Lisa S. Blatt

Correct.

Ketanji Brown Jackson

And so I think it might be a little unfair to suggest that what you were always just saying is that Monahan is based on the text of the statute. It seems to me that you were very clearly saying in your -- right up and to the opposition to rehearing and to the bio below that there was something about the IDEA context and schools that gave Monahan its value.

Lisa S. Blatt

Both of those statements are correct.

It is not inconsistent to say Monahan is required by the text and this makes great policy sense in the school context, which is also what Judge Arnold said in the Eighth Circuit. The disconnect is there's this -- I don't know, it's a lie to say that we never defended Monahan by the text.

It's on page 26 of the brief in opposition.

Ketanji Brown Jackson

No, no, no, I'm not -- I don't think the argument is that you never defended it by the text.

I think the --

Lisa S. Blatt

Well, what is a lie and what is inaccurate --

Ketanji Brown Jackson

Well, no, no, no. I --

Lisa S. Blatt

If I could just get this out -- if I could just get this out, please. What is a lie and inaccurate is that we ever said in any context that this Court should take the same language and define it differently depending on context.

That is not true.

There is no statement.

They adding words to our mouth.

We never said you should have a double regime. What the school district has said, which is what Monahan said, is --

Neil Gorsuch

You -- you believe that Mr. Martinez and the Solicitor General are lying? Is that your accusation?

Lisa S. Blatt

At -- at oral argument, yes, absolutely.

It is not true that we --

Neil Gorsuch

I think you should be more careful with your words, Ms. Blatt.

Lisa S. Blatt

Okay.

Well, they should be more careful in character -- mischaracterizing a position by an experienced advocate of the Supreme Court, with all due respect.

John G. Roberts, Jr.

Counsel, I'm quoting from their reply brief, where they say that -- with citations, what you said, that the secondary education was a "unique context" "giving rise to a unique subset" "calling for a" "different standard."

Lisa S. Blatt

Correct.

John G. Roberts, Jr.

That seems to me to be what the --

Lisa S. Blatt

Well, I'm sorry, no. Where does it say that quoting for a different standard? That part we never said.

Are they quoting?

John G. Roberts, Jr.

Well, they've got quote marks around it. (Laughter.)

Lisa S. Blatt

Where's the -- where's the page?

John G. Roberts, Jr.

It's -- it's page 4 of their yellow brief.

Lisa S. Blatt

Oh.

Well, they'r e -- I mean, we never said that there should be different standards.

What we've always said and what we've acknowledged in the brief in opposition, which is true, that outside the school context, the courts have said there's no intent at least for liability but for damages. But we are where we are with the question presented.

What I hear the real dispute is: What does the question presented ask? And the question presented, we read, is: What is the correct standard? Now, to be sure, they add the pejorative term "uniquely stringent." But had the question said should this Court adopt a uniquely stupid bad-faith standard, the question would still not be should courts adopt uniquely stupid standards.

It would be should courts adopt the bad-faith standard.

Ketanji Brown Jackson

But, Ms. Blatt, you -- in order to say it's uniquely stupid, I think you would have to point to at least one other circuit that has actually applied the bad-faith standard in a different context. I mean, to the extent that you're now saying it's dumb for them to have adopted it or not to have adopted it everywhere, can we get to the substance of your argument?

Lisa S. Blatt

Sure.

Our definition of "bad faith" is discriminatory intent.

Ketanji Brown Jackson

No, I understand. But has a single other standard -- circuit applied that outside of this particular context?

Lisa S. Blatt

So -- well, no, in the sense of the circuits that are applying outside the school context, including the Eighth Circuit, don't apply bad faith.

They apply no intent, deliberate indifference.

Ketanji Brown Jackson

And is your argument that bad faith should apply everywhere?

Lisa S. Blatt

Yes, in a -- the statutory text solely by discrimination is the reason for the action is a discriminatory intent standard.

Amy Coney Barrett

And that would be a sea change, right? That's what the other side told us.

Lisa S. Blatt

Well, it would be only a sea change in terms of liability.

If we're going to talk about what the circuits -- Judge Sutton --

Amy Coney Barrett

Well, a sea change in terms of liability is a pretty big sea change.

I mean, Justice Jackson's pointing out that no circuit has adopted your rule.

Lisa S. Blatt

Well, we're asking the Court to -- to decide this case. In terms of outside the school case, Judge Sutton's opinion in the Sixth Circuit, and that counts as a court, has held that -- that this statute, just like Title IX and Title VI, requires discriminatory intent. Now that's in the disparate impact context, and no one has had a basis for saying there's any distinction between reasonable accommodation and disparate impact.

Amy Coney Barrett

But, regardless whether it's technically in the QP, it strikes me as a pretty big deal.

Lisa S. Blatt

I -- I think that's right. And so --

Amy Coney Barrett

Well, then why would we do it when we don't really have -- we don't -- we don't have -- you know, this didn't come up until their reply because they didn't understand it to be the QP.

We don't have other circuits that have adopted the question. As I suggested to Mr. Martinez, it's possible that if we decided this case in his favor, that then, when it goes back below, this argument that you're making here will be made, and then it can follow our traditional way of letting it percolate up, and then we can address it when we have more information. But this seems pretty -- I ike a really pretty big deal.

Lisa S. Blatt

I -- I think it's -- it's -- everything you said I agree with, except for the blue brief and the government's brief said that the statute require -- that you have to apply the plain text.

So, lo and behold, we looked at the plain text. In terms of how you want to decide the case, absolutely, you need to make clear that if you're just going to reverse, that the Eighth Circuit is free, notwithstanding its precedent, to either level down, like the other side wants, and apply the no intent, deliberate indifference outside the school context, inside the school context, or level up.

Brett M. Kavanaugh

On the -- on the level down/level up point, you're defining "bad faith" so it doesn't require animus.

Lisa S. Blatt

Correct.

Brett M. Kavanaugh

So you're, I think, lowering bad faith from what some people might think bad faith encompasses.

Lisa S. Blatt

But no one -- some people is just this conversation.

No court has -- these courts have said --

Brett M. Kavanaugh

Some judges.

Lisa S. Blatt

They said it requires discriminatory intent.

No one has said animus.

Brett M. Kavanaugh

Okay.

I'm just making the point, you're saying bad faith does not require animus, correct?

Lisa S. Blatt

Correct.

Brett M. Kavanaugh

Okay.

And then the SG defines "deliberate indifference" to require actual knowledge that a -- that it's substantially likely that you're violating the law. And I'm wondering, "bad faith" as you define it, without a requirement of animus, and what they say is deliberate indifference, I'm having a little trouble seeing a case that would actually come out differently under those two things.

Lisa S. Blatt

Well, sure.

Any -- and this is the problem with their deliberate indifference test. And Justice -- this goes to Justice Jackson.

No court, no context except a prison, would ever use a deliberate indifference test for intent to discriminate.

Intent to discriminate is you have to intend to discriminate. Their test is you could have no intent to discriminate.

You could be obsessed with a scandal.

You could have budget concerns.

But you were deliberately indifferent to some unidentified percentage that a student asks for extra test time and you gave 30 minutes instead of 60 minutes. Well, if you think that there's a substantial chance that 60 minutes might be it, but, in good faith, you want to -- you know, one circuit has held 30 minutes is enough, there's damages liability. That is insane.

That is not an intent to discriminate.

That is just either a disagreement about what the law requires or you had some sort of weird problem that had nothing to do with a child's disability status.

You just were deliberately indifferent. If you're going to follow Title VI -- and this is the Fifth Circuit.

The Fifth Circuit said: I don't know what this deliberate indifference is.

Title VI requires intent. There's no scenario where deliberate indifference has ever meant discrimination in and of itself, as opposed to you're deliberately indifferent to a teacher's or student's intentional sexual harassment. We agree you could have a deliberate indifference if there were supervisory liability to discrimination against the disabled.

Brett M. Kavanaugh

Why do you think that's taken hold in all the circuits outside the school context?

Lisa S. Blatt

Easy.

They cited this case called Monell.

I mean, that's just wrong, weird, mistake. So then they said: Well, Davis and Gebser said deliberate indifference, and they just misread it.

I mean, the Fifth Circuit got it right. So, if you're going to rule against us, at least wipe the slate clean and say -- if you're going to -- they want to say you have to follow Title VI because they don't make a difference in terms of parties and you have to use intent for damages, then intent for damages should be intent to discriminate just like Title VI. And we do think there is no textual basis.

They raised a lot of policy sense -- policy stuff between an injunction and loss -- and loss of -- sorry -- injunction and damages. But federal funding is now a big deal. They could say one good-faith disagreement with the IDEA is enough to cut off all the school district's funding just because they disagreed? Or, actually, no, they could have just got it wrong.

Their view is all funding in any school, even Harvard, any school, the entire funding be cut off because they didn't fix the elevator long enough.

Like, the elevator was there, but it was broken for two months or two weeks.

Failure to reasonably accommodate liability. And now federal funding is a big deal. No -- no -- no government has ever threatened the loss of federal funding based on Title -- based on the Rehab Act.

But you don't need anti-Semitism anymore or encampments.

You can just say you violated the reasonable accommodation. Now this is a big deal.

That's what Justice Barrett's saying.

So I understand that you don't want to take on this -- this case, but I didn't bring this petition.

This petition said decide the standard and then said -- cited your article, Justice Kavanaugh, saying you look at the plain text.

So I can't be faulted by pick -- like what Judge Arnold did and pick up the text, and it says solely by reason of discrimination.

Ketanji Brown Jackson

Ms.

-- Ms. Blatt, I think we have to really be fair about what the question presented in this case actually is.

Lisa S. Blatt

Sure.

Ketanji Brown Jackson

It -- it did not say decide the standard.

I'm reading.

The question presented is whether the ADA and Rehabilitation Act require children with disabilities to satisfy a uniquely stringent bad-faith-or-gross - misjudgment standard when seeking relief for discrimination relating to their education.

Lisa S. Blatt

So that can have two meanings.

One, you could put all the emphasis on "uniquely stringent." Should this Court adopt a uniquely stringent standard when it's called bad faith? Or it could mean what we think the end of the petition said it meant. Should a Court adopt the bad-faith standard, which is uniquely stringent? And the last page -- the last line of their petition says you should decide what standard applies in this case. Now, if you want to read it as the "should courts adopt uniquely stringent standards," then you're right.

The -- the -- the parties agree.

Ketanji Brown Jackson

And you're saying that's not the way you read it when I'm looking at page 27 of your bio, which says the bad-faith-or-gross -misjudgment standard is an appropriate exercise of discretion; most importantly, it accounts for the unique nature of claims like Petitioner's, that is, claims by students with disabilities regarding the appropriateness of their IEPs. And you go on at length in talking about the unique nature of this particular context and why it would justify having this standard as

opposed to the standard that all the courts have applied in other contexts.

Lisa S. Blatt

Well, that's why page 26 precedes page 27 --

Ketanji Brown Jackson

Yes.

Lisa S. Blatt

-- which I think you're reading from, and page 26 says the court of appeals' decision below is correct and it's correct because of the text, it's correct because it incorporates Title VI, and it's correct because it's been definitively interpreted in Alexander versus Sandoval, which is a pretty big deal for the uniquely worded Title VI case. But, Justice Jackson, there's no disagreement that we've always said that there is a big problem with the other side's argument in the school context, because every IDEA disagreement now risks the loss of federal funding and injunctive relief.

And so, yeah, that -- that -- that is a big deal.

And in terms of damages, that's a big deal too if you have a deliberate indifference standard, which, to be fair to us, does not apply in any other context. So there's no question that there's an incoherent big mess of a regime because this Court started out in Davis saying that this is not an affirmative action case.

And then you had Choate, which is maybe not Exhibit A, but it's Exhibit B for what this Court has called the bad old days, And that case has a lot of dicta that talks about reasonable accommodation. Monahan was decided after Davis, before Choate.

Ketanji Brown Jackson

But can I just -- can I just focus your attention on that? Because I don't understand why you are really pressing this idea that discrimination claims in the context of reasonable accommodations and disability aren't something unique. I mean, I -- I thought the -- the Alexander versus Choate line of thinking was that you can have discrimination in this context, say, differently from maybe racial discrimination or gender discrimination when an entity that is responsible for accommodating someone with a disability doesn't act, that -- that you have benign

neglect, meaning you're not doing it out of some sort of intent to treat this person differently.

In fact, what you say is I'm treating this person the same, and the same is a world in which they can't walk up the stairs and they can't see the board and they can't do the things that everybody else can do. In the discrimination-of-disability context, the requirement of the law is to treat them differently --

Lisa S. Blatt

Well --

Ketanji Brown Jackson

-- differently in the sense that you're accommodating them so that they can take and have full enjoyment of the services.

Lisa S. Blatt

Well --

Ketanji Brown Jackson

So it's just a different concept in --

Lisa S. Blatt

But that -- yeah, with respect, that's not the statute Congress passed. And if you just look at Title I and Title III, they have oodles and oodles of explanation of what a reasonable accommodation is, multipart definitions on --

Ketanji Brown Jackson

No, but the whole idea of accommodation is unique --

Lisa S. Blatt

That's not in the statute.

Ketanji Brown Jackson

Accommodation is not in the statute?

Lisa S. Blatt

504 and Title II, no. That's what this -- I mean, no.

That's what Judge Sutton said.

Ketanji Brown Jackson

It's not in the ADA?

Lisa S. Blatt

It sure as heck is not in the statute.

The word "reasonable" is not in the statute.

The word "accommodation" is not in the statute.

This passive voice reading has got to be incorrect because it would bring all disparate impact claims under --

Ketanji Brown Jackson

So you -- you read -- you read disability discrimination statutes to not be requiring accommodation for people with disabilities, that they -- that it's just about discriminatory intent, meaning not treating these people the same as everyone else?

Lisa S. Blatt

Correct, and that is glaringly obvious when you look at the seminal statute of the ADA because Title I for employers, Title III for country clubs and hotdog stands, have not only reasonable accommodations provisions, Justice Jackson, but they don't make hotdog stands liable for damages.

And a made-up judicial damage remedy comes from thin air.

Amy Coney Barrett

Ms. Blatt, the answer to this is probably clear since you called the two -tier test stupid, but I just --

Lisa S. Blatt

I -- that was a -- (Laughter.)

Amy Coney Barrett

-- I just want to clarify, you agree there's no two -tier test?

Lisa S. Blatt

Correct.

Amy Coney Barrett

Okay.

So there is what Justice Gorsuch has sometimes called radical --

Lisa S. Blatt

Radical agreement.

Amy Coney Barrett

-- on that point? Okay.

Lisa S. Blatt

There's radical agreement. What there's radical disagreement on is the question presented.

And if you just say -- and I know it's sometimes easier for you to say we don't have to do a lot, but you cause real harm to the parties who don't have Supreme Court counsel and lower courts who get confused when you just remand and say we just remand.

So, if you could at least set the -- at least set the slate free -- while it is part of your job, Justice Kavanaugh, to set the law sometimes, and I understand it's easier for you, and you have a lot going on, not to set the law, but --

Neil Gorsuch

Ms. Blatt --

Lisa S. Blatt

Yeah.

Neil Gorsuch

-- I -- I confess I'm still troubled by your suggestion that your friends on the other side have lied.

Lisa S. Blatt

Okay.

Let's pull it up.

Neil Gorsuch

Yeah.

I think we're going to have to here, and I'd ask you to reconsider that phrase.

Lisa S. Blatt

At oral argument --

Neil Gorsuch

If I might.

Lisa S. Blatt

-- it was incorrect.

Neil Gorsuch

If I -- if I --

Lisa S. Blatt

Sure.

Neil Gorsuch

Incorrect is fine.

Lisa S. Blatt

Well, lying --

Neil Gorsuch

People make mistakes.

Lisa S. Blatt

Okay.

Neil Gorsuch

You can accuse people of being incorrect, but lying --

Lisa S. Blatt

That's fine.

Neil Gorsuch

Ms. Blatt, if I might finish.

Lisa S. Blatt

Sure.

Neil Gorsuch

Lying is another matter.

Page 1 of your brief in opposition --

Lisa S. Blatt

Yep.

Neil Gorsuch

-- as applied to the provision of IDEA services, the overlap between these statutes leads to a conceptual particularity that exists only in this context.

Lisa S. Blatt

Yep.

Neil Gorsuch

That seems to suggest you're arguing for a unique rule. Page 2.

For more than 40 years, courts of appeals considering this unique subset of ADA and Rehabilitation --

Lisa S. Blatt

Yeah.

Neil Gorsuch

-- claims directly challenging IDEA's educational services have widely recognized that plaintiffs must establish more.

Lisa S. Blatt

Yep.

Neil Gorsuch

That scheme requires plaintiffs to show that school professionals acted with discriminatory intent by demonstrating that their decisions were premised on bad faith or gross misjudgment. Page 3.

In this unique context, courts must balance the Rehabilitation Act and ADA's prohibition on disability discrimination with educators' responsibility for determining appropriate special education services. The bad-faith-or-gross -misjudgment standard --

Lisa S. Blatt

We say unique throughout.

Neil Gorsuch

-- properly -- I'm not finished.

Lisa S. Blatt

Yeah.

Neil Gorsuch

Properly accounts for the need for deference. Page 27.

As courts have recognized, discrimination claims based on an IEP's adequacy are a conceptual peculiarity that exists in the primary and secondary educational context. Further down: The bad-faith-or-gross - misjudgment standard permits the courts to adjudicate these novel claims without requiring judges to substitute their own notions of sound educational policy for those in school authorities.

Lisa S. Blatt

Correct.

Neil Gorsuch

One -- one can interpret those perhaps different ways ---

Lisa S. Blatt

Well --

Neil Gorsuch

-- but, surely, a reasonable person could interpret them as arguing for a special rule in the educational context, correct?

Lisa S. Blatt

No, only because of the text, but --

Neil Gorsuch

Ms. Blatt.

Lisa S. Blatt

Okay.

Well, you -- I mean --

Neil Gorsuch

A reasonable person -- all of those emphasized the unique context of primary and secondary education and the need for a special rule, don't they?

Lisa S. Blatt

Fine, but what I'm --

Neil Gorsuch

Fine?

Lisa S. Blatt

-- objecting to --

Neil Gorsuch

Fine?

Lisa S. Blatt

Can I -- can I --

Neil Gorsuch

Then -- then would you withdraw your accusation?

Lisa S. Blatt

I'll withdraw it.

Neil Gorsuch

Thank you.

That's it.

Lisa S. Blatt

Okay.

That's fine.

Sonia Sotomayor

Ms. Blatt, I also -- going back to a question Justice Barrett asked, you are basically saying, no, I'm not asking for a unique rule; I'm asking for a rule that applies in all discrimination statutes. But nowhere else have I seen the use of deliberate indifference or gross enough indifference used to define intentional discrimination. In fact, in Abercrombie, we had a neutral policy that applied to all employees, they can't wear headgear, and we said a neutral policy can still discriminate --

Lisa S. Blatt

Absolutely.

Sonia Sotomayor

-- against religion even though there was no bad faith proven there.

It was all hats are out.

Lisa S. Blatt

Correct.

Sonia Sotomayor

All coverings are out.

Lisa S. Blatt

Correct.

Sonia Sotomayor

So I don't know where the bad faith comes from.

I'm not even sure where deliberate indifference comes from. But putting that aside, before we rule in a way that suggests that your new definition applies to every statute, that this is the way we now define intentional for every statute, shouldn't we have had that fully aired below --

Lisa S. Blatt

Well, if --

Sonia Sotomayor

-- and accurately aired?

Lisa S. Blatt

So, if you just interpret bad faith the way we think Judge Arnold did and the way we do it as improper purpose with only disability, then it's nothing -- it's nothing new.

It's just a prohibited reason, just like in the racial gerrymandering.

Sonia Sotomayor

Well, but that is gerrymandering the definition because, if it's -- a neutral policy in terms of what you wear can still discriminate.

Lisa S. Blatt

Yes.

Sonia Sotomayor

So --

Lisa S. Blatt

So we're in complete agreement that if you have a policy to cancel all field trips because -- and the reason is because you don't want to make accommodations for the disabled, then that is bad faith or that's an

intent to discriminate. We are fine with the statutory language "solely" -- or take out the "solely by reason of disability."

Sonia Sotomayor

But they didn't -- there was no evidence that they passed this because they wanted to discriminate against religious people.

They passed their dress code because they wanted a particular look in their store.

It wasn't until this individual came in and said, "My religion requires this," is they said, "I'm not going to reasonably accommodate you."

Lisa S. Blatt

Yeah.

So --

Sonia Sotomayor

But they didn't pass the policy with antireligion animus.

Lisa S. Blatt

If you -- let me just give you another example.

Sonia Sotomayor

You're asking -- when you're using the words "bad faith," you're talking about animus.

Lisa S. Blatt

No, I'm talking about -- and you can -- you're in charge, so you can say: Intent to discriminate is the standard.

We're not going to use bad faith.

We don't like that word.

Intent to discriminate.

If you say bad faith, please make clear that it only means intent to discriminate, because you could violate the IDEA just because you think disabled children are better off without the accommodation. That is a -- a -- that is a violation of -- of the ADA and the Rehab Act.

That is discrimination.

It's not animus.

It could be benign intent. Basically, it's the same standard in the race context or in the -- the sex context. No one cares what your views are towards women or people of color if you treat them differently.

You can't do that.

Sonia Sotomayor

Counsel, it would have been nice to have known that we were biting off that big a chunk.

Lisa S. Blatt

I agree.

But in terms of what we had to do when you granted cert was look at the text, and then the blue brief said that there is no intent required.

They cited the definition of what a qualified individual was and said --

Sonia Sotomayor

By the way, intent's not even an issue here because there wasn't an injunction being -- or the lack of an injunction challenged here.

They got the injunction under the IDEA, didn't they?

Lisa S. Blatt

They want more.

Sonia Sotomayor

Well, we can put aside whether they want more.

But the only thing between -- before us on the decision below is whether it's an intent standard or a heightened standard, correct?

Lisa S. Blatt

I -- I think that's fair because it's a summary judgment standard.

So that's the way I would put it if I were you, is say all you have to decide is summary judgment. And our point on the damages is part of their whole schtick is that this statute incorporates Title VI, and they -- they say and that requires intent. And so we are saying -- and, again, back to defense of the red brief, when the -- both the gray brief and the blue brief say that no intent is required under the statute, we said that's wrong.

So --

John G. Roberts, Jr.

Well, I mean -- I'm sorry.

Sonia Sotomayor

Go ahead.

Never mind.

John G. Roberts, Jr.

I was going to say the -- the -- the choice is not one standard or another.

I would have thought from the framing of the whole case the question was whether you have a different standard in the educational context.

Lisa S. Blatt

And if -- if that is -- and I agree.

If that is the way you define the question presented, then the parties are in radical agreement. If -- as we read, and the last statement of their petition said you should resolve the standard.

If you don't want to resolve the standard, then you're correct, there's not much to decide. But you are overturning, in effect, the law of five circuits that affects 40,000 -- 46,000 schools.

And there are 8 million kids on -- that are covered by the IDEA, and there are 30,000 of these complaints, and their view is every IDEA violation is a violation of the statute. Now they say there may have been another violation, but that is the theory.

And, in terms of the unique context, what Monahan says is: If you violate a free and appropriate education, that's just not necessarily discriminatory. It could be based on budgets.

It could be based on you just disagreed what the accommodation was, as -- as was the case here. And the Court in Monahan said: You need to show discriminatory intent, and it used the phrase "bad faith," meaning the improper purpose. But I agree, if you -- if you read this like Ames, where there was no defense of the decision below, then you don't have a lot to do.

But we're here radically defending the decision below, which we've done in the rehearing petition and in the -- in the brief in opposition and in the -- the red brief.

Sonia Sotomayor

You don't think it was -- that you might have violated Rule 15.2 of our rules that requires counsel of its obligation, Respondents, "to address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted?" Where in this brief do you say Monahan is consistent outside the unique -- education?

Lisa S. Blatt

We didn't say that.

So that -- that is -- just to be clear, we did not say the implications of our textual defense means Monahan or a intent standard would be required outside. What we took as given and why I don't think the rules were violated is that all the courts have said, in this asymmetrical world following the regulations and Choate, that there is a no intent requirement for reasonable accommodations, although an intent requirement for disparate impact, Judge Sutton's opinion. And then all the circuits but the Fifth Circuit have held -- have said there's deliberate indifference or intent because of the Title VI incorporation. What we did not point out in the -- the orange brief, which is correct, that that regime doesn't make any sense. So that -- that's right, we didn't point that out because it was only when, you know, we're here briefing on the merits, and I think you would want Respondents' counsel to defend the decision below, the decision below is based on the text, so we started with the text. I mean, what I think the other --

Sonia Sotomayor

Thank you, counsel.

Lisa S. Blatt

Sorry.

I don't --

Samuel A. Alito, Jr.

Where do you think that the Petitioner says that a violation of the IDEA necessarily constitutes a violation of the ADA?

Lisa S. Blatt

It's JA 20 and at paragraphs 118 and 133.

So it's not in the brief.

It's in the complaint.

I would just say it's not --

Samuel A. Alito, Jr.

I'm sorry, paragraph 118 and what else?

Lisa S. Blatt

And 133. Now paragraphs 119 and 134 say the ADA and the Rehab Act were violated other ways, but part of their complaint is just the violation of the IDE -- it just says the violation of the IDEA itself is a violation of the other statutes. And we would hope that you would clear that up, that that can't possibly be right, because the IDEA can -- you know, can -- can -- can be -- go way beyond what might be a reasonable accommodation. And I also think it's not clear from their brief on deliberate indifference. Deliberate indifference as to what statutorily protected right? Either the reasonable accommodation right or the IDEA.

And I think, in fairness to them, it's both.

John G. Roberts, Jr.

Thank you, counsel. Justice Thomas? Justice Alito?

Samuel A. Alito, Jr.

Well, I won't have another opportunity to question Mr. Martinez, so perhaps he could address that in rebuttal, if he sees fit, whether he is arguing that a violation of the IDEA necessarily constitutes a violation of the ADA. What he -- what the complaint says is that the district's violations of the IDEA also violate a plaintiff's rights under Section 504 of the Rehabilitation Act, and he says the same thing about the ADA.

Lisa S. Blatt

Yeah.

And, again, it's important to school districts that you make clear if you can level set that -- the mere bare violation because that is the thrust of Monahan, is that a bare violation does not necessarily violate the statute.

Samuel A. Alito, Jr.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor, anything? Justice Kagan? Justice Kavanaugh?

Brett M. Kavanaugh

You say the statute requires intentional discrimination, Title II, and the Rehabilitation Act.

The Solicitor General says, yes, that's right, deliberate indifference is an intent standard. I just want to -- do you want to respond to that?

Lisa S. Blatt

Deliberate indifference is not an intent standard --

Brett M. Kavanaugh

Okay.

That's your --

Lisa S. Blatt

-- for discrimination.

It can be an intent standard in the prison context. If you know someone's dying and you don't do anything, that means you intentionally acted. But you can intentionally act -- deliberate indifference can be evidence of a discriminatory intent, but just because you deliberately don't respond to a parent's complaints doesn't necessarily mean you intend to discriminate on the basis of disability.

Brett M. Kavanaugh

Well -- right. And I think the way the Solicitor General then defines "deliberate indifference" is why at least I see the delta here as pretty small, because they say you have to know that you're violating your legal obligations or what's substantially likely to be your legal obligation.

That's really --

Lisa S. Blatt

But then they said that you don't have to know the law.

So, in other words, if a parent says: High school, you're violating your legal obligations --

Brett M. Kavanaugh

Well, they did -- that -- that is true, they did say you have to know your legal obligations, but that --

Lisa S. Blatt

They said you didn't. Maybe I misheard them.

I heard them say --

Brett M. Kavanaugh

Well, they did --

Lisa S. Blatt

-- you don't need to know the law.

And I know that's what my friend for the Petitioner said, you don't need to know the law.

Brett M. Kavanaugh

I don't know how you can know -- this is a helpful question, by the way.

Lisa S. Blatt

Yeah.

Brett M. Kavanaugh

I don't know how you can know that a federally protected right was substantially likely to be violated without having some idea what the law provides.

Lisa S. Blatt

Well, I -- we would welcome that if you're going to have a deliberate indifference standard, that it be as high as possible because, if you have these -- again, what the school districts are worried about is because you -- you -- you have good-faith disagreements in all -- I mean, these are really tough cases on -- in terms of, you know, how much support.

Here, the -- the -- s he had 10 specialists.

So these are just tough cases.

And so the question was how much support she should be given at home.

Brett M. Kavanaugh

I guess what I'm getting at is deliberate indifference can be fairly protective -- as defined by the Solicitor General, fairly protective of school districts in the sense that the law's not like you open a code book and it tells you, oh, go to 6 p.m. You have to decide --

Lisa S. Blatt

Yes.

If you --

Brett M. Kavanaugh

-- what's reasonable.

Lisa S. Blatt

If you would define it that way, that would be great.

I mean, we would appreciate that, although we do think, if you're going to incorporate Title VI, I mean, you're now just saying the Fifth Circuit is wrong.

The Fifth Circuit said, oh, I don't know, Sandoval looks likes it says intent; it doesn't say deliberate indifference.

And they -- these are all Spending Clause statutes.

So Title IX, Title VI, the Rehab Act, the Affordable Care Act incorporates all these.

They -- their -- and this is a one area.

And Justice Barrett is correct, this is a big, messy area. So I don't blame you for not wanting to get into it, but we would at least appreciate that you make clear that there's a level set particularly on damages.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Barrett? Justice Jackson?

Ketanji Brown Jackson

Yeah.

I just am still struggling with how you account for the language in the disability discrimination statutes that goes beyond discrimination and discriminatory intent. And so I'm looking, for example, at the Title II language which says, "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." And my understanding of the way at least that courts have been interpreting this is you don't need discriminatory intent in a situation in which a person is alleging, for example, that they have been excluded from the participation. And

you seem to be suggesting that you still have to have that element in some way, and I'm confused by that.

Lisa S. Blatt

Sure.

And you have to start from the fact of, what is Congress's authority to even pass Title -- Title II? It's not a Commerce Clause legislation.

Well, it's important because it looks like it's Section 5, and if you just -- so you have to see it through the lens of -- of Congress's power under Section 5. But, even putting that aside, if you don't read it -- if you just look at Titles I and Title III, where they spell out disparate impact, and so that -- if you read that statute in the passive voice to require disparate impact, all the disparate impact and reasonable accommodation provisions and definitions and contours are all superfluous. So that if you just looked at -- I actually think this case is easier under Title II because you don't have the Choate baggage.

But, if you just look at Title II, it's an easy case that there is no reasonable accommodations requirement at all.

That -- that's -- that's our -- that's our stronger case, is under Titles -- Title II, because Titles I and Title III are so chockful of t he contours. And there's no reasonable requirement in II.

So it's made up.

It doesn't say you have to reasonably accommodate.

On the other side, they say the definition is any -- you know, remove structural, communications, transportation barriers and auxiliary aids.

But there's no word "reasonable" in there.

So it has to be read in when it's actually defined in great details in I and III.

What it means to modify the program, what an -- undue hardship is a four-part test, and what is -- what is readily achievable is a four-part test.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel. Rebuttal, Mr. Martinez?

Roman Martinez

Your Honors, I'm not going to dignify Ms. Blatt's name -calling here with a response in kind, though I appreciate that she withdrew the charges here, although perhaps a bit under duress. I do want to address whether we were incorrect in characterizing our position, and the answer is absolutely not.

You heard her say today that she was radically defending the Eighth Circuit's decision in this case.

Well, that decision includes Footnote 2, which expressly characterized Monahan as applying a higher test, a two-tiered test.

So, if she's radically defending that, then she's radically defending the two-tiered approach that I think she said was completely wrong. We would also encourage you to look at page 23, in addition to all the other pages that were cited, where she said that the universe of plaintiffs with claims affected by the question presented is narrow.

For educational discrimination plaintiffs not covered by the IDEA, such as college students, a bad-faith or gross-misjudgment standard does not apply. That's exactly the opposite of what she's saying now. So what is at issue in this case? I think the most important thing we heard from Ms. Blatt is when she conceded in questioning from Justice Jackson that she is trying and the district arguments here are trying to get rid of the reasonable accommodation claims that people in this country with disabilities have enjoyed for decades.

That's what's at stake. This is a revolutionary and radical argument that has not been made in this Court and that she's trying to get you to decide on the basis of essentially no briefing.

There are -- the -- the question of whether reasonable accommodations are required is easy.

There are subsidiary questions that are challenging.

You should not address those subsidiary questions in this case because we haven't had briefing.

It's unfair to you.

You don't have a decision below. It's unfair to us.

It's unfair to our amici, the disability rights community, who would have rung a five-alarm fire if they had known that reasonable accommodation claims were on the table.

So you should not address that.

You should apply your waiver rules. If you do address some of this stuff, Justice Kavanaugh, I would encourage you to look at the COPAA amicus brief.

On pages 18 to 29, it has a very good discussion of the kinds of cases and where the different standards might make a difference. I think, on the merits, the most important point Ms. Blatt made was this assertion, which I would characterize as incorrect in the extreme, that the ADA does not talk about or somehow ratify reasonable accommodation claims.

I would point the Court most importantly to Section 12201(a), in which the ADA Title II expressly incorporates by reference the regulations that had been enacted under the Rehabilitation Act, all of which expressly embrace reasonable accommodation claims. In addition to that, I would point the Court to other provisions of the ADA: 12101(a)(5), 12131(2), 12201(h).

All of those refer to either reasonable accommodations or reasonable modifications.

So, with respect, I think that's wrong. Finally, let me just take a step back, Your Honors, and talk about really what's issue -- what's at issue in this case.

This case started narrow.

It was about a sliver of plaintiffs.

It's now quite broad because of the arguments the district is making.

If you accept her arguments, think of all the people who are going to be affected.

Think of five-year-old Ehlena Fry with cerebral palsy, who needs the help of her service dog, Wonder.

Think about George Lane, the Tennessee man forced to crawl up two flights of stairs in order to have his court -- his day in court.

Think about Ava, who desperately needs every precious hour of school so she can learn to communicate with her parents. We ask you to reject those radical arguments, and we ask you to vacate the decision below.

John G. Roberts, Jr.

Thank you, counsel. The case is submitted.