

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JANE CUMMINGS,)
) Petitioner,)
) v.) No. 20-219
PREMIER REHAB KELLER, P.L.L.C.,)
) Respondent.)

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6 PREMIER REHAB KELLER, P.L.L.C.,)

7 Respondent.)

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10 Washington, D.C.

11 Tuesday, November 30, 2021

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

17 APPEARANCES:

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19 behalf of the Petitioner.

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23 supporting the Petitioner.

24 KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on
25 behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case Number 20-219, Cummings versus Premier Rehab Keller. Mr. Rozynski.

ORAL ARGUMENT OF ANDREW ROZYNSKI
ON BEHALF OF THE PETITIONER

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

The Fifth Circuit categorically prohibited emotional distress damages in all instances under Spending Clause statutes prohibiting discrimination.

Based on Franklin and Barnes, that decision is wrong. Franklin held that compensatory damages are available, and Barnes reaffirmed that holding. Emotional distress damages are the most common and often the only form of compensatory damage remedy for victims of intentional discrimination.

Barnes held that remedies are available under the statutes here. They are traditionally available under contract law. Emotional distress damages are indeed

1 recoverable in breach-of-contract cases for the
2 type of conduct at issue here.

3 As Section 353 of the Second
4 Restatement and all the leading treatises cited
5 in Barnes explain, when a contract's breach is
6 of such a kind that serious emotional
7 disturbance was a particularly likely result,
8 then recovery for emotional disturbance is
9 allowed.

10 Premier has not and cannot dispute
11 that serious emotional disturbance is a
12 particularly likely result of intentional
13 discrimination. Premier asks this Court to
14 disregard the Restatement rule, but there is no
15 basis to do so.

16 The particularly-likely-result concept
17 has been long a fixture of the law, and
18 virtually all courts agree that in contract
19 cases involving places of public accommodations,
20 improper denial of access traditionally gives
21 rise to emotional distress damages.

22 For all these reasons, the Court
23 should reverse the Fifth Circuit because
24 emotional distress damages are available under
25 Spending Clause legislation at issue here.

1 With that, I welcome any questions
2 from the Court and will move to the balance of
3 my argument.

4 JUSTICE THOMAS: If -- if we don't
5 agree with you that the emotional distress
6 damages were traditionally available, do you
7 have a -- another argument?

8 MR. ROZYNSKI: Yes, that in Franklin
9 and what was reaffirmed in Barnes, the Court has
10 already found that compensatory damages are
11 available, and emotional distress is often the
12 only and most common form of compensatory damage
13 that one who's a victim of discrimination
14 experiences and that --

15 JUSTICE THOMAS: Do you -- in -- in --
16 in cases -- if you look at Barnes or Franklin,
17 those appear to be closer to either indifference
18 or -- in Barnes or intentional tort in Franklin.

19 Do you -- would you say this is an
20 intentional tort case?

21 MR. ROZYNSKI: This is not an
22 intentional tort case. What the Fifth Circuit
23 did was categorically say that in all instances
24 under the Spending Clause legislation at issue,
25 that emotional distress damages are

1 categorically unavailable. And so that decision
2 -- that decision by the Fifth Circuit is wrong.

3 CHIEF JUSTICE ROBERTS: I -- I
4 understand the analogy to contract law, but
5 what's necessary in the spending law context? I
6 mean, you can't just go and say, you know, the
7 court of appeal in Montana had decided this case
8 and gave emotional distress damages; therefore,
9 in any case under the Spending Clause, the
10 recipient is subjected to those damages.

11 I mean, what we have here is, as I
12 understand it, a fairly narrow category of
13 compensatory damages in a very narrow -- well, a
14 narrow category of cases.

15 But let's say it's a hundred percent
16 of those cases. I mean, how many of those
17 issues -- those cases have to be present before
18 you can say that a recipient is bound by that
19 under -- under Section 504 or the other
20 categories?

21 MR. ROZYNSKI: Well, anyone could --
22 can go and go on Lexis or Westlaw and pick a
23 case and find a case that says what they -- they
24 want. But, however, you look to the -- the
25 Restatements and you look to the treatises to

1 find what is the state of the law and -- and
2 what exactly is available. And for these types
3 of contracts, what you will see, that the
4 Restatements and -- and all the leading
5 treatises say that when there is a agreement to
6 treat people fairly, with equality, especially
7 in discrimination cases, where you do not
8 improperly exclude people from places of public
9 accommodation, that emotional distress damages
10 are available for these types of situations.

11 And so you would look to the
12 Restatements and the treatises to see what the
13 state of the law is.

14 JUSTICE BARRETT: The treatises -- the
15 treatises all identify a very narrow -- the
16 general rule is that emotional distress is not
17 part of compensatory damages for breaches of
18 contract, so they're a very narrow category of
19 cases, as the Chief Justice said, including, you
20 know, the -- the telegram cases and
21 disposal-of-dead-body cases and marriage
22 contract. And the best cases for you are the
23 innkeeper and common carrier cases.

24 So how close is that analogy, the
25 analogy that you're trying to draw? It seems to

1 me that you would need to kind of draw a pretty
2 strong analogy to that particular category,
3 wouldn't you?

4 MR. ROZYNSKI: Well, yeah. You -- you
5 could look at those analogies. Those aren't the
6 only sets of cases in which the Restatements say
7 that they are available.

8 The -- when the breach is of such a
9 kind that a serious emotional disturbance is a
10 particularly likely result, intentional
11 discrimination meets that -- that standard.

12 JUSTICE BARRETT: Well, let's say I
13 have some skepticism about Restatement Second,
14 and I'm looking at Corbin and a whole variety of
15 other treatises. I think Restatement Second
16 states it at a pretty high level of generality,
17 but Restatement Second has moved more into law
18 reform rather than just law description. So, if
19 you look at a full range of other treatises, I
20 read them all to be identifying discrete
21 categories.

22 And I think that's kind of, in my
23 view, where the nub of this case is. I think
24 you're right, that if we read it at a high level
25 of generality and look at the Restatement view,

1 that if it's foreseeable and if it's the kind of
2 a contract where we would say it's foreseeable,
3 then -- then I think emotional damages -- I
4 think you're right. I mean, discrimination and
5 stigmatic injury flow from discrimination.

6 If we read it at a lower level of
7 generality and we look at, more specifically,
8 you have categories of cases in which,
9 historically, emotional damages were recoverable
10 in contract cases, and I think, you know, when
11 you look at Gebser saying that we should take
12 into account the implied nature of the cause of
13 action in shaping the remedy, I think that is an
14 argument, maybe not a winning one, in favor of
15 adopting the more specific level of generality.

16 MR. ROZYNSKI: Well, even if you look
17 at the treatises, let's take, for example,
18 McCormick, which is one -- one that Respondent
19 actually cites heavily for the proposition.

20 If you look at actually McCormick, you
21 will find that if you look later on in
22 McCormick, you will see that it says practically
23 all courts will give damages for mental distress
24 and humiliation in cases of actions for breach
25 of contract for expulsions of guests from

1 hotels, passengers from trains, or expulsion or
2 refusal of admission to ticket holders in place
3 of public resort or entertainment.

4 And so --

5 JUSTICE BARRETT: I agree. That's --
6 that's what I was asking you. Do you -- to win,
7 do you have to draw an analogy to that
8 particular category as opposed to relying more
9 generally on this foreseeability and notice
10 concept?

11 MR. ROZYNSKI: Well, when you look at
12 contracts that protect dignitary harms rather
13 than pecuniary harms, you will find that these
14 are just examples of cases in which they have
15 been found to be available.

16 If you look at our Aaron case or our
17 Odom case, those were specifically cases
18 involving discrimination, and in those cases,
19 you will see that the Court awarded emotional
20 distress damages for purely breach of contract
21 in those cases.

22 JUSTICE KAVANAUGH: Can I ask about
23 the contract analogy, because it does seem
24 difficult, as Justice Barrett's identifying.
25 And one of the ways I've thought about this case

1 is to try to compare it to the express causes of
2 action. So this is an implied cause of action,
3 as Justice Barrett pointed out.

4 The express causes of action that you
5 highlight do allow these kinds of damages, so
6 that's a -- that's a plus for you in -- in my
7 evaluation of your case.

8 But Congress has put caps on -- on
9 those damages in Title VII, the graduated caps,
10 and that becomes a minus for you because are we
11 supposed to allow uncapped liability in the
12 implied cause of action? That seems a problem
13 to create inconsistency with the express cause
14 of action. Or are we supposed to put caps into
15 the implied cause of action? That starts to
16 seem very legislative and too legislative
17 probably for the Court.

18 So how do we resolve that tension with
19 the implied cause of action, do you think?

20 MR. ROZYNSKI: Sure. Two things.

21 One, in 1986, Congress ratified and
22 said that in terms of remedies, remedies at law
23 and at equity would be available. So this, we
24 would say, is a little bit higher than when
25 Congress hasn't spoken to it at all.

1 And as to -- this Court has already
2 said that compensatory damages are available.
3 And if you look to statutes, such as the Fair
4 Housing Act or 1983, those statutes don't
5 specifically say emotional distress damages are
6 available. They say compensate -- the Court has
7 said that these statutes actually allow for
8 compensatory damages and emotional -- and,
9 therefore, uncapped emotional distress damages.

10 And so, if you look to when Congress
11 hasn't specifically carved out saying either
12 emotional distress damages are not available,
13 like the Prison Litigation Reform Act, or if you
14 look at Title VII, when Congress specifically
15 spoke to the issue and says they're available,
16 but they're capped. Usually, what we see in all
17 the statutes that, if compensatory damages are
18 available for discrimination, they are not
19 capped and they are available for emotional
20 distress. So --

21 JUSTICE KAVANAUGH: Well, not in Title
22 VII, you said, right?

23 MR. ROZYNSKI: Because Congress has
24 specifically spoken to the issue and has limited
25 it. But, when they are actually -- when

1 Congress doesn't limit it in, say, the Fair
2 Housing Act and in 1983 claims, they have been
3 available uncapped. And those statutes don't
4 specifically say emotional distress damages are
5 available.

6 JUSTICE BARRETT: Does it matter --

7 JUSTICE SOTOMAYOR: Some of --

8 JUSTICE BARRETT: Oh, sorry, go ahead.

9 JUSTICE SOTOMAYOR: Some of the amici
10 point to very large recoveries, and I think that
11 that's what Justice Kavanaugh is referring to.

12 And so what he's concerned about is
13 that under Title VII there's limits for
14 discrimination. If we recognize emotional
15 distress damages here, there are no limits. So
16 there would be a disparity between Title VII and
17 discrimination here.

18 Why should we accept that disparity?
19 I think that that's the essence of his question,
20 and he can always correct me.

21 MR. ROZYNSKI: Sure. So the -- the
22 interesting thing about this case is that the
23 courts almost uniformly have allowed emotional
24 distress damages or left them undisturbed. This
25 Court, four times in the past, in awards of

1 emotional distress damages, have left it
2 undisturbed.

3 And so, if this Court were to reverse,
4 it would just be leaving the status quo of
5 what's been going on for the last 30 years. And
6 what we find is that the damages have not been
7 outrageous or very high. They have to go to --
8 they have to go to other statutes, like 1983 and
9 Title VII, and -- and most of those involve
10 state discrimination laws in which awards were
11 high.

12 But we have procedures and processes
13 to cabin high awards, and we have remitter, we
14 have -- we have jury instructions to show to the
15 jury that we -- that it must be supported by
16 competent evidence.

17 And there's a good reason why
18 Respondent doesn't actually cite to any Title VI
19 -- VI cases when they try to show these huge,
20 huge awards, is because there -- for the past 30
21 years, there haven't been any. And so the Court
22 has 30 years of evidence to show that these
23 haven't been huge, untethered to actually the
24 harm that was actually done.

25 CHIEF JUSTICE ROBERTS: What if you

1 have four state supreme courts allowing these
2 types of damages and four state supreme courts
3 disallowing them expressly? Under the Spending
4 Clause, would that measure of damage be
5 incorporated or not?

6 MR. ROZYNSKI: Are you -- Mr. Chief
7 Justice, are you talking about the -- the state
8 statute -- statutes for discrimination?

9 CHIEF JUSTICE ROBERTS: Well, my
10 understanding is, and seeing what the Spending
11 Clause binds you to, you look to what contract
12 remedies are, right? That's typically a
13 question of state law.

14 So what if it's four to four? Is the
15 eligibility for those damages incorporated when
16 you take Medicare funds, Medicaid funds, or not?

17 MR. ROZYNSKI: Well, if it was four to
18 four, we would say it's in our favor, but in --
19 in this case, what it --

20 CHIEF JUSTICE ROBERTS: Why is that?
21 It would seem to me to be a tie.

22 MR. ROZYNSKI: If it was a tie, we
23 would look to what would logically constitute
24 notice, and --

25 CHIEF JUSTICE ROBERTS: Well, that's

1 right. I mean, you know that it's four to four.
2 And I think our precedents say under the
3 Spending Clause what you're buying into has to
4 be pretty clear.

5 MR. ROZYNSKI: Yes. And in this case,
6 it's actually 46 states have expressly stated
7 that or have not stated that they aren't
8 available, and there are only four states that
9 say emotional distress damages are not available
10 for breach-of-contract cases.

11 So, if we actually look --

12 CHIEF JUSTICE ROBERTS: Well, what did
13 the other 46 -- I mean, you're just saying they
14 haven't said anything about it?

15 MR. ROZYNSKI: They've actually either
16 expressly stated that they are available or they
17 have not affirmatively stated that they are not
18 available. And if you look to the states that
19 have affirmatively stated that they are
20 available, you're looking at approximately 32
21 states that have already state -- stated that
22 they are.

23 So, if you're looking at the majority
24 view, if you're looking at the Restatements, the
25 treatises, even the treatises that Respondent

1 cites, for these types of contracts, these are
2 available.

3 JUSTICE ALITO: What measure of
4 emotional distress damages does your client seek
5 in this case?

6 MR. ROZYNSKI: We are at a 12(b)(6)
7 stage right now. We -- and my client hasn't
8 affirmatively stated how much she is seeking.
9 But, traditionally, in these types of cases, the
10 -- the amounts have been somewhere between a
11 dollar to the highest in this type of case that
12 I've -- I've seen is about \$25,000.

13 So there actually --

14 JUSTICE ALITO: Well, what damage did
15 she suffer here? Can you not provide some
16 information about what she is trying to recover?

17 MR. ROZYNSKI: Sure. So Ms. Cummings
18 is deaf and low vision, and if she does not have
19 a sign language interpreter for physical therapy
20 services, she will not be able to effectively
21 communicate with her providers.

22 And without that, she's essentially
23 being excluded from those services. This was
24 considered to be the best rehabilitation --

25 JUSTICE ALITO: No, I understand the

1 nature of your claim. So you just can't tell me
2 anything more than the -- the numbers that you
3 just gave me?

4 MR. ROZYNSKI: Well, when someone is
5 excluded from a facility or a provider that they
6 see as the best, that -- that exclusion in
7 itself is a harm.

8 JUSTICE ALITO: Yeah. Okay, I
9 understand. You're not going to provide the
10 numbers. And I understand it's at 12(b)(6).

11 What invoked the Spending Clause here?

12 MR. ROZYNSKI: The express acceptance
13 of federal funds in an agreement here not to
14 discriminate on the basis of sex, race,
15 disability, et cetera.

16 JUSTICE ALITO: Could -- could the
17 Respondent have lawfully refused to provide
18 treatment on the ground that the patient was
19 going to pay for the treatment using Medicare?
20 Medicare is what's involved here?

21 MR. ROZYNSKI: Well, that is a
22 fact-specific inquiry that we haven't got to
23 yet. And -- and if Respondent wants to raise
24 that in the -- the trial stage, it -- it -- it
25 -- it may.

1 JUSTICE ALITO: What is the -- what is
2 this fact -- what is the fact-specific inquiry?

3 MR. ROZYNSKI: So, when it's --

4 JUSTICE ALITO: You have a claim under
5 the Rehabilitation Act and the Affordable Care
6 Act?

7 MR. ROZYNSKI: Correct.

8 JUSTICE ALITO: And what invokes the
9 -- what is the federal Spending Clause basis for
10 the claim that you are asserting?

11 MR. ROZYNSKI: For the government's
12 power to impose conditions on the receipt of
13 federal funds. That's where the power comes
14 from.

15 JUSTICE ALITO: And what are the
16 federal funds? That's what I'm asking.

17 MR. ROZYNSKI: These are Medicare and
18 Medicaid funding.

19 JUSTICE ALITO: Okay. Could they have
20 -- I just don't know the answer to this
21 question. Could they have lawfully refused to
22 treat her because she was going to pay using
23 Medicare and Medicaid funds? That's okay.

24 MR. ROZYNSKI: I -- I -- I -- I don't
25 -- I don't know --

1 JUSTICE ALITO: If you don't know,
2 that's fine. I understand.

3 MR. ROZYNSKI: -- specifically in this
4 case --

5 JUSTICE ALITO: Thank you.

6 MR. ROZYNSKI: -- if they could have
7 done that.

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas, anything further?

10 JUSTICE BREYER: No, thanks.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer?

13 Justice Alito?

14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: I think the
16 question Justice Alito was asking is you're
17 claiming emotional distress; what did she
18 suffer? I think that was his question. It was
19 as simple as that. What -- what level of pain,
20 what level of being upset? What's the emotional
21 distress?

22 MR. ROZYNSKI: Sure.

23 JUSTICE SOTOMAYOR: He's not asking
24 you to quantify it. He's saying, what did she
25 suffer?

1 MR. ROZYNSKI: Sure. Ms. --
2 Ms. Cummings suffered a profound humiliation, a
3 feeling of less of a self-worth, that she's not
4 as -- as worthy as -- as other members of the
5 public because of her disability to access those
6 services in a manner that everyone else can
7 access them.

8 When someone is excluded, and
9 specifically Ms. Cummings, when she was
10 excluded, she experienced a profound humiliation
11 and a profound sense of indignity that just made
12 her feel like she wasn't worthy, and that is the
13 sense of emotional distress that she
14 experienced.

15 JUSTICE SOTOMAYOR: I understood from
16 the papers, or did I misunderstand incorrectly,
17 that she received less-than-adequate care at the
18 substitute place, so I'm assuming she also
19 suffered some discomfort or pain.

20 MR. ROZYNSKI: Yes. So she did go to
21 the subsequent rehabilitation center, and she
22 still experienced pain and had to actually go
23 through back surgery because the physical
24 therapy was not successful.

25 That is not a claim that is at issue

1 right now at the 12(b)(6) stage. However, she
2 did have to eventually get surgery.

3 JUSTICE SOTOMAYOR: Thank you.

4 MR. ROZYNSKI: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Nothing?

7 Justice Gorsuch? All right.

8 JUSTICE BARRETT: I do have one
9 question. So, when you said that the numbers
10 hadn't been high and this hadn't been a problem,
11 Justice Kavanaugh's point about large figures,
12 you were referring to Rehabilitation Act cases
13 specifically. But, of course, this applies to
14 the cluster of statutes including, say, Title
15 IX. Is the same true across the board of all of
16 these cases, that there haven't been, or is it
17 just the Rehabilitation Act data that you're
18 looking at?

19 MR. ROZYNSKI: It is actually amongst
20 all the statutes, Title VI, Title IX, Rehab Act,
21 ACA. There have not been huge awards in -- in
22 those set of stat -- family of statutes.

23 And those -- those awards have been
24 cited in -- in our amici, in the disability
25 brief and others, and the Court can -- can look

1 at those as well there.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. ROZYNSKI: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Sinzduk.

7 ORAL ARGUMENT OF COLLEEN R. SINZDAK
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE PETITIONER

10 MS. SINZDAK: Mr. Chief Justice, and
11 may it please the Court:

12 This Court has repeatedly recognized
13 that federal funding recipients may be liable
14 for compensatory damages when they engage in
15 intentional conduct in violation of the clear
16 terms of the nondiscrimination statutes.

17 Respondents, therefore, ask this Court
18 to hold that while funding recipients are on
19 notice that they must pay compensation, they are
20 not on notice that they must compensate for some
21 of the core harms of discrimination:
22 humiliation, degradation, and related emotional
23 distress.

24 That contention is irreconcilable with
25 contract law, 30 years of practice in the

1 federal courts, and common sense. If Respondent
2 were correct, then the petitioner in Franklin
3 won only a pyrrhic victory because, while this
4 Court held that she was entitled to seek damages
5 for the severe sexual harassment and abuse she
6 suffered at the hands of a teacher in violation
7 of Title IX, she was not entitled to
8 compensation for the only injuries she described
9 in her briefing, the profound psychological and
10 emotional harms caused by the discrimination.

11 That is not the law, and this Court
12 should not make it so.

13 CHIEF JUSTICE ROBERTS: Did you agree
14 that the conditions that follow from accepting
15 federal funds under the Spending Clause have to
16 be clear? It's not simply enough that you can
17 argue that they're there?

18 MS. SINZDAK: The Court has long held
19 that there needs to be notice and, therefore,
20 the terms need to be clear. Yes.

21 CHIEF JUSTICE ROBERTS: Well, along
22 the lines of some questions I asked your friend,
23 how -- how clear does it have to be? I mean, if
24 you have one case, is that clear enough? If
25 it's a tie, is that clear enough? What --

1 what's the standard?

2 MS. SINZDAK: I think it needs to be
3 the rule, and I think you can look to Barnes and
4 see what they looked at were four contract
5 treatises, all of which said that -- that
6 punitive damages were off the table.

7 CHIEF JUSTICE ROBERTS: Okay. So it
8 has to be the rule. But does -- does it have to
9 be a rule in a particular category of cases?
10 And how big does that category have to be? I
11 mean, we've indicated or said that it -- it --
12 it -- it's a contract analogy. Spending Clause
13 is a contract, and that's where you look.

14 But, if it's a category of cases that
15 comes up once in a blue moon, have you signed on
16 to that, or is it only the more general contract
17 damages?

18 MS. SINZDAK: Well, I think that
19 contractual remedies always depend on the nature
20 of the contract because the question
21 fundamentally with respect to remedies is what
22 might have naturally flown from the breach of
23 this particular contract or this particular
24 contractual provision, what might have been in
25 the reasonable contemplation of the parties.

1 So you do have to look at the specific
2 nature of the contract, and then you say: Well,
3 what -- what types of damages have traditionally
4 been awarded for that type of -- for a breach of
5 that type of contract?

6 And, here, we know that this is a
7 contract or an -- by analogy, this -- this can
8 be considered the sort of contract that is
9 protecting other than pecuniary interests. It's
10 -- it's preventing discrimination, which one of
11 the core harms of discrimination is not -- is
12 not pecuniary.

13 And so contract law has long
14 recognized that where the contract at stake is
15 protecting other than pecuniary interests, the
16 remedies that are available are also well -- are
17 damages for other than pecuniary harms.

18 JUSTICE SOTOMAYOR: Counsel, have you
19 -- have you seen or have you had an -- any
20 federal funding recipient decline to take said
21 federal funds since Franklin, or even if we
22 don't go back as far as Franklin, because, as
23 you point out, Franklin was an emotional
24 distress case, but since at least Sheely, which
25 is I don't know how many years but a lot? Has

1 anybody turned it down or questioned it?

2 MS. SINZDAK: Not to our knowledge,
3 no. And -- and I think -- so the history is
4 quite powerful in that respect because I think,
5 in Barnes, one of the motivations was this fear
6 that if punitive damages were available, people
7 would simply reject federal funding.

8 And we just haven't seen that, even
9 though the legal landscape has really been the
10 availability of this kind of damages for at
11 least 30 years. So I -- I think that that is
12 particularly striking.

13 JUSTICE BARRETT: Ms. Sinzdak, what is
14 your response to Justice Kavanaugh and Justice
15 Sotomayor's questions to your friend about the
16 lack of caps on emotional distress damages in
17 this context as compared to Title VII?

18 MS. SINZDAK: I think Title VII is
19 simply a different statute. It's obviously
20 governing employment discrimination, where the
21 traditional remedy has been back pay. There's
22 no cap on that.

23 And then, when Congress, in 1991, for
24 the first time introduced a -- an additional
25 compen- -- compensatory and punitive remedy,

1 then it put some caps on that, not just, by the
2 way, on compensation for emotional distress but
3 also on compensation for a future pecuniary loss
4 and a variety of other forms of damages. And I
5 think, there, it was a question of capping this
6 additional supplemental remedy to the
7 traditional back pay.

8 Now, in Title VI context, we're just
9 not usually dealing with something where back
10 pay can be a remedy. Often, we're dealing with
11 children who are being subject to discrimination
12 within a school system. So we don't have the
13 sort of traditional pecuniary harms. So it
14 makes sense that the compensation there is
15 available for emotional distress and that the
16 compensation isn't being supplemented by these
17 additional remedies.

18 JUSTICE KAGAN: Ms. Sinzduk, could I
19 take you back to Justice Barrett's initial
20 question, which had to do with the level of
21 generality that we're supposed to consider this
22 at. And -- and I think you said, well, what we
23 should do is look at a category of contracts,
24 and this is a category of non -- primarily
25 non-commercial contracts, and so we should ask,

1 you know, with respect to that category what
2 kind of damages could a person get.

3 I suppose you could go up a level of
4 generality and say that the relevant rule is
5 something like you should always get what
6 damages are foreseeable from a contract breach.
7 Alternatively, you could go down a level of
8 generality and say we're really trying to look
9 at whether there are quite analogous cases
10 having to do with discrimination.

11 So which level of -- you know, that's
12 three. There might be more. What level of
13 generality, how do we pick --

14 MS. SINZDAK: Well --

15 JUSTICE KAGAN: -- should we think
16 about this case at?

17 MS. SINZDAK: -- at -- at the
18 threshold, I'd say the good news is that we win
19 at all three levels of generality that I think
20 you're articulating there. But I -- I do think
21 -- the reason I said that what you need to look
22 at is, for this type of contract, what type of
23 remedies are available, that's just a -- a
24 basic, very broad contract rule that the
25 remedies that are available for a particular

1 breach are determined by what was -- what was
2 foreseeable, what naturally flowed, what was
3 within the reasonable contemplation of the
4 parties at the time of contracting.

5 And then you apply that general rule
6 and you can apply it to the broad category of
7 contracts that protect against non-pecuniary
8 interests -- that protect, pardon me,
9 non-pecuniary interests, or you can apply it
10 even more specifically with respect to
11 discrimination.

12 Now there just aren't many cases with
13 contracts involving discrimination, but we have
14 cited examples where courts have awarded
15 compensation for emotional distress where
16 discrimination is involved -- again, that's a
17 rare circumstance -- and Respondent hasn't cited
18 any cases where a court has rejected that
19 proposition.

20 JUSTICE KAGAN: And do you view the
21 common carrier-type cases, the innkeeper-type
22 cases, should we look at those as discrimination
23 cases, or are those somewhat different and we
24 would have to extrapolate from them?

25 MS. SINZDAK: I think those cases are

1 directly analogous in that I think they're the
2 most obvious example of contracts where there's
3 a term that's about protecting essentially
4 emotional interests because, from the time of
5 Justice Story's opinion in Chamberlain, he's
6 recog- -- that we've recognized that common
7 carriers aren't just contracting to, you know,
8 provide passage or to provide a roof over your
9 head, that their also one term, either explicit
10 or implicit, is to treat you well.

11 And I think that's a direct analog to
12 a nondiscrimination provision because it's
13 really guaranteeing people a certain type of
14 treatment. So I think -- I think the analogy
15 there is very close.

16 JUSTICE KAVANAUGH: You said something
17 in response to Justice Kagan that there aren't
18 many contracts involving discrimination, which
19 makes me go back to what I was saying, which is
20 why are we looking at contract law then -- maybe
21 this is fighting against the inquiry that's
22 already established -- but as a -- if we're
23 looking for something that doesn't exist, as
24 opposed to looking at discrimination statutes
25 with express causes of action and trying to

1 reason by analogy from those.

2 Is that -- help me out with how to
3 look at that.

4 MS. SINZDAK: Sure. So the -- the --
5 Barnes said that the -- that -- that funding
6 recipients are assumed to be aware of -- of
7 remedies traditionally available in contract.
8 And I think that makes sense because sort of
9 more broadly -- and I think this is the question
10 you're getting at -- we know that in -- in
11 Spending Clause legislation the question is
12 notice.

13 What would a funding recipient have
14 expected when they entered into the contract --
15 entered into the agreement, when they accepted
16 the funds? And so I think we do -- contract law
17 supplies a body of law that -- that helps us
18 understand, well, what -- what do people
19 normally expect when they enter into these sorts
20 of agreements.

21 If they're only protecting pecuniary
22 interests, they might expect only to pay
23 pecuniary damages. If the contract is
24 protecting other than pecuniary interests,
25 they're going to expect to pay -- to -- to

1 compensate for other than pecuniary harms.

2 But even if you want to dis- --
3 disregard the contract analogy, then I think,
4 again, you have to -- to consider notice, and
5 that is would federal funding recipients, who
6 are aware that they must pay compensation, would
7 they think, oh, but I won't have to compensate
8 for the core harms of discrimination?

9 And -- and I think, you know, you just
10 have to think about, for example, Tennessee
11 versus Lane, where we have a -- a gentleman who,
12 because of a lack of reasonable accommodations
13 for disabilities, had to pull himself up two
14 flights of stairs.

15 Now he was seeking damages for the
16 humiliation and degradation that he experienced
17 when he had to pull himself up two flights of
18 stairs to attend his hearing because those were
19 the core harms that he -- for which he sought a
20 remedy. And I think it would be --

21 JUSTICE ALITO: Suppose we --

22 JUSTICE KAVANAUGH: Your --

23 JUSTICE ALITO: -- suppose we look at
24 the question through the eyes of the Respondent
25 in this case, as opposed to parties in another

1 case, and what is at issue is the application of
2 the reasonable accommodation standard under the
3 Rehabilitation Act or the requirement under the
4 Affordable Care Act to provide, I think the term
5 is, something like suitable aids?

6 Would a small physical therapist know
7 that a condition of treating a Medicare or a
8 Medicaid patient would be potential liability
9 for emotional distress damages based on what
10 happened here, which was the refusal to find, to
11 hire, a sign language interpreter to accommodate
12 the plaintiff? Would -- would a small physical
13 therapist be on notice of that?

14 MS. SINZDAK: I -- I think that --
15 that -- that what you're getting at is really an
16 antecedent question of whether compensatory
17 damages are available at all in this type of
18 case. And, certainly, this Court has emphasized
19 that there needs to be intentional conduct in
20 violation of the clear terms of an
21 antidiscrimination statute.

22 It may be -- the -- the -- the courts
23 below skipped over that inquiry.

24 JUSTICE ALITO: So we have to assume
25 that it's a -- that it's a viable claim. It's

1 12(b)(6). We assume that it's a viable claim.

2 Don't we have to assume that here?

3 MS. SINZDAK: No, I think the Court
4 should address the question presented, which is
5 whether, as a categorical matter, you can obtain
6 compensation for emotional distress under Title
7 VI, under Title IX, under the Rehabilitation
8 Act, and not --

9 JUSTICE ALITO: No, I understand that.
10 But you're -- you were citing the -- you were
11 citing another case involving egregious
12 discrimination, and we would have to take cases
13 like that into account. But should we not also
14 take into account cases like the one that is
15 before us? That's my question.

16 MS. SINZDAK: I don't think so because
17 I think, to the extent what the Court is
18 suggesting is that the conduct here simply
19 doesn't rise to the level of intentional conduct
20 in violation of the discrimination statutes,
21 then that conduct won't be -- won't subject
22 funding recipients to any compensatory damages.
23 So it doesn't need to worry about the specific
24 -- a specific category of compensatory damages.

25 So, for example, in this case, if this

1 Court says you were wrong to say that you can
2 just never obtain compensation for emotional
3 distress, that no victim of discrimination in
4 violation, no matter how egregious the
5 discrimination is, no victim can ever obtain
6 compensation for emotional distress, then that
7 would go back down and there might be questions
8 about whether, here, we really had the kind of
9 deliberate indifference, the kind of intentional
10 conduct that's necessary to trigger a damages
11 remedy at all.

12 I just want to -- to go back to the
13 point about emotional distress damages and the
14 -- and the possibility that they might be -- go
15 too high, because I think Respondent places a
16 lot of stress on this.

17 And I want to echo what my colleague
18 emphasized, which is that we have had 30 years
19 of these kinds of damages being available, and
20 while -- while Respondent and their amici
21 attempt to cite examples of high awards with
22 respect to emotional distress, they just aren't
23 from this family of statutes.

24 And you have to assume that they've
25 been boiling the oceans looking for sort of

1 exorbitant awards, and they're not finding them.
2 And that's because there are checks on that kind
3 of award.

4 So, as I was just explaining, as a
5 preliminary matter, you can't even get your foot
6 in the door for compensatory damages until you
7 show intentional conduct in violation of the
8 clear terms of a statute. And even after you
9 prove that kind of conduct, you then have to
10 prove actual injury.

11 As this Court explained in *Carey*
12 *versus Piphus*, you can't just assert emotional
13 distress. You have to be able to put forward
14 competent evidence of an actual injury.

15 And courts have actually said, just
16 saying I was sad, I was depressed, even a
17 conclusory statement that you were humiliated
18 isn't going to be enough to get damages. And if
19 a defendant believes that the damages --

20 JUSTICE KAGAN: What -- what does that
21 mean exactly? What is enough?

22 MS. SINZDAK: In general, there needs
23 to be specific detailed evidence cataloguing the
24 emotional distress. Often, there will be
25 corroboration from those around -- around --

1 those who are around the person. Sometimes
2 there will be medical evidence corroborating it.

3 So, for example, you can't just make a
4 conclusory -- conclusory statement that you were
5 depressed. But what you might be able to say
6 is: I did not leave my room for three months.
7 I gained 40 pounds. I -- I -- my marriage broke
8 up. My -- my -- my -- I lost my relationship
9 with my children.

10 And then, if you could put forward
11 concrete corroboration for those things, if you
12 could show medical evidence, then that's the
13 kind of thing that -- that, particularly for the
14 larger awards, you're really going to need to
15 see.

16 JUSTICE ALITO: Where do all these
17 rules come from?

18 MS. SINZDAK: Well, this Court in
19 Carey versus Piphus said that there needs to be
20 actual injury and competent evidence. But,
21 also, there just always needs to be sufficient
22 evidence underlying a damages award.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas, anything further?

25 JUSTICE THOMAS: No, Chief.

1 CHIEF JUSTICE ROBERTS: Justice
2 Breyer?

3 Justice Alito? No?
4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: I do have one
6 question. There's an amici here who says you
7 can't ever have an intentional failure to
8 accommodate, and they send -- tend to think that
9 -- this is the Chamber of Commerce.

10 Do you agree with that statement? Do
11 you disagree with it?

12 MS. SINZDAK: Of course, that question
13 really isn't presented here.

14 JUSTICE SOTOMAYOR: No, it's not --

15 MS. SINZDAK: That's a conduct
16 question.

17 JUSTICE SOTOMAYOR -- before us at all.
18 But it is subsumed --

19 MS. SINZDAK: But, yes, I mean, we
20 would --

21 JUSTICE SOTOMAYOR: -- it is subsumed
22 by Justice Alito's question, which is the
23 assumption that -- that if someone can't afford
24 it, they have -- they shouldn't be subjected to
25 litigation. But the point is that they won't be

1 because --

2 MS. SINZDAK: Because of undue burdens
3 and because the accommodation has to be --

4 JUSTICE SOTOMAYOR: So what --

5 MS. SINZDAK: -- reasonable.

6 Absolutely.

7 JUSTICE SOTOMAYOR: -- what you see --
8 what you see as intentional that would make them
9 liable is only if they could, reasonably could,
10 and refused to do it?

11 MS. SINZDAK: Not only that, most
12 courts of appeals apply a deliberate in --
13 indifference standard, so that means you have to
14 know that the person's federally protected
15 rights are probably going to be invaded unless
16 you make the accommodation. And then you have
17 to intentionally refuse to -- to make that
18 accommodation. I mean, that is -- that is a
19 pretty high -- a pretty high standard there.
20 But I think that that isn't the equivalent of
21 taking it off the table entirely.

22 CHIEF JUSTICE ROBERTS: Justice Kagan,
23 anything?

24 Justice Gorsuch?

25 JUSTICE KAVANAUGH: One follow-up just

1 so I understand the answer to the question about
2 the disparity potential with Title VII, the
3 express cause of action. I think you've argued
4 a couple things. One is that the damages are
5 often not high in these cases, and we have years
6 of experience. The second answer I think you
7 said is Title -- and your colleague, Title VII
8 is not the only statute; there's 1983, there's
9 Title VIII, and those don't have the express
10 caps.

11 And then the third answer you gave was
12 that Title VII has back pay. I don't understand
13 that third one --

14 MS. SINZDAK: So Title VII --

15 JUSTICE KAVANAUGH: -- why that
16 matters.

17 MS. SINZDAK: -- Title VII, the
18 traditional remedy is equit- -- was equitable
19 and it was about back pay. So people were
20 already obtain -- able to obtain, after
21 employment discrimination, often substantial
22 awards for the back pay that they lost.

23 And in 1986, when Congress ratified
24 the damages action -- ratified the availability
25 of a damages action under Title VI, there were,

1 in fact, no compensatory damages available under
2 Title VII. So we know that Congress just thinks
3 of these two statutes differently.

4 And I think that part of the reason
5 for that, part of the reason you might have
6 compensation but in a limited form in Title VII,
7 is because of the existence of this other remedy
8 that typically isn't available where, for
9 example, you have a school child who just
10 doesn't -- doesn't have pay and certainly
11 doesn't have back pay that they might be able to
12 obtain.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: I just have one
17 follow-up. So, in the class of non-pecuniary
18 contracts where courts have recognized the
19 availability of emotional distress damages, they
20 often come along with a willful or wanton caveat
21 available only in cases where the breach was
22 willful or wanton. Should we make anything of
23 that condition here?

24 MS. SINZDAK: I -- I don't think so
25 because I think that in many cases, that isn't

1 attached. But even if that -- that was a
2 requirement, I think because there -- it does
3 have to be intentional conduct in violation of
4 the clear terms, it would be satisfied in all of
5 these cases.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Shanmugam.

10 ORAL ARGUMENT OF KANNON K. SHANMUGAM

11 ON BEHALF OF THE RESPONDENT

12 MR. SHANMUGAM: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 The Rehabilitation Act and the ACA
15 differ from other antidiscrimination statutes in
16 two critical respects.

17 First, they contain no express causes
18 of action and thus say nothing about what
19 private remedies are available to enforce their
20 provisions.

21 Second, they were enacted under the
22 Spending Clause, and because Spending Clause
23 statutes are in the nature of contracts,
24 recipients of federal funding must have clear
25 notice of the conditions that attach to the

1 funding.

2 In Barnes, this Court held that
3 recipients have notice that they are subject to
4 a particular remedy where the remedy was
5 generally and traditionally available in an
6 action for breach of contract. This case
7 presents the question whether emotional distress
8 damages were such a remedy. They were not.

9 The general rule has long been that a
10 plaintiff cannot recover for emotional distress
11 in a contract action. This Court has adhered to
12 that rule in cases governed by federal common
13 law. And while some state courts have made an
14 exception for certain narrow categories of
15 cases, the scope of that exception remains
16 unsettled to this day. Indeed, the availability
17 of emotional distress damages in contract
18 actions is much like the availability of
19 punitive damages, which this Court held was
20 insufficient in Barnes.

21 The Court should be cautious about
22 recognizing the availability of emotional
23 distress damages here. As Justice Alito's
24 question illustrated, emotional distress damages
25 are notoriously difficult to quantify. And it

1 would be perverse to provide emotional distress
2 damages more broadly under Spending Clause
3 statutes with implied causes of action than
4 under antidiscrimination statutes with express
5 causes of action.

6 Title VII, of course, caps those
7 damages. And to your point, Justice Kavanaugh,
8 several other statutes, including Title II, do
9 not permit those damages at all. Congress
10 plainly does not believe that emotional distress
11 damages are a necessary remedy for every
12 instance of discrimination. And the Court would
13 be undertaking a quintessentially legislative
14 task if it provided for open-ended damages here.

15 The judgment of the court of appeals
16 should be affirmed. I welcome the Court's
17 questions.

18 JUSTICE THOMAS: Mr. Shanmugam, would
19 you give us an example of the notice that would
20 have been adequate here for you to be --
21 Respondent to be held liable?

22 MR. SHANMUGAM: I think -- to go to
23 the Chief Justice's question to my friend, I
24 think that it would have to be the prevailing
25 rule that emotional distress damages are

1 available in contract actions.

2 And I think this Court's decision in
3 Barnes provides a guide. There, of course, the
4 Court was considering the availability of
5 punitive damages, and as my friend pointed out,
6 the Court looked to the Restatement and various
7 treatises.

8 But what the Court looked to was the
9 general rule. If you take a look at the
10 Restatement provision at issue, and that's
11 Section 355 rather than Section 353, it's very
12 similar in that it articulates a general rule,
13 punitive damages are not recoverable for a
14 breach of contract, and then an exception, the
15 exception being unless the conduct constituting
16 the breach is also a tort for which punitive
17 damages are recoverable. And under the common
18 law, many courts recognize that where you have
19 wanton or malicious conduct, you can get
20 punitive damages in a breach-of-contract action.

21 But the Court didn't drill down into
22 that exception and determine whether that was
23 analogous, whether, for instance, as has just
24 been discussed, intentional discrimination can
25 be characterized as a form of wanton or

1 malicious conduct. The Court simply looked to
2 the general rule and said that in light of that
3 general rule, a recipient of funding would not
4 have clear notice.

5 JUSTICE KAGAN: I guess I don't
6 understand that answer, Mr. Shanmugam, and --
7 and -- and indulge me for a minute with a
8 hypothetical. And you'll say, well, that
9 differs from this case, but let's just assume
10 the following: Let's say that the Restatement
11 and all the treatises and all the cases, all
12 right, are in accord that in general, of course,
13 you don't get emotional distress damages for
14 breaches of contract but that in a particular
15 kind of contract or contract provision, which is
16 not meant to protect pecuniary interests but is
17 meant to protect other sorts of interests, like
18 dignitary interests, in that category of cases,
19 so say the Restatement, the treatises, and all
20 the cases, in that category of cases, you do get
21 emotional distress damages.

22 Now that's an exception. I mean, call
23 it an exception. But it's completely settled.
24 At that point, you have to lose, don't you?

25 MR. SHANMUGAM: I don't think so

1 necessarily. I will get the necessary caveat
2 that that's not the state of the law out of the
3 way, but I want to address that directly.

4 And I think, again, that Barnes
5 actually illustrates that. I think, if
6 anything, in Barnes, the "exception" was a sort
7 of general rule in the sense that it didn't
8 apply to certain enumerated categories of cases.
9 It applied whenever you had wanton, intentional,
10 malicious conduct. And yet, the Court didn't
11 look to that exception in determining whether or
12 not a party was on fair notice.

13 Now I really do think that this case
14 differs from a situation in which you have a
15 rule that whenever emotional distress is likely
16 to result, emotional distress damages are
17 available. And I think that to the extent that
18 the Restatement used that formulation, I don't
19 think that it was stating a catch-all rule or a
20 legal standard.

21 But I think even if there were such a
22 rule, I'm not sure that Barnes would extend so
23 far as to say, well, as long as you can
24 articulate some category of cases in which a
25 type of damages is available, a party is on fair

1 notice.

2 JUSTICE BREYER: Well, what about --

3 MR. SHANMUGAM: Now, again, we think
4 this is an easier case.

5 JUSTICE BREYER: What -- my law clerk,
6 who's looked up a lot of these things, is
7 usually right. I mean, she's found about, I
8 don't know, five treatises going back to 1883
9 and 32 cases, you just heard him say, and a lot
10 of other stuff, and they all seem to say, well,
11 there is an exception where the object of the
12 contract is such that that's likely to be the
13 harm, and you're -- so what do you say?

14 When I looked at all that, I thought,
15 well, maybe she might have missed a thing or two
16 or whatever it is. I looked at your brief and
17 thought the overwhelming authority seems to
18 support them, doesn't it?

19 MR. SHANMUGAM: I -- I don't think
20 there's any real disagreement about the state of
21 the law. I think where there is disagreement is
22 about the accurate characterization of the law,
23 so let me speak directly to that, Justice
24 Breyer.

25 There certainly are some jurisdictions

1 in which there are certain specific categories
2 of exceptions: common carriers, innkeepers,
3 cases involving death messages sent by telegram
4 and the like.

5 Typically, what's been going on in
6 those cases is that courts have looked to tort
7 law and have imposed a heightened and extra
8 contractual duty alongside the contractual duty
9 in light of the personal interests that are
10 implicated by the particular context, by the
11 relationships at issue.

12 Now, again, I think, if you look at
13 the treatises, the state of the law to this day
14 is unsettled, and there have been jurisdictions
15 that have kind of moved back and forth. There
16 are jurisdictions that have refused to extend
17 those exceptions to various categories of cases
18 in which one might say that emotional distress
19 is similarly reasonably likely. And, of course,
20 there are jurisdictions that do not permit
21 emotional distress damages at all.

22 And, again, we cite the Southern
23 Express decision from this Court for the
24 proposition that in those areas of the law where
25 federal common law applies, obviously, more

1 limited these days, emotional distress damages
2 are categorically --

3 JUSTICE BARRETT: But --

4 MR. SHANMUGAM: -- unavailable.

5 JUSTICE BARRETT: -- Mr. Shanmugam --

6 JUSTICE BREYER: Innkeepers -- I'm
7 sorry.

8 JUSTICE BARRETT: Oh, well, that's
9 what I was going to go to, the innkeeper. I
10 think that's very bad for you, which I assume
11 that --

12 JUSTICE BREYER: Yeah, I do too.

13 JUSTICE BARRETT: Yeah.

14 JUSTICE BREYER: The same question, I
15 mean --

16 JUSTICE BARRETT: Yeah.

17 JUSTICE BREYER: -- you know, nope,
18 you can't stay in the room, you have to sleep
19 outside. There you are, outside, and that's
20 uncomfortable.

21 But, also, all the little kids come
22 around and say ha, ha, ha, he's sleeping outside
23 tonight, ha, ha, ha, just as they might say
24 something even worse, or the person who can't --
25 you know, can't walk upstairs, there's no

1 elevator, and so this handicapped person is
2 trying to, you know, climb up the stairs, and
3 that's a bore and painful, and, also, a lot of
4 people might think this is a little -- you know,
5 sort of make fun of the person. That should --

6 JUSTICE BARRETT: Yeah. And to follow
7 up on Justice Breyer's point, I mean, I read
8 those exceptions as fairly well settled across
9 the treatises, the innkeeper and common carrier,
10 and I think those are the hardest cases for you.

11 MR. SHANMUGAM: I think there are some
12 jurisdictions that have not permitted emotional
13 distress damages even in -- in those cases. And
14 to go to Mr. Rozynski's point, you know, he
15 lumps in all of the jurisdictions that have not
16 expressly rejected emotional distress damages on
17 his side of the law, but in many of those
18 jurisdictions, they simply haven't spoken to the
19 issue at all.

20 But I don't want to overly fight those
21 cases because I would certainly recognize that
22 that's an example that the treatises often cite
23 as kind of the paradigmatic exceptional example,
24 a situation in which, where parties are expelled
25 or not permitted to stay at an inn, courts

1 looking to tort law have found a heightened duty
2 and have said that the breach of that duty can
3 give rise to emotional distress.

4 JUSTICE KAVANAUGH: So is --

5 JUSTICE SOTOMAYOR: Excuse me, but
6 isn't that what --

7 MR. SHANMUGAM: But all of this -- go
8 ahead.

9 JUSTICE SOTOMAYOR: Isn't that what
10 intentional discrimination is? I find it
11 interesting that the two states in Barnes that
12 permitted punitive damages prohibited emotional
13 damages. So it seems to me that if I look at
14 your small universe of states that prohibit
15 emotional damages, those two made it up by
16 permitting punitive damages.

17 But putting that aside, I think the
18 most important point is the nature of the
19 contract here is an agreement by your client to
20 treat people with disabilities equally to others
21 and to provide accommodations and let them enjoy
22 the benefit of their services if it's reasonable
23 to do so.

24 That's no different than the common
25 carrier agreement to treat a passenger with

1 dignity and to treat them with a -- with a sense
2 of respect, the special care.

3 So it's in the same nature. And both
4 of them are intentional in the sense of what an
5 intentional tort speaks about. So I'm -- I'm
6 not sure how you distinguish either those cases
7 or you distinguish the fact that it is an
8 intentional act and an intentional breach of a
9 clear contract with the government and with the
10 patient.

11 MR. SHANMUGAM: Sure. So, Justice
12 Sotomayor, let me make two general points and
13 then a specific point about where you started,
14 which is the relationship with punitive damages.

15 My general points are, first, that the
16 whole point of the contract law analogy is clear
17 notice to contracting parties. And I think that
18 once this Court starts to engage in an analysis
19 about whether or not a recipient of federal
20 funding is more like an innkeeper or, you know,
21 more like a -- a hospital that negligently
22 permits someone to take a baby --

23 JUSTICE SOTOMAYOR: So what do you do
24 with Franklin or what do you do with Sheely for
25 14 years? What do you do with the multiple of

1 state and federal cases in decades that have
2 awarded damages for this kind of discrimination?

3 MR. SHANMUGAM: So I think that there
4 are sort of two separate questions here. The
5 first is, what is the state of contract law?
6 And I would note parenthetically that I think we
7 should be looking at the state of contract law
8 in 1964, two decades before the formulation in
9 the Second Restatement, on which the other side
10 relies, because the inquiry should really focus
11 on the state of the law at the time of Title VI,
12 whose remedies are, of course, incorporated into
13 these statutes.

14 The second and separate argument is
15 kind of this ratification-light argument that is
16 made by the other side and that my friend, Ms.
17 Sinzdak, made very heavily during her argument
18 today, which is this argument that because there
19 were cases that seemed to assume the existence
20 of emotional distress damages, that Congress, at
21 least by the time of the ACA, should somehow be
22 understood to have ratified those cases.

23 Now, of course, that's not how
24 ratification works more generally. Ordinarily,
25 you look to the cases that have actually

1 addressed the question presented.

2 And I think, even by the time of the
3 ACA, there's only one court of appeals, Sheely,
4 which had addressed the question. There were
5 district courts going both ways, as Petitioner
6 herself acknowledges in the cert petition and as
7 the district court set out in its opinion.

8 So I certainly don't think that the
9 law on the specific question of whether these
10 Spending Clause statutes might permit emotional
11 distress damages was settled.

12 I do think that the Spending Clause
13 context here is centrally important really for
14 the reason that this Court set out in Gebser.
15 In Gebser, the Court drew a distinction between,
16 I believe, Title VII and Title IX, and the Court
17 said, well, outside the Spending Clause context,
18 antidiscrimination statutes are often centrally
19 about providing compensation.

20 By contrast, Spending Clause statutes
21 are really about providing equal access and
22 ensuring the parties that receive federal funds
23 provide equal access to federal programs. And I
24 think that that is really the reasoning that
25 underlay this Court's decision in Barnes and its

1 reliance on the contract law analogy.

2 And to pick up on the first part of
3 your question, Justice Sotomayor, and the
4 question of the relationship between emotional
5 distress damages and punitive damages, I think,
6 if you look at the case law, the case law is
7 actually quite similar in that courts in
8 breach-of-contract cases have made both
9 emotional distress and punitive damages
10 available only in exceptional and, frankly, in
11 overlapping circumstances.

12 And, indeed, if you take a look at the
13 Corbin treatise, the Corbin treatise says in its
14 discussion of this very issue that the line
15 between emotional distress damages and punitive
16 damages is "indistinct and hard to draw."

17 And, indeed, I think, if you look to
18 jurisdictions that permit punitive damages and
19 not emotional distress damages, those courts are
20 essentially using punitive damages as a proxy
21 for emotional distress damages and, conversely,
22 some of the courts that have permitted emotional
23 distress damages have noted that they have a
24 punitive and deterrent effect.

25 And I say all of that --

1 JUSTICE KAVANAUGH: If we're in --
2 keep going, sorry.

3 MR. SHANMUGAM: I say all of that
4 simply to make the point that emotional distress
5 damages are in some respects not like other
6 forms of compensatory damages. They are in some
7 respects more similar to punitive damages,
8 particularly where breach-of-contract cases are
9 concerned.

10 JUSTICE KAVANAUGH: A couple questions
11 on that then.

12 First, if we're in the contract world,
13 is the right question to ask, is this kind of
14 situation more like the general contract or more
15 like the contracts in the "narrow exception"?
16 Is that the right question to ask?

17 MR. SHANMUGAM: I -- I think that the
18 right question to ask is, what is the prevailing
19 rule in breach-of-contract cases --

20 JUSTICE KAVANAUGH: Well, that --

21 MR. SHANMUGAM: -- more generally?

22 JUSTICE KAVANAUGH: -- that gets to
23 Justice Kagan's question. You've got to figure
24 out what category you're in. Calling it narrow
25 doesn't do much for me. You've got to figure

1 out which is the better analogy, I think, the
2 general rule or the exception. And Justice
3 Barrett's questions, I think, elucidate why the
4 exception seems pretty on point here.

5 MR. SHANMUGAM: Well, I -- I -- I
6 would say that to the extent that the Court
7 wants to sort of try to identify some category
8 of cases, again, I would fall back on the point
9 that the rule was simply not settled,
10 particularly as of 1964, and, again, the law,
11 frankly, varies even from one of the enumerated
12 exceptions to the other.

13 JUSTICE KAGAN: But, Mr. Shanmugam --

14 MR. SHANMUGAM: In some of those
15 exceptions -- just to finish my sentence --
16 courts have required wanton or malicious
17 conduct. In other contexts, the courts haven't.
18 And so I think it's very hard to derive from
19 this any sort of prevailing rule that would be
20 sufficient to give clear notice.

21 JUSTICE KAGAN: Yeah. I mean, we're a
22 country with a lot of jurisdictions. The right
23 test cannot be does everybody agree, you know,
24 across the board and everybody has considered
25 the exact same question and answered it in the

1 exact same way.

2 If you look at the state of the law
3 generally at the appropriate time, on the one
4 hand, you have these -- what seem, as Justice
5 Kavanaugh just suggested, the most analogous
6 cases, which are the common carrier/innkeeper
7 cases, where there was a refusal or a denial of
8 adequate service. So -- so those cases seem to
9 be pretty much all cutting against you.

10 And then you have, like, well, what do
11 I really do when I'm trying to think what my
12 legal obligations are? I go to the
13 Restatements. I go to the treatises. And you
14 have a whole bunch of Restatements and
15 treatises, starting with the Restatement, which
16 maybe the Second Restatement is a little bit,
17 you know, recommending as opposed to describing,
18 but -- but, with a bunch of treatises, including
19 by most of the major contract treatise authors,
20 you know, Williston, Farnsworth, all of them
21 saying that in this category of cases where the
22 contract provision protects other than pecuniary
23 interests and where you can foresee that there
24 will be other than pecuniary harms flowing from
25 a breach, that those cases -- that those

1 contracts are treated differently with respect
2 to damages.

3 So I guess it's just like, if you look
4 at the treatises, you look at the most analogous
5 set of cases, they cut against you both.

6 MR. SHANMUGAM: Yeah. So a few points
7 in response to that, Justice Kagan, and I'm
8 going to leave aside the point that I've already
9 made, that that was just not the approach that
10 the Court took in Barnes.

11 We are certainly not here advocating
12 for some sort of Eighth Amendment-like state
13 counting rule here. We do think that the rule,
14 at whatever level of generality, has to be the
15 prevailing rule. So I don't think it would be
16 sufficient if you had four state supreme courts
17 going one way and four state supreme courts
18 going the other.

19 But I do want to speak specifically to
20 this question of the appropriate sort of level
21 of generality. I do think that when you take a
22 look at the case law, there are certain
23 categories of cases -- we've talked about the
24 innkeepers, common carriers, death messages, and
25 -- and the like -- where courts have tended to

1 find that emotional distress damages are
2 available.

3 Now I want to emphasize one point that
4 I alluded to earlier, which is that those courts
5 tend to be looking to tort law, and I think that
6 for purposes of this analysis, I think it would
7 be a little bit odd -- and I think that the
8 Solicitor General in her brief recognizes this
9 -- to say that when you're looking at the
10 remedies that are available traditionally for
11 breach of contract, the remedies that are drawn
12 from the tort context are somehow fair game.

13 And, of course, nowadays we have the
14 distinct tort of intentional infliction of
15 emotional distress, which will be available
16 under state law in many of these cases.

17 But I do think that if you look at the
18 Restatement, if you look at the treatises in
19 particular, I do think that those authorities,
20 with all due respect, Justice Kagan, indicate
21 that the law in this area is unsettled. Even
22 this Court in its Southern Express opinion,
23 which -- which certainly did predate 1964,
24 recognized that in the context of telegrams
25 courts have gone in both directions.

1 And I would give you just one example,
2 which is Corbin on Contracts. And Corbin says
3 that the general rule is well established but
4 that by contrast, the class of cases involving
5 emotional distress damages "has resulted in much
6 litigation, and the law cannot be said to be
7 entirely settled."

8 And Corbin also notes, you know,
9 first, that these cases --

10 JUSTICE KAGAN: Well, I think, when it
11 said that, the question was exactly what fell
12 within the category. But, if you had said is it
13 settled that -- you know, denial of adequate
14 service by innkeepers is settled, the treatises
15 clearly give you an answer to that: Yes, it is.

16 MR. SHANMUGAM: Well, there are more
17 states that might have permitted that. At least
18 certainly today there are more states that
19 permit emotional distress damages in certain
20 exceptional circumstances. But, again, these
21 cases are looking to tort law. The legal
22 standard for when emotional distress damages are
23 available is itself open to question in many of
24 these contexts, particularly because courts are
25 looking to tort law. They're requiring wanton

1 or malicious conduct.

2 And, again, at that point, this starts
3 to uncomfortably overlap with punitive damages,
4 where, again, courts have said that emotional
5 distress damages are available in
6 breach-of-contract actions where there is wanton
7 or malicious conduct. And yet, that did not
8 stop the Court from saying we're just going to
9 look to the general rule, as the Court did in
10 Barnes, and that general rule does not permit
11 for punitive damages.

12 And, again, if this is all about
13 notice, I think it would be very unfair to say
14 that recipients of federal funding, many of whom
15 are like my client, a relatively unsophisticated
16 solo practitioner of physical therapy, to have
17 sort of this encyclopedic knowledge of the law
18 to realize that if they accept Medicare and
19 Medicaid funds, they are going to be subject to
20 emotional distress damages because of an analogy
21 to cases involving innkeepers.

22 JUSTICE BARRETT: But, Mr. Shanmugam,
23 let me press on this notice point. I -- I find
24 it very surprising that this case is here so
25 many years, I mean, you know, 40-plus years into

1 recognizing causes of action under this family
2 of statutes. So it seems to me either nobody
3 was seeking emotional distress damages and then
4 suddenly people started doing it and it came up,
5 or, you know, as -- as Petitioners told the
6 story, that everybody assumed that they were
7 available, and then, by when Sheely came around,
8 somebody finally thought to challenge it.

9 So why is it that this just came up in
10 the Eleventh Circuit case before and then, you
11 know, now in this case before us? Everybody
12 seemed to be on notice these cases were being
13 decided and damages being awarded. No one
14 complained.

15 MR. SHANMUGAM: Justice Barrett, for
16 whatever reason, comparatively few of these
17 cases seem to reach the court of appeals level.

18 But this issue was being litigated and
19 being litigated even before this Court's
20 decision in Barnes. The earliest district court
21 decision going our way is a decision, I believe,
22 from 1993. And even before the Eleventh
23 Circuit's decision in Sheely, there were other
24 district courts that had agreed with our view.

25 Now, not surprisingly, once a federal

1 court of appeals went the other way, a number of
2 district courts then followed suit and went in
3 that direction. But I don't think that it is
4 true that it has just been assumed for 40 years,
5 40-plus years, since the enactment of Title VI,
6 that emotional distress damages are available.

7 Indeed, of the four cases that came to
8 this Court involving allegedly emotional
9 distress damages, three of those cases were
10 cases involving pain and suffering. And as we
11 point out in our brief, the analysis for
12 pain-and-suffering damages might be somewhat
13 different because there's a somewhat more
14 substantial basis of contract law permitting
15 those damages.

16 And so, again, I don't think that the
17 law on the federal level was settled, and,
18 again, I think that the law as a matter of
19 contract law was certainly not settled, and the
20 best evidence of that is that I think all of the
21 treatises, while certainly recognizing that some
22 state courts have recognized exceptions --

23 JUSTICE BREYER: What's the one --
24 what's the exception?

25 MR. SHANMUGAM: -- have emphasized the

1 unsettled nature of that exception.

2 JUSTICE BREYER: So what's the one
3 that would apply here? A hypothetical: A deaf
4 woman who has a very hard time seeing hires
5 under contract a rehabilitation expert who
6 promises to give the best treatment. And then,
7 when they go in to talk, the expert -- she says,
8 I need a sign language interpreter, and the
9 expert says, no, not giving you one. What are
10 we going to do? And she says, well, I'll --
11 I'll give you hand signals. I don't understand
12 them. I'll write notes? I have a very hard
13 time reading. Okay? Too bad.

14 Now, breach of the contract, known.
15 And this woman's had a terrible time. She has
16 headaches when she has to try to do this. She
17 -- she runs around in the street and just says,
18 oh, God, it's really hopeless, I'm bad enough
19 off, et cetera, et cetera. Okay. What was the
20 exception that didn't give emotional --
21 emotionally based damages for that?

22 MR. SHANMUGAM: So I -- I think, in
23 your hypothetical, she might potentially have a
24 discrete form of damages if, for instance, as a
25 result of her failure to obtain services, she

1 suffered some tangible injury. And there was a
2 colloquy earlier --

3 JUSTICE BREYER: No, no. What she did
4 is it's just miserable for her. She sits there
5 for two hours and she's feeling God-awful, and
6 her cousin and her parents are there and so is
7 her -- her children, and they all think, oh, my
8 God. And she knows that's what they're
9 thinking.

10 MR. SHANMUGAM: So I'm not aware of
11 any case, Justice Breyer, involving --

12 JUSTICE BREYER: I'm not either, but I
13 have a -- I got that from somewhere. And so --

14 MR. SHANMUGAM: Right. Well, I -- I
15 -- I'm not aware of any case --

16 JUSTICE BREYER: Yeah.

17 MR. SHANMUGAM: -- in which a court at
18 common law would award purely --

19 JUSTICE BREYER: No, no --

20 MR. SHANMUGAM: -- emotional distress
21 --

22 JUSTICE BREYER: -- I asked you which
23 is the category. You were talking about
24 categories and subcategories, and you said some
25 -- they might allow it, like an innkeeper. And

1 then there are others that wouldn't. Okay. So
2 I gave you a case, and I said I would like to
3 know what subcategory wouldn't have given
4 damages for that? There may be some. It's not
5 a facetious question.

6 MR. SHANMUGAM: No. And -- and I
7 think that that's a -- a very hard question that
8 points up the difficulty of trying to identify a
9 subset of cases that is especially analogous.

10 Now, to sort of go back to where
11 Justice Kagan, I think, was -- was questioning
12 my colleagues, I suppose that you could try to
13 go even more specific and to identify
14 breach-of-contract cases involving
15 discrimination.

16 I think the problem with that is that
17 in the private context, no one has identified a
18 case involving a contractual obligation not to
19 discriminate. The most that my friends on the
20 other side have done is to identify two cases in
21 which the fact pattern itself appears to have
22 involved intentional discrimination.

23 Those were both cases that I think
24 pretty comfortably fall within the specific
25 categories of cases in which the underlying

1 contractual obligations were of a sort to give
2 rise to emotional distress damages, but I -- I
3 think everyone is in agreement that there just
4 is not case law involving actual contractual
5 duties not to discriminate --

6 JUSTICE KAVANAUGH: So that --

7 MR. SHANMUGAM: -- that could be
8 specifically analogous.

9 JUSTICE KAVANAUGH: -- so that raises
10 the question what do we use to figure out the
11 appropriate contract analogy, the question
12 earlier, the general rule, as you describe it,
13 or these, I'll use "innkeeper" cases.

14 In figuring that out, should we look
15 to the federal statutes, which 1983, Title VII,
16 and Title VIII, let's just pick those three, as
17 I understand it, emotional distress damages are
18 available in all three of those, admittedly,
19 with caps in Title VII.

20 But why isn't that, tie-breaker is the
21 wrong word, but something to look at in figuring
22 out how Congress would have designed this
23 statute given that we're in this implied cause
24 of action box?

25 MR. SHANMUGAM: Justice Kavanaugh, I

1 think, in many ways, that's an easier way to
2 think about this because, of course, this is a
3 question of statutory interpretation. And we're
4 not here to question the implied right of
5 action. That is, of course --

6 JUSTICE KAVANAUGH: Well, you sort of
7 are right now, I think.

8 MR. SHANMUGAM: Well, no, I don't
9 think so.

10 JUSTICE KAVANAUGH: Because if you --

11 MR. SHANMUGAM: I think that the
12 question --

13 JUSTICE KAVANAUGH: -- if you accept
14 that the question -- if you accept it, that it's
15 a real cause of action, then why not have it be
16 like the other analogous causes of action, which
17 pretty consistently allow emotional distress
18 damages? I'm sorry to interrupt.

19 MR. SHANMUGAM: No, not at all,
20 Justice Kavanaugh.

21 And I think I would fall back on what
22 Justice Scalia said in his concurrence in
23 Franklin, which is that it simply doesn't follow
24 from the existence of an implied cause of action
25 that any and all remedies are available.

1 And I do think it is useful to look to
2 the other antidiscrimination statutes outside
3 the Spending Clause context as a guide.

4 My point, as I indicated in the
5 opening, is that there is no uniform practice on
6 Congress's part, and I think that the statutes
7 fall into three categories.

8 First, there are statutes, and I think
9 the best examples are Section 1983 and the Fair
10 Housing Act, where emotional distress damages
11 are permitted. Those are statutes with pretty
12 broad language. The Fair Housing Act, for
13 instance, provides for actual damages, and
14 courts have construed that to include emotional
15 distress damages.

16 The second category are the
17 antidiscrimination statutes that don't permit
18 emotional distress damages at all. And that
19 category includes some pretty important
20 statutes. I would be hard-pressed to identify a
21 more important one than Title II of the Civil
22 Rights Act, which is, of course, the
23 foundational provision that prohibits
24 discrimination by private actors in the
25 provision of -- of public accommodation. No

1 emotional distress damages under that statute.
2 The same is true with regard to Title III of the
3 ADA, the ADEA, and other statutes.

4 Now Title VII is, I think, perhaps the
5 most significant example because, of course,
6 Title VII when it was first enacted did not
7 provide for compensatory damages at all, and
8 when Congress amended it in the Civil Rights Act
9 of 1991, Congress did so very carefully.

10 It imposed caps, including some quite
11 strict caps particularly with regard to small
12 employers, on the availability not just of
13 emotional distress damages but also punitive
14 damages and other forms of non-economic damages
15 more generally.

16 And so I think that that points up the
17 quintessentially legislative nature of the
18 undertaking here and a reason for the Court to
19 be cautious. I think that this case would have
20 a very different complexion to it if Congress
21 invariably provided emotional distress damages
22 because I think that that would reflect a
23 congressional judgment that that is a necessary
24 remedy for any form of discrimination.

25 And, of course, if the Court were to

1 agree with us here, there would still be a full
2 panoply of available remedies. In many of these
3 cases, particularly the cases involving the most
4 intentional and blatant affirmative acts of
5 exclusion, the kinds of discrimination that are
6 pointed out in the amicus briefs on the other
7 side, there will be compensatory damages in the
8 form of economic harm.

9 And if you actually look at many of
10 the worst examples cited by the other side, you
11 will find that that is, in fact, the case. You
12 have individuals who were unable to obtain their
13 degrees, individuals who had to get --

14 JUSTICE KAGAN: But we've --

15 MR. SHANMUGAM: -- counseling and
16 other --

17 JUSTICE KAGAN: -- long recognized,
18 Mr. Shanmugam, that discriminatory harms are
19 often stigmatic in nature, that they can be very
20 deep and very wounding even if there is no
21 economic harm of the kind that you're talking
22 about.

23 MR. SHANMUGAM: And yet, Congress has
24 made the judgment under these foundational
25 statutes that I just referred to that emotional

1 distress damages are not available.

2 And I do think that in the cases
3 involving intentional, blatant misconduct, there
4 will be not only other forms of economic and
5 other compensatory damages available, but, of
6 course, there will be injunctive relief,
7 declaratory relief, nominal damages, and
8 remedies under state law.

9 I would note parenthetically that if
10 you take a look at many state statutes --

11 JUSTICE KAGAN: Why isn't the --

12 MR. SHANMUGAM: -- they too have caps
13 --

14 JUSTICE KAGAN: -- right way to deal
15 --

16 MR. SHANMUGAM: -- on emotional
17 distress damages.

18 JUSTICE KAGAN: -- with this -- why
19 isn't the right way to deal with this, you know,
20 Justice Kavanaugh said, well, Title VII has
21 caps. We couldn't really impose caps.

22 But, in some ways, the courts can
23 impose caps. In some ways, the courts can make
24 sure through the rules that they convey as to
25 what kind of damages these are and the

1 importance of keeping them in check that they
2 should be -- you know, the -- the Petitioner
3 said up to \$25,000.

4 We don't have to set a number in order
5 to convey a sense that -- that -- that these
6 should be kept in control, and why isn't that
7 the right way to -- to balance the competing
8 interests here?

9 MR. SHANMUGAM: So a couple points in
10 response to that, Justice Kagan.

11 The first is that, as Petitioner
12 herself contends, emotional distress damages can
13 and -- and often are awarded based on the
14 plaintiff's testimony alone.

15 The amicus briefs cite examples of
16 quite significant emotional distress damages
17 awards. To be sure, that's often outside the
18 specific context of the Rehabilitation Act,
19 which involves cases typically concerning a
20 failure to accommodate, which I think do tend to
21 be cases that don't involve, you know, as
22 blatant of discrimination as cases involving
23 exclusion, the paradigmatic sorts of cases that
24 we think about.

25 But, nonetheless, there are plenty of

1 examples of emotional distress damages running
2 into the seven figures. And while those awards
3 can be remitted, the standard for remittitur,
4 consistent with the Seventh Amendment, is quite
5 a high one. It is that the award shocks the
6 conscience.

7 And so, yes, of course, if this Court
8 were to permit these sorts of damages, the Court
9 could say to lower courts in an admonishing way:
10 Look to Title VII. That might provide some
11 guidance.

12 But that just points up the
13 quintessentially legislative nature of this
14 whole undertaking, particularly given that in
15 Title VII, what triggers the various caps is the
16 size of the employer. That's obviously not a
17 consideration that would comfortably fall within
18 the traditional judicial task of remittitur.
19 And yet, it reflects the fact that Congress made
20 the judgment that it wanted to provide a greater
21 degree of protection to small employers.

22 And, again, that just illustrates that
23 if, in fact, emotional distress damages are to
24 be made available here, that is a matter for
25 Congress to address in the first instance.

1 And I think the Court can have some
2 degree of comfort that, if the Court were not to
3 permit emotional distress damages here, it would
4 not be going further than Congress has in other
5 statutes.

6 Quite to the contrary, what the Court
7 would be doing is very similar to what Congress
8 has done in other bedrock antidiscrimination
9 statutes.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 Justice Thomas, anything further?

12 JUSTICE THOMAS: Nothing for me,
13 Chief.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?

16 Justice Alito?

17 Justice Sotomayor?

18 Justice Gorsuch, anything further?

19 No?

20 Thank you, counsel.

21 MR. SHANMUGAM: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal,
23 Mr. Rozyński?

24

25

1 REBUTTAL ARGUMENT OF ANDREW ROZYNSKI
2 ON BEHALF OF THE PETITIONER
3 MR. ROZYNSKI: So going to the --
4 Justice Barrett's comment regarding this --
5 notice, and, essentially, if -- we're all -- you
6 know, lawyers are smart. If -- if -- if their
7 clients had not believed that they were on
8 notice for emotional distress damages, virtually
9 all these complaints involving intentional
10 discrimination are asking for emotional distress
11 damages, they would surely object. But, for
12 almost all -- virtually all cases, they haven't.

13 And that's because they are on notice
14 for these -- these damages. And take for this
15 instance, for this case, Respondent didn't even
16 move to dismiss that they lacked notice of
17 emotional distress damages.

18 The court -- the trial court itself
19 raised sua sponte, on its own accord, and said
20 emotional distress damages are categorically
21 unavailable under these statutes.

22 So, given that this was the state of
23 the law for over 30 years, and Respondent may
24 say that there has been some disagreement, but
25 if you actually look at the cases, there perhaps

1 are three cases that have said that they're not
2 available, and there are -- in our -- in our
3 moving brief, we've cited at least 20 cases,
4 including several court of appeals that have
5 left it undisturbed or say that they are
6 available. And this -- this lack of -- of
7 notice argument, we believe, is just not correct
8 in this context.

9 And citing to McCormick, which was in
10 1935, McCormick says virtually all courts agree
11 that there is emotional distress in the common
12 carrier-type cases that we were talking about
13 here today. So, if Respondent tries to parse
14 out that there was no notice as -- as to the
15 state of 1964, that simply is just not true.

16 And punitive damages, when they were
17 excluded in -- in Barnes, actually, there was no
18 affirmed case of punitive damages ever at that
19 time under these family of statutes.

20 And, here, we would be overturning a
21 -- a whole body of case law to the only remedy
22 that would be available in discrimination cases.
23 And punitive damages are traditionally only
24 available when there is a tort involved as well.

25 However, in emotional distress

1 damages, there is no need to be accompanied by a
2 tort. So the suggestion that a tort, a separate
3 tort, is required is not supported by the -- the
4 treatises and the Restatement.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:21 a.m., the case
8 was submitted.)

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