

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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A. J. T., BY AND THROUGH HER PARENTS,))
A. T. & G. T.,))
Petitioner,))
v.) No. 24-249
OSSEO AREA SCHOOLS,))
INDEPENDENT SCHOOL DISTRICT))
NO. 279, ET AL.,))
Respondents.))
- - - - -

Pages: 1 through 104
Place: Washington, D.C.
Date: April 28, 2025

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3 A. J. T., BY AND THROUGH HER PARENTS,))
4 A. T. & G. T.,)
5 Petitioner,)
6 v.) No. 24-249
7 OSSEO AREA SCHOOLS,)
8 INDEPENDENT SCHOOL DISTRICT)
9 NO. 279, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Monday, April 28, 2025
15

16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:04 a.m.
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25

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7 Petitioner.
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9 the Respondents.
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-249,
5 A.J.T. versus Osseo Area Schools.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

9 MR. MARTINEZ: Mr. Chief Justice, and
10 may it please the Court:

11 The district has conceded Ava's
12 question presented. Both sides now agree that
13 the ADA and the Rehabilitation Act apply the
14 same legal standards to all plaintiffs and that
15 it's wrong to impose any sort of uniquely
16 stringent test on children facing discrimination
17 at school. That concession fully resolves this
18 case.

19 The Eighth Circuit rejected Ava's
20 claims under Monahan's two-tiered asymmetric
21 approach. That ruling can't stand. The
22 district wants to preserve its victory under a
23 new theory it invented after dropping the
24 indefensible two-tiered approach it defended
25 below.

1 Now they say that the statutes apply a
2 bad-faith or gross-misjudgment test to all
3 plaintiffs, not just schoolchildren protected by
4 the IDEA. That's exactly the opposite of what
5 they told you at the cert stage, where they said
6 that no bad faith or intent is required outside
7 the IDEA context.

8 The district's new theory violates the
9 text, history, and purpose of both statutes. It
10 contradicts decades of regulations. It defies
11 at least five precedents of this Court and
12 decisions from virtually every circuit. It
13 would also revolutionize disability law,
14 stripping protections from vulnerable victims
15 and gutting the reasonable accommodations needed
16 for equal opportunity.

17 If you address this new argument, you
18 should reject it out of hand. But you shouldn't
19 address it because it's so clearly procedurally
20 barred many times over. Whether you look at
21 this through the lens of judicial estoppel or
22 waiver or Rules 15 and 24, one thing is clear:
23 The district can't win this case based on a
24 radical new theory that goes beyond Ava's
25 question presented and directly contradicts what

1 they told the lower courts and this Court at the
2 cert stage. Instead, you should follow regular
3 order and procedure, you should answer the
4 limited question presented, and you should
5 vacate the decision below.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Isn't there an
8 argument, though, that we should -- that some
9 would think is embedded or included in the
10 question presented, and that is what is the
11 standard?

12 MR. MARTINEZ: I don't think so,
13 Your Honor. I don't think that question is
14 embedded in the question presented. I think our
15 question presented was very clear that we were
16 asking whether the uniquely stringent test that
17 Monahan required only in the educational
18 context, whether that was the correct rule.

19 And that's clear not just from the
20 framing of the question presented and the
21 paragraphs, the introductory paragraphs, leading
22 into it but also from what we said in the -- the
23 rest of the petition, where we used that
24 "uniquely stringent" phrase 10 different times to
25 talk about what issue we were -- putting before

1 the Court. We said that on pages 2, 3, 15, 13,
2 16, 22, 24, 27, and 39.

3 It's not just us, though. We
4 understood our question presented that way. The
5 other side also understood it the same way. So,
6 when they responded to our petition and they
7 responded to our question presented in their
8 cert papers, they took the case on exactly those
9 terms. They argued about the circuit split,
10 they argued about the merits. They said this
11 case was "narrow" and was only going to affect a
12 sliver of plaintiffs who were in Ava's position,
13 children facing discrimination at school.

14 Now, though, they're trying to make
15 this case about everyone, about 44 million
16 Americans with disabilities who are protected by
17 reasonable accommodations and who would suffer
18 under the bad-faith-and-gross-misjudgment test
19 that they're putting before the Court for the
20 first time.

21 CHIEF JUSTICE ROBERTS: Well, if
22 that's true, counsel, then nobody is defending
23 the position that you challenged, is that right?

24 MR. MARTINEZ: I think, at this point,
25 the other side has conceded that that position

1 is indefensible, and then -- and, therefore,
2 they aren't defending it. I think they have one
3 amicus who filed a brief that seems to be
4 defending the Monahan test.

5 CHIEF JUSTICE ROBERTS: Well, and yet
6 that position that you're attacking was the
7 majority position, right?

8 MR. MARTINEZ: That was the position
9 but -- adopted by five circuit courts. That's
10 right.

11 CHIEF JUSTICE ROBERTS: Well, what do
12 we normally do in a situation like that?
13 Normally, we appoint a -- an amicus to defend
14 the judgment below. And we're saying we should
15 just hand you a victory even though no one's
16 challenging your understanding of what the
17 conflict was about.

18 MR. MARTINEZ: Your Honor, I think
19 that it's fully presented to this Court, the
20 issue of whether that Monahan test is right.
21 And the fact that the other side couldn't even
22 come up with an argument to -- at the merits
23 stage to defend that standard is a reason why
24 you should set that standard aside. It's not a
25 reason to kind of have a do-over or appoint an

1 amicus.

2 I think it's true you sometimes do
3 appoint an amicus in that circumstance. I
4 think you usually do it when the other side
5 is -- is -- is no longer defending the judgment
6 as opposed to the reasoning of the opinion, so I
7 don't think that that sort of situation applies
8 here.

9 But we certainly don't think there's
10 an impediment for -- to you coming in and
11 resolving the question presented. You, of
12 course, can look at the Eighth Circuit's
13 rationale and the rationale of the four other
14 circuits that have adopted this erroneous rule.

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

20 MR. MARTINEZ: I think that the Eighth
21 Circuit would have to apply its own precedent to
22 that question, but I think what you should
23 say --

24 JUSTICE KAVANAUGH: Or it could
25 rethink that precedent. In other words, you're

1 saying to leave open the question of whether the
2 proper standard is deliberate indifference or,
3 instead, is bad faith or gross misjudgment and
4 that that can be considered on remand and can be
5 considered by other courts of appeals, to the
6 Chief Justice's question, that have this
7 carveout or separate rule for schools?

8 MR. MARTINEZ: I think, in theory, it
9 could be considered on remand either by the
10 Eighth Circuit or in other cases by other
11 courts. I do think that in this case, it can't
12 because, in this case, we think the other side
13 is judicially estopped from changing positions
14 on which they, you know, successfully avoided
15 en banc review in the Eighth Circuit.

16 JUSTICE KAVANAUGH: Point taken on
17 that. And then what -- can you explain the
18 delta between, on the one hand, "deliberate
19 indifference" at least as the Solicitor General
20 defines it and "bad faith" or "gross
21 misjudgment" on the other hand? Because the way
22 they define "deliberate indifference" sounds a
23 lot like someone acting in bad faith.

24 MR. MARTINEZ: Your Honor, could I
25 just add -- add one additional comment on your

1 earlier question and then --

2 JUSTICE KAVANAUGH: Mm-hmm.

3 MR. MARTINEZ: -- answer that one? I
4 think the other thing is, when -- when we're
5 asking you to get rid of the Monahan two-tiered
6 approach, I think it would be valuable and
7 important for you to say not only that that
8 approach is wrong but that the rationale under
9 which it was adopted, the rationale being that
10 the IDEA context requires this sort of special
11 rule in this context, is wrong. And I think
12 that would help provide guidance to the Eighth
13 Circuit and other courts.

14 With respect to what the test is, you
15 know, it's a little hard to fully understand the
16 other side's test because they've characterized
17 it in so many different ways. They kind of seem
18 to flip-flop depending on what court they're in
19 and what brief they're writing. As I understand
20 their current theory --

21 JUSTICE KAVANAUGH: No, I -- just put
22 aside what they're -- what is the difference
23 between deliberate indifference and bad faith?

24 MR. MARTINEZ: So I think their bad --
25 as they -- as I understand their bad-faith test,

1 it requires motive, which, in their brief, they
2 describe in various places as requiring a
3 sinister state of mind or something, you know,
4 approximating a bare desire to harm. And so I
5 think that's an animus-type test that requires
6 more than the knowledge that there's a
7 substantial likelihood of a violation --

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

14 MR. MARTINEZ: So I think --

15 JUSTICE KAVANAUGH: And if you know
16 you're supposed to do something as a matter of
17 law and don't act, that's -- you know that --

18 MR. MARTINEZ: I --

19 JUSTICE KAVANAUGH: -- sounds like
20 that.

21 MR. MARTINEZ: I think you can ask the
22 Solicitor General to elaborate on their theory.
23 As I understand their test, which -- which we
24 think is the majority test, you don't have to
25 know the law. You don't -- it's -- a mistake of

1 law is not a defense. You have to know the
2 facts that would constitute a violation of the
3 law, and then you have to be indifferent to
4 those facts.

5 And I think it's -- it's a fair
6 question to ask the SG what -- what they -- how
7 they would characterize it, but that's certainly
8 how I understand the test.

9 JUSTICE SOTOMAYOR: I'm not sure where
10 any of these tests come from, because mens rea
11 is generally willfulness, which requires knowing
12 what the law is, but the statute doesn't talk
13 about willfulness. Motive, in -- intent -- we
14 don't care about motive. We've said that
15 repeatedly in a bunch of different contexts.
16 It's do you know you're doing the act and are
17 you intending to do the act. If it violates the
18 law, you're guilty. Pardon the pun. This is a
19 tort, but you're responsible. Or you do it
20 knowingly, knowing that you're doing the act.

21 So I don't know where the bad faith
22 comes from. I don't know where the gross
23 indifference comes from. I don't know where the
24 deliberate indifference comes from.

25 Have you figured that out?

1 MR. MARTINEZ: So --

2 JUSTICE SOTOMAYOR: I -- I think that
3 that's part of the question that would have to
4 happen if a court takes the other side's point
5 that it should be intentional with respect to
6 all claims, injunctive -- injunctive and/or
7 damages.

8 So I take their point that maybe you
9 need intentional conduct for an -- an
10 injunction, but I don't know why you need
11 anything else.

12 MR. MARTINEZ: Right. Justice
13 Sotomayor, we agree with that -- the impulse
14 underlying that question. I think those are
15 some great questions for the other side.

16 I think what I would say on this is
17 that, cert --

18 JUSTICE SOTOMAYOR: Yeah, but you're
19 here, so --

20 MR. MARTINEZ: Well, let me take a
21 shot at it.

22 JUSTICE SOTOMAYOR: Okay.

23 MR. MARTINEZ: I think, cert --
24 certainly, with respect to liability and whether
25 the statute is violated, there's no intent

1 requirement. It's not in the statute. The --
2 what the statute has is a causation requirement
3 which is satisfied in circumstances where a
4 person's disability -- means that they're being
5 excluded from a building or a program or a
6 service. So there's just no way to -- to gin up
7 a -- an intent requirement out of that.

8 I think what some courts have done in
9 the context of damages is that -- is they've
10 sort of read the damages provisions and the --
11 the damage -- the remedies that are available
12 through the lens of the Spending Clause and
13 said: We -- we require something more, and
14 because we require actual notice to the
15 recipient of federal funds before we cut off
16 federal funds, we should require some form of
17 notice.

18 And so, in the Title IX context,
19 courts have applied a deliberate
20 indifference-type standard, and we think that --
21 that that's sort of the -- the uniform rule or
22 at least the almost uniform rule that's applied
23 by nine circuits in this context.

24 What the other side has, though, is a
25 bad-faith-and-gross-misjudgment rule that is

1 literally -- it comes out of nowhere, like
2 nowhere. There -- no court has ever embraced
3 that test as a standard under -- other than the
4 five circuits that we're arguing about here, no
5 court has ever embraced that test in any other
6 context under the discrimination laws, and we
7 think that's a very high standard to meet.

8 JUSTICE SOTOMAYOR: I think you're
9 going too far, though -- meaning I don't know
10 why you can't have an intentional failure to
11 reasonably accommodate, because that's what
12 discrimination is.

13 And accommodation is: I'm not letting
14 you use a program that you're otherwise
15 qualified for because I'm not letting you get to
16 the program. Either you're not providing a ramp
17 or you're not providing an instrument that I
18 could use. By its own definition, that's
19 intentional conduct, isn't it?

20 MR. MARTINEZ: Well, I -- I don't
21 think so, Your Honor. I think the reasonable
22 accommodation problem arises in a context where
23 there's no intent.

24 And I totally agree with what the
25 other side said on page 30 of their brief in

1 opposition and what this Court said in the
2 Choate decision, where it recognized -- it
3 recognized that the statutes provide -- and --
4 and this is page 30 in their brief -- their
5 statutes proscribe at least some unintentional
6 yet harmful conduct, and talked about Choate,
7 which itself recognized that the Rehabilitation
8 Act targets unintentional discriminatory acts
9 like architectural barriers.

10 JUSTICE SOTOMAYOR: Got it.

11 MR. MARTINEZ: So those do not require
12 intent and --

13 JUSTICE SOTOMAYOR: Alright.

14 MR. MARTINEZ: -- have never been
15 understood to require intent.

16 JUSTICE JACKSON: Mr. Martinez --

17 JUSTICE GORSUCH: Mr. --

18 JUSTICE JACKSON: Oh.

19 JUSTICE GORSUCH: -- Mr. Martinez --
20 I'm sorry -- just to follow up on that, I -- I
21 take your point that we don't have to address
22 any of this on your theory of the case, but
23 deliberate indifference is often deliberately
24 indifferent to somebody else's discrimination.
25 It's usually a supervisory-type liability.

1 And -- and -- as Justice Sotomayor
2 suggested, and maybe I just missed it, when we
3 think of discrimination in many contexts,
4 causation, you're -- you're right, but the act
5 of discrimination is to treat someone else
6 differently because of their disability, right?

7 And I would have thought that that
8 might have meant I -- I intend to treat someone
9 differently. It doesn't matter about my further
10 motive. I agree, I -- I take that point, bad
11 faith. But -- but why wouldn't that be the
12 test?

13 MR. MARTINEZ: So, Your Honor, two
14 things on that. First of all, I guess what I
15 would say is, with respect to the -- the need
16 for intent in every context, what actually
17 helped this whole area of law click for me was
18 reading your decision for -- in the Cinnamon
19 Hills case, which was -- addressing --
20 explaining sort of the theory of reasonable
21 accommodation statutes.

22 JUSTICE GORSUCH: I'm glad you
23 remember that, because I'm not sure I do.

24 MR. MARTINEZ: Well, it's -- it -- it
25 was actually a very thoughtful opinion that --

1 that really kind of teased out the
2 differences --

3 (Laughter.)

4 MR. MARTINEZ: -- between disparate --
5 intentional treatment and reasonable
6 accommodation claims, and what -- what you said
7 in that opinion was that sometimes formal
8 equality isn't enough. And in the disability
9 context, it isn't.

10 JUSTICE GORSUCH: Mm-hmm.

11 MR. MARTINEZ: And the reason for that
12 is that you can have people discriminated and
13 excluded by reason of their disability even
14 though there's no -- there's no intent.

15 And -- and so, because you have a
16 disability --

17 JUSTICE GORSUCH: I see.

18 MR. MARTINEZ: -- you're not able to
19 take advantage of a program. And so, even when
20 there's not animus when there's not a bad actor
21 on the other side, you know, you imagine someone
22 rolls up --

23 JUSTICE GORSUCH: I -- I -- I follow
24 you.

25 MR. MARTINEZ: Okay.

1 JUSTICE GORSUCH: I got it. Thank
2 you. That's helpful to me.

3 MR. MARTINEZ: Sure.

4 JUSTICE JACKSON: Mr. --

5 JUSTICE GORSUCH: And thank you for
6 the reminder.

7 (Laughter.)

8 JUSTICE GORSUCH: I do have one -- one
9 other question.

10 MR. MARTINEZ: Yes.

11 JUSTICE GORSUCH: And that is that
12 you're right that a lot of the courts have
13 looked at these things through the Spending
14 Clause, really, the spending power, and -- and,
15 therefore, states have to be on -- on clear
16 notice, and they've distinguished between
17 damages and injunctions on that basis.

18 But I'm kind of curious why, because I
19 would have thought in a contract scenario I
20 might be more on notice that my violations would
21 incur damages than they would an injunction
22 requiring specific performance, which is an
23 unusual remedy for a contract breach.

24 Thoughts?

25 MR. MARTINEZ: So I think, on that

1 one, I think that with respect to the
2 injunction, if -- if the recipient of federal
3 funding doesn't like the injunction, they can
4 just stop receiving the funding. So they have
5 the ability to get out of -- out of the deal,
6 and so it doesn't put them on the hook to spend
7 money in the same way that a damages remedy
8 would.

9 JUSTICE BARRETT: Mr. Martinez, has
10 any other circuit taken the view or is this
11 argument that the other side is pressing, is
12 that one that's kind of a live issue in the
13 lower courts?

14 MR. MARTINEZ: No.

15 JUSTICE BARRETT: Has any other court
16 taken it?

17 MR. MARTINEZ: No. We have 12 -- 12
18 circuits, all -- every single geographic circuit
19 across the country says that you don't have to
20 show intent to establish a violation of this
21 statute, outside of the context of children with
22 education claims. So the baseline rule that
23 applies everywhere is no intent for liability.

24 You then have 10 circuits that have
25 said you do have some form of intent requirement

1 for damages, and nine of those 10 circuits say
2 that it's -- the test is deliberate
3 indifference.

4 There's a little bit of uncertainty
5 about the Fifth Circuit about what kind of
6 intent is required. The Fifth Circuit has
7 suggested that deliberate indifference might not
8 be enough, but they haven't really clearly
9 adopted a different intent standard.

10 But I think the other side says that
11 there would be disarray if you didn't resolve,
12 like, every last issue in this case. That's
13 just not right.

14 If you say the IDEA context doesn't
15 create a special rule disfavoring kids in the
16 education context, what's almost certainly going
17 to happen is that the circuits out there are
18 just going to apply their baseline rule, and all
19 12 of the geographic circuits are going to say
20 that intent isn't required.

21 JUSTICE BARRETT: Well, it might also
22 be that this sparks percolation on this issue.
23 I mean, maybe what will happen is that there
24 will be pushback of the sort that your friend on
25 the other side is advocating.

1 MR. MARTINEZ: I -- I would doubt that
2 because of the fact that the reason these five
3 courts have applied this Monahan test is really
4 because, and as they explained it very well in
5 their brief in opposition, it's all about the
6 IDEA.

7 I mean, look at their brief in
8 opposition. The first paragraph is all about,
9 like, this is an IDEA case, and they're
10 basically trying to interpret these statutes in
11 circumstances where kids have protections under
12 the IDEA to give them fewer protections under
13 the ADA and Rehabilitation Act.

14 JUSTICE JACKSON: So --

15 JUSTICE KAGAN: I understand,
16 Mr. Martinez, why they did that before Smith v.
17 Robinson and the congressional response to that.
18 It's basically the same rationale that the Court
19 used in Smith v. Robinson.

20 But, once that happened, Smith v.
21 Robinson and then Congress's repudiation of it,
22 why didn't those courts go back and take a look
23 at their own precedent?

24 MR. MARTINEZ: So -- so Monahan was,
25 of course, before Smith versus Robinson. I -- I

1 don't know the answer to that, Your Honor. I
2 think it's hard because you have to get en banc
3 review.

4 We tried our best to get en banc
5 review in this case, and when we did that and
6 we resurfaced this issue to the Eighth Circuit
7 in an effort to get them to overturn their
8 precedent, the other side came in and said --
9 they didn't just say follow this because it's
10 your precedent, they said follow it because it's
11 right, and they won a -- a denial of en banc
12 review in part based on their argument that
13 there is this two-tiered approach and it -- a
14 special rule needs to apply with kids who have
15 IDEA rights.

16 And so now they're coming into this
17 Court flip-flopping on that and trying to kind
18 of play -- have it both ways and play both
19 sides, even though now they realize that that --
20 that earlier argument is indefensible.

21 JUSTICE JACKSON: So, Mr. Martinez,
22 can you just speak very clearly -- I'm --

23 Chief, should -- can I go forward?

24 CHIEF JUSTICE ROBERTS: Sure.

25 JUSTICE JACKSON: Can you just speak

1 very clearly to why they're wrong about that?
2 In other words, they said Monahan is correct for
3 this particular context.

4 MR. MARTINEZ: Yeah.

5 JUSTICE JACKSON: And I'd invite you
6 to just --

7 MR. MARTINEZ: So --

8 JUSTICE JACKSON: -- tell us why
9 they're wrong.

10 MR. MARTINEZ: -- I think there are
11 two main reasons, which I'll summarize very
12 quickly.

13 Number one, there's nothing in the
14 text of either the ADA or the Rehabilitation Act
15 or the statutes it cross-references that sets up
16 a two-tiered standard under which different
17 plaintiffs seeking relief under the same
18 provisions have different standards apply to
19 them.

20 If that weren't enough -- we think it
21 is enough -- you have an express statutory
22 language, 1415(1), in the IDEA that was enacted
23 to overturn Smith versus Robinson and the -- the
24 erroneous reasoning that it embraced, and
25 1415(1) specifically says -- I'm not going to

1 quote it, but it -- it says that you can't use
2 the IDEA to limit people's rights under the
3 other statutes like the ADA or the
4 Rehabilitation Act.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: This is not exactly
10 related to the question that's before us, so
11 perhaps it's unfair, but I think it might have
12 some relationship to what the court below was
13 getting at.

14 So this is the question. What
15 difference, if any, do you see between the cost
16 that a school district must be required to --
17 the extra costs a school district must be
18 required to shoulder under the IDEA and the
19 extra costs that would constitute a reasonable
20 accommodation under the ADA --

21 MR. MARTINEZ: I --

22 JUSTICE ALITO: -- or the
23 Rehabilitation Act?

24 MR. MARTINEZ: -- I think it's going
25 to depend in any particular case. And the way

1 to think about this is these are really
2 different statutory regimes.

3 You have the IDEA that gives you an
4 affirmative right to a FAPE, the ADA in Section
5 504, which eliminate discrimination.

6 Depending on the case, it may be that
7 the IDEA gives you more than the other statutes
8 in one context, and the other statutes might
9 give you more than the IDEA in a different
10 context.

11 Here, I think, with respect to the --
12 the monetary relief that's at issue, it -- it
13 really -- you know, the -- the -- the statutes
14 overlap to some extent, but they don't overlap
15 with respect to the statute of limitations. And
16 so we're trying to take advantage of the statute
17 of limitations that Congress gave us with
18 respect to the ADA and the Rehabilitation Act,
19 which allows us to go back further in time than
20 the two-year statute of limitations under the
21 IDEA.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: A couple
4 follow-ups. You agree that there's an intent
5 requirement for damages claims, but you say it's
6 deliberate indifference, correct?

7 MR. MARTINEZ: Your Honor, in our
8 opening brief, we did not take a position on
9 that. We did not take a position on whether
10 there was an intent requirement, but we
11 certainly are not fighting that. We didn't
12 fight that below. I think the Eighth Circuit
13 and nine other circuits say it's deliberate
14 indifference.

15 JUSTICE KAVANAUGH: That sounds close
16 to a yes.

17 (Laughter.)

18 MR. MARTINEZ: Close -- close -- close
19 to a yes. We -- you know, we would have taken a
20 position on it if we thought that was the
21 question presented, but it isn't, so we -- we
22 didn't have to.

23 JUSTICE KAVANAUGH: And then --

24 MR. MARTINEZ: But I think that's
25 fair.

1 JUSTICE KAVANAUGH: -- do you agree
2 with the SG's formulation of deliberate
3 indifference? Any problems with how they
4 formulate it in their brief?

5 MR. MARTINEZ: As I understand their
6 formulation, I agree with it. I think
7 substantial likelihood is an appropriate way
8 of -- of thinking about, you know, substantial
9 likelihood of a violation. I think the one
10 thing I just want to be very clear on is you
11 don't have to know the law. You have to know
12 the facts that would give rise to the violation.
13 And I think that's an important caveat.

14 JUSTICE KAVANAUGH: Well, on that
15 point, in my last question, there's a lot of
16 line drawing that has to go on in this context,
17 I think, with school districts deciding whether
18 to provide services to 4:30 p.m. or until 6 p.m.
19 And that's a very fact-intensive judgment on
20 which the district court found that the district
21 officials exercised professional judgment,
22 convened multiple IEP meetings, extended the
23 school day beyond the school day of her peers,
24 implemented many of Dr. Reichle's suggestions.
25 Failure provide extended schooling until 6 p.m.

1 at home was, at most, negligent, is what the
2 district court found.

3 And I guess it's hard to know how you
4 say -- where do you find the line for deliberate
5 indifference or you know that you -- that it's
6 substantially likely to be a violation when it's
7 this fact-intensive reasonableness --

8 MR. MARTINEZ: Right.

9 JUSTICE KAVANAUGH: -- kind of
10 inquiry? So how should a court think about
11 that? In other words, the court on remand, if
12 it's applying deliberate indifference, how
13 should it think about it as related to these
14 facts?

15 MR. MARTINEZ: Well, I think I -- the
16 first thing I would say is we -- we love the
17 fact that we have appellate courts, and the
18 Eighth Circuit in this case said, looking at
19 those same facts, that we may well have
20 established deliberate indifference. So it took
21 a different view. We think, certainly, on the
22 summary judgment record in this case, we would
23 get past, you know, the other side's motion for
24 summary judgment on whether there was deliberate
25 indifference.

1 Obviously, it's going to be a -- a
2 fact-bound analysis. It's going to require
3 close attention. And the sensitivity that this
4 Court has -- has often said is very important in
5 the IDEA context should, of course, apply in
6 this context too. But we think that we have
7 good arguments and good facts for us that we can
8 prevail on deliberate indifference properly
9 understood if this goes back down below.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: No.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: And, of course, your
17 overall point is that courts already consider
18 deliberate indifference on facts in other
19 contexts?

20 MR. MARTINEZ: That's right. They --
21 they -- they consider it on other facts in other
22 contexts. And Justice Gorsuch asked, isn't it
23 only the case when you're talking about
24 supervisor -- supervisory-type liability? And
25 we -- I would just say -- I should have said

1 this earlier, Justice Gorsuch, but I'll say it's
2 also true in other contexts, like the prison
3 context. When you're assessing Eighth Amendment
4 claims dealing with the, you know, medical
5 treatment or conditions of confinement, when
6 you're looking at the prison's own conduct, you
7 apply the -- deliberate indifference standard
8 there. And so, yes.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Reaves.

13 ORAL ARGUMENT OF NICOLE F. REAVES

14 FOR THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONER

16 MS. REAVES: Mr. Chief Justice, and
17 may it please the Court:

18 There is no sound basis for applying
19 different intent requirements to Title II and
20 Section 504 claims brought in the school
21 context. The texts of those provisions apply to
22 qualified individuals and provide relief to any
23 person and do not distinguish among different
24 contexts. And if there were any doubt,
25 20 U.S.C. 1415(l) makes clear that Title II and

1 Section 504 rights are not restricted or limited
2 in the education context.

3 Respondents no longer dispute these
4 points. Instead, they ask this Court to adopt a
5 breathtakingly broad rule and hold that a
6 plaintiff cannot bring a Title II or Section 504
7 claim in any context without proving intent to
8 discriminate. No court of appeals has ever
9 adopted that rule, which would entirely
10 eliminate all Title II and Section 504
11 reasonable accommodation claims.

12 This Court should reject Respondents'
13 attempt to belatedly insert such wide-ranging
14 issues into this case and instead merely hold
15 that students are not required to satisfy
16 heightened intent standards in the school
17 context.

18 And Respondents' arguments are wrong
19 on the merits in any event. The text, context,
20 history, and purpose of Title II and Section 504
21 do not require a plaintiff to prove intent to
22 discriminate to bring a claim.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: So the -- I think you
25 argue that intent is required in a -- in damages

1 context?

2 MS. REAVES: Yes, Justice Thomas.

3 JUSTICE THOMAS: But not injunctive
4 relief?

5 MS. REAVES: Yes.

6 JUSTICE THOMAS: Now what's your
7 explanation for the difference?

8 MS. REAVES: So I think the
9 explanation comes primarily from this Court's
10 recognition in the Spending Clause context and
11 particularly in Davis and Gebser, where the
12 Court has walked down a lot of this road, that
13 there needs to be particular notice when there's
14 going to be an expenditure of funds under
15 Spending Clause statutes.

16 And, in contrast, when an entity
17 incurs liability but is only potentially going
18 to have to be on the hook for injunctive relief,
19 the entity has a choice. They can reject
20 ongoing spending in exchange for not having
21 continuing injunctive relief. And that's not
22 the case with backward-looking damages.

23 And I think it's also not unusual for
24 the Court to draw these types of lines in this
25 area. In Lane v. Peña, the Court held that the

1 Rehabilitation Act and Section 504 in
2 particular, that the United States had not
3 waived its sovereign immunity with regard to
4 damages claims but recognized that it had waived
5 its sovereign immunity with regard to injunctive
6 relief claims.

7 JUSTICE GORSUCH: Well, I -- I get
8 this -- the -- the sovereign immunity overlay,
9 but, I mean, the -- the strength of the argument
10 from Petitioners and -- and the government is
11 that the statutes here don't draw any
12 distinction of the sort that Respondent
13 proposes -- proposed below. And, here, you're
14 asking us to draw a distinction that the statute
15 doesn't have on its face between damages and
16 injunctive relief and apply a higher standard
17 when it comes to injunctive relief. So could
18 you address that oddity?

19 And then again, I asked the question
20 of Mr. Martinez, if -- if you're looking at it
21 through a contract-type lens through the
22 Spending Clause, why wouldn't a -- a state be on
23 notice more that a breach would incur damages
24 than specific performance, which is an
25 extraordinary remedy in contract at least? So

1 one might think, if -- if the state were on
2 notice of anything, it might be injunctions
3 before damages rather than the other way around.

4 Thoughts?

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

10 JUSTICE GORSUCH: Well, but textual --
11 I understand that point, but I -- I was focusing
12 on the statutory text. The strength of the
13 argument here is stat -- statute doesn't draw
14 the distinction that Respondent proposed. And
15 now you're asking us to do a similar thing, and
16 I'm -- I'm just wondering about its consistency
17 with contract-type analogies.

18 MS. REAVES: Right. And so, as far as
19 the contract analogy goes, I think that the --
20 the contract analogy obviously isn't perfect
21 because the focus here is -- is notice --

22 JUSTICE GORSUCH: Mm-hmm.

23 MS. REAVES: -- as to liability going
24 forward. And if you've already had a violation
25 of the statute and you're automatically liable

1 without any sort of intent requirement, that
2 would weigh -- raise wheel -- real notice
3 problems. But, unlike a traditional contract, a
4 state can or -- a funded entity can withdraw
5 and -- to forgo ongoing injunctive relief.
6 That's not necessarily true of a contract, but I
7 think, because of the way the Spending Clause
8 contract overlay works in this context, the
9 notice concerns are just less there.

10 And I would also like to just briefly
11 respond to Respondents' suggestion that
12 injunctive relief is always going to be
13 significantly more burdensome. Plaintiff still
14 is going to need to prove both the violation and
15 that they are entitled to injunctive relief, and
16 that means they're going to need to show that
17 the on -- the violation is ongoing and that --
18 but for injunctive relief, the violation is not
19 going to fall --

20 JUSTICE GORSUCH: Does the government
21 think that intent is required or that it --
22 it -- it -- it's -- it's just noticing that --
23 that it might be suggested by our cases? Or --
24 or would deliberate indifference be the
25 appropriate standard for both damages and

1 injunctive relief?

2 MS. REAVES: So we think that -- and I
3 think this is consistent with what we said in
4 our brief -- intent is not required to state a
5 violation of the statute.

6 JUSTICE GORSUCH: No, I understand,
7 but for -- for damage --

8 MS. REAVES: And it is not required
9 for injunctive relief.

10 JUSTICE GORSUCH: -- for damages.

11 MS. REAVES: It absolutely is required
12 for damages.

13 JUSTICE GORSUCH: You think it is?
14 Okay.

15 MS. RAVES: Yes.

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

1 MS. REAVES: That's correct. We don't
2 think the Court has to rule on any of that.
3 Because we do think this was teed up on the
4 assumption that there are baseline standards,
5 the Court doesn't need to get into those, and
6 the question is just whether there's a
7 heightened intent standard that applies to all
8 claims in the school context.

9 CHIEF JUSTICE ROBERTS: In -- in that
10 regard, do you have any concerns that no one is
11 here defending the pot -- position of the
12 majority of circuits who addressed this question
13 below, or am I the only one?

14 (Laughter.)

15 MS. REAVES: Mr. Chief Justice, I -- I
16 don't have any concerns about that. I do think
17 you have the reasoning of the decision below,
18 you have the reasoning of Monahan, you have the
19 reasoning of one of the amicus briefs in support
20 of Respondents. You have Respondents' brief in
21 opposition, which actually did take this
22 head-on.

23 And I honestly don't think there's a
24 lot more to be said for the bad-faith-or-gross-
25 misjudgment standard. It -- it just -- there's

1 no basis for it in the text, particularly in
2 light of Section 1415(1).

3 And I -- I think there's perhaps a
4 reason that Respondents have shifted positions
5 because it is so hard to defend, so I don't
6 think this is a situation in which there's a
7 close question that this Court should be worried
8 about that no one is actually defending.

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

14 MS. REAVES: I honestly think that's a
15 good question. Having read all of these cases
16 post-Monahan and then post Section 1415(1), it
17 really just seems like courts of appeals haven't
18 grappled with it, and maybe it's because of how
19 some of these cases were litigated and 1415(1)
20 wasn't pointed out to the courts.

21 I do find it somewhat surprising, but
22 I don't think that's a reason for the Court to,
23 you know, suggest that the bad-faith-or-gross-
24 misjudgment heightened standard is appropriate.

25 JUSTICE KAVANAUGH: You --

1 JUSTICE BARRETT: Then I'll ask you
2 the question -- oh, sorry.

3 JUSTICE KAVANAUGH: Go ahead.

4 JUSTICE BARRETT: -- the question that
5 the government always gets asked: Difference
6 between your position and Mr. Martinez's?

7 MS. REAVES: I think the primary
8 difference is that, you know, while we don't
9 think the Court has to resolve this in this
10 case, we absolutely believe that intent is
11 required for damages claims under the ADA and
12 title -- and Section 504. And we think that
13 deliberate indifference is a way to prove that
14 intent.

15 And I think -- I -- I took my friend
16 to not be taking a clear position on that here
17 or in -- in -- in his briefing.

18 JUSTICE KAVANAUGH: How would you
19 describe the difference between deliberate
20 indifference and bad faith?

21 MS. REAVES: So I'd like to take this
22 in a couple parts both as to the whole standard
23 and then each part of the bad-faith-or-gross-
24 misjudgment standard.

25 So deliberate indifference requires

1 actual knowledge of -- that a federally
2 protected right was substantially likely to be
3 violated and failure to act. That we think is
4 just a standard intent requirement. It doesn't
5 require any sort of animus.

6 So look at the bad-faith-or-gross-
7 misjudgment standard. Think, first of all, as a
8 whole, it's been rarely applied. It's only been
9 applied in this Monahan line of cases, and it --
10 for that reason, I think it's a little bit
11 undertheorized, whereas deliberate indifference
12 has been applied across the board to Title II
13 and Section 504 cases, other than some circuits
14 in this context.

15 And then, if you break out the two
16 parts of the standard, I think that bad faith
17 appears to have an animus requirement, which we
18 just don't think is consistent with the text of
19 these statutes. It's not consistent with things
20 the Court has said in cases like Murray versus
21 UBS Securities that discrimination generally
22 doesn't require animus. So we think that's, you
23 know, too high of a standard.

24 JUSTICE KAVANAUGH: Is -- is --

25 MS. REAVES: And then, if you get to

1 the gross misjudgment part, I think that's very
2 unclear. You know, Respondents suggested in
3 their brief in opposition that just looking at
4 it on its face, it doesn't require intent at
5 all, and that would be a problem.

6 And then Respondents in their merits
7 brief cite two cases that are over a hundred
8 years old that don't even use "gross
9 misjudgment." They use "gross mistake."

10 JUSTICE KAVANAUGH: Well, to Justice
11 Barrett's question about the circuits, is there
12 a case out there that failed under the bad-faith
13 standard that you think would have succeeded
14 under the deliberate-indifference standard?

15 MS. REAVES: Well, the court of
16 appeals below here thought that it probably made
17 a difference, so I think that's a good example.
18 I think I can give you an example of a case sort
19 of going the opposite direction.

20 So we cite the Eleventh Circuit's
21 decision in Liese in our briefing, and in that
22 case, the -- the issue was whether there was
23 failure to provide a reasonable accommodation in
24 the form of a sign language interpreter for a
25 patient at a hospital, and the court found that

1 there was enough to go to trial because there
2 was deliberate indifference because these
3 individuals had repeatedly requested an
4 interpreter.

5 But there was no indication in that
6 decision that any of those choices made by the
7 hospital were backed by some sort of -- of
8 animus on behalf -- you know, animus
9 discriminating against individuals with
10 disabilities.

11 So I think that case, while it got to
12 go to trial, under our standard wouldn't
13 necessarily get to go to trial --

14 JUSTICE KAVANAUGH: Thank you.

15 MS. REAVES: -- under Respondents.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: What do you think was
21 the impulse that led so many lower courts to
22 adopt the standard that you find to be
23 completely unsupported?

24 MS. REAVES: So I think the initial
25 rationale was the one the court laid out in

1 Monahan, the Eighth Circuit laid out, which was
2 this desire to harmonize the IDEA with the --
3 with Section 504 and Title II.

4 And I think that might have been
5 understandable, but -- and, obviously, this
6 Court found that logic compelling in Smith, but
7 I think, once Congress adopted 1415(1) and said
8 that nothing in the IDEA shall be construed to
9 restrict or limit the rights, procedures, and
10 remedies available under the ADA or
11 Rehabilitation Act, it was just abundantly clear
12 that that harmonization is inappropriate.

13 And I think there also might have been
14 a little bit of a misunderstanding about some of
15 the daylight between these type of claims.

16 I mean, my friend laid out very well,
17 I think, that -- different protections under the
18 IDEA and Title II and Section 504, but there are
19 some claims you just can't bring under the IDEA.

20 So, if an individual is on grade and
21 they don't need any special education, they're
22 not going to get anything under the IDEA. But,
23 if they're using a wheelchair, they are going to
24 potentially need a reasonable accommodation
25 under the ADA.

1 JUSTICE ALITO: Well, don't these two
2 statutes proceed a -- along very different
3 lines? Under the IDEA, the school district must
4 provide a free appropriate public education.
5 That can be extremely expensive, right?

6 MS. REAVES: Yes.

7 JUSTICE ALITO: The antidiscrimination
8 statutes, the ADA and the Rehabilitation Act,
9 start from the baseline that people with
10 disabilities are supposed to be treated the same
11 as people without disabilities. But they depart
12 from the baseline because employers, for
13 example, in the employment context, must make a
14 reasonable accommodation. But there's a limit
15 to the expense that an employer, for example,
16 must be -- is required to bear under the ADA.

17 So is there a substantial difference
18 in that respect between the financial burden
19 that these two statutes impose on the regulated
20 parties?

21 MS. REAVES: No, I -- I don't think so
22 because the reasonable accommodation limitation
23 and particularly the "reasonable" part of that
24 is baked into both Title II and Section 504.
25 That's been recognized since the 1970s, shortly

1 after the Rehabilitation Act was adopted.

2 And then Congress, when it enacted the
3 ADA, said in Section 12201(a) that nothing in
4 the ADA shall be construed to apply a lesser
5 standard than the standards applied under Title
6 V of the Rehabilitation Act or the regulations
7 issued by federal agencies pursuant to such
8 title.

9 So the reasonable accommodation
10 limitation is baked into these Title II claims
11 that can be brought against public schools. And
12 so the public school is going to be able to come
13 forward and say: This is not reasonable because
14 we can't afford it because it's not the sort of
15 thing that is normal accommodation or because it
16 would require a fundamental alteration in the
17 programs that we -- we give to students.

18 JUSTICE ALITO: Well, let me just give
19 you one other example. I don't want to belabor
20 this be -- too much because it's a little --
21 it's a side point.

22 Suppose an employer in -- a -- a place
23 of employment is open from 9 to 5. Let's say
24 it's a store. For some reason, it's open
25 from -- it closes at -- at 5 p.m. And there's

1 an employee with a disability similar to -- to
2 the -- to A.J.T.'s disability here who can't
3 work in the morning but could work later in the
4 day.

5 Would that employer be required under
6 the ADA to allow this employer -- employee to
7 work after closing time instead of during the
8 normal hours when this -- when this business is
9 providing a service to the public?

10 MS. REAVES: No, because, under the
11 reasonable accommodation framework, the employer
12 would be able to say: Well, this isn't a sort
13 of accommodation that's reasonable on its face
14 or used in a variety of cases. This isn't a
15 sort of accommodation we've seen before. And
16 that's a defense courts often recognize.

17 And then they'd also say: Well, this
18 would be a fundamental alteration to our
19 business.

20 And I think, Justice Alito, one thing
21 I would just point out is I actually think that
22 underscores some of the differences between the
23 IDEA and Title II and Section 504 in the
24 education context.

25 You know, we have not taken a position

1 on this, but just because after-hours education
2 is required under the IDEA does not mean that
3 that's a required reasonable accommodation under
4 Title II and Section 504.

5 JUSTICE ALITO: All right. That's
6 what I was asking about. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Kagan?

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

17 MS. REAVES: So I think below, without
18 any other urging, presumably, the Eighth Circuit
19 would apply its general precedent to those two
20 questions. And the Eighth Circuit has generally
21 held that to state a violation of Title II or
22 Section 504, you don't have to prove an intent.
23 That's also true for injunctive relief. But
24 you -- the plaintiff would have to prove
25 deliberate indifference for damages.

1 We haven't taken a position on
2 whether, you know, Respondents could try to
3 raise these broader arguments on remand. I
4 think -- I think there's some good arguments
5 that those have been forfeited and that there
6 are judicial estoppel, but that would obviously
7 be a question for the lower courts to sort out.

8 JUSTICE KAGAN: And you said without
9 any urging on our part or without any
10 encouragement. I mean, is -- is -- is there an
11 argument for encouragement? Is there -- is the
12 better approach not to do that? What -- what --
13 do you have a position on that?

14 MS. REAVES: We don't think that
15 there's any basis for courts to start
16 reconsidering the reasonable accommodations
17 framework that all courts of appeals have signed
18 off on. I'm -- I mean, this Court has
19 recognized it since the mid-1970s. The entirety
20 of the Rehabilitation Act and Title II have been
21 built up around that. And so I don't think
22 there's a good basis for that, and there
23 would -- there wouldn't be any reason to
24 encourage it.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: You said that
5 clear notice was important, I think, in this
6 context in damages claims. And the other side
7 says that your framing of deliberate
8 indifference, in particular, actual knowledge
9 that a federally protected right was
10 substantially likely to be violated -- they
11 focus on substantially likely -- that that does
12 not give in this context school districts clear
13 notice of what they have to do, particular --
14 you know, something like this, 4:30 p.m. or
15 6 p.m., and that it's therefore -- and you're
16 talking about reasonable accommodations and line
17 drawing to Justice Alito's question.

18 How do we deal with that?

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

1 established.

2 JUSTICE KAVANAUGH: Well, just on the
3 question, though, it -- it -- this standard is
4 not exactly crystal-clear. At least that's what
5 the other side says. School districts, to
6 Justice Alito's point, are going to be on the
7 hook for substantial expenditures, and they want
8 just notice, tell us whether we're substantially
9 likely to violate the law. How are they
10 supposed to determine that?

11 MS. REAVES: So a couple of responses
12 to that. So, first of all, I do think, you
13 know, this is an actual knowledge requirement,
14 and it is failure to act, a deliberate choice
15 not to act. And when it comes to --

16 JUSTICE KAVANAUGH: You say actual
17 knowledge of your legal obligations, correct?

18 MS. REAVES: So it's not actual
19 knowledge of the law, but it's actual
20 knowledge -- and, I mean, I think this is
21 consistent with normal intent standards -- that,
22 you know, your actions are -- are illegal and --
23 or your actions are, you know, likely to violate
24 someone's rights. So it's not that you have to
25 know --

1 JUSTICE KAVANAUGH: That's pretty --

2 MS. REAVES: -- the precision of --
3 and, I mean, this is a tricky area in many areas
4 of law, but I do think that with the substantial
5 likelihood standard, as this Court has described
6 it in Davis and Gebser, is going to require, you
7 know, a more than 50 percent assurance that a
8 violation's going to occur, and that means that
9 you've kind of made a mistake as to the whole
10 reasonable accommodation framework.

11 And I would just point out that
12 because we're just talking about injunctive
13 relief, the kind of worst-case scenario here is,
14 if the entity mistakenly, you know, denies a
15 reasonable accommodation and it turns out they
16 should have granted it, they'll just have to
17 grant it going forward unless there is, you
18 know, this high level of deliberate
19 indifference. Like, this -- the -- the standard
20 builds in the ability for school districts to
21 make significant mistakes and not be held liable
22 for damages.

23 JUSTICE KAVANAUGH: Sorry to belabor
24 it. One last question. If -- if a school
25 district says I don't know whether the -- the

1 counsel for the school district says I don't
2 know whether the law would require us to go to
3 6 p.m. or 4:30 p.m., I just don't know, I don't
4 know how that will be assessed, can a -- can a
5 court then say that they acted with knowledge
6 that a federal right was substantially likely to
7 be violated?

8 MS. REAVES: I don't think so. I
9 think that would fall into the kind of
10 bureaucratic inaction or negligence buckets,
11 which are not high enough to be actual
12 knowledge.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: So, in your exchange
18 with Justice Kavanaugh, it seemed like the
19 intent factor or element was taking on a lot of
20 work in terms of figuring these kinds of claims
21 out, and I really thought that in the reasonable
22 accommodations framework that it's an
23 interactive kind of engagement that when a
24 person has a disability and they say I need this
25 accommodation, there's, like, a back-and-forth

1 between the employer, the school district, or
2 whomever, and so it's not really like a surprise
3 coming out of nowhere and it's all about intent.
4 It's really, I thought, about arguments related
5 to whether or not this particular accommodation
6 is reasonable under the circumstances.

7 MS. REAVES: So I do think the
8 bottom-line inquiry is going to be intent, but I
9 think you're absolutely right that in a school
10 context in particular with a disabled child,
11 there's going to often be a lot of
12 back-and-forth between the school district and
13 the student, and that may often, you know, be
14 relevant to showing intent. And I think some of
15 these cases that we've cited, like the Liese
16 case I cited earlier, you know, intent there was
17 possibly shown by the repeated requests for
18 reasonable accommodation and failure to grant
19 those requests or to --

20 JUSTICE JACKSON: So let me just ask
21 this.

22 MS. REAVES: -- consider them
23 seriously.

24 JUSTICE JACKSON: If -- if we say
25 there's no heightened standard here and that the

1 regular standards apply, and let's say the
2 Eighth Circuit has adopted deliberate
3 indifference in this context, the ADA claim
4 could then proceed in the sense that it's not
5 barred because we don't have this animus.

6 Would there be then some engagement
7 around whether or not this particular
8 accommodation was reasonable?

9 MS. REAVES: Yes. I think that would
10 be appropriate on remand. So we obviously
11 haven't taken a position on how this should come
12 out.

13 JUSTICE JACKSON: Yes.

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

22 JUSTICE JACKSON: Mm-hmm.

23 MS. REAVES: And then, if yes, to --
24 the liability question would also need to go
25 through deliberate indifference as to her

1 request for damages.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Blatt.

6 ORAL ARGUMENT OF LISA S. BLATT

7 ON BEHALF OF THE RESPONDENTS

8 MS. BLATT: Mr. Chief Justice, and may
9 it please the Court:

10 This Court should affirm Monahan.
11 Bare IDEA violations do not support liability
12 under Section 504 or the ADA. Instead, the
13 defendant must have acted with discriminatory
14 intent. Monahan correctly described that intent
15 as bad faith, which is the longstanding term for
16 actions done for an improper reason, here,
17 disability.

18 504 and Title II require
19 discrimination by reason of disability. This
20 Court has held that the nearly identical text in
21 Title VI requires intent to discriminate.
22 Petitioner acknowledges that because the law
23 here expressly incorporates Title VI rights and
24 remedies, discriminatory intent must be shown to
25 get damages. But Petitioner departs from that

1 intent requirement for liability and
2 injunctions.

3 That's wrong. When Congress wanted
4 intent-free liability, it said so expressly. In
5 ADA's Title I and III, Congress spelled out
6 reasonable a -- accommodations intent-free
7 claims and barred damages without intent for
8 employers and altogether for hotels and hotdog
9 stands. Congress did not plausibly disfavor
10 states and localities in Title II.

11 This Court should decide the correct
12 standard. The petition ends with: "What
13 standard should apply under the ADA and Rehab
14 Act is a pure question of law. It should be
15 resolved in this case." That's a quote. We
16 agree.

17 And reversing Monahan would expose
18 46,000 public schools to liability when, for 40
19 years, they have trained teachers, allocated
20 budgets, and obtained insurance, all in reliance
21 on Monahan. Every good-faith disagreement would
22 risk liability or even the nuclear option, the
23 loss of federal funding, which is over a hundred
24 billion dollars.

25 The district cares deeply about Ava

1 and gave her more service than any other student
2 even before this litigation started. Such
3 good-faith efforts should not support
4 discrimination liability.

5 I welcome questions.

6 JUSTICE THOMAS: Is this the same
7 argument that you made below?

8 MS. BLATT: Yes. So let me take you
9 through -- again, I had an out-of-body
10 experience listening to what we argued, but in
11 the rehearing petition on page 1, the school
12 district argued Monahan is required by the text.
13 On page 26 of the brief in opposition, we said
14 Monahan is required by the text. We quoted the
15 text, and we said it requires discrimination
16 intent. We -- we cited Title VI because the --
17 this statute expressly incorporates the rights
18 and remedies of Title IV's intent was required.
19 We cited Sandoval, which is your seminal case
20 under Title VI, which holds the nearly identical
21 language requires discriminatory intent.

22 Now, to be sure, page 27's ongoing and
23 the rehearing petition and the red brief still
24 argues from the top of the mountain that this
25 standard makes particularly good sense in the

1 school context because the other side in their
2 complaint -- and this goes directly to Justice
3 Alito's question -- on paragraphs 118 and 133
4 say just because you violate the IDEA, that is
5 ipso facto a violation of the ADA and
6 Rehabilitation Act.

7 So we've always said that you owe
8 deference to schools and this standard makes
9 sense.

10 And I can talk about how Monahan
11 arrived. Monahan makes complete sense. It's a
12 caricature and not an accurate description of
13 that case. It starts with the language of the
14 statute and said: When you have a mere
15 violation of the requirement to provide a free
16 and appropriate education, that is not
17 necessarily discrimination, "the statute solely
18 by reason of discrimination." Something else
19 was required.

20 Now the Court chose bad faith for a
21 reason. Bad faith by definition means an
22 improper purpose. The only purpose that is
23 prohibited by this statute is -- is disability.
24 No one, no case, no cite has ever said that's
25 animus. Again, that's made up, hence,

1 out-of-body experience.

2 JUSTICE JACKSON: Ms. Blatt, I --
3 I'm --

4 MS. BLATT: Yes.

5 JUSTICE JACKSON: -- I'm over here
6 trying to really figure out what you argued
7 below --

8 MS. BLATT: Sure.

9 JUSTICE JACKSON: -- and the many,
10 many times that I understood you to be pegging
11 your argument to the unique elements of this
12 particular environment.

13 MS. BLATT: Correct.

14 JUSTICE JACKSON: And so I think it
15 might be a little unfair to suggest that what
16 you were always just saying is that Monahan is
17 based on the text of the statute.

18 It seems to me that you were very
19 clearly saying in your -- right up and to the
20 opposition to rehearing and to the BIO below
21 that there was something about the IDEA context
22 and schools that gave Monahan its value.

23 MS. BLATT: Both of those statements
24 are correct. It is not inconsistent to say
25 Monahan is required by the text and this makes

1 great policy sense in the school context, which
2 is also what Judge Arnold said in the Eighth
3 Circuit.

4 The disconnect is there's this -- I
5 don't know, it's a lie to say that we never
6 defended Monahan by the text. It's on page 26
7 of the brief in opposition.

8 JUSTICE JACKSON: No, no, no, I'm
9 not -- I don't think the argument is that you
10 never defended it by the text. I think the --

11 MS. BLATT: Well, what is a lie and
12 what is inaccurate --

13 JUSTICE JACKSON: Well, no, no, no.
14 I --

15 MS. BLATT: If I could just get this
16 out -- if I could just get this out, please.

17 What is a lie and inaccurate is that
18 we ever said in any context that this Court
19 should take the same language and define it
20 differently depending on context. That is not
21 true. There is no statement. They adding words
22 to our mouth. We never said you should have a
23 double regime.

24 What the school district has said,
25 which is what Monahan said, is --

1 JUSTICE GORSUCH: You -- you believe
2 that Mr. Martinez and the Solicitor General are
3 lying? Is that your accusation?

4 MS. BLATT: At -- at oral argument,
5 yes, absolutely. It is not true that we --

6 JUSTICE GORSUCH: I think you should
7 be more careful with your words, Ms. Blatt.

8 MS. BLATT: Okay. Well, they should
9 be more careful in character --
10 mischaracterizing a position by an experienced
11 advocate of the Supreme Court, with all due
12 respect.

13 CHIEF JUSTICE ROBERTS: Counsel, I'm
14 quoting from their reply brief, where they say
15 that -- with citations, what you said, that the
16 secondary education was a "unique context"
17 "giving rise to a unique subset" "calling for a"
18 "different standard."

19 MS. BLATT: Correct.

20 CHIEF JUSTICE ROBERTS: That seems to
21 me to be what the --

22 MS. BLATT: Well, I'm sorry, no.
23 Where does it say that quoting for a different
24 standard? That part we never said. Are they
25 quoting?

1 CHIEF JUSTICE ROBERTS: Well, they've
2 got quote marks around it.

3 (Laughter.)

4 MS. BLATT: Where's the -- where's the
5 page?

6 CHIEF JUSTICE ROBERTS: It's -- it's
7 page 4 of their yellow brief.

8 MS. BLATT: Oh. Well, they're -- I
9 mean, we never said that there should be
10 different standards. What we've always said and
11 what we've acknowledged in the brief in
12 opposition, which is true, that outside the
13 school context, the courts have said there's no
14 intent at least for liability but for damages.

15 But we are where we are with the
16 question presented. What I hear the real
17 dispute is: What does the question presented
18 ask? And the question presented, we read, is:
19 What is the correct standard?

20 Now, to be sure, they add the
21 pejorative term "uniquely stringent." But had
22 the question said should this Court adopt a
23 uniquely stupid bad-faith standard, the question
24 would still not be should courts adopt uniquely
25 stupid standards. It would be should courts

1 adopt the bad-faith standard.

2 JUSTICE JACKSON: But, Ms. Blatt,
3 you -- in order to say it's uniquely stupid, I
4 think you would have to point to at least one
5 other circuit that has actually applied the
6 bad-faith standard in a different context.

7 I mean, to the extent that you're now
8 saying it's dumb for them to have adopted it or
9 not to have adopted it everywhere, can we get to
10 the substance of your argument?

11 MS. BLATT: Sure. It -- our
12 definition of "bad faith" is discriminatory
13 intent.

14 JUSTICE JACKSON: No, I understand.
15 But -- has a single other standard -- circuit
16 applied that outside of this particular context?

17 MS. BLATT: So -- well -- no, in the
18 sense of the circuits that are applying outside
19 the school context, including the Eighth
20 Circuit, don't apply bad faith. They apply no
21 intent, deliberate indifference.

22 JUSTICE JACKSON: And is your argument
23 that bad faith should apply everywhere?

24 MS. BLATT: A -- yes, in a -- the
25 statutory text solely by discrimination is the

1 reason for the action is a discriminatory intent
2 standard.

3 JUSTICE BARRETT: And that would be a
4 sea change, right? That's what the other side
5 told us.

6 MS. BLATT: Well, it would be a --
7 only a sea change in terms of liability. If
8 we're going to talk about what the circuits --
9 Judge Sutton --

10 JUSTICE BARRETT: Well, sea change in
11 terms of liability is a pretty big sea change.
12 I mean, Justice Jackson's pointing out that no
13 circuit has adopted your rule.

14 MS. BLATT: Well, we're asking the
15 Court to -- to decide this case.

16 In terms of outside the school case,
17 Judge Sutton's opinion in the Sixth Circuit, and
18 that counts as a court, has held that -- that
19 this statute, just like Title IX and Title VI,
20 requires discriminatory intent.

21 Now that's in the disparate impact
22 context, and no one has had a basis for saying
23 there's any distinction between reasonable
24 accommodation and disparate impact.

25 JUSTICE BARRETT: But, regardless

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

3 MS. BLATT: I -- I think that's right.
4 And so --

5 JUSTICE BARRETT: Well, then why would
6 we do it when we don't really have -- we
7 don't -- we don't have -- you know, this didn't
8 come up until their reply because they didn't
9 understand it to be the QP. We don't have other
10 circuits that have adopted the question.

11 As I suggested to Mr. Martinez, it's
12 possible that if we decided this case in his
13 favor, that then, when it goes back below, this
14 argument that you're making here will be made,
15 and then it can follow our traditional way of
16 letting it percolate up, and then we can address
17 it when we have more information.

18 But this seems pretty -- like a really
19 pretty big deal.

20 MS. BLATT: I -- I think it's --
21 it's -- everything you said I agree with, except
22 for the blue brief and the government's brief
23 said that the statute require -- that you have
24 to apply the plain text. So, lo and behold, we
25 looked at the plain text.

1 In terms of how you want to decide the
2 case, absolutely, you need to make clear that if
3 you're just going to reverse, that the Eighth
4 Circuit is free, notwithstanding its precedent,
5 to either level down, like the other side wants,
6 and apply the no intent, deliberate indifference
7 outside the school context, inside the school
8 context, or level up.

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

12 MS. BLATT: Correct.

13 JUSTICE KAVANAUGH: So you're, I
14 think, lowering bad faith from what some people
15 might think bad faith encompasses.

16 MS. BLATT: But no one -- some people
17 is just this conversation. No court has --
18 these courts have said --

19 JUSTICE KAVANAUGH: Some judges.

20 MS. BLATT: They said it requires
21 discriminatory intent. No one has said animus.

22 JUSTICE KAVANAUGH: Okay. I'm just --
23 making the point, you're saying bad faith does
24 not require animus, correct?

25 MS. BLATT: Correct.

1 JUSTICE KAVANAUGH: Okay. And then --
2 then the SG defines "deliberate indifference" to
3 require actual knowledge that a -- that it's
4 substantially likely that you're violating the
5 law.

6 And I'm wondering, "bad faith" as you
7 define it, without a requirement of animus, and
8 what they say is deliberate indifference, I'm
9 having a little trouble seeing a case that would
10 actually come out differently under those two
11 things.

12 MS. BLATT: Well, sure. Any -- and
13 this is the problem with their deliberate
14 indifference test.

15 And Justice -- this goes to Justice
16 Jackson. No court, no context except a prison,
17 would ever use a deliberate indifference test
18 for -- intent to discriminate. Intent to
19 discriminate is you have to intend to
20 discriminate.

21 Their test is you could have no intent
22 to discriminate. You could be obsessed with a
23 scandal. You could have budget concerns. But
24 you were deliberately indifferent to some --
25 unidentified percentage that a student asks for

1 extra test time and you gave 30 minutes instead
2 of 60 minutes.

3 Well, if you think that there's a
4 substantial chance that 60 minutes might be it,
5 but, in good faith, you want to -- you know, one
6 circuit has held 30 minutes is enough, there's
7 damages liability.

8 That is insane. That is not an intent
9 to discriminate. That is just either a
10 disagreement about what the law requires or you
11 had some sort of weird problem that had nothing
12 to do with the -- a child's disability status.
13 You just were deliberately indifferent.

14 If you're going to follow Title VI --
15 and this is the Fifth Circuit. The Fifth
16 Circuit said: I don't know what this deliberate
17 indifference is. I -- Title VI requires intent.

18 You -- there's no scenario where in --
19 deliberate indifference has ever meant
20 discrimination in and of itself, as opposed to
21 you're deliberately indifferent to a teacher's
22 or student's intentional sexual harassment.

23 We agree you could have a deliberate
24 indifference if there were supervisory liability
25 to discrimination against the disabled.

1 JUSTICE KAVANAUGH: Why do you think
2 that's taken hold in all the circuits outside
3 the school context?

4 MS. BLATT: Easy. They cited this
5 case called Monell. I mean, that's just wrong,
6 weird, mistake.

7 So then they said: Well, Davis and
8 Gebser said deliberate indifference, and they
9 just misread it. I mean, the Fifth Circuit got
10 it right.

11 So, if you're going to rule against
12 us, at least wipe the slate clean and say -- if
13 you going to -- they want to say you have to
14 follow Title VI because they don't make a
15 difference in terms of parties and you have to
16 use intent for damages, then intent for damages
17 should be intent to discriminate just like Title
18 VI.

19 And we do think there is no textual
20 basis. They raised a lot of policy sense --
21 policy stuff between an injunction and loss --
22 and loss of -- sorry -- injunction and damages.

23 But federal funding is now a big deal.
24 They could say one good-faith disagreement with
25 the IDEA is enough to cut off all the school

1 district's funding just because they disagreed?

2 Or, actually, no, they could just got
3 it wrong. Their view is all funding in any
4 school, even Harvard, any school, the entire
5 funding be cut off because they didn't fix the
6 elevator long enough. Like, the elevator was
7 there, but it was broken for two months or two
8 weeks. Failure to reasonably accommodate
9 liability.

10 And now federal funding is a big deal.
11 No -- no -- no government has ever threatened
12 the loss of federal funding based on Title --
13 based on the Rehab Act. But you don't need
14 anti-Semitism anymore or encampments. You can
15 just say you violated the reasonable
16 accommodation.

17 Now this is a big deal. That's what
18 Justice Barrett's saying. So I understand that
19 you don't want to take on this -- this case, but
20 I didn't bring this petition. This petition
21 said decide the standard and then said -- cited
22 your article, Justice Kavanaugh, saying you look
23 at the plain text. So I can't be faulted by
24 pick -- like what Judge Arnold did and pick up
25 the text, and it says solely by reason of

1 discrimination.

2 JUSTICE JACKSON: Ms. -- Ms. Blatt, I
3 think we have to really be fair about what the
4 question presented in this case actually is.

5 MS. BLATT: Sure.

6 JUSTICE JACKSON: It -- it -- it -- it
7 did not say decide the standard. I'm reading.
8 The question presented is whether the ADA and
9 Rehabilitation Act require children with
10 disabilities to satisfy a uniquely stringent
11 bad-faith-or-gross- misjudgment standard when
12 seeking relief for discrimination relating to
13 their education.

14 MS. BLATT: So that can have two
15 meanings. One, you could put all the emphasis
16 on "uniquely stringent." Should this Court
17 adopt a uniquely stringent standard, "oh, and
18 it's called bad faith?" Or it could mean what
19 we think the end of the petition said it meant.
20 Should a Court adopt the bad-faith standard,
21 which is uniquely stringent? And the last
22 page -- the last line of their petition says you
23 should decide what standard applies in this
24 case.

25 Now, if you want to read it as the

1 "should courts adopt uniquely stringent
2 standards," then you're right. The -- the --
3 the parties a -- agree.

4 JUSTICE JACKSON: And you're saying
5 that's not the way you read it when I'm looking
6 at page 27 of your BIO, which says "the
7 bad-faith-or-gross-misjudgment standard is an
8 appropriate exercise of discretion; most
9 importantly, it accounts for the unique nature
10 of claims like Petitioner's, that is, claims by
11 students with disabilities regarding the
12 appropriateness of their IEPs."

13 And you go on at length in talking
14 about the unique nature of this particular
15 context and why it would justify having this
16 standard as opposed to the standard that all the
17 courts have applied in other contexts.

18 MS. BLATT: Well, that's why page 26
19 precedes page 27 --

20 JUSTICE JACKSON: Yes.

21 MS. BLATT: -- which I think you're
22 reading from, and page 26 says the court of
23 appeals' decision below is correct and it's
24 correct because of the text, it's correct
25 because it incorporates Title VI, and it's

1 correct because it's been definitively
2 interpreted in Alexander versus Sandoval, which
3 is a pretty big deal for the uniquely worded
4 Title VI case.

5 But, Justice Jackson, there's no
6 disagreement that we've always said that there
7 is a big problem with the other side's argument
8 in the school context, because every IDEA
9 disagreement now risks the loss of federal
10 funding and injunctive relief. And so, yeah,
11 that -- that -- that is a big deal. And in
12 terms of damages, that's a big deal too if you
13 have a deliberate indifference standard, which,
14 to be fair to us, does not apply in any other
15 context.

16 So there's no question that there's an
17 incoherent big mess of a regime because this
18 Court started out in Davis saying that this is
19 not an affirmative action case. And then you
20 had Choate, which is maybe not Exhibit A, but
21 it's Exhibit B for what this Court has called
22 the bad old days, And that case has a lot of
23 dicta that talks about reasonable accommodation.
24 Monahan was decided after Davis, before Choate.

25 JUSTICE JACKSON: But can I just --

1 can I just focus your attention on that?
2 Because I don't understand why you are really
3 pressing this idea that discrimination claims in
4 the context of reasonable accommodations and
5 disability aren't something unique.

6 I mean, I -- I thought the -- the
7 Alexander versus Choate line of thinking was
8 that you can have discrimination in this
9 context, say, differently from maybe racial
10 discrimination or gender discrimination when
11 a -- an entity that is responsible for
12 accommodating someone with a disability doesn't
13 act, that -- that you have benign neglect,
14 meaning you're not doing it out of some sort of
15 intent to treat this person differently. In
16 fact, what you say is I'm treating this person
17 the same, and the same is a world in which they
18 can't walk up the stairs and they can't see the
19 board and they can't do the things that
20 everybody else can do.

21 In -- in the
22 discrimination-of-disability context, the
23 requirement of the law is to treat them
24 differently --

25 MS. BLATT: Well --

1 JUSTICE JACKSON: -- differently in
2 the sense that you're accommodating them so that
3 they can take and have full enjoyment of the
4 services.

5 MS. BLATT: Well --

6 JUSTICE JACKSON: So it's just a
7 different concept in --

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

14 JUSTICE JACKSON: No, but the whole
15 idea of accommodation is unique --

16 MS. BLATT: That's not in the statute.

17 JUSTICE JACKSON: Accommodation is not
18 in the statute?

19 MS. BLATT: 504 and Title II, no.
20 That's what this -- I mean, no. That's what
21 Judge Sutton said.

22 JUSTICE JACKSON: It's not in the ADA?

23 MS. BLATT: It sure as heck is not in
24 the statute. The word "reasonable" is not in
25 the statute. The word "accommodation" is not in

1 the statute. This passive voice reading has got
2 to be incorrect because it would bring all
3 disparate impact claims under --

4 JUSTICE JACKSON: So you -- you
5 read -- you read disability discrimination
6 statutes to not be requiring accommodation for
7 people with disabilities, that they -- that it's
8 just about discriminatory intent, meaning not
9 treating these people the same as everyone else?

10 MS. BLATT: Correct, and that is
11 glaringly obvious when you look at the seminal
12 statute of the ADA because Title I for
13 employers, Title III for country clubs and
14 hotdog stands, have not only reasonable
15 accommodations provisions, Justice Jackson, but
16 they don't make hotdog stands liable for
17 damages. And a made-up judicial damage remedy
18 comes from thin air.

19 JUSTICE BARRETT: Ms. Blatt, the
20 answer to this is probably clear since you
21 called the two-tiers test stupid, but I just --

22 MS. BLATT: I -- that was a --

23 (Laughter.)

24 JUSTICE BARRETT: -- I -- I just want
25 to clarify, you agree there's no two-tier test?

1 MS. BLATT: Correct.

2 JUSTICE BARRETT: Okay. So there is
3 what Justice Gorsuch has sometimes called
4 radical --

5 MS. BLATT: Radical agreement.

6 JUSTICE BARRETT: -- on that point?
7 Okay.

8 MS. BLATT: There's radical agreement.
9 What there's radical disagreement on is the
10 question presented. And if you just say -- and
11 I know it's sometimes easier for you to say we
12 don't have to do a lot, but you cause real harm
13 to the parties who don't have Supreme Court
14 counsel and lower courts who get confused when
15 you just remand and say we just remand. So, if
16 you could at least set the -- at least set the
17 slate free -- while it is part of your job,
18 Justice Kavanaugh, to set the law sometimes, and
19 I understand it's easier for you, and you have a
20 lot going on, not to set the law, but --

21 JUSTICE GORSUCH: Ms. Blatt --

22 MS. BLATT: Yeah.

23 JUSTICE GORSUCH: -- I -- I confess
24 I'm still troubled by your suggestion that your
25 friends on the other side have lied.

1 MS. BLATT: Okay. Let's pull -- pull
2 it up.

3 JUSTICE GORSUCH: Yeah. I think we're
4 going to have to here, and I'd ask you to
5 reconsider that phrase.

6 MS. BLATT: At oral argument --

7 JUSTICE GORSUCH: If I might.

8 MS. BLATT: -- it was incorrect.

9 JUSTICE GORSUCH: If I -- if I --

10 MS. BLATT: Sure.

11 JUSTICE GORSUCH: Incorrect is fine.

12 MS. BLATT: Well, lying --

13 JUSTICE GORSUCH: People make
14 mistakes.

15 MS. BLATT: Okay.

16 JUSTICE GORSUCH: You can accuse
17 people of being incorrect, but lying --

18 MS. BLATT: That's fine.

19 JUSTICE GORSUCH: Ms. Blatt, if I
20 might finish.

21 MS. BLATT: Sure.

22 JUSTICE GORSUCH: Lying is another
23 matter. Page 1 of your brief in opposition --

24 MS. BLATT: Yep.

25 JUSTICE GORSUCH: -- "as applied to

1 the provision of IDEA services, the overlap
2 between these statutes leads to a conceptual
3 particularity that exists only in this context."

4 MS. BLATT: Yep.

5 JUSTICE GORSUCH: That seems to
6 suggest you're arguing for a unique rule.

7 Page 2. "For more than 40 years,
8 courts of appeals considering this unique subset
9 of ADA and Rehabilitation" --

10 MS. BLATT: Yeah.

11 JUSTICE GORSUCH: -- "claims directly
12 challenging IDEA's educational services have
13 widely recognized that plaintiffs must establish
14 more."

15 MS. BLATT: Yep.

16 JUSTICE GORSUCH: "That scheme
17 requires plaintiffs to show that school
18 professionals acted with discriminatory intent
19 by demonstrating that their decisions were
20 premised on bad faith or gross misjudgment."

21 Page 3. "In this unique context,
22 courts must balance the Rehabilitation Act and
23 ADA's prohibition on disability discrimination
24 with educators' responsibility for determining
25 appropriate special education services. The

1 bad-faith-or-gross-misjudgment standard" --

2 MS. BLATT: We say unique throughout.

3 JUSTICE GORSUCH: -- "properly" --

4 I -- I'm not finished.

5 MS. BLATT: Yeah.

6 JUSTICE GORSUCH: "Properly accounts
7 for the need for deference."

8 Page 27. "As courts have recognized,
9 discrimination claims based on an IEP's adequacy
10 are a conceptual peculiarity that exists in the
11 primary and secondary educational context."

12 Further down: "The
13 bad-faith-or-gross- misjudgment standard permits
14 the courts to adjudicate these novel claims
15 without requiring judges to substitute their own
16 notions of sound educational policy for those in
17 school authorities."

18 MS. BLATT: Correct.

19 JUSTICE GORSUCH: One -- one can
20 interpret those perhaps different ways ---

21 MS. BLATT: Well --

22 JUSTICE GORSUCH: -- but, surely, a
23 reasonable person could interpret them as
24 arguing for a special rule in the educational
25 context, correct?

1 MS. BLATT: No, only because of the
2 text, but --

3 JUSTICE GORSUCH: Ms. Blatt.

4 MS. BLATT: Okay. Well, you -- I
5 mean --

6 JUSTICE GORSUCH: A reasonable
7 person -- all of those emphasized the unique
8 context of primary and secondary education and
9 the need for a special rule, don't they?

10 MS. BLATT: Fine, but what I'm --

11 JUSTICE GORSUCH: Fine?

12 MS. BLATT: -- objecting to --

13 JUSTICE GORSUCH: Fine?

14 MS. BLATT: Can I -- can I --

15 JUSTICE GORSUCH: Then -- then would
16 you withdraw your accusation?

17 MS. BLATT: I'll withdraw it.

18 JUSTICE GORSUCH: Thank you. That's
19 it.

20 MS. BLATT: Okay. That's fine.

21 JUSTICE SOTOMAYOR: Ms. Blatt, I
22 also -- going back to a question Justice Barrett
23 asked, you are basically saying, no, I'm not
24 asking for a unique rule; I'm asking for a rule
25 that applies in all discrimination statutes.

1 But nowhere else have I seen the use of
2 deliberate indifference or gross enough
3 indifference used to define intentional
4 discrimination.

5 In fact, in Albecombie, we had a
6 neutral policy that applied to all employees,
7 they can't wear hair -- headgear, and we said a
8 neutral policy can still discriminate --

9 MS. BLATT: Absolutely.

10 JUSTICE SOTOMAYOR: -- against
11 religion even though there was no bad faith
12 proven there. It was all hats are out.

13 MS. BLATT: Correct.

14 JUSTICE SOTOMAYOR: All coverings are
15 out.

16 MS. BLATT: Correct.

17 JUSTICE SOTOMAYOR: So I don't know
18 where the bad faith comes from. I'm not even
19 sure where deliberate indifference comes from.
20 But putting that aside, before we rule in a way
21 that suggests that your new definition applies
22 to every statute, that this is the way we now
23 define intentional for every statute, shouldn't
24 we have had that fully aired below --

25 MS. BLATT: Well, if --

1 JUSTICE SOTOMAYOR: -- and accurately
2 aired?

3 MS. BLATT: So, if you just interpret
4 bad faith the way we think Judge Arnold did and
5 the way we do it as improper purpose with only
6 disability, then it's nothing -- it's nothing
7 new. It's just an -- an -- a prohibited reason,
8 just like in the racial gerrymandering.

9 JUSTICE SOTOMAYOR: Well, but that is
10 gerrymandering the definition because, if
11 it's -- a neutral policy in terms of what you
12 wear can still discriminate.

13 MS. BLATT: Yes.

14 JUSTICE SOTOMAYOR: So --

15 MS. BLATT: So we're in complete
16 agreement that if you have a policy to cancel
17 all field trips because -- and the reason is
18 because you don't want to make accommodations
19 for the disabled, then that is bad faith or
20 that's an intent to discriminate.

21 We are fine with the statutory
22 language "solely" -- or take out the "solely by
23 reason of disability."

24 JUSTICE SOTOMAYOR: But they didn't --
25 there was no evidence that they passed this

1 because they wanted to discriminate against
2 religious people. They passed their dress code
3 because they wanted a particular look in their
4 store. It wasn't until this individual came in
5 and said, "My religion requires this," is they
6 said, "I'm not going to reasonably accommodate
7 you."

8 MS. BLATT: Yeah. So --

9 JUSTICE SOTOMAYOR: But they didn't
10 pass the policy with antireligion animus.

11 MS. BLATT: If you -- let me just give
12 you another example.

13 JUSTICE SOTOMAYOR: You're asking --
14 when you're using the words "bad faith," you're
15 talking about animus.

16 MS. BLATT: No, I'm talking about --
17 and you can -- you're in charge, so you can say:
18 Intent to discriminate is the standard. We're
19 not going to use bad faith. We don't like that
20 word. Intent to discriminate. If you say bad
21 faith, please make clear that it only means
22 intent to discriminate, because you could
23 violate the IDEA just because you think disabled
24 children are better off without the
25 accommodation.

1 That is a -- a -- that is a violation
2 of -- of the ADA and the Rehab Act. That is
3 discrimination. It's not animus. It could be
4 benign intent.

5 Basically, it's the same standard in
6 the race context or in the -- the sex context.
7 No one cares what your views are towards women
8 or people of color if you treat them
9 differently. You can't do that.

10 JUSTICE SOTOMAYOR: Counsel, it would
11 have been nice to have known that we were biting
12 off that big a chunk.

13 MS. BLATT: I agree. But in terms of
14 what we had to do when you granted cert was look
15 at the text, and then the -- the blue brief said
16 that there is no intent required. They cited
17 the definition of what a qualified individual
18 was and said --

19 JUSTICE SOTOMAYOR: By the way,
20 intent's not even an issue here because there
21 wasn't an injunction being -- or the lack of an
22 injunction challenged here. They got the
23 injunction under the IDEA, didn't they?

24 MS. BLATT: They want more.

25 JUSTICE SOTOMAYOR: Well, we can put

1 aside whether they want more. But the only
2 thing between -- before us on the decision below
3 is whether it's an intent standard or a
4 heightened standard, correct?

5 MS. BLATT: I -- I think that's fair
6 because it's a summary judgment standard. So
7 that's the way I would put it if I were you, is
8 say all you have to decide is summary judgment.

9 And our point on the damages is part
10 of their whole schtick is that this statute
11 incorporates Title VI, and they -- they say and
12 that requires intent.

13 And so we are saying -- and, again,
14 back to defense of the red brief, when the --
15 both the gray brief and the blue brief say that
16 no intent is required under the statute, we said
17 that's wrong. So --

18 CHIEF JUSTICE ROBERTS: Well, I
19 mean -- I'm sorry.

20 JUSTICE SOTOMAYOR: Go ahead. Never
21 mind.

22 CHIEF JUSTICE ROBERTS: I -- I was
23 going to say the -- the -- the choice is not one
24 standard or another. I would have thought from
25 the framing of the whole case the question was

1 whether you have a different standard in the
2 educational context.

3 MS. BLATT: And if -- if that is --
4 and I agree. If that is the way you define the
5 question presented, then the parties are in
6 radical agreement.

7 If -- as we read, and the last
8 statement of their petition said you should
9 resolve the standard. If you don't want to
10 resolve the standard, then you're correct,
11 there's not much to decide.

12 But you are overturning, in effect,
13 the law of five circuits that affects 40,000 --
14 46,000 schools. And there are 8 million kids
15 on -- that are covered by the IDEA, and there
16 are 30,000 of these complaints, and their view
17 is every IDEA violation is a violation of the
18 statute.

19 Now they say there may have been
20 another violation, but that is the -- a theory.
21 And, in terms of the unique context, what
22 Monahan says is: If you violate a free and
23 appropriate education, that's just not
24 necessarily discriminatory.

25 It could be based on budgets. It

1 could be based on you just disagreed what the
2 accommodation was, as -- as was the case here.

3 And the Court in Monahan said: You
4 need to show discriminatory intent, and it used
5 the phrase "bad faith," meaning the improper
6 purpose.

7 But I agree, if you -- if you read
8 this like Ames, where there was no defense of
9 the decision below, then you don't have a lot to
10 do. But we're here radically defending the
11 decision below, which we've done in the
12 rehearing petition and in the -- in the brief in
13 opposition and in the -- the red brief.

14 JUSTICE SOTOMAYOR: You don't think it
15 was -- that you -- might have violated Rule 15.2
16 of our rules that requires counsel of its
17 obligation, Respondents, "to address any
18 perceived misstatement of fact or law in the
19 petition that bears on what issues properly
20 would be before the Court if certiorari were
21 granted?"

22 Where in this brief do you say Monahan
23 is consistent outside the unique -- education?

24 MS. BLATT: We didn't say that. So
25 that -- that is -- just be clear, we did not say

1 the implications of our textual defense means
2 Monahan or a intent standard would be -- be
3 required outside.

4 What we took as given and why I don't
5 think the rules were violated is that all the
6 courts have said, in this asymmetrical world
7 following the regulations and Choate, that there
8 is a "no intent requirement for reasonable
9 accommodations, although an intent requirement
10 for disparate impact," Judge Sutton's opinion.

11 And then all the circuits but the
12 Fifth Circuit have held -- have said there's
13 deliberate indifference or intent because of the
14 Title VI incorporation.

15 What we did not point out in the --
16 the orange brief, which is correct, that that
17 regime doesn't make any sense.

18 So that -- that's right, we didn't
19 point that out because it was only when, you
20 know, we're here briefing on the merits, and I
21 think you would want Respondents' counsel to
22 defend the decision below, the decision below is
23 based on the text, so we started with the text.

24 I mean, what I think the other --

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 MS. BLATT: Sorry. I don't --

3 JUSTICE ALITO: Where do you think
4 that the Petitioner says that a violation of the
5 IDEA necessarily constitutes a violation of the
6 ADA?

7 MS. BLATT: It's JA 20 and 24,
8 paragraphs 118 and 133. So it's not in the
9 brief. It's in the complaint. I would just say
10 it's not --

11 JUSTICE ALITO: I'm sorry,
12 paragraph 118 and what else?

13 MS. BLATT: And 133.

14 Now paragraphs 119 and 134 say the ADA
15 and the Rehab Act were violated other ways, but
16 part of their complaint is just the violation of
17 the IDE -- it just says the violation of the
18 IDEA itself is a violation of the other
19 statutes.

20 And we would hope that you would clear
21 that up, that that can't possibly be right,
22 because the IDEA can -- you know, can -- can --
23 can be -- go way beyond what might be a
24 reasonable accommodation.

25 And I also think it's not clear from

1 their brief on deliberate indifference.
2 Deliberate indifference as to what statutorily
3 protected right? Either the reasonable
4 accommodation right or the IDEA. And I think,
5 in fairness to them, it's both.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Well, I won't have
11 a -- another opportunity to question
12 Mr. Martinez, so perhaps he could address that
13 in rebuttal, if he sees fit, whether he is
14 arguing that a violation of the IDEA necessarily
15 constitutes a violation of the ADA.

16 What he -- what the complaint says is
17 that the district's violations of the IDEA also
18 violate a plaintiff's rights under Section 504
19 of the Rehabilitation Act, and he says the same
20 thing about the ADA.

21 MS. BLATT: Yeah. And, again, it's
22 important to school districts that you make
23 clear if you can level set that -- the mere bare
24 violation because that is the -- thrust of
25 Monahan, is that a bare violation does not

1 necessarily violate the statute.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor, anything?

5 Justice Kagan?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: You say the
8 statute requires intentional discrimination,
9 Title II, and the Rehabilitation Act. The
10 Solicitor General says, yes, that's right,
11 deliberate indifference is an intent standard.

12 I just want to -- you -- want to
13 respond to that?

14 MS. BLATT: Deliberate indifference is
15 not an intent standard --

16 JUSTICE KAVANAUGH: Okay. That's
17 your --

18 MS. BLATT: -- for discrimination. It
19 can be an intent standard in the prison context.
20 If you know someone's dying and you don't do
21 anything, that means you intentionally acted.

22 But you can intentionally act --
23 deliberate indifference can be evidence of a
24 discriminatory intent, but just because you
25 deliberately don't respond to a parent's

1 complaints doesn't necessarily mean you intend
2 to discriminate on the basis of disability.

3 JUSTICE KAVANAUGH: Well -- right.
4 And I think the way the Solicitor General then
5 defines "deliberate indifference" is why at
6 least I see the delta here as pretty small,
7 because they say you have to know that you're
8 violating your legal obligations or what's
9 substantially likely to be your legal
10 obligation. That's really --

11 MS. BLATT: But then they said that
12 you don't have to know the law. So, in other
13 words, if a parent says: Hi school, you're
14 violating your legal obligations --

15 JUSTICE KAVANAUGH: Well, they did --
16 that -- that is true, they did say you have to
17 know your legal obligations, but that --

18 MS. BLATT: They said you didn't.
19 Maybe I misheard them. I heard them say --

20 JUSTICE KAVANAUGH: Well, they did --

21 MS. BLATT: -- you don't need to know
22 the law. And I know that's what my friend for
23 the Petitioner said, you don't need to know the
24 law.

25 JUSTICE KAVANAUGH: I don't know how

1 you can know -- this is a helpful question, by
2 the way.

3 MS. BLATT: Yeah.

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

8 MS. BLATT: Well, I -- we would
9 welcome that if you're going to have a
10 deliberate indifference standard, that it be as
11 high as possible because, if you have these --
12 again, what the school districts are worried
13 about is because you -- you -- you have
14 good-faith disagreements in all -- I mean, these
15 are really tough cases on -- in terms of, you
16 know, how much support. Here, the -- the -- she
17 had 10 specialists. So these are just tough
18 cases. And so the question was how much support
19 she should be given at home.

20 JUSTICE KAVANAUGH: I guess what I'm
21 getting at is deliberate indifference can be
22 fairly protective -- as defined by the Solicitor
23 General, fairly protective of school districts
24 in the sense that the law's not like you open a
25 code book and it tells you, oh, go to 6 p.m.

1 You have to decide --

2 MS. BLATT: Yes. If you --

3 JUSTICE KAVANAUGH: -- what's
4 reasonable.

5 MS. BLATT: If you would define it
6 that way, that would be great. I mean, we would
7 appreciate that, although we do think, if you're
8 going to incorporate Title VI, I mean, you're
9 now just saying the Fifth Circuit is wrong. The
10 Fifth Circuit said, oh, I don't know, Sandoval
11 looks likes it says intent; it doesn't say
12 deliberate indifference. And they -- these are
13 all Spending Clause statutes. So Title IX,
14 Title VI, the Rehab Act, the Affordable Care Act
15 incorporates all these. They -- their -- and
16 this is a one area. And Justice Barrett is
17 correct, this is a big, messy area.

18 So I don't blame you for not wanting
19 to get into it, but we would at least appreciate
20 that you make clear that there's a level set
21 particularly on damages.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: Yeah. I just am
2 still struggling with how you account for the
3 language in the disability discrimination
4 statutes that goes beyond discrimination and
5 discriminatory intent.

6 And so I'm looking, for example, at
7 the Title II language which says, "No qualified
8 individual with a disability shall, by reason of
9 such disability, be excluded from participation
10 in or be denied the benefits of the services,
11 programs, or activities of a public entity, or
12 be subjected to discrimination by such entity."

13 And my understanding of the way at
14 least that courts have been interpreting this is
15 you don't need discriminatory intent in a
16 situation in which a person is alleging, for
17 example, that they have been excluded from the
18 participation.

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

22 MS. BLATT: Sure. And you have to
23 start from the fact of, what is Congress's
24 authority to even pass Title -- Title II? It's
25 not a Commerce Clause legislation. Well, it's

1 important because it looks like it's Section 5,
2 and if you just -- so you have to see it through
3 the lens of -- of -- of Congress's power under
4 Section 5.

5 But, even putting that aside, if you
6 don't read it -- if you just look at Titles I
7 and Title III, where they spell out disparate
8 impact, and so that -- if you read that statute
9 in the passive voice to require disparate
10 impact, all the disparate impact and reasonable
11 accommodation provisions and definitions and
12 contours are all superfluous.

13 So that if you just looked at -- I
14 actually think this case is easier under
15 Title II because you don't have the Choate
16 baggage. But, if you just look at Title II,
17 it's an easy case that there is no reasonable
18 accommodations requirement at all. That --
19 that's -- that's our -- that's our stronger
20 case, is under Titles -- Title II, because
21 Titles I and Title III are so chockful of the
22 contours.

23 And there's no reasonable requirement
24 in II. So it's made up. It doesn't say you
25 have to reasonably accommodate. On the other

1 side, they say the definition is any -- you
2 know, remove structural, communications,
3 transportation barriers and auxiliary aids. But
4 there's no word "reasonable" in there. So it
5 has to be read in when it's actually defined in
6 great details in I and III. What it means to
7 modify the program, what an undue -- hardship is
8 a four-part test, and what is -- what is readily
9 achievable is a four-part test.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Martinez?

14 REBUTTAL ARGUMENT OF ROMAN MARTINEZ
15 ON BEHALF OF THE PETITIONER

16 MR. MARTINEZ: Your Honors, I'm not
17 going to dignify Ms. Blatt's name-calling here
18 with a response in kind, though I appreciate
19 that she withdrew the charges here, although
20 perhaps a bit under duress.

21 I do want to address whether we were
22 incorrect in characterizing our position, and
23 the answer is absolutely not. You heard her say
24 today that she was radically defending the
25 Eighth Circuit's decision in this case. Well,

1 that decision includes Footnote 2, which
2 expressly characterized Monahan as applying a
3 higher test, a two-tiered test. So, if she's
4 radically defending that, then she's radically
5 defending the two-tiered approach that I think
6 she said was completely wrong.

7 We would also encourage you to look at
8 page 23, in addition to the -- all the other
9 pages that were cited, where she said that "the
10 universe of plaintiffs with claims affected by
11 the question presented is narrow. For
12 educational discrimination plaintiffs not
13 covered by the IDEA, such as college students, a
14 bad-faith or gross-misjudgment standard does not
15 apply." That's exactly the opposite of what
16 she's saying now.

17 So what is at issue in this case? I
18 think the most important thing we heard from
19 Ms. Blatt is when she conceded in questioning
20 from Justice Jackson that she is trying and the
21 district arguments here are trying to get rid of
22 the reasonable accommodation claims that people
23 in this country with disabilities have enjoyed
24 for decades. That's what's at stake.

25 This is a revolutionary and radical

1 argument that has not been made in this Court
2 and that she's trying to get you to decide on
3 the basis of essentially no briefing. There
4 are -- the -- the question of whether reasonable
5 accommodations are required is easy. There are
6 subsidiary questions that are challenging. You
7 should not address those subsidiary questions in
8 this case because we haven't had briefing. It's
9 unfair to you. You don't have a decision below.
10 It's unfair to us. It's unfair to our amici,
11 the disability rights community, who would have
12 rung a five-alarm fire if they had known that
13 reasonable accommodation claims were on the
14 table. So you should not address that. You
15 should apply your waiver rules.

16 If you do address some of this stuff,
17 Justice Kavanaugh, I would encourage you to look
18 at the COPAA amicus brief. On pages 18 to 29,
19 it has a very good discussion of the kinds of
20 cases and where the different standards might
21 make a difference.

22 I think, on the merits, the most
23 important point Ms. Blatt made was this
24 assertion, which I would characterize as
25 incorrect in the extreme, that the ADA does not

1 talk about or somehow ratify reasonable
2 accommodation claims. I would appoint the Court
3 most importantly to Section 12201(a), in which
4 the ADA Title II expressly incorporates by
5 reference the regulations that had been enacted
6 under the Rehabilitation Act, all of which
7 expressly embrace reasonable accommodation
8 claims.

9 In addition to that, I would point the
10 Court to other provisions of the ADA:
11 12101(a)(5), 12131(2), 12201(h). All of those
12 refer to either reasonable accommodations or
13 reasonable modifications. So, with respect, I
14 think that's wrong.

15 Finally, let me just take a step back,
16 Your Honors, and talk about really what's
17 issue -- what's at issue in this case. This
18 case started narrow. It was about a sliver of
19 plaintiffs. It's now quite broad because of the
20 arguments the district is making. If you accept
21 her arguments, think of all the people who are
22 going to be affected. Think of five-year-old
23 Ehlana Fry with cerebral palsy, who needs the
24 help of her service dog, Wonder. Think about
25 George Lane, the Tennessee man forced to crawl

1 up two flights of stairs in order to have his
2 court -- his day in court. Think about Ava, who
3 desperately needs every precious hour of school
4 so she can learn to communicate with her
5 parents.

6 We ask you to reject those radical
7 arguments, and we ask you to vacate the decision
8 below.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:30 a.m., the case
13 was submitted.)
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Official

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