

# SUPREME COURT OF THE UNITED STATES

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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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5                               Petitioner, )  
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10                               Respondents. )  
11       - - - - -

12  
13                               Washington, D.C.

14                               Monday, April 28, 2025

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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

1 APPEARANCES:  
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3 of the Petitioner.  
4 NICOLE F. REAVES, Assistant to the Solicitor General,  
5 Department of Justice, Washington, D.C.; for the  
6 United States, as amicus curiae, supporting the  
7 Petitioner.  
8 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
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 the

1 Court. We said that on pages 2, 3, 15, 13, 16,  
2 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 adopted by five circuit courts. That's right.

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

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

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

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

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

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

23          JUSTICE KAVANAUGH: Or it could  
24   rethink that precedent. In other words, you're  
25   saying to leave open the question of whether the

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

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

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

23 MR. MARTINEZ: Your Honor, could I  
24 just add one additional comment on your earlier  
25 question and then --

1 JUSTICE KAVANAUGH: Mm-hmm.

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

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

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

23 MR. MARTINEZ: So I think their bad --  
24 as they -- as I understand their bad faith test,  
25 it requires motive, which, in their brief, they

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

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

13 MR. MARTINEZ: So I think --

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

17 MR. MARTINEZ: I --

18 JUSTICE KAVANAUGH: -- sounds like  
19 that.

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

1 facts that would constitute a violation of the  
2 law, and then you have to be indifferent to  
3 those facts.

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

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

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

24 Have you figured that out?

25 MR. MARTINEZ: So --

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

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

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

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

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

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

21 JUSTICE SOTOMAYOR: Okay.

22 MR. MARTINEZ: I think, cert --  
23 certainly, with respect to liability and whether  
24 the statute is violated, there's no intent  
25 requirement. It's not in the statute. What the

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

5 So there's just no way to -- to gin up  
6 a -- an intent requirement out of that.

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

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

23 What the other side has, though, is a  
24 bad-faith-and-gross-misjudgment rule that is  
25 literally -- it comes out of nowhere, like



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

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

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

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

23 And I totally agree with what the  
24 other side said on page 30 of their brief in  
25 opposition and what this Court said in the

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

9 JUSTICE SOTOMAYOR: Got it.

10 MR. MARTINEZ: So those do not require  
11 intent and have never been understood to require  
12 intent.

13 JUSTICE JACKSON: Mr. Martinez --

14 JUSTICE GORSUCH: Mr. --

15 JUSTICE JACKSON: Oh.

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

23 And -- and, as Justice Sotomayor  
24 suggested, and maybe I just missed it, when we  
25 think of discrimination in many contexts,

1 causation, you're -- you're right, but the act  
2 of discrimination is to treat someone else  
3 differently because of their disability, right?

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

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

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

20 MR. MARTINEZ: Well, it -- it was  
21 actually a very thoughtful opinion that -- that  
22 really kind of teased out the differences --

23 (Laughter.)

24 MR. MARTINEZ: -- between disparate --  
25 intentional treatment and reasonable

1 accommodation claims, and what -- what you said  
2 in that opinion was that sometimes formal  
3 equality isn't enough. And in the disability  
4 context, it isn't.

5 JUSTICE GORSUCH: Mm-hmm.

6 MR. MARTINEZ: And the reason for that  
7 is that you can have people discriminated and  
8 excluded by reason of their disability even  
9 though there's no -- there's no intent.

10 And -- and so, because you have a  
11 disability --

12 JUSTICE GORSUCH: I see.

13 MR. MARTINEZ: -- you're not able to  
14 take advantage of a program. And so, even when  
15 there's not animus when there's not a bad actor  
16 on the other side, you imagine someone rolls  
17 up --

18 JUSTICE GORSUCH: I -- I follow you.

19 MR. MARTINEZ: Okay.

20 JUSTICE GORSUCH: I got it. Thank  
21 you. That's helpful to me.

22 MR. MARTINEZ: Sure.

23 JUSTICE JACKSON: Mr. --

24 JUSTICE GORSUCH: And thank you for  
25 the reminder.

1 (Laughter.)

2 JUSTICE GORSUCH: I do have one -- one  
3 other question.

4 MR. MARTINEZ: Yes.

5 JUSTICE GORSUCH: And that is that  
6 you're right that a lot of the courts have  
7 looked at these things through the Spending  
8 Clause, really the spending power, and -- and,  
9 therefore, states have to be on -- on clear  
10 notice, and they've distinguished between  
11 damages and injunctions on that basis.

12 But I'm kind of curious why, because I  
13 would have thought in a contract scenario I  
14 might be more on notice that my violations would  
15 incur damages than they would an injunction  
16 requiring specific performance, which is an  
17 unusual remedy for a contract breach.

18 Thoughts?

19 MR. MARTINEZ: So I think, on that  
20 one, I think that with respect to the  
21 injunction, if -- if the recipient of federal  
22 funding doesn't like the injunction, they can  
23 just stop receiving the funding. So they have  
24 the ability to get out of -- out of the deal,  
25 and so it doesn't put them on the hook to spend

1 money in the same way that a damages remedy  
2 would.

3 JUSTICE BARRETT: Mr. Martinez, has  
4 any other circuit taken the view or is this  
5 argument that the other side is pressing, is  
6 that one that's kind of a live issue in the  
7 lower courts?

8 MR. MARTINEZ: No.

9 JUSTICE BARRETT: Has any other court  
10 taken it?

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

18 You then have 10 circuits that have  
19 said you do have some form of intent requirement  
20 for damages, and nine of those 10 circuits say  
21 that the test is deliberate indifference.

22 There's a little bit of uncertainty  
23 about the Fifth Circuit about what kind of  
24 intent is required. The Fifth Circuit has  
25 suggested that deliberate indifference might not

1 be enough, but they haven't really clearly  
2 adopted a different intent standard.

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

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

14 JUSTICE BARRETT: Well, it might also  
15 be that this sparks percolation on this issue.  
16 I mean, maybe what will happen is that there  
17 will be pushback of the sort that your friend on  
18 the other side is advocating.

19 MR. MARTINEZ: I -- I would doubt that  
20 because of the fact that the reason these five  
21 courts have applied this Monahan test is really  
22 because, and as they explained it very well in  
23 their brief in opposition, it's all about the  
24 IDEA.

25 I mean, look at their brief in

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

7 JUSTICE JACKSON: So --

8 JUSTICE KAGAN: I understand,  
9 Mr. Martinez, why they did that before Smith v.  
10 Robinson and the congressional response to that.  
11 It's basically the same rationale that the Court  
12 used in Smith v. Robinson.

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

17 MR. MARTINEZ: So -- so Monahan was,  
18 of course, before Smith versus Robinson. I  
19 don't know the answer to that, Your Honor. I  
20 think it's hard because you have to get en banc  
21 review.

22 We tried our best to get en banc  
23 review in this case, and when we did that and  
24 we -- we surfaced this issue to the Eighth  
25 Circuit in an effort to get them to overturn



1     their precedent, the other side came in and  
2     said -- they didn't just say follow this because  
3     it's your precedent, they said follow it because  
4     it's right, and they won a denial of en banc  
5     review in part based on their argument that  
6     there is this two-tiered approach and a special  
7     rule needs to apply with kids who have IDEA  
8     rights.

9             And so now they're coming into this  
10    Court flip-flopping on that and trying to kind  
11    of play -- have it both ways and play both  
12    sides, even though now they realize that that --  
13    that earlier argument is indefensible.

14            JUSTICE JACKSON:  So, Mr. Martinez,  
15    can you just speak very clearly --

16            Chief, should -- can I go forward?

17            CHIEF JUSTICE ROBERTS:  Sure.

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

22            MR. MARTINEZ:  Yeah.

23            JUSTICE JACKSON:  And I'd invite you  
24    to just --

25            MR. MARTINEZ:  So --

1 JUSTICE JACKSON: -- tell us why  
2 they're wrong.

3 MR. MARTINEZ: -- I think there are  
4 two main reasons, which I'll summarize very  
5 quickly.

6 Number one, there's nothing in the  
7 text of either the ADA or the Rehabilitation Act  
8 or the statutes it cross-references that sets up  
9 a two-tiered standard under which different  
10 plaintiffs seeking relief under the same  
11 provisions have different standards apply to  
12 them.

13 If that weren't enough -- we think it  
14 is enough -- you have an express statutory  
15 language, 1415(1), in the IDEA that was enacted  
16 to overturn Smith versus Robinson and the -- the  
17 erroneous reasoning that it embraced, and  
18 1415(1) specifically says -- I'm not going to  
19 quote it, but it base -- it says that you can't  
20 use the IDEA to limit people's rights under the  
21 other statutes like the ADA or the  
22 Rehabilitation Act.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: This is not exactly  
3 related to the question that's before us, so  
4 perhaps it's unfair, but I think it might have  
5 some relationship to what the court below was  
6 getting at.

7 So this is the question. What  
8 difference, if any, do you see between the cost  
9 that a school district must be required to --  
10 the extra costs a school district must be  
11 required to shoulder under the IDEA and the  
12 extra costs that would constitute a reasonable  
13 accommodation under the ADA --

14 MR. MARTINEZ: I --

15 JUSTICE ALITO: -- or the  
16 Rehabilitation Act?

17 MR. MARTINEZ: -- I think it's going  
18 to depend in any particular case. And the way  
19 to think about this is these are really  
20 different statutory regimes.

21 You have the IDEA that gives you an  
22 affirmative right to a FAPE, the ADA in Section  
23 504, which eliminate discrimination.

24 Depending on the case, it may be that  
25 the IDEA gives you more than the other statutes

1 in one context, and the other statutes might  
2 give you more than the IDEA in a different  
3 context.

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

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: A couple  
22 follow-ups. You agree that there's an intent  
23 requirement for damages claims, but you say it's  
24 deliberate indifference, correct?

25 MR. MARTINEZ: Your Honor, in our

1 opening brief, we did not take a position on  
2 that. We did not take a position on whether  
3 there was an intent requirement, but we  
4 certainly are not fighting that. We didn't  
5 fight that below. I think the Eighth Circuit  
6 and nine other circuits say it's deliberate  
7 indifference.

8 JUSTICE KAVANAUGH: That sounds close  
9 to a yes.

10 (Laughter.)

11 MR. MARTINEZ: Close -- close -- close  
12 to a yes. We -- you know, we would have taken a  
13 position on it if we thought that was the  
14 question presented, but it isn't, so we -- we  
15 didn't have to.

16 JUSTICE KAVANAUGH: And then --

17 MR. MARTINEZ: But I think that's  
18 fair.

19 JUSTICE KAVANAUGH: -- do you agree  
20 with the SG's formulation of deliberate  
21 indifference? Any problems with how they  
22 formulate it in their brief?

23 MR. MARTINEZ: As I understand their  
24 formulation, I agree with it. I think  
25 substantial likelihood is an appropriate way

1 of -- of thinking about, you know, substantial  
2 likelihood of a violation. I think the one  
3 thing I just want to be very clear on is you  
4 don't have to know the law. You have to know  
5 the facts that would give rise to the violation.  
6 And I think that's an important caveat.

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

21 And I guess it's hard to know how you  
22 say -- where do you find the line for deliberate  
23 indifference where you know that it's  
24 substantially likely to be a violation when it's  
25 this fact-intensive reasonableness --

1 MR. MARTINEZ: Right.

2 JUSTICE KAVANAUGH: -- kind of  
3 inquiry? So how should a court think about  
4 that? In other words, the court on remand, if  
5 it's applying deliberate indifference, how  
6 should it think about it as related to these  
7 facts?

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

18 Obviously, it's going to be a -- a  
19 fact-bound analysis. It's going to require  
20 close attention. And the sensitivity that this  
21 Court has -- has often said is very important in  
22 the IDEA context should, of course, apply in  
23 this context too. But we think that we have  
24 good arguments and good facts for us that we can  
25 prevail on deliberate indifference properly

1 understood if this goes back down below.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 JUSTICE BARRETT: No.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Jackson?

8 JUSTICE JACKSON: And, of course, your  
9 overall point is that courts already consider  
10 deliberate indifference on facts in other  
11 contexts?

12 MR. MARTINEZ: That's right. They --  
13 they -- they consider it on other facts in other  
14 contexts. And Justice Gorsuch asked isn't it  
15 only the case when you're talking about  
16 supervisor -- supervisory-type liability? And  
17 we -- I would just say -- I should have said  
18 this earlier, Justice Gorsuch, but I'll say it's  
19 also true in other contexts like the prison  
20 context. When you're assessing Eighth Amendment  
21 claims dealing with the, you know, medical  
22 treatment or conditions of confinement, when  
23 you're looking at the prison's own conduct, you  
24 apply the deliberate indifference standard  
25 there. And so, yes.



1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Ms. Reaves.

5 ORAL ARGUMENT OF NICOLE F. REAVES  
6 FOR THE UNITED STATES, AS AMICUS CURIAE,  
7 SUPPORTING THE PETITIONER

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

10 There is no sound basis for applying  
11 different intent requirements to Title II and  
12 Section 504 claims brought in the school  
13 context. The texts of those provisions apply to  
14 qualified individuals and provide relief to any  
15 person and do not distinguish among different  
16 contexts. And if there were any doubt,  
17 20 U.S.C. 1415(1) makes clear that Title II and  
18 Section 504 rights are not restricted or limited  
19 in the education context.

20 Respondents no longer dispute these  
21 points. Instead, they ask this Court to adopt a  
22 breathtakingly broad rule and hold that a  
23 plaintiff cannot bring a Title II or Section 504  
24 claim in any context without proving intent to  
25 discriminate. No court of appeals has ever

1     adopted that rule, which would entirely  
2     eliminate all Title II and Section 504  
3     reasonable accommodation claims.

4             This Court should reject Respondents'  
5     attempt to belatedly insert such wide-ranging  
6     issues into this case and instead merely hold  
7     that students are not required to satisfy  
8     heightened intent standards in the school  
9     context.

10            And Respondents' arguments are wrong  
11     on the merits in any event. The text, context,  
12     history, and purpose of Title II and Section 504  
13     do not require a plaintiff to prove intent to  
14     discriminate to bring a claim.

15            I welcome the Court's questions.

16            JUSTICE THOMAS: So the -- I think you  
17     argue that intent is required in a damages  
18     context?

19            MS. REAVES: Yes, Justice Thomas.

20            JUSTICE THOMAS: But not injunctive  
21     relief?

22            MS. REAVES: Yes.

23            JUSTICE THOMAS: Now what's your  
24     explanation for the difference?

25            MS. REAVES: So I think the

1 explanation comes primarily from this Court's  
2 recognition in the Spending Clause context and  
3 particularly in Davis and Gebser, where the  
4 Court has walked down a lot of this road, that  
5 there needs to be particular notice when there's  
6 going to be an expenditure of funds under  
7 Spending Clause statutes.

8 And, in contrast, when an entity  
9 incurs liability but is only potentially going  
10 to have to be on the hook for injunctive relief,  
11 the entity has a choice. They can reject  
12 ongoing spending in exchange for not having  
13 continuing injunctive relief. And that's not  
14 the case with backward-looking damages.

15 And I think it's also not unusual for  
16 the Court to draw these types of lines in this  
17 area. In Lane v. Peña, the Court held that the  
18 Rehabilitation Act and Section 504 in  
19 particular, that the United States had not  
20 waived its sovereign immunity with regard to  
21 damages claims but recognized that it had waived  
22 its sovereign immunity with regard to injunctive  
23 relief claims.

24 JUSTICE GORSUCH: Well, I -- I get  
25 the -- the sovereign immunity overlay, but, I

1 mean, the -- the strength of the argument from  
2 Petitioners and -- and the government is that  
3 the statutes here don't draw any distinction of  
4 the sort that Respondent proposes -- proposed  
5 below. And, here, you're asking us to draw a  
6 distinction that the statute doesn't have on its  
7 face between damages and injunctive relief and  
8 apply a higher standard when it comes to  
9 injunctive relief. So could you address that  
10 oddity?

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

21 Thoughts?

22 MS. REAVES: So, as to the first part  
23 of your question, I don't think we're asking the  
24 Court to draw a new line here because I think  
25 both Gebser and Davis already strongly suggest

1     this line between damages and injunctive relief.

2                 JUSTICE GORSUCH: Well, but textual --  
3     I understand that point, but I was focusing on  
4     the statutory text. The strength of the  
5     argument here is the statute doesn't draw the  
6     distinction that Respondent proposed. And now  
7     you're asking us to do a similar thing, and  
8     I'm -- I'm just wondering about its consistency  
9     with contract-type analogies.

10                MS. REAVES: Right. And so, as far as  
11     the contract analogy goes, I think that the --  
12     the contract analogy obviously isn't perfect  
13     because the focus here is -- is notice --

14                JUSTICE GORSUCH: Mm-hmm.

15                MS. REAVES: -- as to liability going  
16     forward. And if you've already had a violation  
17     of the statute and you're automatically liable  
18     without any sort of intent requirement, that  
19     would raise real notice problems. But, unlike a  
20     traditional contract, a state can or a funded  
21     entity can withdraw and -- to forgo ongoing  
22     injunctive relief. That's not necessarily true  
23     of a contract, but I think, because of the way  
24     the Spending Clause contract overlay works in  
25     this context, the notice concerns are just less

1     there.

2                   And I would also like to just briefly  
3     respond to Respondents' suggestion that  
4     injunctive relief is always going to be  
5     significantly more burdensome. Plaintiff still  
6     is going to need to prove both the violation and  
7     that they are entitled to injunctive relief, and  
8     that means they're going to need to show that  
9     the on -- the violation is ongoing and that but  
10    for injunctive relief, the violation is not  
11    going to fall --

12                  JUSTICE GORSUCH: Does the government  
13    think that intent is required or that it --  
14    it -- it -- it's just noticing that -- that it  
15    might be suggested by our cases? Or would  
16    deliberate indifference be the appropriate  
17    standard for both damages and injunctive relief?

18                  MS. REAVES: So we think that -- and I  
19    think this is consistent with what we said in  
20    our brief -- intent is not required to state a  
21    violation of the statute.

22                  JUSTICE GORSUCH: No, I understand,  
23    but for -- for damage --

24                  MS. REAVES: And it is not required  
25    for injunctive relief.

1 JUSTICE GORSUCH: -- for damages.

2 MS. REAVES: It absolutely is required  
3 for damages.

4 JUSTICE GORSUCH: You think it is?  
5 Okay.

6 MS. RAVES: Yes.

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

17 MS. REAVES: That's correct. We don't  
18 think the Court has to rule on any of that.  
19 Because we do think this was teed up on the  
20 assumption that there are baseline standards,  
21 the Court doesn't need to get into those, and  
22 the question is just whether there's a  
23 heightened intent standard that applies to all  
24 claims in the school context.

25 CHIEF JUSTICE ROBERTS: In that

1     regard, do you have any concerns that no one is  
2     here defending the position of the majority of  
3     circuits who addressed this question below, or  
4     am I the only one?

5                     (Laughter.)

6                     MS. REAVES:   Mr. Chief Justice, I  
7     don't have any concerns about that.  I do think  
8     you have the reasoning of the decision below,  
9     you have the reasoning of Monahan, you have the  
10    reasoning of one of the amicus briefs in support  
11    of Respondents.  You have Respondents' brief in  
12    opposition, which actually did take this  
13    head-on.

14                    And I honestly don't think there's a  
15    lot more to be said for the bad-faith-or-gross-  
16    misjudgment standard.  It -- it just -- there's  
17    no basis for it in the text, particularly in  
18    light of Section 1415(1).

19                    And I -- I think there's perhaps a  
20    reason that Respondents have shifted positions  
21    because it is so hard to defend, so I don't  
22    think this is a situation in which there's a  
23    close question that this Court should be worried  
24    about that no one is actually defending.

25                    JUSTICE BARRETT:  Why do you think no



1 circuit has changed its position? If it's so  
2 obvious that Respondent has just completely  
3 given it up and jumped overboard, why are all  
4 these circuits sticking with it?

5 MS. REAVES: I honestly think that's a  
6 good question. Having read all of these cases  
7 post-Monahan and then post Section 1415(1), it  
8 really just seems like courts of appeals haven't  
9 grappled with it, and maybe it's because of how  
10 some of these cases were litigated and 1415(1)  
11 wasn't pointed out to the courts.

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

16 JUSTICE KAVANAUGH: You --

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

19 JUSTICE KAVANAUGH: Go ahead.

20 JUSTICE BARRETT: -- the question that  
21 the government always gets asked: The  
22 difference between your position and  
23 Mr. Martinez's?

24 MS. REAVES: I think the primary  
25 difference is that, you know, while we don't

1 think the Court has to resolve this in this  
2 case, we absolutely believe that intent is  
3 required for damages claims under the ADA and  
4 title -- and Section 504. And we think that  
5 deliberate indifference is a way to prove that  
6 intent.

7 And I think -- I -- I took my friend  
8 to not be taking a clear position on that here  
9 or in -- in -- in his briefing.

10 JUSTICE KAVANAUGH: How would you  
11 describe the difference between deliberate  
12 indifference and bad faith?

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

17 So deliberate indifference requires  
18 actual knowledge of -- that a federally  
19 protected right was substantially likely to be  
20 violated and failure to act. That we think is  
21 just a standard intent requirement. It doesn't  
22 require any sort of animus.

23 So look at the bad-faith-or-gross-  
24 misjudgment standard. I think, first of all, as  
25 a whole, it's been rarely applied. It's only

1     been applied in this Monahan line of cases, and  
2     for that reason, I think it's a little bit  
3     undertheorized, whereas deliberate indifference  
4     has been applied across the board to Title II  
5     and Section 504 cases, other than some circuits  
6     in this context.

7             And then, if you break out the two  
8     parts of the standard, I think that bad faith  
9     appears to have an animus requirement, which we  
10    just don't think is consistent with the text of  
11    these statutes. It's not consistent with things  
12    the Court has said in cases like Murray versus  
13    UBS Securities that discrimination generally  
14    doesn't require animus. So we think that's, you  
15    know, too high of a standard.

16            JUSTICE KAVANAUGH: Is -- is --

17            MS. REAVES: And then, if you get to  
18    the gross misjudgment part, I think that's very  
19    unclear. You know, Respondents suggested in  
20    their brief in opposition that just looking at  
21    it on its face, it doesn't require intent at  
22    all, and that would be a problem.

23            And then Respondents in their merits  
24    brief cite two cases that are over a hundred  
25    years old that don't even use "gross

1 misjudgment." They use "gross mistake."

2 JUSTICE KAVANAUGH: Well, to Justice  
3 Barrett's question about the circuits, is there  
4 a case out there that failed under the bad faith  
5 standard that you think would have succeeded  
6 under the deliberate indifference standard?

7 MS. REAVES: Well, the court of  
8 appeals below here thought that it probably made  
9 a difference, so I think that's a good example.  
10 I think I can give you an example of a case sort  
11 of going the opposite direction.

12 So we cite the Eleventh Circuit's  
13 decision in Liese in our briefing, and in that  
14 case, the issue was whether there was failure to  
15 provide a reasonable accommodation in the form  
16 of a sign language interpreter for a patient at  
17 a hospital, and the court found that there was  
18 enough to go to trial because there was  
19 deliberate indifference because these  
20 individuals had repeatedly requested an  
21 interpreter.

22 But there was no indication in that  
23 decision that any of those choices made by the  
24 hospital were backed by some sort of -- of  
25 animus on behalf -- you know, animus

1 discriminating against individuals with  
2 disabilities.

3 So I think that case, while it got to  
4 go to trial, under our standard wouldn't  
5 necessarily get to go to trial under  
6 Respondents.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas?

11 Justice Alito?

12 JUSTICE ALITO: What do you think was  
13 the impulse that led so many lower courts to  
14 adopt the standard that you find to be  
15 completely unsupported?

16 MS. REAVES: So I think the initial  
17 rationale was the one the court laid out in  
18 Monahan, the Eighth Circuit laid out, which was  
19 this desire to harmonize the IDEA with the --  
20 with Section 504 and Title II.

21 And I think that might have been  
22 understandable, but -- and, obviously, this  
23 Court found that logic compelling in Smith, but  
24 I think, once Congress adopted 1415(1) and said  
25 that nothing in the IDEA shall be construed to

1 restrict or limit the rights, procedures, and  
2 remedies available under the ADA or  
3 Rehabilitation Act, it was just abundantly clear  
4 that that harmonization isn't appropriate.

5 And I think there also might have been  
6 a little bit of a misunderstanding about some of  
7 the daylight between these type of claims.

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

12 So, if an individual is on grade and  
13 they don't need any special education, they're  
14 not going to get anything under the IDEA. But,  
15 if they're using a wheelchair, they are going to  
16 potentially need a reasonable accommodation  
17 under the ADA.

18 JUSTICE ALITO: Well, don't these two  
19 statutes proceed along very different lines?  
20 Under the IDEA, the school district must provide  
21 a free appropriate public education. That can  
22 be extremely expensive, right?

23 MS. REAVES: Yes.

24 JUSTICE ALITO: The antidiscrimination  
25 statutes, the ADA and the Rehabilitation Act,

1 start from the baseline that people with  
2 disabilities are supposed to be treated the same  
3 as people without disabilities. But they depart  
4 from the baseline because employers, for  
5 example, in the employment context, must make a  
6 reasonable accommodation. But there's a limit  
7 to the expense that an employer, for example,  
8 must be -- is required to bear under the ADA.

9 So is there a substantial difference  
10 in that respect between the financial burden  
11 that these two statutes impose on the regulated  
12 parties?

13 MS. REAVES: No, I -- I don't think so  
14 because the reasonable accommodation limitation  
15 and particularly the "reasonable" part of that  
16 is baked into both Title II and Section 504.  
17 That's been recognized since the 1970s, shortly  
18 after the Rehabilitation Act was adopted.

19 And then Congress, when it enacted the  
20 ADA, said in Section 12201(a) that nothing in  
21 the ADA shall be construed to apply a lesser  
22 standard than the standards applied under Title  
23 V of the Rehabilitation Act or the regulations  
24 issued by federal agencies pursuant to such  
25 title.

1                   So the reasonable accommodation  
2     limitation is baked into these Title II claims  
3     that can be brought against public schools. And  
4     so the public school is going to be able to come  
5     forward and say: This is not reasonable because  
6     we can't afford it because it's not the sort of  
7     thing that is a normal accommodation or because  
8     it would require a fundamental alteration in the  
9     programs that we -- we give to students.

10                  JUSTICE ALITO: Well, let me just give  
11     you one other example. I don't want to belabor  
12     this too much because it's a little -- it's a  
13     side point.

14                  Suppose an employer in -- a -- a place  
15     of employment is open from 9 to 5. Let's say  
16     it's a store. For some reason, it's open  
17     from -- it closes at -- at 5 p.m. And there's  
18     an employee with a disability similar to -- to  
19     the -- to A.J.T.'s disability here, who can't  
20     work in the morning but could work later in the  
21     day.

22                  Would that employer be required under  
23     the ADA to allow this employer -- employee to  
24     work after closing time instead of during the  
25     normal hours when this -- when this business is



1 providing a service to the public?

2 MS. REAVES: No, because, under the  
3 reasonable accommodation framework, the employer  
4 would be able to say: Well, this isn't a sort  
5 of accommodation that's reasonable on its face  
6 or used in a variety of cases. This isn't a  
7 sort of accommodation we've seen before. And  
8 that's a defense courts often recognize.

9 And then they'd also say: Well, this  
10 would be a fundamental alteration to our  
11 business.

12 And I think, Justice Alito, one thing  
13 I would just point out is I actually think that  
14 underscores some of the differences between the  
15 IDEA and Title II and Section 504 in the  
16 education context.

17 You know, we have not taken a position  
18 on this, but just because after-hours education  
19 is required under the IDEA does not mean that  
20 that's a required reasonable accommodation under  
21 Title II of Section 504.

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

24 CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor?

1 Justice Kagan?

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

9 MS. REAVES: So I think below, without  
10 any other urging, presumably, the Eighth Circuit  
11 would apply its general precedent to those two  
12 questions. And the Eighth Circuit has generally  
13 held that to state a violation of Title II or  
14 Section 504, you don't have to prove an intent.  
15 That's also true for injunctive relief. But  
16 you -- the plaintiff would have to prove  
17 deliberate indifference for damages.

18 We haven't taken a position on  
19 whether, you know, Respondents could try to  
20 raise these broader arguments on remand. I  
21 think -- I think there's some good arguments  
22 that those have been forfeited and that there  
23 are judicial estoppel, but that would obviously  
24 be a question for the lower courts to sort out.

25 JUSTICE KAGAN: And you said without

1 any urging on our part or without any  
2 encouragement. I mean, is -- is -- is there an  
3 argument for encouragement? Is there -- is the  
4 better approach not to do that? What -- do you  
5 have a position on that?

6 MS. REAVES: We don't think that  
7 there's any basis for courts to start  
8 reconsidering the reasonable accommodations  
9 framework that all courts of appeals have signed  
10 off on. I mean, this Court has recognized it  
11 since the mid-1970s. The entirety of the  
12 Rehabilitation Act and Title II have been built  
13 up around that. And so I don't think there's a  
14 good basis for that, and there would -- there  
15 wouldn't be any reason to encourage it.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: You said that  
21 clear notice was important, I think, in this  
22 context in damages claims. And the other side  
23 says that your framing of deliberate  
24 indifference, in particular, actual knowledge  
25 that a federally protected right was

1 substantially likely to be violated -- they  
2 focus on substantially likely -- that that does  
3 not give in this context school districts clear  
4 notice of what they have to do, particular --  
5 you know, something like this, 4:30 p.m. or 6:30  
6 p.m., and that it's therefore -- and you're  
7 talking about reasonable accommodations and line  
8 drawing to Justice Alito's question.

9 How do we deal with that?

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

18 JUSTICE KAVANAUGH: Well, just on the  
19 question, though, this standard is not exactly  
20 crystal-clear. At least that's what the other  
21 side says. School districts, to Justice Alito's  
22 point, are going to be on the hook for  
23 substantial expenditures, and they want just  
24 notice, tell us whether we're substantially  
25 likely to violate the law. How are they

1       supposed to determine that?

2               MS. REAVES:   So a couple of responses  
3       to that.   So, first of all, I do think, you  
4       know, this is an actual knowledge requirement,  
5       and it is failure to act, a deliberate choice  
6       not to act.   And when it comes to --

7               JUSTICE KAVANAUGH:   You say actual  
8       knowledge of your legal obligations, correct?

9               MS. REAVES:   So it's not actual  
10      knowledge of the law, but it's actual  
11      knowledge -- and, I mean, I think this is  
12      consistent with normal intent standards -- that,  
13      you know, your actions are -- are illegal and --  
14      or your actions are, you know, likely to violate  
15      someone's rights.   So it's not that you have to  
16      know --

17              JUSTICE KAVANAUGH:   That's pretty --

18              MS. REAVES:   -- the precision of --  
19      and, I mean, this is a tricky area in many areas  
20      of law, but I do think that with the substantial  
21      likelihood standard, as this Court has described  
22      it in Davis and Gebser, it is going to require,  
23      you know, a more than 50 percent assurance that  
24      a violation's going to occur, and that means  
25      that you've kind of made a mistake as to the

1 whole reasonable accommodation framework.

2           And I would just point out that  
3 because we're just talking about injunctive  
4 relief, the kind of worst-case scenario here is,  
5 if the entity mistakenly, you know, denies a  
6 reasonable accommodation and it turns out they  
7 should have granted it, they'll just have to  
8 grant it going forward unless there is, you  
9 know, this high level of deliberate  
10 indifference. Like, the standard builds in the  
11 ability for school districts to make significant  
12 mistakes and not be held liable for damages.

13           JUSTICE KAVANAUGH: Sorry to belabor  
14 it. One last question. If -- if a school  
15 district says I don't know whether -- the  
16 counsel for the school district says I don't  
17 know whether the law would require us to go to  
18 6 p.m. or 4:30 p.m., I just don't know, I don't  
19 know how that will be assessed, can -- can a  
20 court then say that they acted with knowledge  
21 that a federal right was substantially likely to  
22 be violated?

23           MS. REAVES: I don't think so. I  
24 think that would fall into the kind of  
25 bureaucratic inaction or negligence buckets,

1     which are not high enough to be actual  
2     knowledge.

3                   JUSTICE KAVANAUGH:   Thank you.

4                   CHIEF JUSTICE ROBERTS:   Justice  
5     Barrett?

6                   Justice Jackson?

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

22                   MS. REAVES:   So I do think the  
23    bottom-line inquiry is going to be intent, but I  
24    think you're absolutely right that in a school  
25    context in particular with a disabled child,

1     there's going to often be a lot of  
2     back-and-forth between the school district and  
3     the student, and that may often, you know, be  
4     relevant to showing intent. And I think some of  
5     these cases that we've cited, like the Liese  
6     case I cited earlier, you know, intent there was  
7     possibly shown by the repeated requests for  
8     reasonable accommodation and failure to grant  
9     those requests or to --

10           JUSTICE JACKSON: So let me just ask  
11     this.

12           MS. REAVES: -- consider them  
13     seriously.

14           JUSTICE JACKSON: If -- if we say  
15     there's no heightened standard here and that the  
16     regular standards apply, and let's say the  
17     Eighth Circuit has adopted deliberate  
18     indifference in this context, the ADA claim  
19     could then proceed in the sense that it's not  
20     barred because we don't have this animus.

21           Would there be then some engagement  
22     around whether or not this particular  
23     accommodation was reasonable?

24           MS. REAVES: Yes. I think that would  
25     be appropriate on remand. So we obviously



1 haven't taken a position on how this should come  
2 out.

3 JUSTICE JACKSON: Yes.

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

12 JUSTICE JACKSON: Mm-hmm.

13 MS. REAVES: And then, if yes, to --  
14 the liability question would also need to go  
15 through deliberate indifference as to her  
16 request for damages.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Ms. Blatt.

21 ORAL ARGUMENT OF LISA S. BLATT  
22 ON BEHALF OF THE RESPONDENTS

23 MS. BLATT: Mr. Chief Justice, and may  
24 it please the Court:

25 This Court should affirm Monahan.

1 Bare IDEA violations do not support liability  
2 under Section 504 or the ADA. Instead, the  
3 defendant must have acted with discriminatory  
4 intent. Monahan correctly described that intent  
5 as bad faith, which is the longstanding term for  
6 actions done for an improper reason, here,  
7 disability.

8           504 and Title II require  
9 discrimination by reason of disability. This  
10 Court has held that the nearly identical text in  
11 Title VI requires intent to discriminate.  
12 Petitioner acknowledges that because the law  
13 here expressly incorporates Title VI rights and  
14 remedies, discriminatory intent must be shown to  
15 get damages. But Petitioner departs from that  
16 intent requirement for liability and  
17 injunctions.

18           That's wrong. When Congress wanted  
19 intent-free liability, it said so expressly. In  
20 ADA's Title I and III, Congress spelled out  
21 reasonable accommodations intent-free claims and  
22 barred damages without intent for employers and  
23 altogether for hotels and hotdog stands.  
24 Congress did not plausibly disfavor states and  
25 localities in Title II.

1           This Court should decide the correct  
2     standard. The petition ends with: "What  
3     standard should apply under the ADA and Rehab  
4     Act is a pure question of law. It should be  
5     resolved in this case." That's a quote. We  
6     agree.

7           And reversing Monahan would expose  
8     46,000 public schools to liability when, for 40  
9     years, they have trained teachers, allocated  
10    budgets, and obtained insurance all in reliance  
11    on Monahan. Every good-faith disagreement would  
12    risk liability or even the nuclear option, the  
13    loss of federal funding, which is over a hundred  
14    billion dollars.

15           The district cares deeply about Ava  
16    and gave her more service than any other student  
17    even before this litigation started. Such  
18    good-faith efforts should not support  
19    discrimination liability.

20           I welcome questions.

21           JUSTICE THOMAS: Is this the same  
22    argument that you made below?

23           MS. BLATT: Yes. So let me take you  
24    through again -- I had an out-of-body experience  
25    listening to what we argued, but in the

1 rehearing petition on page 1, the school  
2 district argued Monahan is required by the text.  
3 On page 26 of the brief in opposition, we said  
4 Monahan is required by the text. We quoted the  
5 text, and we said it requires discrimination  
6 intent. We -- we cited Title VI because this  
7 statute expressly incorporates the rights and  
8 remedies of Title IV's intent was required. We  
9 cited Sandoval, which is your seminal case under  
10 Title VI, which holds the nearly identical  
11 language requires discriminatory intent.

12 Now, to be sure, page 27's ongoing and  
13 the rehearing petition and the red brief still  
14 argues from the top of the mountain that this  
15 standard makes particularly good sense in the  
16 school context because the other side in their  
17 complaint -- and this goes directly to Justice  
18 Alito's question -- on paragraphs 118 and 133  
19 say just because you violate the IDEA, that is  
20 ipso facto a violation of the ADA and  
21 Rehabilitation Act.

22 So we've always said that you owe  
23 deference to schools, and this standard makes  
24 sense.

25 And I can talk about how Monahan

1 arrived. Monahan makes complete sense. It's a  
2 caricature and not an accurate description of  
3 that case.

4 It starts with the language of the  
5 statute and said: When you have a mere  
6 violation of the requirement to provide a free  
7 and appropriate education, that is not  
8 necessarily discrimination, "the statute solely  
9 by reason of discrimination." Something else  
10 was required.

11 Now the Court chose bad faith for a  
12 reason. Bad faith by definition means an  
13 improper purpose. The only purpose that is  
14 prohibited by this statute is -- is disability.  
15 No one, no case, no cite has ever said that's  
16 animus. Again, that's made up, hence,  
17 out-of-body experience.

18 JUSTICE JACKSON: Ms. Blatt, I --  
19 I'm --

20 MS. BLATT: Yes.

21 JUSTICE JACKSON: -- I'm over here  
22 trying to really figure out what you argued  
23 below --

24 MS. BLATT: Sure.

25 JUSTICE JACKSON: -- and the many,

1 many times that I understood you to be pegging  
2 your argument to the unique elements of this  
3 particular environment.

4 MS. BLATT: Correct.

5 JUSTICE JACKSON: And so I think it  
6 might be a little unfair to suggest that what  
7 you were always just saying is that Monahan is  
8 based on the text of the statute.

9 It seems to me that you were very  
10 clearly saying in your -- right up and to the  
11 opposition to rehearing and to the bio below,  
12 that there was something about the IDEA context  
13 in schools that gave Monahan its value.

14 MS. BLATT: Both of those statements  
15 are correct. It is not inconsistent to say  
16 Monahan is required by the text and this makes  
17 great policy sense in the school context, which  
18 is also what Judge Arnold said in the Eighth  
19 Circuit.

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

24 JUSTICE JACKSON: No, no, no, I'm  
25 not -- I don't think the argument is that you've

1 never defended it by the text. I think the --

2 MS. BLATT: Well, what is a lie and  
3 what is inaccurate --

4 JUSTICE JACKSON: Well, no, no, no.  
5 I --

6 MS. BLATT: If I could just get this  
7 out -- if I could just get this out, please.

8 What is a lie and inaccurate is that  
9 we ever said in any context that this Court  
10 should take the same language and define it  
11 differently depending on context. That is not  
12 true. There is no statement. They adding words  
13 to our mouth. We never said you should have a  
14 double regime.

15 What the school district has said,  
16 which is what Monahan said, is --

17 JUSTICE GORSUCH: You -- you believe  
18 that Mr. Martinez and the Solicitor General are  
19 lying? Is that your accusation?

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

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

24 MS. BLATT: Okay. Well, they should  
25 be more careful in character --

1 mischaracterizing a position by an experienced  
2 advocate of the Supreme Court, with all due  
3 respect.

4 CHIEF JUSTICE ROBERTS: Counsel, I'm  
5 quoting from their reply brief, where they say  
6 that -- with citations, what you said, that the  
7 secondary education was a "unique context"  
8 "giving rise to a unique subset" "calling for a"  
9 "different standard."

10 MS. BLATT: Correct.

11 CHIEF JUSTICE ROBERTS: That seems to  
12 me to be what the --

13 MS. BLATT: Well, I'm sorry, no.  
14 Where does it say that quoting for a different  
15 standard? That part we never said. Are they  
16 quoting?

17 CHIEF JUSTICE ROBERTS: Well, they've  
18 got quote marks around it.

19 (Laughter.)

20 MS. BLATT: Where's the -- where's the  
21 page?

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

24 MS. BLATT: Oh. Well, they're -- I  
25 mean, we never said that there should be



1 different standards. What we've always said and  
2 what we've acknowledged in the brief in  
3 opposition, which is true, that outside the  
4 school context, the courts have said there's no  
5 intent at least for liability but for damages.

6 But we are where we are with the  
7 question presented. What I hear the real  
8 dispute is: What does the question presented  
9 ask? And the question presented, we read, is:  
10 What is the correct standard?

11 Now, to be sure, they add the  
12 pejorative term "uniquely stringent." But had  
13 the question said should this Court adopt a  
14 uniquely stupid bad-faith standard, the question  
15 would still not be should courts adopt uniquely  
16 stupid standards. It would be should courts  
17 adopt the bad-faith standard.

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

23 I mean, to the extent that you're now  
24 saying it's dumb for them to have adopted it or  
25 not to have adopted it everywhere, can we get to

1 the substance of your argument?

2 MS. BLATT: Sure. Our definition of  
3 "bad faith" is discriminatory intent.

4 JUSTICE JACKSON: No, I understand.  
5 But has a single other standard --  
6 circuit applied that outside of this particular  
7 context?

8 MS. BLATT: So -- well, no, in the  
9 sense of the circuits that are applying outside  
10 the school context, including the Eighth  
11 Circuit, don't apply bad faith. They apply no  
12 intent, deliberate indifference.

13 JUSTICE JACKSON: And is your argument  
14 that bad faith should apply everywhere?

15 MS. BLATT: Yes, in a -- the statutory  
16 text solely by discrimination is the reason for  
17 the action is a discriminatory intent standard.

18 JUSTICE BARRETT: And that would be a  
19 sea change, right? That's what the other side  
20 told us.

21 MS. BLATT: Well, it would be only a  
22 sea change in terms of liability. If we're  
23 going to talk about what the circuits --  
24 Judge Sutton --

25 JUSTICE BARRETT: Well, a sea change

1 in terms of liability is a pretty big sea  
2 change. I mean, Justice Jackson's pointing out  
3 that no circuit has adopted your rule.

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

6 In terms of outside the school case,  
7 Judge Sutton's opinion in the Sixth Circuit, and  
8 that counts as a court, has held that -- that  
9 this statute, just like Title IX and Title VI,  
10 requires discriminatory intent.

11 Now that's in the disparate impact  
12 context, and no one has had a basis for saying  
13 there's any distinction between reasonable  
14 accommodation and disparate impact.

15 JUSTICE BARRETT: But, regardless  
16 whether it's technically in the QP, it strikes  
17 me as a pretty big deal.

18 MS. BLATT: I -- I think that's right.  
19 And so --

20 JUSTICE BARRETT: Well, then why would  
21 we do it when we don't really have -- we  
22 don't -- we don't have -- you know, this didn't  
23 come up until their reply because they didn't  
24 understand it to be the QP. We don't have other  
25 circuits that have adopted the question.

1           As I suggested to Mr. Martinez, it's  
2 possible that if we decided this case in his  
3 favor, that then, when it goes back below, this  
4 argument that you're making here will be made,  
5 and then it can follow our traditional way of  
6 letting it percolate up, and then we can address  
7 it when we have more information.

8           But this seems pretty -- like a really  
9 pretty big deal.

10           MS. BLATT: I -- I think it's --  
11 it's -- everything you said I agree with, except  
12 for the blue brief and the government's brief  
13 said that the statute require -- that you have  
14 to apply the plain text. So, lo and behold, we  
15 looked at the plain text.

16           In terms of how you want to decide the  
17 case, absolutely, you need to make clear that if  
18 you're just going to reverse, that the Eighth  
19 Circuit is free, notwithstanding its precedent,  
20 to either level down, like the other side wants,  
21 and apply the no intent, deliberate indifference  
22 outside the school context, inside the school  
23 context, or level up.

24           JUSTICE KAVANAUGH: On the -- on the  
25 level down/level up point, you're defining "bad

1     faith" so it doesn't require animus.

2                 MS. BLATT:  Correct.

3                 JUSTICE KAVANAUGH:  So you're, I  
4     think, lowering bad faith from what some people  
5     might think bad faith encompasses.

6                 MS. BLATT:  But no one -- some people  
7     is just this conversation.  No court has --  
8     these courts have said --

9                 JUSTICE KAVANAUGH:  Some judges.

10                MS. BLATT:  They said it requires  
11     discriminatory intent.  No one has said animus.

12                JUSTICE KAVANAUGH:  Okay.  I'm just  
13     making the point, you're saying bad faith does  
14     not require animus, correct?

15                MS. BLATT:  Correct.

16                JUSTICE KAVANAUGH:  Okay.  And then  
17     the SG defines "deliberate indifference" to  
18     require actual knowledge that a -- that it's  
19     substantially likely that you're violating the  
20     law.

21                And I'm wondering, "bad faith" as you  
22     define it, without a requirement of animus, and  
23     what they say is deliberate indifference, I'm  
24     having a little trouble seeing a case that would  
25     actually come out differently under those two

1 things.

2 MS. BLATT: Well, sure. Any -- and  
3 this is the problem with their deliberate  
4 indifference test.

5 And Justice -- this goes to Justice  
6 Jackson. No court, no context except a prison,  
7 would ever use a deliberate indifference test  
8 for intent to discriminate. Intent to  
9 discriminate is you have to intend to  
10 discriminate.

11 Their test is you could have no intent  
12 to discriminate. You could be obsessed with a  
13 scandal. You could have budget concerns. But  
14 you were deliberately indifferent to some  
15 unidentified percentage that a student asks for  
16 extra test time and you gave 30 minutes instead  
17 of 60 minutes.

18 Well, if you think that there's a  
19 substantial chance that 60 minutes might be it,  
20 but, in good faith, you want to -- you know, one  
21 circuit has held 30 minutes is enough, there's  
22 damages liability.

23 That is insane. That is not an intent  
24 to discriminate. That is just either a  
25 disagreement about what the law requires or you

1 had some sort of weird problem that had nothing  
2 to do with a child's disability status. You  
3 just were deliberately indifferent.

4 If you're going to follow Title VI --  
5 and this is the Fifth Circuit. The Fifth  
6 Circuit said: I don't know what this deliberate  
7 indifference is. Title VI requires intent.

8 There's no scenario where deliberate  
9 indifference has ever meant discrimination in  
10 and of itself, as opposed to you're deliberately  
11 indifferent to a teacher's or student's  
12 intentional sexual harassment.

13 We agree you could have a deliberate  
14 indifference if there were supervisory liability  
15 to discrimination against the disabled.

16 JUSTICE KAVANAUGH: Why do you think  
17 that's taken hold in all the circuits outside  
18 the school context?

19 MS. BLATT: Easy. They cited this  
20 case called Monell. I mean, that's just wrong,  
21 weird, mistake.

22 So then they said: Well, Davis and  
23 Gebser said deliberate indifference, and they  
24 just misread it. I mean, the Fifth Circuit got  
25 it right.

1                   So, if you're going to rule against  
2     us, at least wipe the slate clean and say: If  
3     you're going to -- they want to say you have to  
4     follow Title VI because they don't make a  
5     difference in terms of parties and you have to  
6     use intent for damages, then intent for damages  
7     should be intent to discriminate just like Title  
8     VI.

9                   And we do think there is no textual  
10    basis. They raised a lot of policy sense --  
11    policy stuff between an injunction and loss --  
12    and loss of -- sorry -- injunction and damages.

13                  But federal funding is now a big deal.  
14    They could say one good-faith disagreement with  
15    the IDEA is enough to cut off all the school  
16    district's funding just because they disagreed?

17                  Or, actually, no, they could have just  
18    got it wrong. Their view is all funding in any  
19    school, even Harvard, any school, the entire  
20    funding be cut off because they didn't fix the  
21    elevator long enough. Like the elevator was  
22    there, but it was broken for two months or two  
23    weeks. Failure to reasonably accommodate  
24    liability.

25                  And now federal funding is a big deal.



1 No -- no -- no government has ever threatened  
2 the loss of federal funding based on Title --  
3 based on the Rehab Act. But you don't need  
4 anti-Semitism anymore or encampments. You can  
5 just say you violated the reasonable  
6 accommodation.

7 Now this is a big deal. That's what  
8 Justice Barrett's saying. So I understand that  
9 you don't want to take on this -- this case, but  
10 I didn't bring this petition. This petition  
11 said decide the standard and then said -- cited  
12 your article, Justice Kavanaugh, saying you look  
13 at the plain text. So I can't be faulted by  
14 pick -- like what Judge Arnold did and pick up  
15 the text, and it says solely by reason of  
16 discrimination.

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

20 MS. BLATT: Sure.

21 JUSTICE JACKSON: It -- it did not say  
22 decide the standard. I'm reading. The question  
23 presented is whether the ADA and Rehabilitation  
24 Act require children with disabilities to  
25 satisfy a uniquely stringent bad-faith-or-gross-

1 misjudgment standard when seeking relief for  
2 discrimination relating to their education.

3 MS. BLATT: So that can have two  
4 meanings. One, you could put all the emphasis  
5 on "uniquely stringent." Should this Court  
6 adopt a uniquely stringent standard when it's  
7 called bad faith? Or it could mean what we  
8 think the end of the petition said it meant?  
9 Should a Court adopt the bad faith standard,  
10 which is uniquely stringent? And the last  
11 page -- the last line of their petition says you  
12 should decide what standard applies in this  
13 case.

14 Now, if you want to read it as the  
15 "should courts adopt uniquely stringent  
16 standards," then you're right. The -- the --  
17 the parties agree.

18 JUSTICE JACKSON: And you're saying  
19 that's not the way you read it when I'm looking  
20 at page 27 of your bio, which says the  
21 bad-faith-or-gross-misjudgment standard is an  
22 appropriate exercise of discretion; most  
23 importantly, it accounts for the unique nature  
24 of claims like Petitioner's, that is, claims by  
25 students with disabilities regarding the

1       appropriateness of their IEPs.

2                   And you go on at length in talking  
3       about the unique nature of this particular  
4       context and why it would justify having this  
5       standard as opposed to the standard that all the  
6       courts have applied in other contexts.

7                   MS. BLATT:   Well, that's why page 26  
8       precedes page 27 --

9                   JUSTICE JACKSON:   Yes.

10                  MS. BLATT:   -- which I think you're  
11       reading from, and page 26 says the court of  
12       appeals' decision below is correct and it's  
13       correct because of the text, it's correct  
14       because it incorporates Title VI, and it's  
15       correct because it's been definitively  
16       interpreted in Alexander versus Sandoval, which  
17       is a pretty big deal for the uniquely worded  
18       Title VI case.

19                  But, Justice Jackson, there's no  
20       disagreement that we've always said that there  
21       is a big problem with the other side's argument  
22       in the school context, because every IDEA  
23       disagreement now risks the loss of federal  
24       funding and injunctive relief.  And so, yeah,  
25       that -- that -- that is a big deal.  And in

1 terms of damages, that's a big deal too if you  
2 have a deliberate indifference standard, which,  
3 to be fair to us, does not apply in any other  
4 context.

5 So there's no question that there's an  
6 incoherent big mess of a regime because this  
7 Court started out in Davis saying that this is  
8 not an affirmative action case. And then you  
9 had Choate, which is maybe not Exhibit A, but  
10 it's Exhibit B for what this Court has called  
11 the bad old days. And that case has a lot of  
12 dicta that talks about reasonable accommodation.  
13 Monahan was decided after Davis, before Choate.

14 JUSTICE JACKSON: But can I just --  
15 can I just focus your attention on that?  
16 Because I don't understand why you are really  
17 pressing this idea that discrimination claims in  
18 the context of reasonable accommodations and  
19 disability aren't something unique.

20 I mean, I -- I thought the -- the  
21 Alexander versus Choate line of thinking was  
22 that you can have discrimination in this  
23 context, say, differently from maybe racial  
24 discrimination or gender discrimination when an  
25 entity that is responsible for accommodating

1 someone with a disability doesn't act, that --  
2 that you have benign neglect, meaning you're not  
3 doing it out of some sort of intent to treat  
4 this person differently. In fact, what you say  
5 is I'm treating this person the same, and the  
6 same is a world in which they can't walk up the  
7 stairs and they can't see the board and they  
8 can't do the things that everybody else can do.

9 In the discrimination-of-disability  
10 context, the requirement of the law is to treat  
11 them differently --

12 MS. BLATT: Well --

13 JUSTICE JACKSON: -- differently in  
14 the sense that you're accommodating them so that  
15 they can take and have full enjoyment of the  
16 services.

17 MS. BLATT: Well --

18 JUSTICE JACKSON: So it's just a  
19 different concept in --

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

1 JUSTICE JACKSON: No, but the whole  
2 idea of accommodation is unique --

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

4 JUSTICE JACKSON: Accommodation is not  
5 in the statute?

6 MS. BLATT: 504 and Title II, no.  
7 That's what this -- I mean, no. That's what  
8 Judge Sutton said.

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

10 MS. BLATT: It sure as heck is not in  
11 the statute. The word "reasonable" is not in  
12 the statute. The word "accommodation" is not in  
13 the statute. This passive voice reading has got  
14 to be incorrect because it would bring all  
15 disparate impact claims under --

16 JUSTICE JACKSON: So you -- you  
17 read -- you read disability discrimination  
18 statutes to not be requiring accommodation for  
19 people with disabilities, that they -- that it's  
20 just about discriminatory intent, meaning not  
21 treating these people the same as everyone else?

22 MS. BLATT: Correct, and that is  
23 glaringly obvious when you look at the seminal  
24 statute of the ADA because Title I for  
25 employers, Title III for country clubs and

1 hotdog stands, have not only reasonable  
2 accommodations provisions, Justice Jackson, but  
3 they don't make hotdog stands liable for  
4 damages. And a made-up judicial damage remedy  
5 comes from thin air.

6 JUSTICE BARRETT: Ms. Blatt, the  
7 answer to this is probably clear since you  
8 called the two-tier test stupid. But I just --

9 MS. BLATT: I -- that was a --  
10 (Laughter.)

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

13 MS. BLATT: Correct.

14 JUSTICE BARRETT: Okay. So there is  
15 what Justice Gorsuch has sometimes called  
16 radical --

17 MS. BLATT: Radical agreement.

18 JUSTICE BARRETT: -- on that point?  
19 Okay.

20 MS. BLATT: There's radical agreement.  
21 What there's radical disagreement on is the  
22 question presented. And if you just say -- and  
23 I know it's sometimes easier for you to say we  
24 don't have to do a lot, but you cause real harm  
25 to the parties who don't have Supreme Court

1     counsel and lower courts who get confused when  
2     you just remand and say we just remand. So, if  
3     you could at least set the -- at least set the  
4     slate free -- while it is part of your job,  
5     Justice Kavanaugh, to set the law sometimes, and  
6     I understand it's easier for you, and you have a  
7     lot going on, not to set the law, but --

8             JUSTICE GORSUCH: Ms. Blatt --

9             MS. BLATT: Yeah.

10            JUSTICE GORSUCH: -- I -- I confess  
11     I'm still troubled by your suggestion that your  
12     friends on the other side have lied.

13            MS. BLATT: Okay. Let's pull it up.

14            JUSTICE GORSUCH: Yeah. I think we're  
15     going to have to here, and I'd ask you to  
16     reconsider that phrase.

17            MS. BLATT: At oral argument --

18            JUSTICE GORSUCH: If I might.

19            MS. BLATT: -- it was incorrect.

20            JUSTICE GORSUCH: If I -- if I --

21            MS. BLATT: Sure.

22            JUSTICE GORSUCH: Incorrect is fine.

23            MS. BLATT: Well, lying --

24            JUSTICE GORSUCH: People make  
25     mistakes.



1 MS. BLATT: Okay.

2 JUSTICE GORSUCH: You can accuse  
3 people of being incorrect, but lying --

4 MS. BLATT: That's fine.

5 JUSTICE GORSUCH: Ms. Blatt, if I  
6 might finish.

7 MS. BLATT: Sure.

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

10 MS. BLATT: Yep.

11 JUSTICE GORSUCH: -- as applied to the  
12 provision of IDEA services, the overlap between  
13 these statutes leads to a conceptual  
14 particularity that exists only in this context.

15 MS. BLATT: Yep.

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

18 Page 2. For more than 40 years,  
19 courts of appeals considering this unique subset  
20 of ADA and Rehabilitation claims --

21 MS. BLATT: Yeah.

22 JUSTICE GORSUCH: -- directly  
23 challenging IDEA's educational services have  
24 widely recognized that plaintiffs must establish  
25 more.

1 MS. BLATT: Yep.

2 JUSTICE GORSUCH: That scheme requires  
3 plaintiffs to show that school professionals  
4 acted with discriminatory intent by  
5 demonstrating that their decisions were premised  
6 on bad faith or gross misjudgment.

7 Page 3. In this unique context,  
8 courts must balance the Rehabilitation Act and  
9 ADA's prohibition on disability discrimination  
10 with educators' responsibility for determining  
11 appropriate special education services. The  
12 bad-faith-or-gross-misjudgment standard --

13 MS. BLATT: We say unique throughout.

14 JUSTICE GORSUCH: -- properly -- I'm  
15 not finished.

16 MS. BLATT: Yeah.

17 JUSTICE GORSUCH: Properly accounts  
18 for the need for deference.

19 Page 27. As courts have recognized,  
20 discrimination claims based on an IEP's adequacy  
21 are a conceptual particularity that exists in  
22 the primary and secondary educational context.

23 Further down: The bad-faith-or-gross-  
24 misjudgment standard permits the courts to  
25 adjudicate these novel claims without requiring

1 judges to substitute their own notions of sound  
2 educational policy for those in school  
3 authorities.

4 MS. BLATT: Correct.

5 JUSTICE GORSUCH: One -- one can  
6 interpret those perhaps different ways ---

7 MS. BLATT: Well --

8 JUSTICE GORSUCH: -- but, surely, a  
9 reasonable person could interpret them as  
10 arguing for a special rule in the educational  
11 context, correct?

12 MS. BLATT: No, only because of the  
13 text, but --

14 JUSTICE GORSUCH: Ms. Blatt.

15 MS. BLATT: Okay. Well, you -- I  
16 mean --

17 JUSTICE GORSUCH: A reasonable  
18 person -- all of those emphasized the unique  
19 context of primary and secondary education and  
20 the need for a special rule, don't they?

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

22 JUSTICE GORSUCH: Fine?

23 MS. BLATT: -- objecting to --

24 JUSTICE GORSUCH: Fine?

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

1 JUSTICE GORSUCH: Then -- then would  
2 you withdraw your accusation?

3 MS. BLATT: I'll withdraw it.

4 JUSTICE GORSUCH: Thank you. That's  
5 it.

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

7 JUSTICE SOTOMAYOR: Ms. Blatt, I  
8 also -- going back to a question Justice Barrett  
9 asked, you are basically saying, no, I'm not  
10 asking for a unique rule; I'm asking for a rule  
11 that applies in all discrimination statutes.  
12 But nowhere else have I seen the use of  
13 deliberate indifference or gross enough  
14 indifference used to define intentional  
15 discrimination.

16 In fact, in Abercrombie, we had a  
17 neutral policy that applied to all employees,  
18 they can't wear headgear, and we said a neutral  
19 policy can still discriminate --

20 MS. BLATT: Absolutely.

21 JUSTICE SOTOMAYOR: -- against  
22 religion even though there was no bad faith  
23 proven there. It was all hats are out.

24 MS. BLATT: Correct.

25 JUSTICE SOTOMAYOR: All coverings are

1 out.

2 MS. BLATT: Correct.

3 JUSTICE SOTOMAYOR: So I don't know  
4 where the bad faith comes from. I'm not even  
5 sure where deliberate indifference comes from.  
6 But putting that aside, before we rule in a way  
7 that suggests that your new definition applies  
8 to every statute, that this is the way we now  
9 define intentional for every statute, shouldn't  
10 we have had that fully aired below --

11 MS. BLATT: Well, if --

12 JUSTICE SOTOMAYOR: -- and accurately  
13 aired?

14 MS. BLATT: So, if you just interpret  
15 bad faith the way we think Judge Arnold did and  
16 the way we do it as improper purpose with only  
17 disability, then it's nothing -- it's nothing  
18 new. It's just a prohibited reason, just like  
19 in the racial gerrymandering.

20 JUSTICE SOTOMAYOR: Well, but that is  
21 gerrymandering, the definition, because, if  
22 it's -- a neutral policy in terms of what you  
23 wear can still discriminate.

24 MS. BLATT: Yes.

25 JUSTICE SOTOMAYOR: So --

1 MS. BLATT: So we're in complete  
2 agreement that if you have a policy to cancel  
3 all field trips because -- and the reason is  
4 because you don't want to make accommodations  
5 for the disabled, then that is bad faith or  
6 that's an intent to discriminate.

7 We are fine with the statutory  
8 language "solely" -- or take out the "solely by  
9 reason of disability."

10 JUSTICE SOTOMAYOR: But they didn't --  
11 there was no evidence that they passed this  
12 because they wanted to discriminate against  
13 religious people. They passed their dress code  
14 because they wanted a particular look in their  
15 store. It wasn't until this individual came in  
16 and said, "My religion requires this," is they  
17 said, "I'm not going to reasonably accommodate  
18 you."

19 MS. BLATT: Yeah. So --

20 JUSTICE SOTOMAYOR: But they didn't  
21 pass the policy with antireligion animus.

22 MS. BLATT: If you -- let me just give  
23 you another example.

24 JUSTICE SOTOMAYOR: They're asking --  
25 when you're using the words "bad faith," you're

1 talking about animus.

2 MS. BLATT: No, I'm talking about --  
3 and you can -- you're in charge, so you can say:  
4 Intent to discriminate is the standard. We're  
5 not going to use bad faith. We don't like that  
6 word. Intent to discriminate. If you say bad  
7 faith, please make clear that it only means  
8 intent to discriminate, because you could  
9 violate the IDEA just because you think disabled  
10 children are better off without the  
11 accommodation.

12 That is a -- a -- that is a violation  
13 of -- of the ADA and the Rehab Act. That is  
14 discrimination. It's not animus. It could be  
15 benign intent.

16 Basically, it's the same standard in  
17 the race context or in the -- the sex context.  
18 No one cares what your views are towards women  
19 or people of color if you treat them  
20 differently. You can't do that.

21 JUSTICE SOTOMAYOR: Counsel, it would  
22 have been nice to have known that we were biting  
23 off that big a chunk.

24 MS. BLATT: I agree. But in terms of  
25 what we had to do when you granted cert was look

1 at the text, and then the blue brief said that  
2 there is no intent required. They cited the  
3 definition of what a qualified individual was  
4 and said --

5 JUSTICE SOTOMAYOR: By the way,  
6 intent's not even an issue here because there  
7 wasn't an injunction being -- or the lack of an  
8 injunction challenge here. They got the  
9 injunction under the IDEA, didn't they?

10 MS. BLATT: They want more.

11 JUSTICE SOTOMAYOR: Well, we can put  
12 aside whether they want more. But the only  
13 thing between -- before us on the decision below  
14 is whether it's an intent standard or a  
15 heightened standard, correct?

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

20 And our point on the damages is part  
21 of their whole schtick is that this statute  
22 incorporates Title VI, and they -- they say and  
23 that requires intent.

24 And so we are saying -- and, again,  
25 back to defense of the red brief, when the --



1 both the gray brief and the blue brief say that  
2 no intent is required under the statute, we said  
3 that's wrong.

4 JUSTICE SOTOMAYOR: So --

5 CHIEF JUSTICE ROBERTS: Well, I  
6 mean -- I'm sorry.

7 JUSTICE SOTOMAYOR: Go ahead. Never  
8 mind.

9 CHIEF JUSTICE ROBERTS: I was going to  
10 say the -- the -- the choice is not one standard  
11 or another. I would have thought from the  
12 framing of the whole case the question was  
13 whether you have a different standard in the  
14 educational context.

15 MS. BLATT: And if -- if that is --  
16 and I agree. If that is the way you define the  
17 question presented, then the parties are in  
18 radical agreement.

19 If -- as we read, and the last  
20 statement of their petition said you should  
21 resolve the standard. If you don't want to  
22 resolve the standard, then you're correct,  
23 there's not much to decide.

24 But you are overturning, in effect,  
25 the law of five circuits that affects 40,000 --

1 46,000 schools. And there are 8 million kids  
2 on -- that are covered by the IDEA, and there  
3 are 30,000 of these complaints, and their view  
4 is every IDEA violation is a violation of the  
5 statute.

6 Now they say there may have been  
7 another violation, but that is the theory. And  
8 in terms of the unique context, what Monahan  
9 says is: If you violate a free and appropriate  
10 education, that's just not necessarily  
11 discriminatory.

12 It could be based on budgets. It  
13 could be based on you just disagreed what the  
14 accommodation was, as -- as was the case here.

15 And the Court in Monahan said: You  
16 need to show discriminatory intent. And it used  
17 the phrase "bad faith," meaning the improper  
18 purpose.

19 But I agree, if you -- if you read  
20 this like Ames, where there was no defense of  
21 the decision below, then you don't have a lot to  
22 do. But we're here radically defending the  
23 decision below, which we've done in the  
24 rehearing petition and in the -- in the brief in  
25 opposition and in the -- the red brief.

1 JUSTICE SOTOMAYOR: You don't think it  
2 was -- that you might have violated Rule 15.2 of  
3 our rules that requires counsel of its  
4 obligation, Respondents, "to address any  
5 perceived misstatement of fact or law in the  
6 petition that bears on what issues properly  
7 would be before the Court if certiorari were  
8 granted?"

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

11 MS. BLATT: We didn't say that. So  
12 that -- that is -- just to be clear, we did not  
13 say the implications of our textual defense  
14 means Monahan or a intent standard would be  
15 required outside.

16 What we took as given and why I don't  
17 think the rules were violated is that all the  
18 courts have said, in this asymmetrical world  
19 following the regulations and Choate, that there  
20 is a no intent requirement for reasonable  
21 accommodations, although an intent requirement  
22 for disparate impact, Judge Sutton's opinion.

23 And then all the circuits but the  
24 Fifth Circuit have held -- have said there's  
25 deliberate indifference or intent because of the

1 Title VI incorporation.

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

5 So that -- that's right, we didn't  
6 point that out because it was only when, you  
7 know, we're here briefing on the merits, and I  
8 think you would want Respondents' counsel to  
9 defend the decision below, the decision below is  
10 based on the text, so we started with the text.

11 I mean, what I think the other --

12 JUSTICE SOTOMAYOR: Thank you,  
13 counsel.

14 MS. BLATT: Sorry.

15 JUSTICE ALITO: Where do you think  
16 that the Petitioner says that a violation of the  
17 IDEA necessarily constitutes a violation of the  
18 ADA?

19 MS. BLATT: It's JA 2024 at paragraphs  
20 118 and 133. So it's not in the brief. It's in  
21 the complaint. I would just say it's not --

22 JUSTICE ALITO: I'm sorry,  
23 paragraph 118 and what else?

24 MS. BLATT: And 133.

25 Now paragraphs 119 and 134 say the ADA

1 and the Rehab Act were violated other ways, but  
2 part of their complaint is just the violation of  
3 the IDE -- it just says the violation of the  
4 IDEA itself is a violation of the other  
5 statutes.

6 And we would hope that you would clear  
7 that up, that that can't possibly be right,  
8 because the IDEA can -- you know, can -- can --  
9 can be -- go way beyond what might be a  
10 reasonable accommodation.

11 And I also think it's not clear from  
12 their brief on deliberate indifference.  
13 Deliberate indifference as to what statutorily  
14 protected right? Either the reasonable  
15 accommodation right or the IDEA. And I think,  
16 in fairness to them, it's both.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas?

20 Justice Alito?

21 JUSTICE ALITO: Well, I won't have  
22 another opportunity to question Mr. Martinez, so  
23 perhaps he could address that in rebuttal, if he  
24 sees fit, whether he is arguing that a violation  
25 of the IDEA necessarily constitutes a violation

1 of the ADA.

2 What he -- what the complaint says is  
3 that the district's violations of the IDEA also  
4 violate a plaintiff's rights under Section 504  
5 of the Rehabilitation Act, and he says the same  
6 thing about the ADA.

7 MS. BLATT: Yeah. And, again, it's  
8 important to school districts that you make  
9 clear if you can level set that -- the mere bare  
10 violation because that is the thrust of Monahan,  
11 is that a bare violation does not necessarily  
12 violate the statute.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor, anything?

16 Justice Kagan?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: You say the  
19 statute requires intentional discrimination,  
20 Title II, and the Rehabilitation Act. The  
21 Solicitor General says, yes, that's right,  
22 deliberate indifference is an intent standard.

23 I just want to -- do you want to  
24 respond to that?

25 MS. BLATT: Deliberate indifference is

1 not an intent standard --

2 JUSTICE KAVANAUGH: Okay. That's  
3 your --

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

8 But you can intentionally act --  
9 deliberate indifference can be evidence of a  
10 discriminatory intent, but just because you  
11 deliberately don't respond to a parent's  
12 complaints doesn't necessarily mean you intend  
13 to discriminate on the basis of disability.

14 JUSTICE KAVANAUGH: Well -- right.  
15 And I think the way the Solicitor General then  
16 defines "deliberate indifference" is why at  
17 least I see the delta here as pretty small,  
18 because they say you have to know that you're  
19 violating your legal obligations or what's  
20 substantially likely to be your legal  
21 obligation. That's really --

22 MS. BLATT: But then they said that  
23 you don't have to know the law. So, in other  
24 words, if a parent says: High school, you're  
25 violating your legal obligations --

1 JUSTICE KAVANAUGH: Well, they did --  
2 that -- that is true, they did say you have to  
3 know your legal obligations, but that --

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

6 JUSTICE KAVANAUGH: Well, they did --

7 MS. BLATT: -- you don't need to know  
8 the law. And I know that's what my friend for  
9 the Petitioner said, you don't need to know the  
10 law.

11 JUSTICE KAVANAUGH: I don't know how  
12 you can know -- this is a helpful question, by  
13 the way.

14 MS. BLATT: Yeah.

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

19 MS. BLATT: Well, I -- we would  
20 welcome that. If you're going to have a  
21 deliberate indifference standard, that it be as  
22 high as possible, because if you have these --  
23 again, what the school districts are worried  
24 about is because you -- you -- you have good  
25 faith disagreements in all -- I mean, these are



1 really tough cases on -- in terms of, you know,  
2 how much support. Here the -- the -- she had  
3 ten specialists.

4 JUSTICE KAVANAUGH: Okay.

5 MS. BLATT: So these are just tough  
6 cases. And so the question was how much support  
7 she should be given at home.

8 JUSTICE KAVANAUGH: I guess what I'm  
9 getting at is deliberate indifference can be  
10 fairly protective -- as defined by the Solicitor  
11 General, fairly protective of school districts  
12 in the sense that the law's not like you open a  
13 code book and it tells you, oh, go to 6:00 p.m.  
14 You have to decide --

15 MS. BLATT: Yes. If you --

16 JUSTICE KAVANAUGH: -- what's  
17 reasonable.

18 MS. BLATT: If you would define it  
19 that way, that would be great. I mean, we would  
20 appreciate that, although we do think if you're  
21 going to incorporate Title VI, I mean, you're  
22 now just saying the Fifth Circuit is wrong. The  
23 Fifth Circuit said, oh, I don't know, Sandoval  
24 looks likes it says intent; it doesn't say  
25 deliberate indifference. And they -- these are

1 all Spending Clause statutes. So Title IX,  
2 Title VI, the Rehab Act, the Affordable Care Act  
3 incorporates all these. They -- their -- and  
4 this is a one area. And Justice Barrett is  
5 correct, this is a big messy area.

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

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Yeah. I just -- I'm  
15 still struggling with how you account for the  
16 language in the disability discrimination  
17 statutes that goes beyond discrimination and  
18 discriminatory intent.

19 And so I'm looking, for example, at  
20 the Title II language, which says, "No qualified  
21 individual with a disability shall, by reason of  
22 such disability, be excluded from participation  
23 in or be denied the benefits of the services,  
24 programs, or activities of a public entity, or  
25 be subjected to discrimination by such entity."

1                   And my understanding of the way at  
2     least that courts have been interpreting this is  
3     you don't need discriminatory intent in a  
4     situation in which a person is alleging, for  
5     example, that they have been excluded from the  
6     participation.

7                   And you seem to be suggesting that you  
8     still have to have that element in some way.  
9     And I'm confused by that.

10                  MS. BLATT: Sure. And you have to  
11     start from the fact of what is Congress's  
12     authority to even pass Title -- Title II? It's  
13     not a Commerce Clause legislation. Well, it's  
14     important because it looks like it's Section 5,  
15     and if you just -- so you have to see it through  
16     the lens of -- of Congress's power under Section  
17     5.

18                  But even putting that aside, if you  
19     don't read it -- if you just look at Titles I  
20     and Title III where they spell out disparate  
21     impact, and so that -- if you read that statute  
22     in the passive voice to require disparate  
23     impact, all the disparate impact and reasonable  
24     accommodation provisions and definitions and  
25     contours are all superfluous.

1                   So that if you just looked at -- I  
2       actually think this case is easier under  
3       Title II because you don't have the Choate  
4       baggage. But if you just look at Title II, it's  
5       an easy case that there is no reasonable  
6       accommodations requirement at all. That --  
7       that's -- that's our -- that's our stronger  
8       case, is under Titles -- Title II, because  
9       Titles I and Title III are so chock-full of the  
10      contours.

11                  And there's no reasonable requirement  
12      in II. So it's made up. It doesn't say you  
13      have to reasonably accommodate. On the other  
14      side, they say the definition is any -- you  
15      know, remove structural, communications,  
16      transportation barriers and auxiliary aids. But  
17      there's no word "reasonable" in there. So it  
18      has to be read in when it's actually defined in  
19      great details in I and III. What it means to  
20      modify the program, what an -- undue hardship is  
21      a four-part test, and what is -- what is readily  
22      achievable is a four-part test.

23                  JUSTICE JACKSON: Thank you.

24                  CHIEF JUSTICE ROBERTS: Thank you,  
25      counsel.

1                   Rebuttal, Mr. Martinez?

2                   REBUTTAL ARGUMENT OF ROMAN MARTINEZ  
3                   ON BEHALF OF THE PETITIONER

4                   MR. MARTINEZ: Your Honors, I'm not  
5 going to dignify Ms. Blatt's name calling here  
6 with a response in kind, though I appreciate  
7 that she withdraw the charges here, although  
8 perhaps under a bit under duress.

9                   I do want to address whether we were  
10 incorrect in characterizing our position. And  
11 the answer is absolutely not. You heard her say  
12 today that she was radically defending the  
13 Eighth Circuit's decision in this case. Well,  
14 that decision includes footnote 2, which  
15 expressly characterized Monahan as applying a  
16 higher test, a two-tiered test. So if she's  
17 radically defending that, then she's radically  
18 defending the two-tiered approach that I think  
19 she said was completely wrong.

20                  We would also encourage you to look at  
21 page 23, in addition to all the other pages that  
22 were cited, where she said that the universe of  
23 plaintiffs with claims affected by the question  
24 presented is narrow. For educational  
25 discrimination plaintiffs not covered by the

1 IDEA such as college students, a bad faith or  
2 gross misjudgment standard does not apply.  
3 That's exactly the opposite what she's saying  
4 now.

5 So what is at issue in this case? I  
6 think the most important thing we heard from  
7 Ms. Blatt is when she conceded in questioning  
8 from Justice Jackson that she is trying and the  
9 district arguments here are trying to get rid of  
10 the reasonable accommodation claims that people  
11 in this country with disabilities have enjoyed  
12 for decades. That's what's at stake.

13 This is a revolutionary and radical  
14 argument that has not been made in this Court  
15 and that she's trying to get you to decide on  
16 the basis of essentially no briefing. There are  
17 -- the -- the question of whether reasonable  
18 accommodations are required is easy. There are  
19 subsidiary questions that are challenging. You  
20 should not address those subsidiary questions in  
21 this case because we haven't had briefing. It's  
22 unfair to you. You don't have a decision below.  
23 It's unfair to us. It's unfair to our amici,  
24 the disability rights community, who would have  
25 rung a five-alarm fire if they had known that

1 reasonable accommodation claims were on the  
2 table. So you should not address that. You  
3 should apply your waiver rules.

4 If you do address some of this stuff,  
5 Justice Kavanaugh, I would encourage you to look  
6 at the COPAA amicus brief. On pages 18 to 29,  
7 it has a very good discussion of the kinds of  
8 cases and where the different standards might  
9 make a difference.

10 I think on the merits, the most  
11 important point Ms. Blatt made was this  
12 assertion, which I would characterize as  
13 incorrect in the extreme, that the ADA does not  
14 talk about or somehow ratify reasonable  
15 accommodation claims. I would point the Court  
16 most importantly to Section 12201(a), in which  
17 the ADA Title II expressly incorporates by  
18 reference the regulations that had been enacted  
19 under the Rehabilitation Act, all of which  
20 expressly embrace reasonable accommodation  
21 claims.

22 In addition to that, I would point the  
23 Court to other provisions of the ADA:  
24 12101(a)(5), 121312, 12201(h). All of those  
25 refer to either reasonable accommodations or

1 reasonable modifications. So with respect, I  
2 think that's wrong.

3           Finally, let me just take a step back,  
4 Your Honors, and talk about really what's --  
5 what's at issue in this case. This case started  
6 narrow. It was about a sliver of plaintiffs.  
7 It's now quite broad because of the arguments  
8 the district is making. If you accept her  
9 arguments, think of all the people who are going  
10 to be affected. Think of five-year-old Ehlena  
11 Fry with cerebral palsy, who needs the help of  
12 her service dog, Wonder. Think about George  
13 Lane, the Tennessee man forced to crawl up two  
14 flights of stairs in order to have his court --  
15 his day in court. Think about Ava, who  
16 desperately needs every precious hour of school  
17 so she can learn to communicate with her  
18 parents.

19           We ask you to reject those radical  
20 arguments, and we ask you to vacate the decision  
21 below.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           The case is submitted.

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1                   (Whereupon, at 11:30 a.m., the case  
2    was submitted.)  
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