

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

## OF THE

## UNITED STATES

CAPTION: JAMES GRIFFIN LANE, Petitioner v. FEDERICO F.  
PENA, SECRETARY OF TRANSPORTATION, ET AL.

CASE NO: 95-365

PLACE: Washington, D.C.

DATE: Monday, April 15, 1996

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       JAMES GRIFFIN LANE,                                 :

4                         Petitioner                                 :

5                 v.   :     No. 95-365

6       FEDERICO F. PENA, SECRETARY OF :

7         TRANSPORTATION, ET AL.                                 :

8       - - - - -X

9   Washington, D.C.

10    Monday, April 15, 1996

11                 The above-entitled matter came on for oral  
12       argument before the Supreme Court of the United States at  
13       11:05 a.m.

14       APPEARANCES:

15       WALTER A. SMITH, JR. ESQ., Washington, D.C.; on behalf of  
16       the Petitioner.

17       BETH S. BRINKMANN, ESQ., Assistant to the Solicitor  
18       General, Department of Justice, Washington, D.C.; on  
19       behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-365 -- the spectators are admonished to  
5 remain silent until you get outside the courtroom. the  
6 Court remains in session.

7 We'll hear argument next in Number 95-365, James  
8 Griffin Lane v. Federico Pena.

9 Mr. Smith, you may proceed whenever you're  
10 ready.

11 ORAL ARGUMENT OF WALTER A. SMITH, JR.

12 ON BEHALF OF THE PETITIONER

13 MR. SMITH: Thank you. Mr. Chief Justice, may  
14 it please the Court:

15 The question in this case is whether Congress  
16 intended that Federal agencies who discriminate against  
17 disabled people in violation of section 504 of the  
18 Rehabilitation Act are to be subject to damages for those  
19 violations.

20 It's undisputed in this case that in fact the  
21 Government did violate section 504. It's also undisputed  
22 that Petitioner Griff Lane was caused significant damages  
23 by that violation. In fact, the paper before the Court  
24 contained the parties' stipulation that his damages were  
25 some \$75,000 --



1 QUESTION: I see the petitioner's name, correct?  
2 Mr. Smith, is James Griffin Lane. When you say Griff any  
3 Lane, is that how you refer to him?

4 MR. SMITH: Yes, Your Honor. That's the name  
5 I've always called him. Sorry.

6 The \$75,000 to Mr. Lane include his out-of-  
7 pocket expenses and his lost earnings for the 2 years he  
8 was improperly excluded from the Merchant Marine Academy.

9 Now, we understand that in deciding whether or  
10 not Mr. Lane is going to be entitled to these damages, we  
11 will have to meet the strict burden that this Court's statute  
12 sovereign immunity cases have placed on us. We must show  
13 that in fact it was clear in the statute that Congress  
14 intended these damages to be made available. We believe  
15 it is clear in the statute.

16 QUESTION: Mr. Smith, may I refer you to the  
17 statute, section 505(a)(2), dealing explicitly with  
18 remedies? There is a section, is there not, of the  
19 statute that deals with remedies?

20 MR. SMITH: Yes, Your Honor.

21 QUESTION: And it says the remedies set forth in  
22 title VI of the Civil Rights Act of 1964 shall be  
23 available to any person aggrieved under the statute, and  
24 the civil title VI includes compensatory damages, I  
25 believe, is that right?

1 MR. SMITH: Yes, Your Honor, that is correct.

2 QUESTION: And then it goes on and it says, any  
3 person aggrieved by any act or failure to act by any  
4 recipient of Federal assistance, or Federal provider of  
5 such assistance.

6 Now, who is a Federal provider? Is the  
7 Department of Transportation a Federal provider of  
8 assistance?

9 MR. SMITH: Yes, Your Honor, it is, and we  
10 believe --

11 QUESTION: Well, if it is, then does the statute  
12 cover it and you don't have to go through all this  
13 implication?

14 MR. SMITH: Well, as we argued in our reply  
15 brief, we believe even if you read 505(a)(2) alone, in  
16 isolation, because the Department of Transportation is a  
17 Federal provider --

18 QUESTION: How do we know who's a Federal  
19 provider? It's -- under the operative section that was  
20 amended to include any program or activity conducted by  
21 any executive agency, it didn't refer to it as a Federal  
22 provider, did it?

23 MR. SMITH: It did not, Your Honor, and as we've  
24 argued in our brief, we believe that Congress when it  
25 amended 504 and also provided in 505(a)(2) for this --

1 QUESTION: Can you give me a hand here and use  
2 the U.S.C. sections? I mean, maybe you work with the  
3 enacted bill all the time, but I don't. Are you talking  
4 about section 794a? Is that what we're talking about?

5 MR. SMITH: Yes --

6 QUESTION: 794a(a)(2) would be the remedy  
7 section, right?

8 MR. SMITH: That's correct.

9 QUESTION: And the general liability section  
10 would be 794(a), right?

11 MR. SMITH: That's correct also, Your Honor.

12 I'm looking, Justice Scalia, at pages 2 and 3 of  
13 our brief, where all of these provisions are set out, and  
14 I will use the U.S.C. cite for clarity.

15 We believe, Justice O'Connor, that because the  
16 Department of Transportation is a Federal provider in the  
17 sense that the Government is using it in its brief, that  
18 is --

19 QUESTION: Is there a definition anywhere?

20 MR. SMITH: There is not a definition that I'm  
21 aware of, Your Honor, of Federal provider anywhere in the  
22 statute.

23 If you were to treat Federal provider there as  
24 simply an agency that extends funds to a non-Federal  
25 recipient, then the Department of Transportation is

1 clearly a Federal provider, as the regulations we've cited  
2 in our brief show. It provides funds, in that sense, for  
3 highways, railroads, airports.

4 Indeed, every departmental agency in the Federal  
5 Government is a Federal provider in that sense.

6 QUESTION: Would you call the Department of  
7 Transportation a Federal provider with respect to the  
8 Merchant Marine Academy?

9 MR. SMITH: No, Your Honor, we would not,  
10 because of this Court's decision in Paralyzed Veterans,  
11 which indicates that funds that are actually provided to  
12 an entity that the Federal Government manages itself,  
13 which is what DOT does here, effectively, for the Merchant  
14 Marine Academy, then the Merchant Marine Academy is not a  
15 recipient of Federal financial assistance, but DOT would  
16 remain a Federal provider for purposes of the question  
17 Justice O'Connor was asking, but our view is that you  
18 shouldn't read Federal provider in that narrow sense here.

19 We believe that what Congress intended at the  
20 time it adopted 794a(a)(2) was to provide a remedy for the  
21 new duty it had just imposed on the Federal Government in  
22 what is now 504(a) of the Rehabilitation Act. In 504(a)  
23 in 1978, Congress extended the application of 504 to  
24 Federal agencies, or in this case executive agencies, and  
25 at the same time it amended 505(a)(2), as Justice O'Connor



1 said, to provide remedies.

2 We think the explanation of the difference in  
3 wording that the Ninth Circuit provided in Doe is correct.  
4 The amendment to 504 came from the House. The amendment  
5 to 505(a)(2) came from the Senate, and the conference  
6 report didn't make the two exactly coterminous.

7 But to read this as intending a difference in  
8 treatment between the two would mean that Congress imposed  
9 a new duty on the Federal Government but then in the  
10 remedy section provided no remedy, and at the same time,  
11 that Federal provider means something different --

12 QUESTION: Mr. Smith, why is that so  
13 extraordinary? under the Administrative Procedure Act,  
14 under 702 with its broad waiver of sovereign immunity,  
15 nonmonetary relief, the idea of sovereign immunity being  
16 waived as to relief other than monetary is hardly novel.

17 MR. SMITH: Well, certainly, Your Honor, but I  
18 would suggest to you there's no suggestion anywhere in the  
19 statute, or in the legislative history, that Congress was  
20 assuming that the APA was going to apply to the situation  
21 precisely for the reason that we're here now.

22 QUESTION: I'm not talking about the APA  
23 applying, but is it -- am I not right that 702, in its  
24 broad waiver of sovereign immunity, is hardly limited to  
25 cases arising under the APA.

1 I thought that -- at least, there are several  
2 decisions that are held that that's an all-purpose waiver.

3 MR. SMITH: I believe that is right, Your Honor.  
4 that wouldn't change the contention that I'm trying to  
5 make here.

6 QUESTION: Why wouldn't it --

7 QUESTION: It would --

8 MR. SMITH: Sorry.

9 QUESTION: It would mean that there's always a  
10 suit under the APA to get the Government to comply with  
11 obligations imposed upon the Government by law. If the  
12 Government is acting, you have a suit to review the  
13 lawfulness of that Government action.

14 MR. SMITH: I believe that is right, Your Honor.

15 QUESTION: Okay, so then the only question is,  
16 is there in addition provided by this statute a suit for  
17 money damages, which the APA does not provide?

18 MR. SMITH: Does it not provide, and our  
19 contention is what Congress is trying to do here was to  
20 equalize the remedies available for all entities covered  
21 by section 504, including the Federal Government, and that  
22 is what it was doing in 504(a)(2), or 29 U.S.C.  
23 794a(a)(2).

24 QUESTION: Well, it's truly remarkable, then,  
25 with the sections coming right in sequence, that different

1 language is used in 505(a)(2), 794a(a)(2), than the  
2 section right before it. You say, really, they mean the  
3 same thing.

4 MR. SMITH: Our contention is that they mean the  
5 same thing, but our contention also is that if they don't  
6 mean the same thing, that Federal provider is something  
7 narrower, that we are still entitled to damages in this  
8 case.

9 I mean, it's quite clear, and we understand the  
10 Government's position to agree with us here, that whatever  
11 Federal provider may mean, there is a damage remedy  
12 available against it, which means that something more than  
13 what the APA provides is provided for in 505(a)(2).

14 QUESTION: Well, who's the Federal provider in  
15 your case?

16 MR. SMITH: The Federal provider in our case  
17 is -- within the meaning we've now been discussing it,  
18 Your Honor, is the Department of Transportation.

19 QUESTION: But I thought a moment ago you said  
20 that would not be the Federal provider with respect to the  
21 Merchant Marine Academy.

22 MR. SMITH: That is right, Your Honor. Our view  
23 is that because 505(a)(2) subjects -- let me just -- the  
24 language is, the remedies in title VI shall be available  
25 to any person aggrieved by any act or failure to act by a

1 Federal provider in violation of section 5 -- in violation  
2 of 794.

3 DOT is a Federal provider. It has committed an  
4 act in violation of section 504, 794 --

5 QUESTION: What is that act?

6 MR. SMITH: 504 of the Rehabilitation Act, Your  
7 Honor.

8 QUESTION: No, I mean, you say it's committed an  
9 act. Do you --

10 MR. SMITH: Oh, sorry. It discriminated in  
11 violation of section 504 against --

12 QUESTION: I thought the academy discriminated.

13 QUESTION: I thought the academy did that.

14 MR. SMITH: Well, Your Honor, we, of course,  
15 brought our action against all three levels here, and  
16 because the Department of Transportation effectively  
17 manages the Merchant Marine Academy through MARAD, which  
18 is another intervening entity, DOT is ultimately  
19 responsible in our view, which is why we brought the  
20 action against the Secretary, for the conduct here.

21 QUESTION: Could the Secretary have ordered the  
22 admission, or the continued student status of your client?

23 MR. SMITH: Oh, absolutely, Your Honor.

24 QUESTION: The Secretary could have reversed the  
25 decision of the Maritime Academy?



1 MR. SMITH: Presumably so, Your Honor. We  
2 actually submitted our papers, when we appealed the  
3 decision of the academy, both to MARAD and to the Office  
4 of the Secretary, and the resulting decision came from  
5 MARAD upholding his exclusion.

6 QUESTION: Mr. Smith, the distinction that  
7 you're making, the -- you say that 502(a)(2), provider,  
8 covers the Department of Transportation because it  
9 provides, but in this particular case it's in its capacity  
10 as executive agency, not as provider.

11 Under that reading, it would mean that a  
12 Government agency that doesn't provide funds, that just  
13 has its own operation, would not be responsible for money  
14 damages, and that's an illogical way, I think, for  
15 Congress to act. Either they want the Government agency  
16 as Government agency with respect to people under its  
17 programs to be covered or it doesn't, but a line between  
18 an agency that gives money and an agency that doesn't,  
19 doesn't make a whole lot of sense.

20 MR. SMITH: I agree with that, Your Honor.  
21 That's why our first argument is that, in fact, Congress  
22 intended a damage remedy to be available against the  
23 discriminator itself. When it's a Federal agency, a  
24 damage remedy is available. When it's a recipient --

25 QUESTION: If you don't get that from the word,

1 Federal provider, in 502(a)(2), where do you get that  
2 explicit waiver of damages, or clear waiver?

3 MR. SMITH: Well, we get it in part from  
4 505(a)(2), Your Honor. We also get it from the  
5 Equalization Act of 1986, where Congress did two things.  
6 It abrogated the sovereign immunity of the States, and  
7 more important for our purposes, Congress made clear that  
8 it wanted the remedies available for section 504 to be the  
9 same for all defendants under section 504.

10 That is, the remedies available against States  
11 were to be the same as the remedies available against all  
12 other entities, or to use the language of section 2 of 42  
13 U.S.C. 2000d-7, the remedies shall be the same for a  
14 violation in the suit, which is referring to a suit under  
15 section 504, against any public or private entity other  
16 than a State.

17 QUESTION: Mr. Smith, can I suggest a different  
18 reading of 794a(a)(2), and you tell me why it would not  
19 make sense.

20 It seems to me the phrase, recipient of Federal  
21 assistance, bears a fairly common meaning. There are  
22 Federal assistance programs in which Federal money is  
23 given to organizations which in turn act to help those in  
24 need, and if such a person providing help to those in need  
25 discriminates in violation of the act, you would have a

1 suit under a(a)(2).

2 And then it goes on to say, or Federal provider  
3 of such assistance. That would mean that if the Federal  
4 agency which provides money to the private agency which  
5 makes the direct assistance discriminates in its provision  
6 of funds by denying funds for handicapped facilities, for  
7 example, you would have a claim against -- for damages  
8 against that Federal agency.

9 If you interpreted it that way, it would provide  
10 a cause of action for money damages only with respect to  
11 the money that the assistance program would have provided.  
12 That's what the money damages would be. It would make  
13 perfect sense.

14 MR. SMITH: It --

15 QUESTION: Why isn't that the way to read it?

16 MR. SMITH: It isn't clear in that case, Your  
17 Honor, what the duty then is in 504(a), 794a, that the  
18 Federal provider as you're now defining it was violating.

19 QUESTION: The Federal provider cannot deny  
20 funds to an otherwise eligible private provider of  
21 assistance to the public on the ground that those funds  
22 are going to be spent on handicapped facilities.

23 MR. SMITH: If that --

24 QUESTION: If it's denied that, you know, this  
25 is an extravagant expenditure, building this ramp for

1 wheelchairs or what-not is an extravagant expenditure, and  
2 we will not provide funds for that, you would have a cause  
3 of action against the Federal provider to get those funds.

4 MR. SMITH: In that event, Your Honor, Congress  
5 has imposed a duty on executive agencies not to  
6 discriminate.

7 QUESTION: Yes.

8 MR. SMITH: But it's not provided the same  
9 damage remedy for that kind of discrimination --

10 QUESTION: Right.

11 MR. SMITH: -- as the kind you just now  
12 described.

13 QUESTION: Right, because it knew that, you  
14 know, damages can get out of hand, especially against a  
15 deep pocket like the Government, and the only kind of  
16 damage actions we're going to allow are damage actions for  
17 the amount of money that would have been provided under  
18 the assistance program.

19 MR. SMITH: Even if that reading is a plausible  
20 one, Your Honor, and I think it is not because of the  
21 anomaly of there being two kinds of obvious discrimination  
22 and for one you're suggesting a remedy, a damage remedy is  
23 provided and for the other not, I would still contend to  
24 you that any doubt about Congress' intention on the point  
25 you've just raised is resolved again by the Equalization



1 of Remedies Act.

2 QUESTION: But that Equalization of Remedies Act  
3 seems to me to be devoted primarily to making the States  
4 liable in response to our Atascadero decision.

5 MR. SMITH: I agree with that, Your Honor, that  
6 that was the impetus for the 1986 act, but section 2 of  
7 that act as we ready it, and we don't understand the  
8 Government to deny this, section 2 of that act, by its own  
9 terms, equalizes the remedies between the States, which we  
10 know includes damages, with all other defendants who are  
11 subject to a suit for a violation under all of the  
12 statutes named in section 1.

13 QUESTION: Well, but what it's saying, section 2  
14 is saying is that you're going to have the remedies  
15 available against a State that are available against other  
16 entities, and you draw from that kind of a negative  
17 inference that since damages are available against the  
18 State, therefore they must be available against these  
19 other public entities, too?

20 MR. SMITH: Well, not a negative inference, Your  
21 Honor. I would say it's a positive one, because the  
22 language of section 2 speaks of a suit against a State for  
23 a violation of a statute referred to in section 1, which  
24 includes section 504 that we've been talking about, and it  
25 equalizes the remedy between a State on the one hand and

1 all other entities covered by section 504 on the other.

2 QUESTION: But it doesn't --

3 QUESTION: You're reading the converse of it.

4 You're saying that all the -- remedies against all public  
5 entities is the same as that available against the States,  
6 but that's not what it says. It says the converse.

7 MR. SMITH: Well, Your Honor, if -- I would say  
8 that any public entity here includes the Federal  
9 Government.

10 QUESTION: But your reading makes public and  
11 private superfluous. It didn't say, any other entity  
12 whatsoever. It says, any public and private entity,  
13 thereby indicating to me that there may be a distinction  
14 between the remedies available against a private entity on  
15 the one hand, and a public entity on the other.

16 MR. SMITH: If that --

17 QUESTION: So the State equalization clause  
18 wants to pick both of them up, and that's why it has  
19 public and private in it, knowing that there may be a  
20 difference.

21 MR. SMITH: Well --

22 QUESTION: Maybe public doesn't refer to the  
23 United States. How do you know it refers to the United  
24 States? It could refer to municipalities.

25 MR. SMITH: Well, Your Honor, the reason I think

1 it has to refer to the United States is because the United  
2 States is certainly an entity that is covered by section  
3 504, which is listed in paragraph (1).

4 QUESTION: But even if it does, I don't know why  
5 it falls from your -- anything further falls from your  
6 argument than if the Federal Government does not have to  
7 provide a general damages remedy, then by virtue of this  
8 particular provision the State wouldn't have to provide  
9 one.

10 I mean, it -- if -- you seem to say, because a  
11 State has to provide one based on some independent ground,  
12 that the Feds do, too, but it seems to me that on your  
13 reading of (2), you can't go any further than saying, if  
14 this were the basis for subjecting the States to damages,  
15 then the States would not be subjected to a general damage  
16 remedy because the National Government is not.

17 MR. SMITH: Let me try to respond, Your Honor.

18 The States are unquestionably subject to a  
19 damage remedy under the language of this provision under  
20 this Court's decision in Franklin.

21 QUESTION: Mm-hmm.

22 MR. SMITH: And I would urge that, since the  
23 States are subject to a damage remedy, and since the  
24 purpose of this provision was to equalize that remedy with  
25 the remedies available against any public or private

1 entity other than a State that is subject to suit under  
2 section 504, necessarily public entity in that phrase has  
3 to include the Federal Government.

4 QUESTION: I'm assuming that it does, but the --  
5 what you refer to as being equalization, as I understand  
6 the statute means that the States cannot provide less than  
7 the other entities to whom they are compared.

8 It does not follow from that that if the State,  
9 by virtue of one comparison, has to provide a damage  
10 remedy, that another public entity, i.e., the United  
11 States, must do the same thing. It just doesn't follow.

12 MR. SMITH: Well, if I follow you, Your Honor,  
13 that would mean that we would have differing remedies, as  
14 Justice Kennedy was suggesting, that the public and  
15 private entity may be subject to, but if that were the  
16 case, it's difficult for me to see how we are to choose  
17 between them with regard to what remedies the State is  
18 going to be subject to.

19 QUESTION: Why isn't it just saying, you're  
20 entitled to the best remedy there is, it's private entity  
21 just as though public wasn't there. It's public or, so if  
22 there would be this remedy against a private entity, it  
23 would be against the State.

24 But your interpretation seems to me strange for  
25 this reason, Mr. Smith. Here is a clear, explicit waiver



1 by the Federal Government of the State's Eleventh  
2 Amendment immunity. If it had waiver of Federal sovereign  
3 immunity in mind, the most logical thing to do would not  
4 be to put it in this reverse way that you suggest, but to  
5 say, and there shall be no Federal immunity.

6 MR. SMITH: Well, the answer to that, Your  
7 Honor, is, as the Chief Justice pointed out, the purpose  
8 of this provision was to respond to Atascadero.

9 Atascadero was premised in part on the fact that  
10 nowhere in section 504 were States named at all as being  
11 subject to the act. In the 1978 amendment --

12 QUESTION: Wouldn't it be logical, though, even  
13 if the trigger is a case that's dealing with State  
14 immunities, for a Congress filled with lawyers to think,  
15 well, we know the Feds are also immune, while we're  
16 dealing with governmental immunity we should take care of  
17 both?

18 MR. SMITH: Well, they might have, Your Honor,  
19 and of course, I wish they had, or I wouldn't be here now.

20 But from our position Congress didn't do that in  
21 the '86 equalization remedies because it thought it didn't  
22 need to. It had already subjected Federal agencies to  
23 suit in the 1978 amendments, and the language of 504 that  
24 did that, it has been well-established by Cannon and other  
25 cases, did in fact create a private cause of action

1 against every entity that's named in the language of the  
2 statute, so sovereign immunity had already been waived for  
3 the Federal Government at the time of the 1986  
4 Equalization Act.

5 QUESTION: Your argument is that this language  
6 reflects the understanding by Congress that all public and  
7 private entities were liable for money damages. I think  
8 that's what your argument is.

9 Not that it created liability for money damages,  
10 but that that language there, suit against any -- in a  
11 suit against any public or private entity other than a  
12 State, it displays an acknowledgement by the Congress that  
13 passed that that all public and private entities were  
14 similarly suable.

15 It's not a trick question. This is --

16 MR. SMITH: No, no, I'm thinking. I'm thinking.  
17 I'm thinking before I answer, Your Honor.

18 I think the answer is yes, because Congress  
19 wanted to treat all of them equally, and any public or  
20 private entity, as that phrase is used there, refers to  
21 all of the covered entities under section 504, which  
22 includes the Federal Government.

23 I'll reserve the remainder of my time.

24 QUESTION: If I could ask you one more thing --  
25

1 MR. SMITH: Certainly.

2 QUESTION: Is your case helped at all by the  
3 fact that it's recognized -- I think it's recognized that  
4 back pay is permissible in a suit against the Government?  
5 Does that help your case, or do we think of back pay as  
6 being an equitable remedy?

7 MR. SMITH: Well, we think it's helped, Your  
8 Honor, because of the overall implausibility of the  
9 proposition that Congress would have provided everything  
10 that it did here, which is to say it provided that the  
11 Federal Government would be subject to the action, that  
12 attorney's fees would be available, that injunctive relief  
13 would be available --

14 QUESTION: Well, I guess what I'm saying is --

15 MR. SMITH: -- that back pay would be available,  
16 but not damages.

17 QUESTION: -- is the Government right in saying,  
18 or at least in implying that back pay is simply an  
19 equitable remedy?

20 MR. SMITH: Well, I think now, Your Honor,  
21 because the Court dealt with that in the Franklin case,  
22 that very distinction that was being drawn, and said the  
23 effect of the ruling there was to make the States liable  
24 to pay money damages, even when it was called equitable  
25 relief in the form of back pay.

1 QUESTION: Very well, Mr. Smith.

2 Ms. Brinkmann, we'll hear from you.

3 ORAL ARGUMENT OF BETH S. BRINKMANN

4 ON BEHALF OF THE RESPONDENTS

5 MS. BRINKMANN: Mr. Chief Justice, and may it  
6 please the Court:

7 The Rehabilitation Act does not contain the  
8 waiver the petitioner seeks. The act is silent regarding  
9 the remedies available against the Federal Government for  
10 violation of section 504. That --

11 QUESTION: Well, what about the section that  
12 appears to make a Federal provider liable?

13 MS. BRINKMANN: Your Honor, for the several  
14 reasons I think that members of the Court were suggesting,  
15 we interpret that not to extend to Federal executive  
16 agencies, programs or activities conducted by Federal  
17 executive agencies under section 794.

18 First of all, the word such --

19 QUESTION: Well, do you agree that Congress did  
20 waive sovereign immunity for purposes of money damages  
21 insofar as the money is -- the assistance is provided by a  
22 Federal provider?

23 MS. BRINKMANN: We -- no, we do not agree that  
24 damages are necessarily available against a Federal  
25 funder. Damages would be available, but whether -- no



1 court has held that you can get damages against a Federal  
2 agency that's providing funds.

3 As we explain in our brief, in fact, the courts  
4 are not even in agreement on whether or not there's  
5 implied cause of action for a Federal funding agency. The  
6 courts have -- and this Court did not resolve that issue  
7 in Cannon.

8 However, we do believe that there would be a  
9 remedy against a Federal fund provider in that situation  
10 either for injunctive relief -- certainly the APA would  
11 provide that background.

12 QUESTION: Well, it does say the remedies set  
13 forth in title VI are available against a Federal  
14 provider, doesn't it?

15 MS. BRINKMANN: Yes, and title VI remedies  
16 against Federal providers, Your Honor, include things such  
17 as remedies for the fund recipient, when the fund  
18 recipient is challenging the cutoff of funds or action by  
19 the Federal fund provider. There are lots of remedies  
20 under title VI, but we don't concede that there -- even in  
21 that situation, which I think the Court realizes is very  
22 different than the situation before it now, but in that  
23 situation --

24 QUESTION: Well, why would Congress want to  
25 waive sovereign immunity if the Federal Government is a

1 Federal provider of assistance but not if it does it  
2 directly, as an executive agency? That is kind of odd,  
3 isn't it?

4 MS. BRINKMANN: We think what Congress is trying  
5 to do in subsection (a)(2), Your Honor, was make section  
6 504 like title VI and title IX. There's this mechanism  
7 for providing funds to agencies and States, and what  
8 remedies are available under that are under title VI  
9 2000d-1, where it sets up -- for example, a recipient of  
10 Federal funds has a right to a hearing and some due  
11 process before those funds could be cut off.

12 We think that the structure of the language  
13 really reinforces our interpretation. We would focus  
14 first on the word such in that subsection (2). I think as  
15 Justice Scalia was pointing out, Federal provider of such  
16 a system we believe refers back to the earlier clause  
17 talking about the Federal assistance.

18 We would also point out, as the Chief Justice  
19 pointed out, the contrast between the language with  
20 subsection (a)(1), where title VII remedies were  
21 incorporated for employment discrimination against the  
22 Federal Government. In that section, (a)(1) is written  
23 broadly, that those remedies are available for any  
24 complaint under section 791, and certainly, if Congress'  
25 intent had been as petitioner states, that would have been

1 the language they used in (2) for any complaint under  
2 section 794.

3 QUESTION: Ms. Brinkmann, I still don't  
4 understand why you exclude damage remedies against the  
5 Federal provider. It's because you say no damages are  
6 obtainable against a Federal provider under title VI of  
7 the Civil Rights Act, is that --

8 MS. BRINKMANN: I think the question would be,  
9 Your Honor, the way to analyze it is to see what remedies  
10 are available under title VI, and I think calling it  
11 damages, what makes me hesitate, I think it would be a  
12 question, for example, under Bowen v. Massachusetts  
13 whether or not there could be some monetary relief,  
14 perhaps as an injunctive, requiring the agency either to  
15 provide funds or not provide funds, but it's not a damages  
16 remedy --

17 QUESTION: So it's not saying -- 794a(a)(2) in  
18 your view does not say that money damages are available.  
19 It says that money damages are available here where they  
20 are available under title VI, which is not always --

21 MS. BRINKMANN: That's right, Your Honor.

22 QUESTION: -- in your view.

23 QUESTION: But even if we took --

24 QUESTION: Perhaps they wouldn't include pain  
25 and suffering, or something like that.

1 MS. BRINKMANN: Perhaps. I think a really  
2 significant feature of the act, Your Honor, that you raise  
3 in my mind when you point that out is the expressed waiver  
4 of compensatory damages that Congress enacted in 1991 for  
5 section 501.

6 In the Civil Rights Act of 1991, Congress made  
7 very clear that it was waiving damages, sovereign immunity  
8 for compensatory damages for claims under section 501, and  
9 it puts significant limitations on that waiver.

10 First of all, it's limited to intentional  
11 discrimination, or in the case of a 501, a Rehabilitation  
12 Act claim, also the failure to reasonably accommodate.

13 The text of this is on pages 5a through 7a of  
14 our brief. That's the 1991 Civil Rights Act.

15 In addition to the --

16 QUESTION: Well, is the Department of  
17 Transportation a Federal provider of assistance?

18 MS. BRINKMANN: We don't believe so under the  
19 broad definition of that subsection (a)(2). It certainly  
20 provides assistance to various programs and activities,  
21 but under (a)(2), we submit that that only refers to  
22 Federal providers of the assistance to the recipient, and  
23 again, we will contrast that to the language in (a)(1).

24 And I'd also remind the Court, I think as  
25 Justice Ginsburg was pointing out, there is the ADA waiver



1 as a background to this, and I think it's --

2 QUESTION: Is that the source of your  
3 concession? I think you are not disputing that there is  
4 relief, and it's injunctive, back pay, and attorney's  
5 fees.

6 MS. BRINKMANN: Yes.

7 QUESTION: Where does the waiver of the  
8 sovereign's immunity as to those come from?

9 MS. BRINKMANN: Your Honor, I don't think it's  
10 necessarily something the Court needs to resolve in this  
11 case. In Cannon, Darrone, Alexander v. Choate, the Court  
12 has just assumed that there were causes of action implied.

13 We would certainly say that there's no doubt  
14 that there's one under the Administrative Procedure Act,  
15 and the amendment to the Administrative Procedure Act that  
16 made clear that waiver for nonmonetary damages was enacted  
17 in 1976, just shortly before this 1978 amendment for --

18 QUESTION: Does that cover back pay? The APA  
19 wouldn't cover back pay, would it?

20 MS. BRINKMANN: The A -- no.

21 QUESTION: It says nonmonetary.

22 MS. BRINKMANN: It is. Actually, Your Honor, in  
23 Darrone, the way the Court interpreted the availability of  
24 back pay was as an equitable remedy, because that's the  
25 way it had been interpreted under title VII.

1 QUESTION: But that's not the waiver that's  
2 contained in 702. It says -- the word is nonmonetary.

3 QUESTION: Nonmonetary.

4 MS. BRINKMANN: Yes.

5 QUESTION: It does not include back pay, so you  
6 still have to explain where you get a cause of action  
7 against the Government for back pay, and it's -- it  
8 doesn't satisfy me to say we don't have to worry about  
9 that in this case, because I for one think that where  
10 there has been a general grant of suit against the United  
11 States, I don't think we have to further insist that there  
12 be a specific grant of suit for money damages. I think if  
13 there's a general grant of suit against the United States,  
14 I would normally think it's suit for all purposes that  
15 suit lies.

16 MS. BRINKMANN: Well, Your Honor, there are  
17 several opinions of this Court that I think hold to the  
18 contrary. For example, Library of Congress v. Shaw.

19 QUESTION: That was a discrete item. That was  
20 interest --

21 MS. BRINKMANN: Yes.

22 QUESTION: -- which traditionally had been  
23 treated as separate, requiring a separate immunity waiver.

24 But while you're dealing with back pay,  
25 attorney's fees also is monetary relief against the

1 Government, so the source of those two, which you  
2 concede --

3 MS. BRINKMANN: We would point to the attorney's  
4 fees as the most easily resolved, Your Honor. On page --  
5 under 794a(b) it's an express waiver of attorney's fees by  
6 a prevailing party. We would also point out under the  
7 APA --

8 QUESTION: Excuse me, 794a --

9 MS. BRINKMANN: (b).

10 QUESTION: (b) -- yes.

11 MS. BRINKMANN: Yes. There's also, of course, a  
12 waiver under the Administrative Procedures Act under the  
13 Equal Access to Justice Act.

14 Going to the point about the waiver for money  
15 damages I would also point out, Your Honor, in addition to  
16 the Library of Congress v. Shaw there's the Court's  
17 opinion in Lehman v. Nakshian about the jury trial right  
18 under the ADA, and again, that was a situation in which  
19 the statute talked about the Federal Government in the  
20 same terms as private, that they would be liable for legal  
21 and equitable remedies, but as in Shaw, where it was the  
22 same language, the United States would be responsible as  
23 all other parties.

24 The Court has repeatedly emphasized, however,  
25 that the aspects of the sovereign immunity waiver has to

1 be express, and although the Court had implied the right  
2 to a jury trial for private defendants in a earlier case,  
3 Lorillard, the Court did not imply that against the  
4 Federal Government in Lehman, and also, we think that Shaw  
5 is a, you know, statutory issue concerning interest, but  
6 we think that the thrust of that Court also supports us  
7 here.

8 QUESTION: Ms. Brinkmann, may I call your  
9 attention, or ask you a question about the 1986 statute?

10 MS. BRINKMANN: Mm-hmm.

11 QUESTION: In your view, is the Secretary of  
12 Transportation and/or the Merchant Marine Academy a public  
13 entity other than a State within the meaning of that  
14 statute?

15 MS. BRINKMANN: My first answer, it doesn't  
16 matter, but I'll answer directly then explain why.

17 QUESTION: Well, I think it matters, so let's  
18 have an answer.

19 MS. BRINKMANN: Looking at the history of that  
20 provision, Your Honor, we believe that the intent would  
21 not include Federal --

22 QUESTION: So you're answer's no.

23 MS. BRINKMANN: -- executive agencies of the  
24 Federal Government.

25 Yes. Because the statutes that are referred to



1 in (a)(1) of that are all Federal funding provisions, and  
2 the other --

3 QUESTION: Your answer is not consistent with  
4 the plain meaning of any public entity.

5 MS. BRINKMANN: Your Honor --

6 QUESTION: But you say you have to look at  
7 legislative history and you figure they didn't mean to  
8 include --

9 MS. BRINKMANN: Right.

10 QUESTION: -- Federal agencies.

11 MS. BRINKMANN: We acknowledge that, Your Honor,  
12 and if the plain language has to be interpreted to include  
13 the Federal Government, we don't believe that that makes  
14 any difference, as members of the Court were pointing out.

15 That simply means that in an action against a  
16 State, the plaintiff gets the same remedies that are  
17 available in actions against a private entity or a public  
18 entity --

19 QUESTION: Correct.

20 MS. BRINKMANN: -- and their injunctive --

21 QUESTION: But is it not quite clear that  
22 Congress intended there to be a damage remedy against  
23 States and, therefore, must it not have made the  
24 assumption Justice Scalia described a little earlier?  
25 They must therefore have assumed, if public entity

1 includes the Merchant Marine Academy, that such a remedy  
2 was available against the Merchant Marine Academy.

3 MS. BRINKMANN: Now, we would say that there  
4 were damage remedies available against private entities  
5 that were receiving Federal financial assistance.

6 QUESTION: Well but, here's the problem,  
7 Ms. Brinkmann. If we adopt the petitioner's view, we will  
8 have solved the problem that we took this case for and  
9 would not have created another problem.

10 If we take your view, we're going to have to  
11 have another lawsuit as to the meaning of 2000d-7(2),  
12 because as he interprets the law, all public and private  
13 entities can get money damages. All public and private --  
14 suits against all public and private entities will give  
15 money damages --

16 MS. BRINKMANN: I just don't think it --

17 QUESTION: -- and it's easy to apply (a)(2).

18 Now, if we take your view, there's at least some  
19 public entity that you can't get money damages against,  
20 and what do you do then under 2000d-7(a)(2)?

21 MS. BRINKMANN: I look at the word, or, Your  
22 Honor, private or -- public or private entity. It doesn't  
23 mean that you only get the overlap, everything that you  
24 can get in both of those against public or private, it's  
25 that against a State you can get any remedy that you can

1 get against any private entity, or against any public  
2 entity, and you can get damages against private entities,  
3 or, as was pointed out earlier, municipalities --

4 QUESTION: Well, it says to the same extent as  
5 such remedies are available for such a violation in the  
6 suit against any public or private --

7 MS. BRINKMANN: Right.

8 QUESTION: -- entity, but --

9 MS. BRINKMANN: I think the problem you're  
10 suggesting would arise if it said public and private, but  
11 it says public or private. It's simply making --

12 QUESTION: Well, which one of the two do you  
13 pick? Do you pick the one that gives you the lesser  
14 damages, or the one that gives you more? It is  
15 disjunctive, but you still have to decide which one of the  
16 two disjunctive ones you select. Do you select the lesser  
17 or the greater?

18 MS. BRINKMANN: I think the greater, Your Honor,  
19 to the extent that that --

20 QUESTION: Well, we'll have a lawsuit about  
21 that, I suppose.

22 MS. BRINKMANN: Your Honor, I don't think that  
23 that is the --

24 QUESTION: Well --

25 MS. BRINKMANN: -- necessary interpretation for

1 purposes here, and under the Court's authority for the  
2 explicit nature of a waiver we would again contrast to  
3 this the explicit waiver for compensatory damages for  
4 employment discrimination.

5 QUESTION: Ms. Brinkmann, supposing Congress  
6 just originally, without having any -- passed a statute  
7 saying that all public entities shall be liable for  
8 damages if they violate the handicapped act. Now, would  
9 you think that would include the United States?

10 MS. BRINKMANN: Yes, I think it probably would,  
11 Your Honor.

12 QUESTION: So you think a generic term like all  
13 public entities would be a sufficient waiver for -- to  
14 include the United States? I --

15 MS. BRINKMANN: It may well be. The problem is,  
16 Your Honor, in (a)(2) it doesn't say anything about  
17 damages.

18 QUESTION: Well, I would -- ordinarily I would  
19 think that our cases would not support what you say in  
20 your answer.

21 MS. BRINKMANN: I --

22 QUESTION: They're simply referring to where you  
23 could be talking about local governments, State  
24 governments, that to make the United States liable it  
25 requires something more specific than public entities.



1 MS. BRINKMANN: I agree with Your Honor. I do  
2 hesitate to say something that generic.

3 The problem is, the Court has said that it's  
4 not -- there isn't some specific formula for stating the  
5 waiver of sovereign immunity against the Federal  
6 Government, and if all the circumstances were that that's  
7 what Congress intended, but I would think there would have  
8 to be some indicia of intent, that they meant that to  
9 apply to the Federal Government.

10 QUESTION: What if it said, all entities? All  
11 entities. Would that suffice?

12 MS. BRINKMANN: No, Your Honor. I think there  
13 would have to be something clearer than that.

14 QUESTION: Because there are so many entities in  
15 the world.

16 MS. BRINKMANN: I think it's because of the  
17 Court's --

18 QUESTION: If it says all public entities, it  
19 does suffice. There are a whole lot of public entities in  
20 the world, too.

21 MS. BRINKMANN: But I think the Court has made  
22 clear that for the Federal Government, normal presumptions  
23 that you might -- might arise from words like use of legal  
24 remedies, in Lehman, or to be responsible to the same  
25 extent for reasonable attorney's fees as private parties

1 in Shaw, those don't mean the same thing against the  
2 Federal Government unless Congress expressly makes that  
3 clear.

4 QUESTION: Isn't the --

5 QUESTION: Ms. Brinkmann, if you can go back to  
6 the back pay, because I don't think I got it fully. Why  
7 is the Government responsible for back pay?

8 MS. BRINKMANN: The Court in Darrone addressed  
9 the issue, Your Honor, of whether under 504 an employment  
10 discrimination suit could be brought against recipients of  
11 Federal funds. For employment discrimination cases  
12 against the Federal Government as employer, that comes  
13 under section 501. 501 incorporates all of title VII's  
14 remedies, so the entitlement to back pay arises out of the  
15 entitlement to back pay under title VII.

16 And I should also point out that when Congress  
17 amended title VII and 501 to provide for compensatory  
18 damages with the restrictions I keep trying to get back  
19 to, the Court -- I mean, Congress also specified -- and  
20 this is on page 7a. This is under the 1991 Civil Rights  
21 Act.

22 There's a provision where it explains that  
23 although they're waiving sovereign immunity for  
24 compensatory damages for title VII and 501 and ADA,  
25 compensatory damages awarded under this section shall not

1 include back pay, interest on back pay, or any other type  
2 of relief authorized under section 706(g) of the Civil  
3 Rights Act of '64. That's where we believe the  
4 entitlement --

5 QUESTION: Do I understand that there was a back  
6 pay element in this \$75,000?

7 MS. BRINKMANN: No, Your Honor. This isn't an  
8 employment situation. No.

9 QUESTION: May I ask you another question about  
10 the 1986 statute? Forgetting the plain language for a  
11 minute, just looking at broadly the provision, it's your  
12 view that Congress deliberately wanted to overcome a  
13 constitutional objection to suits against States and  
14 impose the States to damage liability, but yet retain its  
15 own sovereign immunity. That's what you think Congress  
16 was realistically trying to do.

17 MS. BRINKMANN: Yes.

18 QUESTION: Do you think that's probable?

19 MS. BRINKMANN: I do, Your Honor. I think that  
20 the matters of the Federal fisc are something that  
21 Congress addresses, and Congress apparently felt very --

22 QUESTION: It's not concerned about State fiscs?

23 MS. BRINKMANN: Apparently not, Your Honor. I  
24 think one --

25 QUESTION: Ms. Brinkmann, when did the States

1       become liable under title VII?

2               MS. BRINKMANN: Under title VII.

3               QUESTION: 1972.

4               QUESTION: Was it before or --

5               MS. BRINKMANN: 1972, according to the Chief  
6 Justice.

7               QUESTION: And when did the Federal Government  
8 agencies become --

9               MS. BRINKMANN: I think it was a couple of years  
10 after that, Your Honor.

11              QUESTION: So it's not so unusual to impose an  
12 obligation on the States and still keep the Feds free.

13              MS. BRINKMANN: Right. I would also point out  
14 that I think Congress repeatedly has now felt comfortable  
15 to waive immunity against money damages for employment  
16 contexts. Those are situations in which it's familiar  
17 with what damages are available. Those are known.

18              Whereas discrimination problems that arise in  
19 activities, or programs conducted by Federal agencies,  
20 could raise a whole host of questions that Congress may  
21 not have wanted to bite that much off at that time.

22              QUESTION: I want to just pursue Justice  
23 Stevens' point. Have you been able to think of any reason  
24 that Congress would have wanted to say, we will pay all  
25 private people pay money damages. States, I guess, by and



1 large, do. We'll pay money damages, too, for any one of  
2 the 490 -- \$1 trillion worth of Government programs, but  
3 we won't pay money damages in whatever's left over in the  
4 Federal Government, which probably isn't much.

5 I mean, what was the theory of such a thing? Is  
6 there a word that suggests either there's a theory to  
7 that, or is there a word that suggests that anybody in  
8 Congress even thought about it for more than a second or  
9 two?

10 MS. BRINKMANN: I don't --

11 QUESTION: Or at all?

12 MS. BRINKMANN: I don't think they necessarily  
13 thought about it.

14 One point, though, that I'd like to emphasize,  
15 Your Honor, is, by including Federal executive agencies'  
16 activities and programs under section 504, Congress went  
17 further than it did in title --

18 QUESTION: I'm not saying whether what they did  
19 was good or bad. I'm simply saying, if you have a  
20 distinction in terms of sovereign immunity that seems  
21 totally irrational, that we can't even think of a reason  
22 for --

23 MS. BRINKMANN: Your Honor --

24 QUESTION: -- and you also have language that  
25 permits the award, why isn't that good enough?

1 MS. BRINKMANN: I guess what -- I'm trying to  
2 address that, Your Honor, by pointing out that one thing  
3 Congress did under section 504 was for the first time, to  
4 my knowledge, bring programs and activities conducted by  
5 Federal agencies under this type of prohibition.

6 They're not covered by title VI and title IX.  
7 That may appear irrational, also.

8 On the other hand, Congress may have wanted to  
9 be more protective of the discrimination against the  
10 people with disabilities because of a lower constitutional  
11 standard that would be applied to them, so Congress  
12 decided to take that step and be more protective for that  
13 class but did not take the additional one of opening up a  
14 whole class of unknown damages in all Federal programs.

15 QUESTION: Ms. Brinkmann, I hate to bring you  
16 back to back pay, but I didn't understand your  
17 explanation. As I recall, when you got done, it boiled  
18 down to section 706 of the Civil Rights Act of '64, that  
19 that's where --

20 MS. BRINKMANN: That's right.

21 QUESTION: But 794a(a)(1), what you're referring  
22 to as 504, and I wish you'd refer to the code sections --

23 MS. BRINKMANN: I'm sorry.

24 QUESTION: -- because I -- does not incorporate  
25 section 706. It incorporates section 717, including the

1 applications of 7 -- is it 706 --

2 MS. BRINKMANN: Yes.

3 QUESTION: -- (f) through (k)?

4 MS. BRINKMANN: Yes. 706(g) is where it comes  
5 from.

6 QUESTION: 706 --

7 MS. BRINKMANN: (g), and that's on page -- if  
8 you look at 7a, on page 7a of our brief, Your Honor, it's  
9 the last -- the very bottom of the page. That is section  
10 1981a(b)(2). It's from the 1991 Civil Rights Act, and  
11 that explains why the new waiver in 1991 in employment  
12 cases for compensatory damages doesn't, in fact, include  
13 back pay, because back pay is already there.

14 QUESTION: Gotcha. Okay. That would explain  
15 it.

16 MS. BRINKMANN: Okay. I just wanted to go back  
17 for one more point to emphasize the restrictions that  
18 Congress placed on the waiver for employment  
19 discrimination cases.

20 In the 1991 amendments, Congress made clear that  
21 it was only for intentional cases in employment, or for  
22 failure to reasonably accommodate. There, Federal  
23 sovereign immunity is not waived for punitive damages, and  
24 there are also actual statutory caps set on the amount  
25 that can be recovered under that waiver, depending on the

1 number of employees that an employer --

2 QUESTION: Is the reason for the exclusion of  
3 back pay in the '91 act the fact that it's already  
4 included?

5 MS. BRINKMANN: Yes. Yes.

6 QUESTION: Ms. Brinkmann, may I go back to what  
7 is probably a simple point about the '86 act?

8 Justice Scalia asked you the question, referring  
9 to subsection (2), which refers to remedies against any  
10 public or private entity, and he said, how do we know that  
11 Congress didn't mean to restrict the remedy to the entity  
12 that gets -- that is least liable, as opposed to expanding  
13 the remedy by reference to the entity that is most liable?

14 Is it your answer, we know it preferred the  
15 expansive interpretation because it was a post Atascadero  
16 case, and the whole point of, the object of the  
17 legislation was simply to expand liability? It was --  
18 your answer, in effect, is a congressional intent answer,  
19 is that it?

20 MS. BRINKMANN: We think that's right, Your  
21 Honor.

22 QUESTION: Without the congressional intent,  
23 there wouldn't be an answer in the text?

24 MS. BRINKMANN: I think the plain interpretation  
25 of that sentence would be that in -- are available such a



1 violation in a suit against such a public or private  
2 entity. I think you are -- in your action against the  
3 State you say, what remedies do I get, and you get to go  
4 look at any suit against any public or private entity, and  
5 whatever they get in that case, you get, so I think it  
6 would still be the more expansive definition even without  
7 any congressional intent.

8 QUESTION: Logically you could say, well, I'm  
9 not subject to that remedy because somebody else is not.  
10 I mean, logically you could do either one. You've got to  
11 go on intent, I suppose, or maybe you've got to go perhaps  
12 on a generalized practice that you don't enact statutes  
13 like this in order to limit liability, just as a general  
14 rule. That just isn't the structure that you would employ  
15 for that purpose.

16 MS. BRINKMANN: I think that would be further  
17 support for our interpretation.

18 I'd also point out, regardless of that, Your  
19 Honor, this is clearly not the -- not, kind of, the  
20 language that waives the Federal Government sovereign  
21 immunity against damages.

22 QUESTION: Well, but --

23 MS. BRINKMANN: It would have been a  
24 provision --

25 QUESTION: But that in effect, that, just going

1 back to Justice Breyer's point on that, I suppose your  
2 ultimate answer on that is, it may be as illogical as the  
3 devil, but the fact is, if you're going to be starchy  
4 about requiring waivers of Federal sovereign immunity,  
5 illogicality is not enough to do it.

6 I mean, is that -- does the Government fall back  
7 on that position, if --

8 MS. BRINKMANN: Frankly, Your Honor, I don't  
9 think we need to. I mean, we would if we had to.

10 QUESTION: But if we think you do, is that the  
11 Government's position?

12 MS. BRINKMANN: I'd think so.

13 Another thing I think that the Court should  
14 focus on about the development of law that was the  
15 backdrop behind these statutes, the remedies for damages  
16 was not clear until the Franklin Court, the Franklin  
17 opinion from this Court in 1992, so even at the time that  
18 this 1986 amendment was passed, it was not at all clear  
19 that there were damages necessarily available against all  
20 defendants.

21 There were lower courts that had held that, but  
22 those cases did not involve Federal executive agencies,  
23 because they're not covered by title VI and title IX, so  
24 those cases did not address the issue that's before the  
25 Court here of Federal sovereign immunity, and that's

1 really a critical distinction between the statutes that  
2 often is not addressed in opinions by courts because it  
3 just wasn't at issue.

4 In fact, I think that that's a significant  
5 factor. When you look through the history of the  
6 different times that when these other provisions were  
7 enacted you can see the development of the law did not  
8 extend at that time to damages against entities other --  
9 in some lower courts have been involved in, but it did not  
10 extend to the waiver of sovereign immunity.

11 In fact, one of the lower court's opinions,  
12 Miener, that the petitioners cite -- recognize this was  
13 pre-Atascadero -- that although there would be implied  
14 cause of action for damages against private entities, it  
15 could not operate against the State because there hadn't  
16 been a waiver of sovereign immunity.

17 QUESTION: Ms. Brinkmann, would you explain once  
18 more what the Government is willing to concede 794a(a)(2)  
19 does allow by way of monetary damages?

20 MS. BRINKMANN: It allows acts -- remedies that  
21 are available under title VI, and this Court has never  
22 directly addressed whether a Federal provider is subject  
23 to a direct suit under that provision.

24 It's certainly subject to suit under the APA,  
25 and it's also subject to all the remedies and procedures

1 set forth in title VI.

2 QUESTION: What do you mean by a Federal  
3 provider? Do you mean a grant-making agency?

4 MS. BRINKMANN: Yes. Yes, Your Honor, and the  
5 recipient, if it's told that the Federal provider believes  
6 that the recipient is discriminating and funds are going  
7 to be cut off, there's all this procedural due process,  
8 and that recipient would be a person aggrieved by an act  
9 of the Federal provider and could invoke that provision.

10 And Congress was really trying to say, we're  
11 going to treat section 504 for the Federal fund recipients  
12 the same way we do title VI and title IX, but it did not,  
13 although they tried to adapt that provision to Federal  
14 executive agency programs which were never covered under  
15 title VI, or title IX, for that matter.

16 If there's nothing further, Your Honor --

17 QUESTION: Thank you, Ms. Brinkmann.

18 Mr. Smith, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF WALTER A. SMITH, JR.

20 ON BEHALF OF THE PETITIONER

21 MR. SMITH: Thank you, Your Honor.

22 First of all, Your Honor, I think it's important  
23 for the Court to construe all of these provisions together  
24 and decide whether or not the reading the Government is  
25 offering is a plausible one, and whether the structure as



1 a whole that the Government is asking you to adopt is a  
2 logical one, because if it is not, the Court should not  
3 attribute an illogical, nonplausible intent to the  
4 Congress.

5 And the reading that the Government is offering  
6 you here is that Congress intended that all recipients of  
7 Federal financial assistance be subject to damages, that  
8 States be subject to damages -- Congress expressly  
9 abrogated the States' sovereign immunity for that  
10 purpose -- that the Federal Government be liable for  
11 damages when it comes to employment discrimination on the  
12 basis of disability, that the Federal Government be liable  
13 in some way when it's a Federal provider, although the  
14 Government wants to narrowly contain that, and it has no  
15 explanation for why damages wouldn't be available under  
16 the plain meaning of a(a)(2) in that circumstance.

17 But yet, it urges the Court to conclude that in  
18 this one area, direct discrimination by executive  
19 agencies, that Congress set out to withhold one kind of  
20 relief only, money damages. It provided for injunctive  
21 relief, it provided for back pay, it provided for  
22 attorney's fees, but the Congress set out to withhold one  
23 kind of relief, money damages. I submit to you that's an  
24 implausible reading of this statute.

25 QUESTION: Well, it -- except that it seems to

1 me that it simply poses two opposing canons of  
2 interpretation. One is to find the most systematic way of  
3 construing the whole statute. Another is to preserve the  
4 Government's immunity absent the satisfaction of a very  
5 high standard of waiver, and I think what your argument  
6 does say, says to us is, all right, which are you going to  
7 prefer, systematic logic, or the importance of sovereign  
8 immunity?

9 MR. SMITH: Well, I'm not asking you to choose,  
10 Your Honor, because I think we serve both. I think this  
11 Court's cases make clear that, while the waiver of  
12 sovereign immunity has to be clear, the Court will not  
13 deny damage relief in a case like this, where the reading  
14 is an implausible one.

15 QUESTION: What about Ms. Brinkmann's argument  
16 that when Congress did waive immunity in 501, it predated  
17 it. It was not just that we waive immunity, but they --

18 MR. SMITH: I think that -- I think the 501  
19 provision actually supports us, Your Honor. That was an  
20 entirely different section that was not construed to  
21 provide a private cause of action until 1978, unlike 504,  
22 and in 1978 Congress set out two different kinds of  
23 remedies, title VII for the 501 section, and title VI for  
24 the 504 section.

25 Damages are available under title VI. They are

1 not available under title VII, and as a consequence,  
2 Congress has to amend the statute in 1991, to make damages  
3 available for the first time and thereby equalize the  
4 remedies against the Federal Government when it  
5 discriminates on the basis of disability, so I think the  
6 501 circumstance helps our view that Congress surely did  
7 not intend to carve out this one area and withhold relief.

8 Let me speak to the public entity point for just  
9 a moment. I understand the Government's argument to be  
10 that the Federal Government is not a public entity within  
11 the meaning of 2000d-7(2) because the only statutes  
12 being --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

14 MR. SMITH: Thank you.

15 CHIEF JUSTICE REHNQUIST: The case is submitted.

16 (Whereupon, at 12:03 p.m., the case in the  
17 above-entitled matter was submitted.)  
18  
19  
20  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

JAMES GRIFFIN LANE, Petitioner v. FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.

CASE NO:      95-365

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)



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