

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 81
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9
10 Washington, D.C.

11 Tuesday, November 30, 2021

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16
17 APPEARANCES:

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19 behalf of the Petitioner.

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23 supporting the Petitioner.

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

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P R O C E E D I N G S

(10:00 a.m.)

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

ORAL ARGUMENT OF ANDREW ROZYNSKI
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 And so --

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

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

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

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

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

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

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

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

20 MR. ROZYNSKI: Sure. Two things.

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

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

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

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

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

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

6 JUSTICE BARRETT: Does it matter --

7 JUSTICE SOTOMAYOR: Some of --

8 JUSTICE BARRETT: Oh, sorry, go ahead.

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

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

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

22 MR. ROZYNSKI: Sure. So the -- the
23 interesting thing about this case is that the
24 courts almost uniformly have allowed emotional
25 distress damages or left them undisturbed. This

1 Court, four times in the past, in awards of
2 emotional distress damages, have left it
3 undisturbed.

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

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

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

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

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

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

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

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

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

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

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

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

12 So, if we actually look --

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

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

24 So, if you're looking at the majority
25 view, if you're looking at the Restatements, the

1 treatises, even the treatises that Respondent
2 cites, for these types of contracts, these are
3 available.

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

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

14 So there actually --

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

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

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

1 JUSTICE ALITO: No, I understand the
2 nature of your claim. So you just can't tell me
3 anything more than the -- the numbers that you
4 just gave me?

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

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

12 What invoked the Spending Clause here?

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

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

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

1 -- it may.

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

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

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

8 MR. ROZYNSKI: Correct.

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

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

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

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

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

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

1 -- I don't know --

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

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

6 JUSTICE ALITO: Thank you.

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

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

11 JUSTICE BREYER: No, thanks.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer?

14 Justice Alito?

15 Justice Sotomayor?

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

23 MR. ROZYNSKI: Sure.

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

1 suffer?

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

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

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

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

1 That is not a claim that is at issue
2 right now at the 12(b)(6) stage. However, she
3 did have to eventually get surgery.

4 JUSTICE SOTOMAYOR: Thank you.

5 MR. ROZYNSKI: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?
7 Nothing?

8 Justice Gorsuch? All right.

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

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

24 And those -- those awards have been
25 cited in -- in our amici, in the disability

1 brief and others, and the Court can -- can look
2 at those as well there.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. ROZYNSKI: Thank you.

7 CHIEF JUSTICE ROBERTS: Ms. Sinzduk.

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

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

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

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

25 That contention is irreconcilable with

1 contract law, 30 years of practice in the
2 federal courts, and common sense. If Respondent
3 were correct, then the petitioner in Franklin
4 won only a pyrrhic victory because, while this
5 Court held that she was entitled to seek damages
6 for the severe sexual harassment and abuse she
7 suffered at the hands of a teacher in violation
8 of Title IX, she was not entitled to
9 compensation for the only injuries she described
10 in her briefing, the profound psychological and
11 emotional harms caused by the discrimination.

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

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

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

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

1 it's a tie, is that clear enough? What --
2 what's the standard?

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

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

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

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

1 the reasonable contemplation of the parties.

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

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

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

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

1 is I don't know how many years but a lot? Has
2 anybody turned it down or questioned it?

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

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

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

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

25 And then, when Congress, in 1991, for

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

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

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

1 and this is a category of non -- primarily
2 non-commercial contracts, and so we should ask,
3 you know, with respect to that category what
4 kind of damages could a person get.

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

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

16 MS. SINZDAK: Well --

17 JUSTICE KAGAN: -- should we think
18 about this case at?

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

1 basic, very broad contract rule that the
2 remedies that are available for a particular
3 breach are determined by what was -- what was
4 foreseeable, what naturally flowed, what was
5 within the reasonable contemplation of the
6 parties at the time of contracting.

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

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

22 JUSTICE KAGAN: And do you view the
23 common carrier-type cases, the innkeeper-type
24 cases, should we look at those as discrimination
25 cases, or are those somewhat different and we

1 would have to extrapolate from them?

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

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

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

1 opposed to looking at discrimination statutes
2 with express causes of action and trying to
3 reason by analogy from those.

4 Is that -- help me out with how to
5 look at that.

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

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

23 If they're only protecting pecuniary
24 interests, they might expect only to pay
25 pecuniary damages. If the contract is

1 protecting other than pecuniary interests,
2 they're going to expect to pay -- to -- to
3 compensate for other than pecuniary harms.

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

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

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

23 JUSTICE ALITO: Suppose we --

24 JUSTICE KAVANAUGH: Your --

25 JUSTICE ALITO: -- suppose we look at

1 the question through the eyes of the Respondent
2 in this case, as opposed to parties in another
3 case, and what is at issue is the application of
4 the reasonable accommodation standard under the
5 Rehabilitation Act or the requirement under the
6 Affordable Care Act to provide, I think the term
7 is, something like suitable aids?

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

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

24 It may be -- the -- the -- the courts
25 below skipped over that inquiry.

1 JUSTICE ALITO: So we have to assume
2 that it's a -- that it's a viable claim. It's
3 12(b)(6). We assume that it's a viable claim.
4 Don't we have to assume that here?

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

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

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

1 -- a specific category of compensatory damages.

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

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

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

1 And you have to assume that they've
2 been boiling the oceans looking for sort of
3 exorbitant awards, and they're not finding them.
4 And that's because there are checks on that kind
5 of award.

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

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

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

22 JUSTICE KAGAN: What -- what does that
23 mean exactly? What is enough?

24 MS. SINZDAK: In general, there needs
25 to be specific detailed evidence cataloguing the

1 emotional distress. Often, there will be
2 corroboration from those around -- around --
3 those who are around the person. Sometimes
4 there will be medical evidence corroborating it.

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

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

18 JUSTICE ALITO: Where do all these
19 rules come from?

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

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further?

2 JUSTICE THOMAS: No, Chief.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 Justice Alito? No?

6 Justice Sotomayor?

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

12 Do you agree with that statement? Do
13 you disagree with it?

14 MS. SINZDAK: Of course, that question
15 really isn't presented here.

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

17 MS. SINZDAK: That's a conduct
18 question.

19 JUSTICE SOTOMAYOR -- before us at all.
20 But it is subsumed --

21 MS. SINZDAK: But, yes, I mean, we
22 would --

23 JUSTICE SOTOMAYOR: -- it is subsumed
24 by Justice Alito's question, which is the
25 assumption that -- that if someone can't afford

1 it, they have -- they shouldn't be subjected to
2 litigation. But the point is that they won't be
3 because --

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

6 JUSTICE SOTOMAYOR: So what --

7 MS. SINZDAK: -- reasonable.

8 Absolutely.

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

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

24 CHIEF JUSTICE ROBERTS: Justice Kagan,
25 anything?

1 Justice Gorsuch?

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

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

16 MS. SINZDAK: So Title VII --

17 JUSTICE KAVANAUGH: -- why that
18 matters.

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

25 And in -- in -- in 1986, when Congress

1 ratified the damages action -- ratified the
2 availability of a damages action under Title VI,
3 there were, in fact, no compensatory damages
4 available under Title VII. So we know that
5 Congress just thinks of these two statutes
6 differently.

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

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

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

1 that condition here?

2 MS. SINZDAK: I -- I don't think so
3 because I think that in many cases, that isn't
4 attached. But even if that -- that was a
5 requirement, I think because there -- it does
6 have to be intentional conduct in violation of
7 the clear terms, it would be satisfied in all of
8 these cases.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Shanmugam.

13 ORAL ARGUMENT OF KANNON K. SHANMUGAM
14 ON BEHALF OF THE RESPONDENT

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

17 The Rehabilitation Act and the ACA
18 differ from other antidiscrimination statutes in
19 two critical respects.

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

24 Second, they were enacted under the
25 Spending Clause, and because Spending Clause

1 statutes are in the nature of contracts,
2 recipients of federal funding must have clear
3 notice of the conditions that attach to the
4 funding.

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

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

24 The Court should be cautious about
25 recognizing the availability of emotional

1 distress damages here. As Justice Alito's
2 question illustrated, emotional distress damages
3 are notoriously difficult to quantify. And it
4 would be perverse to provide emotional distress
5 damages more broadly under Spending Clause
6 statutes with implied causes of action than
7 under antidiscrimination statutes with express
8 causes of action.

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

18 The judgment of the court of appeals
19 should be affirmed. I welcome the Court's
20 questions.

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

25 MR. SHANMUGAM: I think -- to go to

1 the Chief Justice's question to my friend, I
2 think that it would have to be the prevailing
3 rule that emotional distress damages are
4 available in contract actions.

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

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

24 But the Court didn't drill down into
25 that exception and determine whether that was

1 analogous, whether, for instance, as has just
2 been discussed, intentional discrimination can
3 be characterized as a form of wanton or
4 malicious conduct. The Court simply looked to
5 the general rule and said that in light of that
6 general rule, a recipient of funding would not
7 have clear notice.

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

25 Now that's an exception. I mean, call

1 it an exception. But it's completely settled.

2 At that point, you have to lose, don't you?

3 MR. SHANMUGAM: I don't think so
4 necessarily. I will get the necessary caveat
5 that that's not the state of the law out of the
6 way, but I want to address that directly.

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

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

24 But I think even if there were such a
25 rule, I'm not sure that Barnes would extend so

1 far as to say, well, as long as you can
2 articulate some category of cases in which a
3 type of damages is available, a party is on fair
4 notice.

5 JUSTICE BREYER: Well, what about --

6 MR. SHANMUGAM: Now, again, we think
7 this is an easier case.

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

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

22 MR. SHANMUGAM: I -- I don't think
23 there's any real disagreement about the state of
24 the law. I think where there is disagreement is
25 about the accurate characterization of the law,

1 so let me speak directly to that, Justice
2 Breyer.

3 There certainly are some jurisdictions
4 in which there are certain specific categories
5 of exceptions: common carriers, innkeepers,
6 cases involving death messages sent by telegram
7 and the like.

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

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

25 And, again, we cite the Southern

1 Express decision from this Court for the
2 proposition that in those areas of the law where
3 federal common law applies, obviously, more
4 limited these days, emotional distress damages
5 are categorically --

6 JUSTICE BARRETT: But --

7 MR. SHANMUGAM: -- unavailable.

8 JUSTICE BARRETT: -- Mr. Shanmugam --

9 JUSTICE BREYER: Innkeepers -- I'm
10 sorry.

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

15 JUSTICE BREYER: Yeah, I do too.

16 JUSTICE BARRETT: Yeah.

17 JUSTICE BREYER: The same question, I
18 mean --

19 JUSTICE BARRETT: Yeah.

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

24 But, also, all the little kids come
25 around and say ha, ha, ha, he's sleeping outside

1 tonight, ha, ha, ha, just as they might say
2 something even worse, or the person who can't --
3 you know, can't walk upstairs, there's no
4 elevator, and so this handicapped person is
5 trying to, you know, climb up the stairs, and
6 that's a bore and painful, and, also, a lot of
7 people might think this is a little -- you know,
8 sort of make fun of the person. That should --

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

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

23 But I don't want to overly fight those
24 cases because I would certainly recognize that
25 that's an example that the treatises often cite

1 as kind of the paradigmatic exceptional example,
2 a situation in which, where parties are expelled
3 or not permitted to stay at an inn, courts
4 looking to tort law have found a heightened duty
5 and have said that the breach of that duty can
6 give rise to emotional distress.

7 JUSTICE KAVANAUGH: So is --

8 JUSTICE SOTOMAYOR: Excuse me, but
9 isn't that what --

10 MR. SHANMUGAM: But all of this -- go
11 ahead.

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

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

1 to do so.

2 That's no different than the common
3 carrier agreement to treat a passenger with
4 dignity and to treat them with a -- with a sense
5 of respect, the special care.

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

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

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

1 JUSTICE SOTOMAYOR: So what do you do
2 with Franklin or what do you do with Sheely for
3 14 years? What do you do with the multiple of
4 state and federal cases in decades that have
5 awarded damages for this kind of discrimination?

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

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

1 Now, of course, that's not how
2 ratification works more generally. Ordinarily,
3 you look to the cases that have actually
4 addressed the question presented.

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

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

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

23 By contrast, Spending Clause statutes
24 are really about providing equal access and
25 ensuring the parties that receive federal funds

1 provide equal access to federal programs. And I
2 think that that is really the reasoning that
3 underlay this Court's decision in Barnes and its
4 reliance on the contract law analogy.

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

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

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

1 distress damages have noted that they have a
2 punitive and deterrent effect.

3 And I say all of that --

4 JUSTICE KAVANAUGH: If we're in --
5 keep going, sorry.

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

13 JUSTICE KAVANAUGH: A couple questions
14 on that then.

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

20 MR. SHANMUGAM: I -- I think that the
21 right question to ask is, what is the prevailing
22 rule in breach-of-contract cases --

23 JUSTICE KAVANAUGH: Well, that --

24 MR. SHANMUGAM: -- more generally?

25 JUSTICE KAVANAUGH: -- that gets to

1 Justice Kagan's question. You've got to figure
2 out what category you're in. Calling it narrow
3 doesn't do much for me. You've got to figure
4 out which is the better analogy, I think, the
5 general rule or the exception. And Justice
6 Barrett's questions, I think, elucidate why the
7 exception seems pretty on point here.

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

16 JUSTICE KAGAN: But, Mr. Shanmugam --

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

24 JUSTICE KAGAN: Yeah. I mean, we're a
25 country with a lot of jurisdictions. The right

1 test cannot be does everybody agree, you know,
2 across the board and everybody has considered
3 the exact same question and answered it in the
4 exact same way.

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

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

1 interests and where you can foresee that there
2 will be other than pecuniary harms flowing from
3 a breach, that those cases -- that those
4 contracts are treated differently with respect
5 to damages.

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

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

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

22 But I do want to speak specifically to
23 this question of the appropriate sort of level
24 of generality. I do think that when you take a
25 look at the case law, there are certain

1 categories of cases -- we've talked about the
2 innkeepers, common carriers, death messages, and
3 -- and the like -- where courts have tended to
4 find that emotional distress damages are
5 available.

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

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

20 But I do think that if you look at the
21 Restatement, if you look at the treatises in
22 particular, I do think that those authorities,
23 with all due respect, Justice Kagan, indicate
24 that the law in this area is unsettled. Even
25 this Court in its Southern Express opinion,

1 which -- which certainly did predate 1964,
2 recognized that in the context of telegrams
3 courts have gone in both directions.

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

11 And Corbin also notes, you know,
12 first, that these cases --

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

19 MR. SHANMUGAM: Well, there are more
20 states that might have permitted that. At least
21 certainly today there are more states that
22 permit emotional distress damages in certain
23 exceptional circumstances. But, again, these
24 cases are looking to tort law. The legal
25 standard for when emotional distress damages are

1 available is itself open to question in many of
2 these contexts, particularly because courts are
3 looking to tort law. They're requiring wanton
4 or malicious conduct.

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

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

25 JUSTICE BARRETT: But, Mr. Shanmugam,

1 let me press on this notice point. I've -- I
2 find it very surprising that this case is here
3 so many years, I mean, you know, 40-plus years
4 into recognizing causes of action under this
5 family of statutes. So it seems to me either
6 nobody was seeking emotional distress damages
7 and then suddenly people started doing it and it
8 came up, or, you know, as -- as Petitioners told
9 the story, that everybody assumed that they were
10 available, and then, by when Sheely came around,
11 somebody finally thought to challenge it.

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

18 MR. SHANMUGAM: Justice Barrett, for
19 whatever reason, comparatively few of these
20 cases seem to reach the court of appeals level.

21 But this issue was being litigated and
22 being litigated even before this Court's
23 decision in Barnes. The earliest district court
24 decision going our way is a decision, I believe,
25 from 1993. And even before the Eleventh

1 Circuit's decision in Sheely, there were other
2 district courts that had agreed with our view.

3 Now, not surprisingly, once a federal
4 court of appeals went the other way, a number of
5 district courts then followed suit and went in
6 that direction. But I don't think that it is
7 true that it has just been assumed for 40 years,
8 40-plus years, since the enactment of Title VI,
9 that emotional distress damages are available.

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

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

1 JUSTICE BREYER: What's the one --
2 what's the exception?

3 MR. SHANMUGAM: -- have emphasized the
4 unsettled nature of that exception.

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

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

25 MR. SHANMUGAM: So I -- I think, in

1 your hypothetical, she might potentially have a
2 discrete form of damages if, for instance, as a
3 result of her failure to obtain services, she
4 suffered some tangible injury. And there was a
5 colloquy earlier --

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

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

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

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

19 JUSTICE BREYER: Yeah.

20 MR. SHANMUGAM: -- in which a court at
21 common law would award purely --

22 JUSTICE BREYER: No, no --

23 MR. SHANMUGAM: -- emotional distress
24 --

25 JUSTICE BREYER: -- I asked you which

1 is the category. You were talking about
2 categories and subcategories, and you said some
3 -- they might allow it, like an innkeeper. And
4 then there are others that wouldn't. Okay. So
5 I gave you a case, and I said I would like to
6 know what subcategory wouldn't have given
7 damages for that? There may be some. It's not
8 a facetious question.

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

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

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

1 Those were both cases that I think
2 pretty comfortably fall within the specific
3 categories of cases in which the underlying
4 contractual obligations were of a sort to give
5 rise to emotional distress damages, but I -- I
6 think everyone is in agreement that there just
7 is not case law involving actual contractual
8 duties not to discriminate --

9 JUSTICE KAVANAUGH: So that --

10 MR. SHANMUGAM: -- that could be
11 specifically analogous.

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

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

23 But why isn't that, tie-breaker is the
24 wrong word, but something to look at in figuring
25 out how Congress would have designed this

1 statute given that we're in this implied cause
2 of action box?

3 MR. SHANMUGAM: Justice Kavanaugh, I
4 think, in many ways, that's an easier way to
5 think about this because, of course, this is a
6 question of statutory interpretation. And we're
7 not here to question the implied right of
8 action. That is, of course --

9 JUSTICE KAVANAUGH: Well, you sort of
10 are right now, I think.

11 MR. SHANMUGAM: Well, no, I don't
12 think so.

13 JUSTICE KAVANAUGH: Because if you --

14 MR. SHANMUGAM: I think that the
15 question --

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

22 MR. SHANMUGAM: No, not at all,
23 Justice Kavanaugh.

24 And I think I would fall back on what
25 Justice Scalia said in his concurrence in

1 Franklin, which is that it simply doesn't follow
2 from the existence of an implied cause of action
3 that any and all remedies are available.

4 And I do think it is useful to look to
5 the other antidiscrimination statutes outside
6 the Spending Clause context as a guide.

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

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

19 The second category are the
20 antidiscrimination statutes that don't permit
21 emotional distress damages at all. And that
22 category includes some pretty important
23 statutes. I would be hard-pressed to identify a
24 more important one than Title II of the Civil
25 Rights Act, which is, of course, the

1 foundational provision that prohibits
2 discrimination by private actors in the
3 provision of -- of public accommodation. No
4 emotional distress damages under that statute.
5 The same is true with regard to Title III of the
6 ADA, the ADEA, and other statutes.

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

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

19 And so I think that that points up the
20 quintessentially legislative nature of the
21 undertaking here and a reason for the Court to
22 be cautious. I think that this case would have
23 a very different complexion to it if Congress
24 invariably provided emotional distress damages
25 because I think that that would reflect a

1 congressional judgment that that is a necessary
2 remedy for any form of discrimination.

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

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

17 JUSTICE KAGAN: But we've --

18 MR. SHANMUGAM: -- counseling and
19 other --

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

1 MR. SHANMUGAM: And yet, Congress has
2 made the judgment under these foundational
3 statutes that I just referred to that emotional
4 distress damages are not available.

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

12 I would note parenthetically that if
13 you take a look at many state statutes --

14 JUSTICE KAGAN: Why isn't the --

15 MR. SHANMUGAM: -- they too have caps
16 --

17 JUSTICE KAGAN: -- right way to deal
18 --

19 MR. SHANMUGAM: -- on emotional
20 distress damages.

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

25 But, in some ways, the courts can

1 impose caps. In some ways, the courts can make
2 sure through the rules that they convey as to
3 what kind of damages these are and the
4 importance of keeping them in check that they
5 should be -- you know, the -- the Petitioner
6 said up to \$25,000.

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

12 MR. SHANMUGAM: So a couple points in
13 response to that, Justice Kagan.

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

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

1 exclusion, the paradigmatic sorts of cases that
2 we think about.

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

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

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

25 And, again, that just illustrates that

1 if, in fact, emotional distress damages are to
2 be made available here, that is a matter for
3 Congress to address in the first instance.

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

9 Quite to the contrary, what the Court
10 would be doing is very similar to what Congress
11 has done in other bedrock antidiscrimination
12 statutes.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Justice Thomas, anything further?

15 JUSTICE THOMAS: Nothing for me,
16 Chief.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer?

19 Justice Alito?

20 Justice Sotomayor?

21 Justice Gorsuch, anything further?

22 No?

23 Thank you, counsel.

24 MR. SHANMUGAM: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal,

1 Mr. Rozyński?

2 REBUTTAL ARGUMENT OF ANDREW ROZYNSKI
3 ON BEHALF OF THE PETITIONER

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

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

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

23 So, given that this was the state of
24 the law for over 30 years, and Respondent may
25 say that there has been some disagreement, but

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

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

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

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

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

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

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

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