

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JANE CUMMINGS,)
Petitioner,)
v.) No. 20-219
PREMIER REHAB KELLER, P.L.L.C.,)
Respondent.)
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Pages: 1 through 80

Place: Washington, D.C.

Date: November 30, 2021

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case Number
5 20-219, Cummings versus Premier Rehab Keller.

6 Mr. Rozyński.

7 ORAL ARGUMENT OF ANDREW ROZYNSKI

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 find what is the state of the law and -- and
2 what exactly is available. And for these types
3 of contracts, what you will see, that the
4 Restatements and -- and all the leading
5 treatises say that when there is a agreement to
6 treat people fairly with equality, especially in
7 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. 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 in litigation, 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 those cases,
19 you will see that the Court awarded emotional
20 distress damages for purely breach of contract
21 in those cases.

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

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

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

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

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

20 MR. ROZYNSKI: Sure. Two things.

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

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

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

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

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

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

6 JUSTICE BARRETT: Does it matter --

7 JUSTICE SOTOMAYOR: Some of --

8 JUSTICE BARRETT: I'm sorry, go ahead.

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

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

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

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

1 emotional distress damages have left it
2 undisturbed.

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

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

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

25 CHIEF JUSTICE ROBERTS: What if you

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, that's

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

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

11 So, if we actually look --

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

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

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

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

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

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

13 So there actually --

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

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

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

25 JUSTICE ALITO: No, I understand the

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

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

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

11 What invoked the Spending Clause here?

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

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

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

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

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

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

7 MR. ROZYNSKI: Correct.

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

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

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

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

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

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

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

3 MR. ROZYNSKI: -- specifically in this
4 case if they could have done that.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas, anything further?

8 JUSTICE BREYER: No, thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer?

11 Justice Alito?

12 Justice Sotomayor?

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

20 MR. ROZYNSKI: Sure.

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

24 MR. ROZYNSKI: Sure. Ms. --
25 Ms. Cummings suffered a profound humiliation, a

1 feeling of less of a self-worth, that she's not
2 as -- as worthy as -- as other members of the
3 public because of her disability to access those
4 services in a manner that everyone else can
5 access them.

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

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

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

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

1 JUSTICE SOTOMAYOR: Thank you.

2 MR. ROZYNSKI: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Nothing?

5 Justice Gorsuch? All right.

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

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

21 And those -- those awards have been
22 cited in -- in our amici and the disability
23 brief and others, and the Court can -- can look
24 at those as well there.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. ROZYNSKI: Thank you.

4 CHIEF JUSTICE ROBERTS: Ms. Sinzduk.

5 ORAL ARGUMENT OF COLLEEN R. SINZDUK
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE PETITIONER

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

10 This Court has repeatedly recognized
11 that federal funding recipients may be liable
12 for compensatory damages when they engage in
13 intentional conduct in violation of the clear
14 terms of the non-discrimination statutes.

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

22 That contention is irreconcilable with
23 contract law, 30 years of practice in the
24 federal courts, and common sense. If Respondent
25 were correct, then the Petitioner in Franklin

1 won only a pyrrhic victory because, while this
2 Court held that she was entitled to seek damages
3 for the severe sexual harassment and abuse she
4 suffered at the hands of a teacher in violation
5 of Title IX, she was not entitled to
6 compensation for the only injuries she described
7 in her briefing, the profound psychological and
8 emotional harms caused by the discrimination.
9 That is not the law, and this Court should not
10 make it so.

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

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

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

25 MS. SINZDAK: I think it needs to be

1 the rule, and I think you can look to Barnes and
2 see what they looked at were four contract
3 treatises, all of which said that -- that
4 punitive damages were off the table.

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

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

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

24 So you do have to look at the specific
25 nature of the contract, and then you say: Well,

1 what -- what types of damages have traditionally
2 been awarded for that type of -- for a breach of
3 that type of contract?

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

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

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

25 MS. SINZDAK: Not to our knowledge,

1 no. And -- and I think -- so the history is
2 quite powerful in that respect because I think,
3 in Barnes, one of the motivations was this fear
4 that if punitive damages were available, people
5 would simply reject federal funding.

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

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

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

21 And then, when Congress, in 1991, for
22 the first time introduced a -- an additional
23 compen- -- compensatory and punitive remedy,
24 then it put some caps on that, not just, by the
25 way, on compensation for emotional distress but

1 also on compensation for a future pecuniary loss
2 and a variety of other forms of damages. And I
3 think there it was a question of capping this
4 additional supplemental remedy to the
5 traditional back pay.

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

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

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

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

12 MS. SINZDAK: Well --

13 JUSTICE KAGAN: -- should we think
14 about this case at?

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

1 within the reasonable contemplation of the
2 parties at the time of contracting.

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

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

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

23 MS. SINZDAK: I think those cases are
24 directly analogous in that I think they're the
25 most obvious example of contracts where there's

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

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

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

25 Is that -- help me out with how to

1 look at that.

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

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

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

25 But even if you want to dis- --

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

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

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

19 JUSTICE ALITO: Suppose we --

20 JUSTICE KAVANAUGH: Your --

21 JUSTICE ALITO: -- suppose we look at
22 the question through the eyes of the Respondent
23 in this case, as opposed to parties in another
24 case, and what is at issue is the application of
25 the reasonable accommodation standard under the

1 Rehabilitation Act or the requirement under the
2 Affordable Care Act to provide, I think the term
3 is, something like suitable aids?

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

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

20 It may be -- the -- the -- the courts
21 below skipped over that inquiry.

22 JUSTICE ALITO: So we have to assume
23 that it's a -- that it's a viable claim. It's
24 12(b)(6). We assume that it's a viable claim.
25 Don't we have to assume that here?

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

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

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

23 So, for example, in this case, if this
24 Court says you were wrong to say that you can
25 just never obtain compensation for emotional

1 distress, that no victim of discrimination in
2 violation, no matter how egregious the
3 discrimination is, no victim can ever obtain
4 compensation for emotional distress, then that
5 would go back down and there might be questions
6 about whether, here, we really had the kind of
7 deliberate indifference, the kind of intentional
8 conduct that's necessary to trigger a damages
9 remedy at all.

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

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

22 And you have to assume that they've
23 been boiling the oceans looking for sort of
24 exorbitant awards, and they're not finding them.
25 And that's because there are checks on that kind

1 of award.

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

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

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

18 JUSTICE KAGAN: What -- what does that
19 mean exactly? What is enough?

20 MS. SINZDAK: In general, there needs
21 to be specific detailed evidence cataloguing the
22 emotional distress. Often, there will be
23 corroboration from those around -- around --
24 those who are around the person. Sometimes
25 there will be medical evidence corroborating it.

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

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

14 JUSTICE ALITO: Where do all these
15 rules come from?

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

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas, anything further?

23 JUSTICE THOMAS: No, Chief.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer?

1 Justice Alito? No?

2 Justice Sotomayor?

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

8 Do you agree with that statement? Do
9 you disagree with it?

10 MS. SINZDAK: Of course, that question
11 really isn't presented here.

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

13 MS. SINZDAK: That's a conduct
14 question.

15 JUSTICE SOTOMAYOR -- before us at all.
16 But it is subsumed --

17 MS. SINZDAK: But, yes, I mean, we
18 would --

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

25 MS. SINZDAK: Because of undue burdens

1 and because the accommodation has to be
2 reasonable.

3 JUSTICE SOTOMAYOR: So what --

4 MS. SINZDAK: Absolutely.

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

9 MS. SINZDAK: Not only that, most
10 courts of appeals apply a deliberate in --
11 indifference standard, so that means you have to
12 know that the person's federally protected
13 rights are probably going to be invaded unless
14 you make the accommodation. And then you have
15 to intentionally refuse to -- to make that
16 accommodation. I mean, that is -- that is a
17 pretty high -- a pretty high standard there.

18 But I think that that isn't the
19 equivalent of taking it off the table entirely.

20 CHIEF JUSTICE ROBERTS: Justice Kagan,
21 anything?

22 Justice Gorsuch?

23 JUSTICE KAVANAUGH: One follow-up just
24 so I understand the answer to the question about
25 the disparity potential with Title VII, the

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

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

12 MS. SINZDAK: So Title VII --

13 JUSTICE KAVANAUGH: -- why that
14 matters.

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

21 And in 1986, when Congress ratified
22 the damages action -- ratified the availability
23 of a damages action under Title VI, there were,
24 in fact, no compensatory damages available under
25 Title VII. So we know that Congress just thinks

1 of these two statutes differently.

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

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

22 MS. SINZDAK: I -- I don't think so
23 because I think that in many cases, that isn't
24 attached. But even if that -- that was a
25 requirement, I think because there -- it does

1 have to be intentional conduct in violation of
2 the clear terms, it would be satisfied in all of
3 these cases.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON K. SHANMUGAM

9 ON BEHALF OF THE RESPONDENT

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

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

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

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

25 In Barnes, this Court held that

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

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

19 The Court should be cautious about
20 recognizing the availability of emotional
21 distress damages here. As Justice Alito's
22 question illustrated, emotional distress damages
23 are notoriously difficult to quantify. And it
24 would be perverse to provide emotional distress
25 damages more broadly under Spending Clause

1 statutes with implied causes of action than
2 under antidiscrimination statutes with express
3 causes of action.

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

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

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

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

25 And I think this Court's decision in

1 Barnes provides a guide. There, of course, the
2 Court was considering the availability of
3 punitive damages, and as my friend pointed out,
4 the Court looked to the Restatement and various
5 treatises.

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

19 But the Court didn't drill down into
20 that exception and determine whether that was
21 analogous whether, for instance, as has just
22 been discussed, intentional discrimination can
23 be characterized as a form of wanton or
24 malicious conduct. The Court simply looked to
25 the general rule and said that in light of that

1 general rule, a recipient of funding would not
2 have clear notice.

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

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

23 MR. SHANMUGAM: I don't think so
24 necessarily. I will get the necessary caveat
25 that that's not the state of the law out of the

1 way, but I want to address that directly.

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

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

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

25 JUSTICE BREYER: Well, what about --

1 MR. SHANMUGAM: Now, again, we think
2 this is an easier case.

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

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

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

23 There certainly are some jurisdictions
24 in which there are certain specific categories
25 of exceptions, common carriers, innkeepers,

1 cases involving death messages sent by telegram
2 and the like.

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

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

20 And, again, we cite the Southern
21 Express decision from this Court for the
22 proposition that in those areas of the law where
23 federal common law applies, obviously, more
24 limited these days, emotional distress damages
25 are categorically --

1 JUSTICE BARRETT: But --
2 MR. SHANMUGAM: -- unavailable.
3 JUSTICE BARRETT: -- Mr. Shanmugam --
4 JUSTICE BREYER: Innkeepers -- I'm
5 sorry.
6 JUSTICE BARRETT: Oh, well, that's
7 what I was going to go to, the innkeeper. I
8 think that's very bad for you, which I assume
9 that --
10 JUSTICE BREYER: Yeah, I do too.
11 JUSTICE BARRETT: Yeah.
12 JUSTICE BREYER: The same question, I
13 mean --
14 JUSTICE BARRETT: Yeah.
15 JUSTICE BREYER: -- you know, nope,
16 you can't stay in the room, you have to sleep
17 outside. There you are, outside, and that's
18 uncomfortable.
19 But, also, all the little kids come
20 around and say ha, ha, ha, he's sleeping outside
21 tonight, ha, ha, ha, just as they might say
22 something even worse, or the person who can't --
23 you know, can't walk upstairs, there's no
24 elevator, and so this handicapped person is
25 trying to, you know, climb up the stairs, and

1 that's a bore and painful, and, also, a lot of
2 people might think this is a little -- you know,
3 sort of make fun of the person. That should --

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

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

18 But I don't want to overly fight those
19 cases because I would certainly recognize that
20 that's an example that the treatises often cite
21 as kind of the paradigmatic exceptional example,
22 a situation in which where parties are expelled
23 or not permitted to stay at an inn, courts
24 looking to tort law have found a heightened duty
25 and have said that the breach of that duty can

1 give rise to emotional distress.

2 JUSTICE KAVANAUGH: So is --

3 JUSTICE SOTOMAYOR: Excuse me, but
4 isn't that what --

5 MR. SHANMUGAM: But all of this -- go
6 ahead.

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

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

22 That's no different than the common
23 carrier agreement to treat a passenger with
24 dignity and to treat them with a -- with a sense
25 of respect, the special care.

1 So it's in the same nature. And both
2 of them are intentional in the sense of what an
3 intentional tort speaks about.

4 So I'm -- I'm not sure how you
5 distinguish either those cases or you
6 distinguish the fact that it is an intentional
7 act and an intentional breach of a clear
8 contract with the government and with the
9 patient.

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

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

22 JUSTICE SOTOMAYOR: So what do you do
23 with Franklin or what do you do with Sheely for
24 14 years? What do you do with the multiple of
25 state and federal cases in decades that have

1 awarded damages for this kind of discrimination?

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

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

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

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

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

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

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

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

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

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

24 And I say all of that --

25 JUSTICE KAVANAUGH: If we're in --

1 keep going, sorry.

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

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

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

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

19 JUSTICE KAVANAUGH: Well, that -- that
20 gets to the -- Justice Kagan's question. You've
21 got to figure out what category you're in.
22 Calling it narrow doesn't do much for me.
23 You've got to figure out which is the better
24 analogy, I think, the general rule or the
25 exception. And Justice Barrett's questions, I

1 think, elucidate why the exception seems pretty
2 on point here.

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

11 JUSTICE KAGAN: But, Mr. Shanmugam --

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

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

25 If you look at the state of the law

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

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

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

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

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

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

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

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

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

24 And I would give you just one example,
25 which is Corbin on Contracts. And Corbin says

1 that the general rule is well established but
2 that by contrast, the class of cases involving
3 emotional distress damages "has resulted in much
4 litigation, and the law cannot be said to be
5 entirely settled."

6 And Corbin also notes, you know,
7 first, that these cases --

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

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

25 And, again, at that point, this starts

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

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

20 JUSTICE BARRETT: But, Mr. Shanmugam,
21 let me press on this notice point. I -- I find
22 it very surprising that this case is here so
23 many years, I mean, you know, 40-plus years into
24 recognizing the causes of action under this
25 family of statutes.

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

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

15 MR. SHANMUGAM: Justice Barrett, for
16 whatever reason, comparatively few of these
17 cases seem to reach the court of appeals level.
18 But this issue was being litigated and being
19 litigated even before this Court's decision in
20 Barnes.

21 The earliest district court decision
22 going our way is a decision, I believe, from
23 1993. And even before the Eleventh Circuit's
24 decision in Sheely, there were other district
25 courts that had agreed with our view. Now, not

1 surprisingly, once a federal court of appeals
2 went the other way, a number of district courts
3 then followed suit and went in that direction.

4 But I don't think that it is true that
5 it has just been assumed for 40 years, 40-plus
6 years, since the enactment of Title VI, that
7 emotional distress damages are available.
8 Indeed, of the four cases that came to this
9 Court involving allegedly emotional distress
10 damages, three of those cases were cases
11 involving pain and suffering. And as we point
12 out in our brief, the analysis for pain and
13 suffering damages might be somewhat different
14 because there's a somewhat more substantial
15 basis of contract law permitting those damages.

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

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

25 MR. SHANMUGAM: -- have emphasized the

1 unsettled nature of that exception.

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

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

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

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

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

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

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

13 MR. SHANMUGAM: Well, I -- I -- I'm
14 not aware of any case in which a court at common
15 law would award --

16 JUSTICE BREYER: No, no --

17 MR. SHANMUGAM: Purely emotional
18 distress --

19 JUSTICE BREYER: -- I asked you which
20 is the category. You were talking about
21 categories and subcategories. And you said some
22 -- they might allow it, like an innkeeper. And
23 then there are others that wouldn't. Okay. So
24 I gave you a case.

25 And I said I would like to know what

1 subcategory wouldn't have given damages for
2 that? There may be some. It's not a facetious
3 question.

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

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

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

20 Those were both cases that I think
21 pretty comfortably fall within the specific
22 categories of cases in which the underlying
23 contractual obligations were of a sort to give
24 rise to emotional distress damages, but I -- I
25 think everyone is in agreement that there just

1 is not case law involving actual contractual
2 duties not to discriminate --

3 JUSTICE KAVANAUGH: So that --

4 MR. SHANMUGAM: -- that could be
5 specifically analogous.

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

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

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

22 MR. SHANMUGAM: Justice Kavanaugh, I
23 think in many ways that's an easier way to think
24 about this because, of course, this is a
25 question of statutory interpretation. And we're

1 not here to question the implied right of action
2 that is --

3 JUSTICE KAVANAUGH: Well, you sort of
4 are right now.

5 MR. SHANMUGAM: Well, no, I don't
6 think so.

7 JUSTICE KAVANAUGH: Because if you --

8 MR. SHANMUGAM: I think if the
9 question --

10 JUSTICE KAVANAUGH: -- accept it -- if
11 you accept it, that it's a real cause of action,
12 then why not have it be like the other analogous
13 causes of action, which pretty consistently
14 allow emotional distress damages? Sorry to
15 interrupt.

16 MR. SHANMUGAM: No, not at all,
17 Justice Kavanaugh.

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

23 And I do think it is useful to look to
24 the other antidiscrimination statutes outside
25 the Spending Clause context as a guide.

1 My point, as I indicated in the
2 opening, is that there is no uniform practice on
3 Congress's part. And I think that the statutes
4 fall into three categories.

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

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

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

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

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

22 And, of course, if the Court were to
23 agree with us here, there would still be a full
24 panoply of available remedies. In many of these
25 cases, particularly the cases involving the most

1 intentional and blatant affirmative acts of
2 exclusion, the kinds of discrimination that are
3 pointed out in the amicus briefs on the other
4 side, there will be compensatory damages in the
5 form of economic harm.

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

11 JUSTICE KAGAN: But we've --

12 MR. SHANMUGAM: -- counseling in other
13 --

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

20 MR. SHANMUGAM: And yet Congress has
21 made the judgment under these foundational
22 statutes that I just referred to that emotional
23 distress damages are not available.

24 And I do think that in the cases
25 involving intentional, blatant misconduct, there

1 will be not only other forms of economic and
2 other compensatory damages available but, of
3 course, there will be injunctive relief,
4 declaratory relief, nominal damages, and
5 remedies under state law.

6 I would note parenthetically that if
7 you take a look at many state statutes --

8 JUSTICE KAGAN: Why isn't the --

9 MR. SHANMUGAM: -- they too have caps
10 on emotional distress damages.

11 JUSTICE KAGAN: -- right way to deal
12 with this -- why isn't the right way to deal
13 with this, you know, Justice Kavanaugh said,
14 well, Title VII has caps. We couldn't really
15 impose caps.

16 But in some ways the courts can impose
17 caps. In some ways the courts can make sure
18 through the rules that they convey, as to what
19 kind of damages these are, and the importance of
20 keeping them in check, that they should be, you
21 know, the -- the Petitioner said up to \$25,000.

22 We don't have to set a number in order
23 to convey a sense that -- that -- that these
24 should be kept in control, and why isn't that
25 the right way to -- to balance the competing

1 interests here?

2 MR. SHANMUGAM: So a couple points in
3 response to that, Justice Kagan. The first is
4 that, as Petitioner herself contends, emotional
5 distress damages can and -- and often are
6 awarded based on the plaintiff's testimony
7 alone.

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

18 But, nonetheless, there are plenty of
19 examples of emotional distress damages running
20 into the seven figures. And while those awards
21 can be remitted, the standard for remittitur,
22 consistent with the Seventh Amendment, is quite
23 a high one. It is that the award shocks the
24 conscience.

25 And so, yes, of course, if this Court

1 were to permit these sorts of damages, the Court
2 could say to lower courts in an admonishing way:
3 Look to Title VII. That might provide some
4 guidance.

5 But that just points up the
6 quintessentially legislative nature of this
7 whole undertaking, particularly given that in
8 Title VII, what triggers the various caps is the
9 size of the employer. That's obviously not a
10 consideration that would comfortably fall within
11 the traditional judicial task of remittitur.

12 And yet it reflects the fact that
13 Congress made the judgment that it wanted to
14 provide a greater degree of protection to small
15 employers.

16 And, again, that just illustrates that
17 if, in fact, emotional distress damages are to
18 be made available here, that is a matter for
19 Congress to address in the first instance.

20 And I think the court can have some
21 degree of comfort that, if the court were not to
22 permit emotional distress damages here, it would
23 not be going further than Congress has in other
24 statutes.

25 Quite to the contrary, what the Court

1 would be doing is very similar to what Congress
2 has done in other bedrock antidiscrimination
3 statutes.

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Thomas, anything further?

6 Justice Breyer?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Gorsuch, anything further?

10 JUSTICE GORSUCH: No.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. SHANMUGAM: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal,
15 Mr. Rozyński?

16 REBUTTAL ARGUMENT OF ANDREW ROZYNSKI

17 ON BEHALF OF THE PETITIONER

18 MR. ROZYNSKI: Excuse me. So going to
19 the -- Justice Barrett's comment regarding this
20 -- notice, and essentially if -- we're all --
21 you know, lawyers are smart. If -- if -- if
22 their clients had not believed that they were on
23 notice for emotional distress damages, virtually
24 all these complaints involving intentional
25 discrimination are asking for emotional distress

1 damages, they would surely object. But for
2 almost all -- virtually all cases, they haven't.

3 And that's because they are on notice
4 for these -- these damages. And take for this
5 instance, for this case, Respondent didn't even
6 move to dismiss that they lacked notice of
7 emotional distress damages.

8 The court, the trial court itself
9 raised sua sponte, on its own accord, and said
10 emotional distress damages are categorically
11 unavailable under these statutes.

12 So given that this was the state of
13 the law for over 30 years, and Respondent may
14 say that there has been some disagreement, but
15 if you actually look at the cases, there perhaps
16 are three cases that have said that they're not
17 available. And there are -- in our -- in our
18 moving brief, we've cited at least 20 cases,
19 including several court of appeals that have
20 left it undisturbed or say that they are
21 available.

22 And this -- this lack of -- of notice
23 argument, we believe, is just not correct in
24 this context. And citing to McCormick, which
25 was in 1935, McCormick says virtually all courts

1 agree that there is emotional distress in the
2 common carrier type cases that we were talking
3 about here today.

4 So if Respondent tries to parse out
5 that there was no notice as -- as to the state
6 of 1964, that simply is just not true.

7 And punitive damages, when they were
8 excluded in -- in Barnes, actually, there was no
9 affirmed case of punitive damages ever at that
10 time under these family of statutes.

11 And here we would be overturning a --
12 a whole body of case law to the only remedy that
13 would be available in discrimination cases. And
14 punitive damages are traditionally only
15 available when there is a tort involved as well.

16 However, in emotional distress
17 damages, there is no need to be accompanied by a
18 tort. So the suggestion that a tort, a separate
19 tort, is required is not supported by the
20 treatises and the Restatement.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:21 a.m., the case
25 was submitted.)

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