No.

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), prohibits disability-based discrimination in any public program or activity receiving federal funds. Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132, more generally prohibits disability-based discrimination in any public program, activity or service regardless of the receipt of federal funds. The question presented in this case is:

Whether the Eighth Circuit, in agreement with the Fourth Circuit but in conflict with the Third and Sixth Circuits, correctly held that punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioner Kay Barnes states that the other parties in the court of appeals were the following defendants named in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri: Dr. Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold. Although the Eighth Circuit's caption also lists as defendants Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri Police Department, and Neil Becker, in his official capacity as a member of the Kansas City Police Department, both were in fact dismissed from the case by the trial court prior to the entry of judgment. See note 4, *infra*. In this Court, the petitioners in addition to Commissioner Barnes are Commissioner Daniels-Young, Commissioner Eckhold, and Commissioner Karl Zobrist (who has succeeded to the office previously held by Jeffrey J. Simon, see S. Ct. Rule 35.3), all in their official capacities. Commissioner Mulvihill resigned from the Board of Police Commissioners effective on May 26, 2001; his successor has not yet been named, but will become a petitioner once he or she takes office. S. Ct. Rule 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 257 F.3d 738. The order denying rehearing en banc (Bowman and Loken, JJ., dissenting) and panel rehearing (App., *infra*, 52a) is unreported. A previous opinion of the court of appeals (*id*. at 35a-51a) is reported at 152 F.3d 907. The opinion of the district court vacating the punitive damages award (App., *infra*, 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2001, and rehearing was denied on August 20, 2001 (App., *infra*, 52a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, all as amended, are set forth at App., *infra*, 53a-56a.

STATEMENT

This long-running case arises out of the 1992 arrest of a patron of a Kansas City nightclub who got into an altercation with a bar employee, was forcibly ejected from the bar, and then, once outside the bar, refused to honor a request to leave made by several off-duty police officers serving as security guards. After being placed under arrest for trespassing, the patron, who is paraplegic and confined to a wheelchair, was transported to the police station in a van that was equipped with a bench. Despite precautions taken to secure the patron in an upright position, he fell from the bench during the trip after he loosened his seatbelt and another belt that had been used to secure him somehow came undone. On the basis of injuries allegedly sustained in the fall, the patron – respondent Jeffrey

Gorman – sued several members of the Kansas City police department and Board of Police Commissioners, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The jury awarded Gorman more than a $1 million in compensatory damages as well as punitive damages of $1.2 million. Although the district court vacated the $1.2 million penalty as legally impermissible, the court of appeals reversed. In holding that punitive damages could be recovered from a municipal government under these provisions of the federal civil rights laws, the Eighth Circuit placed itself squarely in conflict with decisions of the Third and Sixth Circuits. Tellingly, the Eighth Circuit acknowledged that it was "sympathetic" to the Sixth Circuit's contrary view (which rested on concerns that were "hardly misplaced") and had reached the opposite conclusion "not with great satisfaction." App., *infra*, 12a, 13a, 15a. Nevertheless, the Eighth Circuit deemed itself "compel[led]" by this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), to "part[] ways with our sister circuit" and to recognize an implied judicial remedy of punitive damages. App., *infra*, 13a, 15a-16a.

A. The Statutory Framework and This Court's Decision in *Franklin*

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of vocational and other rehabilitation services for the disabled and imposes certain conditions on the recipients of federal funds. Among other things, the Act (in § 504) bars discrimination against persons with disabilities under federal grants and programs and (in § 501) places certain obligations on federal agencies with respect to the employment of the disabled. See 29 U.S.C. §§ 791, 794(a). Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In 1978, Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub. L. No. 95-602, Title I, § 120(a), 92 Stat. 2982. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. ("Title VI"), prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance."

In 1986, in response to *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), Congress abrogated the States' Eleventh Amendment immunity with respect to suits based on violations of Section 504 of the Rehabilitation Act, Title VI, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"), which prohibits sex discrimination in educational activities and programs that receive federal funding. See 42 U.S.C. § 2000d-7(a)(1).

In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, which overturned *Grove City College* v. *Bell*, 465 U.S. 555 (1984), by defining "program or activity" in Title VI, Section 504 of the Rehabilitation Act, and related statutes to include "all of the operations" of an entity, "any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a.

In 1990, Congress passed the Americans with Disabilities Act ("ADA"). Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42

U.S.C. § 12132. Section 203 of the ADA, in turn, specifies that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

In enacting Title VI, Title IX, Section 504 of the Rehabilitation Act, and Section 202 of the ADA, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979)), and Title VI (*Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983)).

Following enactment of the ADA, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072, which, among other things, created a limited right to recover punitive damages (subject to specified monetary caps) in certain actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of ADA, 42 U.S.C. § 12112. See 42 U.S.C. § 1981a(a)(2). The punitive damages provision does not apply to Section 504 of the Rehabilitation Act or to Section 202 of the ADA. The 1991 Act also provides that the newly authorized punitive damages remedy may not be recovered from any "government, government agency or political subdivision." *Id.* § 1981a(b)(1).

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that an implied right of action under Title IX supports a claim for "monetary damages." *Id*. at 63. The Court reaffirmed the "general rule" that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any *appropriate* relief in a cognizable cause of action brought pursuant to a federal statute." *Id*. at 70-71 (emphasis added). Based on its review, the Court found no evidence that Congress had intended to depart from this presumption. *Id*. at 72-73. Finally, the Court examined but

rejected several other arguments why an award of compensatory damages would be inappropriate. *Id*. at 73-76.

B. The Events Underlying This Lawsuit

Respondent Jeffrey Gorman was rendered paraplegic by an auto accident that occurred in 1988. On a Saturday night in May 1992, Gorman and a friend were out drinking at a country-and-western nightclub in Kansas City, Missouri, when they got into an altercation with a bouncer.[1] As a result, Gorman was forcibly expelled from the bar. Outside, he approached several police officers in the hope that they would intercede on his behalf. The officers, who were off duty and working as private security, instead told Gorman that he had to leave. When Gorman refused, he was placed under arrest for trespass. Gorman was subsequently convicted of one count of misdemeanor trespass.

While waiting for a police van that would transport him to the station for booking, Gorman told the off-duty officers that he had to go to the restroom to empty his full urine bag.[2] The off-duty officers (whom Gorman sued in a separate lawsuit, which was settled) told Gorman to wait until he got to the station. Sometime thereafter, a police van arrived driven by Officer Neil Becker. The van was equipped with a bench but lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Gorman testified at trial that he told

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[1] As the court appeals correctly noted, "[a]lmost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent." App., *infra*, 3a n.2. Like the court of appeals, we present here Gorman's version of events because he prevailed below. *Ibid*.

[2] "Gorman * * * lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist * * *." App., *infra*, 2a.

the officers that he was unable to stay upright without his wheelchair and could not ride in the van without risking a fall from the bench. Nevertheless, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not properly hold Gorman upright, and it lay across his already full urine bag. According to Gorman's testimony, the officers loosened the seatbelt after he complained about it. As an extra precaution, however, the officers also used Gorman's own belt to strap him to the wire mesh behind the bench to secure him in an upright position.

Officer Becker, the only on-duty officer, then drove the van to the police station. As some point during the ride, Gorman released his seatbelt out of concern over the pressure it was placing on the urine bag. Eventually, the other belt also came undone and Gorman fell to the floor, causing the urine bag to rupture. Officer Becker stopped the van but was unable to lift Gorman by himself, so he fastened Gorman to a support in the back of the van for the duration of the trip. After arriving at the station, Gorman was booked, processed, and released.

C. The Proceedings Below

1. On May 30, 1995, Gorman filed an action in the United States District Court for the Western District of Missouri alleging that, "by reason of" his disability, he had been discriminated against and had been "excluded from participation in" or "denied the benefits of" the "programs" or "activities" of the Kansas City Police Department, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the ADA, 42 U.S.C. § 12132. Gorman named as defendants Officer Becker, then-Chief of Police Steven Bishop, and various current or former members of the Board of Police Commissioners of Kansas City ("the Board"), including the Mayor of Kansas City, Missouri (who by virtue of that position automatically serves as a Member of the Board).[3]

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[3] The Board members named in the original complaint were Mayor

Following an initial dismissal by the district court (see *Gorman* v. *Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996); *Gorman* v. *Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996)), the court of appeals remanded the case for a trial of respondent's claims against petitioners in their official capacity. App., *infra*, 35a-51a. A jury thereafter returned a verdict in respondent's favor, awarding him compensatory damages of $1,034,817.33 and punitive damages of $1,200,000.00. *Id.* at 4a.[4]

2. Relying (App., *infra*, 24a-27a) on the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996), the district court set aside the award of punitive damages. App., *infra*, 21a-34a. The court explained that its "first task," under the framework articulated in this Court's *Franklin* decision, was "to determine whether there is a clear indication that Congress imposed limits on the scope of relief." App., *infra*, 25a. The court found such a clear indication in the three amendments made to Section 504 of the Rehabilitation Act in 1986, 1987, and 1991, as well in the "backdrop of judicial decisions" that existed at the time these amendments occurred. *Id.* at 25a-26a. Although "Congress amended portions of the Rehabilitation Act three times (including section

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Emanuel Cleaver II, John Dillingham, Jack Headley, Jacqueline Paul, Balius Tate, Donna Boley, and Albert Riederer. Resp. C.A. App. 25. In an amended complaint filed on November 6, 1995, respondent added defendants Stacey Daniels[-Young] and James F. Ralls, Jr., and omitted defendant Riederer. Resp. C.A. App. 29; see also Pet. ii; note 4, *infra*.

[4] At the close of Gorman's case, the trial court dismissed the claims against Police Chief Easley and Officer Becker in their official capacities, thus leaving only the individual Board members as defendants. See 4/5/99 Tr. 495-496; Resp. C.A. App. 45 (jury instruction explaining dismissal). The district court's judgment was entered against Mayor Cleaver and Commissioners Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold, all in their official capacities as members of the Board. While this case was on appeal, petitioner Kay Barnes succeeded Emanuel Cleaver II as Mayor of Kansas City and thus as a member of the Board.

504 twice) and the ADA once, * * * at no time did Congress take steps to alter the consensus of judicial decisions" holding that punitive damages "were not available." *Id*. at 25a-27a. "'The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in status quo – *i.e*., no punitive damages.'" *Id.* at 27a (quoting *Moreno*, 99 F.3d at 791).

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-20a. Although the panel stated that it was "sympathetic" to the Sixth Circuit's view that punitive damages are unavailable under Section 504 (*id*. at 8a, 12a), and even acknowledged that the "concerns" animating the Sixth Circuit were "hardly misplaced" (*id*. at 13a), it nevertheless ruled ("not with great satisfaction") that the Sixth Circuit's approach was "foreclosed by controlling precedent" (*id*. at 8a, 15a) – in particular, this Court's decision in *Franklin*.

As the Eighth Circuit read *Franklin*, there is a presumption that all "appropriate remedies" will be available in an implied cause of action, which can be overcome only if Congress "expressly limit[s] the remedies available." App., *infra*, 11a-12a. In the court of appeals' view, because this Court had "long made clear that punitive damages are an integral part of the common law tradition and the judicial arsenal," punitive damages "fall within the panoply of remedies *usually available* to American courts." *Id*. at 10a (emphasis added) (citing *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)). "Given an implied cause of action," the Eighth Circuit reasoned, *Franklin* "compels the conclusion" that a plaintiff may recover "all appropriate remedies, including punitive damages" – unless there is an "express congressional statement to the contrary." *Ibid.*

Unlike the Sixth Circuit – whose "methodology and conclusions" the court below explicitly rejected (App., *infra*, 12a) – the Eighth Circuit could not discern the requisite congressional intent to foreclose a punitive damages remedy. The court recognized that its analysis "turns * * * on its head"

Congress's understanding, evident in the "text and history of the 1991 Act" (which added a limited punitive damages remedy), that in so doing Congress "intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA, and "considered the new language necessary to create a punitive damages remedy under the acts." *Id*. at 15a. But that evidence was not sufficiently "express" to persuade the court of appeals that Congress intended to preclude resort to punitive damages as a remedy in cases not covered by the narrow 1991 provision.

The court of appeals then remanded the case for a determination (purportedly under *Franklin*) whether an award of punitive damages was "appropriate" in this "specific case." App., *infra*, 16a. Again, the panel flatly disagreed with the Sixth Circuit. As a *categorical* matter, that court had held that, "given the legislative and judicial backdrop" and a number of policy considerations, punitive damages are "not 'appropriate' as required by *Franklin*" in *any* action brought under Section 504 of the Rehabilitation Act. *Id*. at 16 n.10 (citing *Moreno*, 99 F.3d at 791-92). In the Eighth Circuit's view, the question whether a remedy is "appropriate" under *Franklin* is a case-specific (not statute-specific) inquiry. App., *infra*, 16a & n.10. The court therefore remanded for consideration of whether the punitive award in this case was supported by sufficient evidence and not constitutionally excessive.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve an important question of federal law on which the circuits are sharply divided: whether punitive damages are an appropriate implied remedy in private disability discrimination lawsuits brought against municipal governments (and perhaps other defendants) under Section 504 of the Rehabilitation Act and Section 202 of the ADA. Because those provisions apply to a wide array of public "programs," "activities," and (in the case of the ADA) "services," see *Pennsylvania Dep't of*

Corrections v. *Yeskey*, 524 U.S. 206 (1998), the question presented in this case has arisen with great frequency.

Much of the confusion in the lower courts boils down to disagreements over the meaning of *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which only this Court can clarify. Perhaps for that reason, and because it felt "compel[led]" by its reading of *Franklin* (App, *infra*, 13a) to reach a result it regarded as questionable (*id*. at 8a, 12a), the Eighth Circuit all but invited this Court to review its decision. See *id*. at 15a-16a ("Perhaps our parting ways with our sister circuit will prompt the Supreme Court or Congress to inject additional clarity into this area."). The Court should accept that invitation, correct the serious errors made by the Eighth Circuit, and ensure that *Franklin* is not used as a vehicle for working future incursions into the traditional immunity of municipalities from punitive liability, see *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981).

A. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT CONFLICT

In holding that punitive damages were recoverable, the Eighth Circuit expressly disagreed with the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996). Although the Eighth Circuit believed that "only one other circuit" besides itself "has addressed" this issue (App., *infra*, 8a), in fact the conflict is much deeper. As we explain below, two additional circuits – and scores of district courts – have taken conflicting positions on the availability of punitive damages in disability discrimination lawsuits brought against government defendants under Section 504 of the Rehabilitation Act and Section 202 of the ADA. To resolve the mature conflict in the circuits on the question of punitive damages, and to clarify the meaning of *Franklin*, further review is warranted.

1. In *Moreno*, the Sixth Circuit squarely held that punitive damages are not an appropriate remedy in an implied cause of action under Section 504. The en banc majority conducted an

extensive review of the amendments made to the Rehabilitation Act between 1986 and 1991 as well as "the background against which Congress was legislating." 99 F.3d at 789. At the time these amendments were made, the Sixth Circuit explained, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Id*. at 790-91 (citing cases). "In fact, it is not until 1994 that we find a single case where punitive damages were awarded under § 504." *Id*. at 790. Moreover, in neither the 1986 nor 1987 amendments (see page 3, *supra*) "did Congress indicate any desire to change the established understanding that punitive damages were not available." *Ibid.* Finally, the Civil Rights Act of 1991, which "made punitive damages available – for the first time – under § 501 of the Rehabilitation Act," pointedly failed to "extend the new punitive damages provision to § 504." *Ibid.* "The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in *statu quo – i.e*., no punitive damages." *Id*. at 791.

The Sixth Circuit also concluded (99 F.3d at 791) that "punitive damages are not 'appropriate' under § 504 in any event" – as that court understood the word "appropriate" in *Franklin*. "It would be highly anomalous" the court explained, "to let a plaintiff asserting an implied right of action under § 504 recover more in punitive damages than could be recovered by a plaintiff asserting the statutory remedy created for § 501." *Ibid*. Moreover, the court noted, "Congress has chosen other ways to 'punish' those who violate § 504" (99 F.3d at 791), in particular the termination of funding through administrative procedures. Finally, "judicial creation of a punitive damages remedy" would have the effect of "expand[ing] § 504 beyond all 'manageable bounds'" (*id*. at 792 (quoting *Alexander* v. *Choate*, 469 U.S. 287, 299 (1985))), thereby "upset[ting] a long-standing balance that the courts, absent some contrary directive by Congress, should be vigilant to preserve." *Ibid.*

The Eighth Circuit in this case sharply disagreed with both the result in *Moreno* and what it termed the Sixth Circuit's "methodology." App., *infra*, 12a. In so doing, the court below essentially cast its lot with the two members of the Sixth Circuit who dissented from the 11-2 en banc opinion. See *Moreno*, 99 F.3d at 793-96 (opinions of Judges Martin and Daughtrey, concurring in part and dissenting in part).

2. Contrary to the Eighth Circuit's suggestion, the Sixth Circuit is not the only court of appeals to have resolved the issue presented in this case. The Fourth Circuit has also held – albeit somewhat obliquely – that punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act. In *Pandazides* v. *Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994), the court was faced with the question whether a plaintiff suing under Section 504 is entitled to a jury trial under the Seventh Amendment. To resolve that issue, the Fourth Circuit examined "whether the remedy available is * * * legal or equitable in nature." 13 F.3d at 828-29. In considering "the character of the damages available under § 504," the Fourth Circuit observed that the "lower courts are split over the availability of * * * punitive damages" in this setting. *Id*. at 829-30. It went on to rule that its prior decision in *Eastman* v. *Virginia Polytechnic Inst. & State University*, 939 F.2d 204 (4th Cir. 1991), which held that punitive damages "were unavailable under § 504," was "no longer * * * good law" in light of *Franklin*. 13 F.3d at 830. Because, in its view, *Franklin* requires that "a full panoply of legal remedies" (including punitive damages) be available under Section 504, see 13 F.3d at 830-32, the Fourth Circuit held that "a jury trial is constitutionally mandated under § 504." *Id*. at 832.

The Third Circuit recently took sides in this debate as well. In *Doe* v. *County of Centre*, 242 F.3d 437 (3d Cir. 2001), it held – consistent with the Sixth Circuit's decision in *Moreno* but in conflict with *Pandazides* and the Eighth Circuit's decision below – that punitive damages are not recoverable in an action brought against a municipal government under Section 504 of

the Rehabilitation Act and Section 202 of the ADA. Relying primarily on *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), which rejected municipal liability for punitive damages under 42 U.S.C. § 1983, the Third Circuit rejected the argument (accepted by the Eighth Circuit in this case) that *Franklin* requires a different result. *Id*. at 456-58. The Third Circuit recognized (*id*. at 456) that "the Fourth Circuit held in *Pandazides*" that a "plaintiff could seek punitive damages under Section 504," but pointedly refused to follow the Fourth Circuit's lead.[5] The Third Circuit also acknowledged (*ibid*.) the conflict between *Pandazides* and *Moreno*.[6]

3. Although the remaining circuits have yet to issue definitive rulings on the question presented, the existence of a circuit conflict has not gone unnoticed. The Tenth Circuit, in expressly reserving the issue "whether punitive damages are available under Section 504," has acknowledged the conflict between *Moreno* and *Pandazides*. *Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1223 (10th Cir. 1999). So, too, has the Second Circuit in recently declining to decide the availability of punitive damages under Title VI. *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001).[7] And not

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[5] District courts in the Fourth Circuit have followed *Pandazides*'s holding concerning the availability of punitive damages. See, *e.g.*, *Proctor* v. *Prince George's Hosp. Center*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (rejecting argument "that punitive damages are not available under the Rehabilitation Act" on ground that it "directly contradicts *Pandazides*"). Cf. *Turner* v. *First Hosp. Corp. of Norfolk*, 772 F. Supp. 284, 287-88 (E.D. Va. 1991) (holding punitive damages unavailable in decision predating *Pandazides*).

[6] District courts in the Sixth Circuit have since applied *Moreno* in a number of cases. See, *e.g.*, *Dorsey* v. *City of Detroit*, 157 F. Supp. 2d 729, 731 (E.D. Mich. 2001); *Key* v. *Grayson*, 2001 WL 1083714, at *6, *19 (E.D. Mich. Sept. 5, 2001); *Ability Center of Greater Toledo* v. *Sandusky*, 133 F. Supp. 2d 589 (N.D. Ohio 2001).

[7] Many district courts have likewise taken note of the circuit conflict.

surprisingly, in the absence of dispositive circuit court rulings, district courts outside the Third, Fourth, Sixth, and Eighth Circuits have reached conflicting results since *Franklin* on the question whether punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA:

- In the First Circuit, district courts generally have allowed punitive damages claims to proceed. See *Levier* v. *Scarborough Police Dep't*, 2000 WL 761003, at *1 (D. Me. May 10, 2000) (Section 504 and Section 202); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (Section 504); *McKay* v. *Winthrop Board of Education*, 1997 WL 816505, at *1, *2 (D. Me. June 6, 1997) (both provisions); *Penney* v. *Town of Middleton*, 888 F. Supp. 332, 342 (D.N.H. 1994) (Section 504).

- In the Second Circuit, district courts have reached conflicting results. Compare *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages not available under Section 202), and *Kuntz* v. *City of New Haven*, 1993 WL 276945, at *18 (D. Conn. Mar. 3, 1993) (same under Section 504), with *Hunt* v. *Meharry Medical College*, 2000 WL 739551, at *4 (S.D.N.Y. June 8, 2000) (punitive damages available under Section 504), and *Hernandez* v. *City of Hartford*, 959 F. Supp. 125, 133-34 (D. Conn. 1997) (same under Sections 202 and 504), and *Zaffino* v. *Surles*, 1995 WL 146207, at *1-3 (S.D.N.Y. Mar. 31, 1995) (same under Section 504), and *DeLeo* v. *City of Stamford*, 919 F. Supp. 70, 72-74 (D. Conn. 1995) (same).

- In the Fifth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504.

See, *e.g.*, *Proctor*, 32 F. Supp. 2d at 829-30 (conflict between *Moreno* and *Pandazides*); *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482 n.15 (D.N.H. 1997) (same); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (same).

See *United States* v. *Forest Dale, Inc.*, 818 F. Supp. 954, 970 (N.D. Tex. 1993).

- In the Seventh Circuit, district courts have reached conflicting decisions. Compare *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1024-25 (N.D. Ill. 1997) (punitive damages not recoverable under Section 202), and *Dertz* v. *City of Chicago*, 1997 WL 85169, at *20 (N.D. Ill. Feb. 24, 1997) (same under Section 202 and Section 504), with *Garrett* v. *Chicago School Reform Board of Trustees*, 1996 WL 411319, at *3-4 (N.D. Ill. July 19, 1996) (punitive damages available under Section 202 and Section 504), and *Simenson* v. *Hoffman*, 1995 WL 631804, at *6-7 (N.D. Ill. Oct. 24, 1995) (same under Section 504).

- In the Ninth Circuit, district courts have allowed punitive damages claims. See *Henkle* v. *Gregory*, 150 F. Supp. 2d 1067, 1077-78 (D. Nev. 2001) (Section 504); *Patricia N.* v. *Lemahieu*, 141 F. Supp. 2d 1243, 1252-53 (D. Haw. 2001) (Section 202 and Section 504); *Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144, 1146-52 (D. Haw. 1997), appeal dismissed, 165 F.3d 1257 (9th Cir. 1999).

- In the Tenth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504. See *Tafoya* v. *Bobroff*, 865 F. Supp. 743, 748, 751 (D.N.M. 1994), aff'd mem., 74 F.3d 1250 (10th Cir. 1996); cf. *Roberts*, 183 F.3d at 1223 (reserving issue).

- In the Eleventh Circuit, one district court has ruled that punitive damages may not be recovered against a municipal government on a claim brought under Section 202 of the ADA. See *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468-69 (M.D. Ala. 1994).[8]

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[8] The division of authority has not escaped the notice of commentators. See, *e.g.*, 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 224, 227 (2000 Cum. Supp.); *Remedies – Punitive Damages – Americans with Disabilities Act – Rehabilitation Act*, FED. LITIGATOR,

4. This Court should intervene now to resolve the 2-2 circuit conflict and bring uniformity to this important area of federal law. Federal law should not impose punitive liability under Section 504 of the Rehabilitation Act and Section 202 of the ADA on municipal governments (and other defendants) in Arkansas, Iowa, Maryland, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Virginia, and West Virginia but not on similarly situated defendants in Delaware, Kentucky, Michigan, New Jersey, Ohio, Pennsylvania, Tennessee, and the Virgin Islands.

Nor is there any realistic possibility that the entrenched conflict in the circuits will disappear. The Sixth Circuit's decision in *Moreno* was rendered by an en banc court and has since been extended to claims brought under Section 202 of the ADA. *Johnson* v. *City of Saline*, 151 F.3d 564, 573 (6th Cir. 1998). And the Eighth Circuit in this case declined (over the dissenting votes of Judges Bowman and Loken) to rehear this case en banc, notwithstanding the acknowledged conflict with the Sixth Circuit. App., *infra*, 52a. The panel itself pleaded for clarification by this Court. *Id*. at 15a-16a.

Finally, the entrenched conflict in the circuits comes down, in the end, to a fundamental disagreement over the meaning of *Franklin*. As noted above, that disagreement is apparent in a comparison of *Moreno* and the Eighth Circuit's decision in this case. Even in cases not involving the federal statutes governing disability, race, or gender discrimination in the provision of public services, courts of appeals have adopted vastly different understandings of what *Franklin* requires. Compare *Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1190-92, 1194

Sept. 2001, at 236, 237 (noting circuit split); Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U.L. REV. 323, 415 & n.425 (1999) ("courts remain split on the availability of punitive damages claims under section 504") (collecting cases); Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 HOUSTON L. REV. 1101, 1128-29 (2000).

(1st Cir. 1994) (relying on the "broad and unequivocal language in *Franklin*" as a basis for construing the statutory phrase "all appropriate relief" in Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), as authorizing a punitive award of double backpay damages), with *Knapp* v. *Eagle Property Management Corp.*, 54 F.3d 1272, 1277-79 (7th Cir. 1995) (refusing to read *Franklin* as "dictating the conclusion that *all* monetary damages are recoverable in every implied cause of action," and disallowing certain forms of compensatory damages in discrimination action brought by participant in federal rent assistance program under 42 U.S.C. § 1437f(t)(1)(B)). Because only this Court can clarify *Franklin*'s meaning, and its relationship to the principles underlying *City of Newport*, further review is needed.

B. THE ISSUES RAISED ARE IMPORTANT AND RECURRING

Whether the courts should recognize a punitive damages remedy under Section 504 of the Rehabilitation Act and Section 202 of the ADA is an important question of federal law. As the many cases cited above make clear, this issue has arisen with great frequency in the federal courts (and indeed has the potential to arise in virtually any case brought under these statutory provisions). That is a substantial category of litigation because each of these provisions has an exceedingly broad reach. See pages 9-10, *supra*. See also 42 U.S.C. § 12131(1) (ADA provision broadly defining "public entity"); 29 U.S.C. § 794(b) (defining "programs" and "activities" subject to Section 504 as including "all of the operations of" a broad range of entities). As the Sixth Circuit has correctly observed (and as this case graphically illustrates), "the phrase 'services, programs or activities'" in Section 202 of the ADA "encompasses virtually everything that a public entity does." *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

Moreover, because the Rehabilitation Act (like other statutes) specifically borrows the remedies available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the proper resolution of this case is likely to affect the availability of puni-

tive damages under Title VI as well as other closely related provisions of federal civil rights laws, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). This close linkage is confirmed by the Eighth Circuit's decision, which rested on the premise that punitive damages are also available under Title VI. App., *infra*, 11a ("we must * * * conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI"); *id*. at 13a (*Franklin* "compel[s]" this conclusion). As this Court is well aware, the volume of litigation brought under these related federal civil rights laws is also quite substantial. See, *e.g.*, *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998) ("The number of reported [Title IX] cases concerning sexual harassment of students in schools confirms that harassment is an all too common aspect of the educational experience."). It therefore comes as no surprise that, since *Franklin*, numerous lower courts have considered whether punitive damages are recoverable in cases brought under Title VI[9] or Title IX.[10]

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[9] See. *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages unavailable under Title VI); *Sims* v. *Unified Government of Wyandotte County*, 120 F. Supp. 2d 938, 947 (D. Kan. 2000) (same); see also *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (same) (pre-*Franklin*). But see *Davison* v. *Santa Barbara High School Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998) (punitive damages available under Title VI). Cf. also *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001) (declining to decide issue).

[10] See, *e.g.*, *Landon* v. *Oswego Unit School Dist. No. 308*, 143 F. Supp. 2d 1011, 1013-14 (N.D. Ill. 2001) (punitive damages unavailable under Title IX); *Booker* v. *City of Boston*, 2000 WL 1868180, at *4 (D. Mass. Dec. 12, 2000) (same); *Morlock* v. *West Central Education Dist.*, 46 F. Supp. 2d 892, 924 (D. Minn. 1999) (same); *Crawford* v. *School Dist. of Philadelphia*, 1998 WL 288288, at *2 (E.D. Pa. June 3, 1998) (same); *Doe* v. *Londonderry School Dist.*, 970 F. Supp. 64, 75-76 (D.N.H.) (same), modified in other respects, 32 F. Supp. 2d 1360 (1997); *Collier* v. *William Penn School Dist.*, 956 F. Supp.1209, 1217 (E.D. Pa. 1997) (same), rev'd mem., 191 F.3d 444

In recent years, this Court has repeatedly granted review to resolve conflicts over the meaning of these important federal statutes (as well as the related provisions in Title VI and Title IX). See, *e.g.*, *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001); *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999); *Gebser*, *supra*; *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998); *Lane* v. *Peña*, 518 U.S. 187 (1996); *Franklin*, *supra*. Most of these cases, moreover, have involved the scope of liability or remedies under implied rights of action. See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Lau* v. *Nichols*, 414 U.S. 563 (1974). The Court's extensive activity in this area demonstrates not only the complex nature of this body of law and the Court's special role in defining implied rights of action but also the national importance of questions arising under the federal civil rights laws.

Finally, the issues raised in this case have special importance for municipal governments.[11] If review is granted, petitioners will argue not only that punitive damages are gen-

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(1999). See also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 481-84 (D.N.H. 1997) (discussing issue without resolving it). But see *Canty* v. *Old Rochester Regional School Dist.*, 66 F. Supp. 2d 114, 118 (D. Mass. 1999) (plaintiff may recover punitive damages, but only upon a showing that school district "continues to commit egregious violations of Title IX" at time of trial "with no sign of relenting").

[11] They also have significance for the States, which have been held to waive their Eleventh Amendment immunity from suit under Section 504 of the Rehabilitation Act when they accept federal funds. See *Jim C.* v. *United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2591 (2001). Moreover, the lower courts are divided over whether Congress validly abrogated the States' Eleventh Amendment immunity under Title II of the ADA, which includes Section 202. See *Doe* v. *Division of Youth & Family Servs.*, 148 F. Supp. 2d 462, 485-86 (D.N.J. 2001) (collecting cases); App., *infra*, 5a.

erally unavailable under the relevant provisions of the Rehabilitation Act and ADA, but also that, at a minimum, punitive damages are unavailable on claims asserted against municipal governments. This case accordingly is important because of its potential to clarify the applicability of the principles underlying *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), outside the context of 42 U.S.C. § 1983. Moreover, the ramifications for municipal treasuries can hardly be overstated. In this case, respondent (in addition to being fully compensated) was awarded punitive damages of $1.2 million. And, of course, the mere availability of punitive damages will have the obvious effect of raising settlement values in cases brought under the relevant civil rights laws, with attendant, adverse consequences for government treasuries (and therefore for taxpayers).

C. THE DECISION BELOW IS MANIFESTLY INCORRECT

Further review is also warranted because the Eighth Circuit's decision is seriously flawed. The court of appeals has upheld the availability of punitive damages under the Rehabilitation Act even though – as the lower court candidly acknowledged – there was "near unanimity" in the federal courts in the first two decades of that statute's life that it would *not* support a claim for punitive damages (and neither would Title VI or Title IX). App., *infra*, 12a. The Eighth Circuit approved punitive liability even while acknowledging that, when Congress in 1991 amended *other* provisions of the Rehabilitation Act and the ADA to allow a limited punitive damages remedy subject to a cap, it "considered the new language necessary to create a punitive damages remedy under the acts" and "intended to expand, and not contract, the available remedies." *Id*. at 15a. And the lower court reached that result in a case involving a municipal defendant, even though "municipal immunity from punitive damages" was firmly "established at common law" more than a century ago and "has persisted to the present day in the vast majority of jurisdictions." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-61 (1981).

Why? In the Eighth Circuit's view, this stark break with tradition was "compel[led]" by this Court's decision in *Franklin*. App., *infra*, 10a. In the lower court's view, *Franklin* created a "one-way ratchet" under which, "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." App., *infra*, 14a (emphasis added). Moreover, unless Congress "expressly limit[s] the remedies available" (*id*. at 12a) – which is no small feat given that the private right of action is implied (as well as subsequently defined by the judiciary) – courts must ignore other, telling evidence of congressional intent, such as the legislative intent underlying amendments made to the statute, the backdrop of judicial interpretation at the time such amendments are made, and even principles of governmental immunity that have been settled for more than a century. The consequence of that sweeping approach to implied rights of action, perversely enough, is that "the most questionable of private rights will also be the most expansively remediable." *Franklin*, 503 U.S. at 78 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in the judgment). There is absolutely no basis for that result.

1. To begin with, *Franklin* is simply not the judicial straitjacket the court of appeals thought it to be. As the Sixth Circuit correctly recognized, *Franklin* invites courts to "engage in a two-part inquiry": first, "whether there is any clear indication of congressional intent to limit the presumption in favor of any and all appropriate damage remedies; and second, absent any such indication, * * * whether the remedy in question is 'appropriate.'" *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir.1996) (en banc). But there is nothing in *Franklin* that forbids courts, during the first step of that inquiry, to consider legislative amendments, the "background against which Congress was legislating" (*id*. at 789), and any other evidence that might shed light on whether Congress lacked an intent to authorize a particular remedy. Similarly, there is no basis on which to interpret *Franklin*'s reference to "appropriate" remedies nar-

rowly as meaning "'appropriate' *in a specific case*" (App., *infra*, 16a (emphasis added)). A remedy may be "inappropriate" for a particular statutory scheme, or because it undercuts well-established principles of law, and not just because it does not fit the conduct at issue in a particular lawsuit. See *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-52 (1979) (rejecting implied remedy of punitive damages under the Railway Labor Act as inconsistent with national labor policy).

2. Several of this Court's decisions since *Franklin* demonstrate the error of the Eighth Circuit's approach. In *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), this Court rejected an argument predicated on an expansive reading of *Franklin*. In that case, which (like *Franklin* itself) involved a Title IX action for damages brought against a school district, the Court pointed out that it had "made no effort in *Franklin*" to specify "the circumstances in which a damages remedy should lie." *Id*. at 284. Moreover, the Court emphasized that, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Ibid*. *Franklin*'s "general rule" concerning the availability of all appropriate relief, the Court observed, must "yield[] where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Id*. at 285 (internal quotations omitted).

Applying those principles, the Court held that it would frustrate the purposes of Title IX to allow recovery against a school district on the basis of *respondeat superior* or a theory of constructive notice. *Gebser*, 524 U.S. at 285. In words equally applicable to this case, the Court emphasized that, "[w]hen Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief." *Ibid*. The Court also reasoned that the "implied damages remedy should be fashioned along the same lines" as Title IX's "express remedial scheme," which

allows for suspension or termination of federal funding and "is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682." *Id.* at 290. The Court relied as well on the fact that "[i]t was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case." *Id*. at 286. "Adopting petitioner's position," the Court explained, "would amount * * * to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Ibid.*

Here, as in *Gebser*, the Eighth Circuit should have taken account of the fact that when the Rehabilitation Act was enacted in 1973 – *and* when it was amended in 1986, 1987, and 1991 – there was "near unanimity" (App., *infra*, 12a) in the federal courts about the *unavailability* of punitive damages (and similar unanimity existed at that time with respect to Title VI and Title IX). See also *Moreno*, 99 F.3d at 789-91 (discussing this history and background understanding and concluding that it provided "a pretty clear indication" that "Congress did not intend to allow" punitive damages). Here, as in *Gebser*, the Eighth Circuit should have recognized that it possessed a "measure of latitude" in applying *Franklin* and should have considered the implications of Congress's creation in 1991 of a limited punitive damages remedy applicable to *other* provisions of the Rehabilitation Act (and inapplicable to municipal governments). And here, as in *Gebser*, the Eighth Circuit should have recognized that any inquiry into Congress's intent under *Franklin* must be informed by such considerations as the Rehabilitation Act's "express remedial scheme" and whether punitive damages would be consistent with the purposes underlying the statutes. The Eighth Circuit, however, did none of this.

The error in the court of appeals' analysis is also demonstrated by *Lane* v. *Peña*, 518 U.S. 187 (1996), where this Court

held that a private plaintiff suing under Section 504 of the Rehabilitation Act may not recover monetary damages against the *federal* government. Rejecting another argument that *Franklin* mandated a contrary result, the Court explained that *Franklin* "involved an action against nonfederal defendants under Title IX" and could not be applied "wholesale" to actions against the federal government given the federal government's traditional immunity. 518 U.S. at 196-97. Here, as in *Lane*, any inquiry into available remedies and Congress's intent should have taken into account the backdrop of well-settled governmental immunities. *City of Newport*, *supra*. The Eighth Circuit failed to do so, contrary to the teachings of *Lane*.

3. Had the Eighth Circuit's taken account of these considerations, rather than applying a cramped and incorrect interpretation of *Franklin*, it would have found ample evidence that Congress never intended to authorize the recovery of punitive damages under Section 504 of the Rehabilitation Act or Section 202 of the ADA (and that such a remedy was wholly inappropriate). We outline below several of the most obvious considerations pointing toward this conclusion.

a. As the lower court correctly noted, "Congress extended the remedies available under Title VI to section 504 in 1978, 29 U.S.C. § 794a, and then to section 202 [of the ADA] in 1990, 42 U.S.C. § 12133." App., *infra*, 12a. Congress made further amendments to the Rehabilitation Act in 1986, 1987, and 1991. See pages 3-4, *supra*. At the time Congress enacted these remedial provisions and further amendments, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Moreno*, 99 F.3d at 790 (citing cases); see also App., *infra*, 13a-14a & n.9 (same). "The repeated * * * amendments to the Rehabilitation Act without altering the existing understanding that punitive damages were not available under § 504 [are] a pretty clear indication * * * that Congress did not intend to allow such damages." *Moreno*, 99 F.3d at 791; accord *Gebser*, 524 U.S. at 285.

b. The Civil Rights Act of 1991 strongly confirms Congress's lack of intent to authorize (and the inappropriateness of) punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA. The 1991 Act created a limited and carefully defined right to recover punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applied to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. It did *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see *County of Centre*, 242 F.3d at 457.

As the Eighth Circuit recognized in this case, but inexplicably failed to credit, the "text and history of the 1991 Act" make clear that in enacting these provisions "Congress intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA. App., *infra*, 15a; see also *ibid.* (making same observation about legislation proposed, but not enacted, in 1992). See generally *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533, 534 (1999) ("Congress provided for *additional* remedies, including punitive damages for certain classes of Title VII and ADA violations.") (emphasis added). Moreover, as several courts have recognized,[12] the mere juxtaposition, without more, of the limited punitive damages provisions of the 1991 Act (42 U.S.C. § 1981a) on the one

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[12] See, *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (1991 Act's creation of punitive damages remedy under Title I of ADA "counsels against any inference that punitive damages are available under Title II"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (same). But see *Kedra* v. *Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (relying on 1991 Act's creation of punitive damages remedy under Title VII as reason for permitting punitive damages under Section 504).

hand, and the remedial provision governing Section 504 and Section 202 (29 U.S.C. § 794a; 42 U.S.C. § 12133) on the other, provides structural evidence of an intent on Congress's part not to authorize punitive damages under the latter provisions. See also *Kolstad*, 527 U.S. at 534 ("The very structure of § 1981a suggests a congressional intent to authorize punitive damages only in a subset of cases involving intentional discrimination"). Finally, Congress's express exemption of governmental entities from punitive liability under the 1991 Act provides powerful evidence of Congress's intent not to permit punitive liability in a case such as this. See also *Gebser*, 524 U.S. at 285 (refusing to "allow[] unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence [in the 1991 Act] that when Congress expressly considered both in Title VII it restricted the amount of damages available").

c. In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive damages. *Id*. at 259-63. Next, the Court scoured the legislative history of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for evidence that Congress "intended to disturb the settled common-law immunity," of which Congress was presumptively aware. 453 U.S. at 263-266. Finally, the Court examined "whether considerations of public policy dictate" recognition of a punitive damages remedy against municipalities despite the longstanding immunity and the absence of evidence of congressional intent to impose such novel liability. *Id.* at 267-71.

In holding that Section 1983 does not impose punitive liability on municipal governments, this Court explained that the deterrent and retributive objectives underlying punitive damages are not served by imposing them on municipalities. "Regarding retribution," the Court stated, "it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the

tort." 453 U.S. at 267. Punitive damages in this setting, the Court added, "are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for citizens footing the bill." *Ibid.* The Court explained that the goal of deterrence is not served by the imposition of punitive damages. *Id.* at 268-70. Finally, the Court expressed concern over the "very real" costs and risks associated with allowing private individuals to visit punishments upon municipal governments. See *id.* at 270-71.

As the Third Circuit recognized in its conflicting decision in *County of Centre*, 242 F.3d at 456, "[t]he principles derived from *City of Newport* are directly applicable to" Section 504 of the Rehabilitation Act and Section 202 of the ADA. In determining whether Congress intended to allow punitive damages against municipalities under these statutes, as well as whether such damages are "appropriate" within the meaning of *Franklin*, the Eighth Circuit should have taken into account the long history and compelling policy rationales described in *City of Newport*. Moreover, it should have asked whether there was any evidence of congressional intent to depart *not* from *Franklin*'s general rule concerning the availability of all appropriate relief, but rather from the general immunity enjoyed by municipalities. *County of Centre*, 242 F.3d at 456. Its failure to do so was error. That error is further confirmed, moreover, by the 1991 Act's exemption of municipalities and other government entities from punitive liability under other provisions of the Rehabilitation Act and the ADA.[13]

d. In *Gebser*, this Court reasoned that the "implied damages remedy" under Title IX "should be fashioned along the same lines" as the statute's "express remedial scheme," which

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[13] In the Eighth Circuit, petitioners maintained that the Board was an "arm of the state" and thus entitled to Eleventh Amendment immunity. The court of appeals, however, rejected that submission. App., *infra*, 5a-8a. As this case comes to the Court, therefore, it can be assumed that the Board is, in essence, a municipal entity.

allows for suspension or termination of federal funding. 524 U.S. at 290. In this case, in contrast, the Eighth Circuit read *Franklin* as barring any inference that could be drawn about the availability of punitive damages from Congress's inclusion of administrative remedies to guard against fund recipients' violations of the Section 504 of the Rehabilitation Act or Section 202 of the ADA. App., *infra*, 10a n.6 (under *Franklin*, "administrative and private causes of action" must be treated as "separate and distinct"). That, too, was error.

Had the Eighth Circuit examined the "express remedial scheme" applicable to Section 504 of the Rehabilitation Act, it would have concluded – as the Sixth Circuit did in *Moreno* – that "Congress has chosen other ways to 'punish' those who violate § 504." 99 F.3d at 791. In particular, "a punishment of cutoff of federal funds is one of the remedies available" under the statute." *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (citing this as a ground for disallowing punitive damages in case brought under Title VI); see also *Moreno*, 99 F.3d at 791-92; *DeLeo* v. *City of Stamford*, 919 F. Supp 70, 74 n.7 (D. Conn. 1995). Indeed, one reason for this Court's recognition under Title IX of a private right of action was to provide an alternative to the "severe" remedy of funding termination. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979); see also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482-83 (D.N.H. 1997) (surveying legislative history of Title IX and identifying evidence that "Congress was leery of giving private litigants the power to threaten grant recipients with large, punitive sanctions").

e. Finally, in enacting Section 504 of the Rehabilitation Act, Congress acted pursuant to its Spending Clause powers. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). To "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," this Court

has "insist[ed] that Congress speak with a clear voice" when imposing conditions on the receipt of federal funds. *Ibid.* Moreover, this Court made clear in *Gebser* that the "contractual nature" of Spending Clause statutes "has implications for our construction of the scope of the available remedies." 524 U.S. at 287. Because the common law generally does not recognize punitive damages as remedy for breach of contract, see RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981), it is doubtful that punitive damages should *ever* be awarded as a remedy in cases involving Spending Clause legislation. At a minimum, courts should require an unequivocal statement of congressional intent before allowing such a remedy. This the Eighth Circuit failed to do.[14]

Taken together, these serious errors in the Eighth Circuit's analysis provide further reason why this Court should accept the court of appeals' invitation "to inject additional clarity into this area" of law. App., *infra*, 16a. And there is no good reason not to accept that invitation *now*. The fact that the court of appeals remanded to the district with instructions to determine whether the punitive damages award was "appropriate" in this "specific case" (*ibid.*) is no reason to delay review of this long-running case, which has already taken three trips to the Eighth Circuit. See *id.* at 2a, 39a & n.4; *Gorman* v. *Bartch*, 123 F.3d 1126 (8th Cir. 1997); see also *Foust*, 442 U.S. at 45 (exercising review to decide analogous issue despite court of appeals' remand for excessiveness review). Moreover, the panel squarely rejected the argument that punitive damages are unavailable as a matter of law in implied actions brought under

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[14]It is especially difficult, moreover, to see how petitioners could have understood in 1992 that a condition placed on the Board's receipt of federal funds was the potential liability for punitive damages, since (1) it was "not until 1994" (several years after respondent's arrest) that there was even "a single case where punitive damages were awarded under § 504" (*Moreno*, 99 F.3d at 790), and (2) it was unclear that the relevant statutes even applied in this situation, as the court of appeals explained in upholding qualified immunity in a prior appeal (App., *infra*, 46a-50a).

Section 504 of the Rehabilitation Act and Section 202 of the ADA; and it gave the word "appropriate" an unduly narrow (and in our view incorrect) interpretation that will govern any remand proceedings and limit petitioners' ability to demonstrate inappropriateness. Because the important and clear-cut legal issues decided by the panel are fundamental to the conduct of any future proceedings on remand – and because they will continue to have sweeping implications for a wide array of other cases, *regardless* of the outcome of this particular dispute – review should not be delayed. See *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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