

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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A. J. T., BY AND THROUGH HER PARENTS,))
A. T. & G. T.,))
Petitioner,))
v.) No. 24-249
OSSEO AREA SCHOOLS,))
INDEPENDENT SCHOOL DISTRICT))
NO. 279, ET AL.,))
Respondents.))
- - - - -

Pages: 1 through 103

Place: Washington, D.C.

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3 A. J. T., BY AND THROUGH HER PARENTS,))
4 A. T. & G. T.,)
5 Petitioner,)
6 v.) No. 24-249
7 OSSEO AREA SCHOOLS,)
8 INDEPENDENT SCHOOL DISTRICT)
9 NO. 279, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.

14 Monday, April 28, 2025

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16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:04 a.m.

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7 Petitioner.

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9 the Respondents.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-249,
5 A.J.T. versus Osseo Area Schools.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

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

11 The district has conceded Ava's
12 question presented. Both sides now agree that
13 the ADA and the Rehabilitation Act apply the
14 same legal standards to all plaintiffs and that
15 it's wrong to impose any sort of uniquely
16 stringent test on children facing discrimination
17 at school. That concession fully resolves this
18 case.

19 The Eighth Circuit rejected Ava's
20 claims under Monahan's two-tiered asymmetric
21 approach. That ruling can't stand. The
22 district wants to preserve its victory under a
23 new theory it invented after dropping the
24 indefensible two-tiered approach it defended
25 below.

1 Now they say that the statutes apply a
2 bad-faith or gross-misjudgment test to all
3 plaintiffs, not just schoolchildren protected by
4 the IDEA. That's exactly the opposite of what
5 they told you at the cert stage, where they said
6 that no bad faith or intent is required outside
7 the IDEA context.

8 The district's new theory violates the
9 text, history, and purpose of both statutes. It
10 contradicts decades of regulations. It defies
11 at least five precedents of this Court and
12 decisions from virtually every circuit. It
13 would also revolutionize disability law,
14 stripping protections from vulnerable victims
15 and gutting the reasonable accommodations needed
16 for equal opportunity.

17 If you address this new argument, you
18 should reject it out of hand. But you shouldn't
19 address it because it's so clearly procedurally
20 barred many times over. Whether you look at
21 this through the lens of judicial estoppel or
22 waiver or Rules 15 and 24, one thing is clear:
23 The district can't win this case based on a
24 radical new theory that goes beyond Ava's
25 question presented and directly contradicts what

1 they told the lower courts and this Court at the
2 cert stage. Instead, you should follow regular
3 order and procedure, you should answer the
4 limited question presented, and you should
5 vacate the decision below.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Isn't there an
8 argument, though, that we should -- that some
9 would think is embedded or included in the
10 question presented, and that is what is the
11 standard?

12 MR. MARTINEZ: I don't think so,
13 Your Honor. I don't think that question is
14 embedded in the question presented. I think our
15 question presented was very clear that we were
16 asking whether the uniquely stringent test that
17 Monahan required only in the educational
18 context, whether that was the correct rule.

19 And that's clear not just from the
20 framing of the question presented and the
21 paragraphs, the introductory paragraphs, leading
22 into it but also from what we said in the -- the
23 rest of the petition, where we used that
24 "uniquely stringent" phrase 10 different times to
25 talk about what issue we were putting before the

1 Court. We said that on pages 2, 3, 15, 13, 16,
2 22, 24, 27, and 39.

3 It's not just us, though. We
4 understood our question presented that way. The
5 other side also understood it the same way. So,
6 when they responded to our petition and they
7 responded to our question presented in their
8 cert papers, they took the case on exactly those
9 terms. They argued about the circuit split,
10 they argued about the merits. They said this
11 case was "narrow" and was only going to affect a
12 sliver of plaintiffs who were in Ava's position,
13 children facing discrimination at school.

14 Now, though, they're trying to make
15 this case about everyone, about 44 million
16 Americans with disabilities who are protected by
17 reasonable accommodations and who would suffer
18 under the bad-faith-and-gross-misjudgment test
19 that they're putting before the Court for the
20 first time.

21 CHIEF JUSTICE ROBERTS: Well, if
22 that's true, counsel, then nobody is defending
23 the position that you challenged, is that right?

24 MR. MARTINEZ: I think, at this point,
25 the other side has conceded that that position

1 is indefensible, and then -- and, therefore,
2 they aren't defending it. I think they have one
3 amicus who filed a brief that seems to be
4 defending the Monahan test.

5 CHIEF JUSTICE ROBERTS: Well, and yet
6 that position that you're attacking was the
7 majority position, right?

8 MR. MARTINEZ: That was the position
9 adopted by five circuit courts. That's right.

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

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

25 I think it's true you sometimes do

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

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

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

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

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

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

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

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

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

25 JUSTICE KAVANAUGH: Mm-hmm.

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

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

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

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

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

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

12 MR. MARTINEZ: So I think --

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

16 MR. MARTINEZ: I --

17 JUSTICE KAVANAUGH: -- sounds like
18 that.

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

1 law, and then you have to be indifferent to
2 those facts.

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

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

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

23 Have you figured that out?

24 MR. MARTINEZ: So --

25 JUSTICE SOTOMAYOR: I think that

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

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

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

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

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

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

20 JUSTICE SOTOMAYOR: Okay.

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

1 satisfied in circumstances where a person's
2 disability means that they're being excluded
3 from a building or a program or a service. So
4 there's just no way to -- to gin up a -- an
5 intent requirement out of that.

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

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

22 What the other side has, though, is a
23 bad-faith-and-gross-misjudgment rule that is
24 literally -- it comes out of nowhere, like
25 nowhere. There -- no court has ever embraced

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

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

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

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

22 And I totally agree with what the
23 other side said on page 30 of their brief in
24 opposition and what this Court said in the
25 Choate decision, where it recognized -- it

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

8 JUSTICE SOTOMAYOR: Got it.

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

12 JUSTICE JACKSON: Mr. Martinez --

13 JUSTICE GORSUCH: Mr. --

14 JUSTICE JACKSON: Oh.

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

22 And -- and, as Justice Sotomayor
23 suggested, and maybe I just missed it, when we
24 think of discrimination in many contexts,
25 causation, you're -- you're right, but the act

1 of discrimination is to treat someone else
2 differently because of their disability, right?

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

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

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

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

22 (Laughter.)

23 MR. MARTINEZ: -- between disparate --
24 intentional treatment and reasonable
25 accommodation claims, and what -- what you said

1 in that opinion was that sometimes formal
2 equality isn't enough. And in the disability
3 context, it isn't.

4 JUSTICE GORSUCH: Mm-hmm.

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

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

11 JUSTICE GORSUCH: I see.

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

17 JUSTICE GORSUCH: I -- I follow you.

18 MR. MARTINEZ: Okay.

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

21 MR. MARTINEZ: Sure.

22 JUSTICE JACKSON: Mr. --

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

25 (Laughter.)

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

3 MR. MARTINEZ: Yes.

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

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

17 Thoughts?

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

1 would.

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

7 MR. MARTINEZ: No.

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

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

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

21 There's a little bit of uncertainty
22 about the Fifth Circuit about what kind of
23 intent is required. The Fifth Circuit has
24 suggested that deliberate indifference might not
25 be enough, but they haven't really clearly

1 adopted a different intent standard.

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

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

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

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

24 I mean, look at their brief in
25 opposition. The first paragraph is all about,

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

6 JUSTICE JACKSON: So --

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

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

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

21 We tried our best to get en banc
22 review in this case, and when we did that and
23 we resurfaced this issue to the Eighth Circuit
24 in an effort to get them to overturn their
25 precedent, the other side came in and said --

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

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

12 JUSTICE JACKSON: So, Mr. Martinez,
13 can you just speak very clearly --

14 Chief, should -- can I go forward?

15 CHIEF JUSTICE ROBERTS: Sure.

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

20 MR. MARTINEZ: Yeah.

21 JUSTICE JACKSON: And I'd invite you
22 to just --

23 MR. MARTINEZ: So --

24 JUSTICE JACKSON: -- tell us why
25 they're wrong.

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: This is not exactly

1 related to the question that's before us, so
2 perhaps it's unfair, but I think it might have
3 some relationship to what the court below was
4 getting at.

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

12 MR. MARTINEZ: I --

13 JUSTICE ALITO: -- or the
14 Rehabilitation Act?

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

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

22 Depending on the case, it may be that
23 the IDEA gives you more than the other statutes
24 in one context, and the other statutes might
25 give you more than the IDEA in a different

1 context.

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

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 Justice Kagan?

17 Justice Gorsuch?

18 Justice Kavanaugh?

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

23 MR. MARTINEZ: Your Honor, in our
24 opening brief, we did not take a position on
25 that. We did not take a position on whether

1 there was an intent requirement, but we
2 certainly are not fighting that. We didn't
3 fight that below. I think the Eighth Circuit
4 and nine other circuits say it's deliberate
5 indifference.

6 JUSTICE KAVANAUGH: That sounds close
7 to a yes.

8 (Laughter.)

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

14 JUSTICE KAVANAUGH: And then --

15 MR. MARTINEZ: But I think that's
16 fair.

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

21 MR. MARTINEZ: As I understand their
22 formulation, I agree with it. I think
23 substantial likelihood is an appropriate way
24 of -- of thinking about, you know, substantial
25 likelihood of a violation. I think the one

1 thing I just want to be very clear on is you
2 don't have to know the law. You have to know
3 the facts that would give rise to the violation.
4 And I think that's an important caveat.

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

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

24 MR. MARTINEZ: Right.

25 JUSTICE KAVANAUGH: -- kind of

1 inquiry? So how should a court think about
2 that? In other words, the court on remand, if
3 it's applying deliberate indifference, how
4 should it think about it as related to these
5 facts?

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

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

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

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Ms. Reaves.

3 ORAL ARGUMENT OF NICOLE F. REAVES

4 FOR THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE PETITIONER

6 MS. REAVES: Mr. Chief Justice, and

7 may it please the Court:

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

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

1 reasonable accommodation claims.

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

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

13 I welcome the Court's questions.

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

17 MS. REAVES: Yes, Justice Thomas.

18 JUSTICE THOMAS: But not injunctive
19 relief?

20 MS. REAVES: Yes.

21 JUSTICE THOMAS: Now what's your
22 explanation for the difference?

23 MS. REAVES: So I think the
24 explanation comes primarily from this Court's
25 recognition in the Spending Clause context and

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

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

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

22 JUSTICE GORSUCH: Well, I -- I get
23 the -- the -- the sovereign immunity overlay,
24 but, I mean, the -- the strength of the argument
25 from Petitioners and -- and the government is

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

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

19 Thoughts?

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

25 JUSTICE GORSUCH: Well, but textual --

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

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

12 JUSTICE GORSUCH: Mm-hmm.

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

25 And I would also like to just briefly

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

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

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

20 JUSTICE GORSUCH: No, I understand,
21 but for -- for damage --

22 MS. REAVES: And it is not required
23 for injunctive relief.

24 JUSTICE GORSUCH: -- for damages.

25 MS. REAVES: It absolutely is required

1 for damages.

2 JUSTICE GORSUCH: You think it is?

3 Okay.

4 MS. RAVES: Yes.

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

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

23 CHIEF JUSTICE ROBERTS: In that
24 regard, do you have any concerns that no one is
25 here defending the position of the majority of

1 circuits who addressed this question below, or
2 am I the only one?

3 (Laughter.)

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

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

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

23 JUSTICE BARRETT: Why do you think no
24 circuit has changed its position? If it's so
25 obvious that Respondent has just completely

1 given it up and jumped overboard, why are all
2 these circuits sticking with it?

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

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

14 JUSTICE KAVANAUGH: You --

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

17 JUSTICE KAVANAUGH: Go ahead.

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

22 MS. REAVES: I think the primary
23 difference is that, you know, while we don't
24 think the Court has to resolve this in this
25 case, we absolutely believe that intent is

1 required for damages claims under the ADA and
2 title -- and Section 504. And we think that
3 deliberate indifference is a way to prove that
4 intent.

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

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

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

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

21 So look at the bad-faith-or-gross-
22 misjudgment standard. I think, first of all, as
23 a whole, it's been rarely applied. It's only
24 been applied in this Monahan line of cases, and
25 for that reason, I think it's a little bit

1 undertheorized, whereas deliberate indifference
2 has been applied across the board to Title II
3 and Section 504 cases, other than some circuits
4 in this context.

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

14 JUSTICE KAVANAUGH: Is -- is --

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

21 And then Respondents in their merits
22 brief cite two cases that are over a hundred
23 years old that don't even use "gross
24 misjudgment." They use "gross mistake."

25 JUSTICE KAVANAUGH: Well, to Justice

1 Barrett's question about the circuits, is there
2 a case out there that failed under the bad-faith
3 standard that you think would have succeeded
4 under the deliberate-indifference standard?

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

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

20 But there was no indication in that
21 decision that any of those choices made by the
22 hospital were backed by some sort of -- of
23 animus on behalf -- you know, animus
24 discriminating against individuals with
25 disabilities.

1 So I think that case, while it got to
2 go to trial, under our standard wouldn't
3 necessarily get to go to trial --

4 JUSTICE KAVANAUGH: Thank you.

5 MS. REAVES: -- under Respondents.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

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

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

19 And I think that might have been
20 understandable, but -- and, obviously, this
21 Court found that logic compelling in Smith, but
22 I think, once Congress adopted 1415(1) and said
23 that nothing in the IDEA shall be construed to
24 restrict or limit the rights, procedures, and
25 remedies available under the ADA or

1 Rehabilitation Act, it was just abundantly clear
2 that that harmonization is inappropriate.

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

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

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

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

21 MS. REAVES: Yes.

22 JUSTICE ALITO: The antidiscrimination
23 statutes, the ADA and the Rehabilitation Act,
24 start from the baseline that people with
25 disabilities are supposed to be treated the same

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

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

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

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

24 So the reasonable accommodation
25 limitation is baked into these Title II claims

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

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

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

20 Would that employer be required under
21 the ADA to allow this employer -- employee to
22 work after closing time instead of during the
23 normal hours when this -- when this business is
24 providing a service to the public?

25 MS. REAVES: No, because, under the

1 reasonable accommodation framework, the employer
2 would be able to say: Well, this isn't a sort
3 of accommodation that's reasonable on its face
4 or used in a variety of cases. This isn't a
5 sort of accommodation we've seen before. And
6 that's a defense courts often recognize.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan?

25 JUSTICE KAGAN: Ms. Reaves, if we

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

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

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

23 JUSTICE KAGAN: And you said without
24 any urging on our part or without any
25 encouragement. I mean, is -- is -- is there an

1 argument for encouragement? Is there -- is the
2 better approach not to do that? What -- do you
3 have a position on that?

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

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: You said that
19 clear notice was important, I think, in this
20 context in damages claims. And the other side
21 says that your framing of deliberate
22 indifference, in particular, actual knowledge
23 that a federally protected right was
24 substantially likely to be violated -- they
25 focus on substantially likely -- that that does

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

7 How do we deal with that?

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

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

25 MS. REAVES: So a couple of responses

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

5 JUSTICE KAVANAUGH: You say actual
6 knowledge of your legal obligations, correct?

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

15 JUSTICE KAVANAUGH: That's pretty --

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

25 And I would just point out that

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

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

21 MS. REAVES: I don't think so. I
22 think that would fall into the kind of
23 bureaucratic inaction or negligence buckets,
24 which are not high enough to be actual
25 knowledge.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 Justice Jackson?

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

20 MS. REAVES: So I do think the
21 bottom-line inquiry is going to be intent, but I
22 think you're absolutely right that in a school
23 context in particular with a disabled child,
24 there's going to often be a lot of
25 back-and-forth between the school district and

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

8 JUSTICE JACKSON: So let me just ask
9 this.

10 MS. REAVES: -- consider them
11 seriously.

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

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

22 MS. REAVES: Yes. I think that would
23 be appropriate on remand. So we obviously
24 haven't taken a position on how this should come
25 out.

1 JUSTICE JACKSON: Yes.

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

10 JUSTICE JACKSON: Mm-hmm.

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

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Ms. Blatt.

19 ORAL ARGUMENT OF LISA S. BLATT

20 ON BEHALF OF THE RESPONDENTS

21 MS. BLATT: Mr. Chief Justice, and may
22 it please the Court:

23 This Court should affirm Monahan.
24 Bare IDEA violations do not support liability
25 under Section 504 or the ADA. Instead, the

1 defendant must have acted with discriminatory
2 intent. Monahan correctly described that intent
3 as bad faith, which is the longstanding term for
4 actions done for an improper reason, here,
5 disability.

6 504 and Title II require
7 discrimination by reason of disability. This
8 Court has held that the nearly identical text in
9 Title VI requires intent to discriminate.
10 Petitioner acknowledges that because the law
11 here expressly incorporates Title VI rights and
12 remedies, discriminatory intent must be shown to
13 get damages. But Petitioner departs from that
14 intent requirement for liability and
15 injunctions.

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

24 This Court should decide the correct
25 standard. The petition ends with: "What

1 standard should apply under the ADA and Rehab
2 Act is a pure question of law. It should be
3 resolved in this case." That's a quote. We
4 agree.

5 And reversing Monahan would expose
6 46,000 public schools to liability when, for 40
7 years, they have trained teachers, allocated
8 budgets, and obtained insurance, all in reliance
9 on Monahan. Every good-faith disagreement would
10 risk liability or even the nuclear option, the
11 loss of federal funding, which is over a hundred
12 billion dollars.

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

18 I welcome questions.

19 JUSTICE THOMAS: Is this the same
20 argument that you made below?

21 MS. BLATT: Yes. So let me take you
22 through -- again, I had an out-of-body
23 experience listening to what we argued, but in
24 the rehearing petition on page 1, the school
25 district argued Monahan is required by the text.

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

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

20 So we've always said that you owe
21 deference to schools and this standard makes
22 sense.

23 And I can talk about how Monahan
24 arrived. Monahan makes complete sense. It's a
25 caricature and not an accurate description of

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

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

15 JUSTICE JACKSON: Ms. Blatt, I --
16 I'm --

17 MS. BLATT: Yes.

18 JUSTICE JACKSON: -- I'm over here
19 trying to really figure out what you argued
20 below --

21 MS. BLATT: Sure.

22 JUSTICE JACKSON: -- and the many,
23 many times that I understood you to be pegging
24 your argument to the unique elements of this
25 particular environment.

1 MS. BLATT: Correct.

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

6 It seems to me that you were very
7 clearly saying in your -- right up and to the
8 opposition to rehearing and to the BIO below
9 that there was something about the IDEA context
10 and schools that gave Monahan its value.

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

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

21 JUSTICE JACKSON: No, no, no, I'm
22 not -- I don't think the argument is that you
23 never defended it by the text. I think the --

24 MS. BLATT: Well, what is a lie and
25 what is inaccurate --

1 JUSTICE JACKSON: Well, no, no, no.

2 I --

3 MS. BLATT: If I could just get this
4 out -- if I could just get this out, please.

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

12 What the school district has said,
13 which is what Monahan said, is --

14 JUSTICE GORSUCH: You -- you believe
15 that Mr. Martinez and the Solicitor General are
16 lying? Is that your accusation?

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

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

21 MS. BLATT: Okay. Well, they should
22 be more careful in character --
23 mischaracterizing a position by an experienced
24 advocate of the Supreme Court, with all due
25 respect.

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

7 MS. BLATT: Correct.

8 CHIEF JUSTICE ROBERTS: That seems to
9 me to be what the --

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

14 CHIEF JUSTICE ROBERTS: Well, they've
15 got quote marks around it.

16 (Laughter.)

17 MS. BLATT: Where's the -- where's the
18 page?

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

21 MS. BLATT: Oh. Well, they're -- I
22 mean, we never said that there should be
23 different standards. What we've always said and
24 what we've acknowledged in the brief in
25 opposition, which is true, that outside the

1 school context, the courts have said there's no
2 intent at least for liability but for damages.

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

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

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

20 I mean, to the extent that you're now
21 saying it's dumb for them to have adopted it or
22 not to have adopted it everywhere, can we get to
23 the substance of your argument?

24 MS. BLATT: Sure. Our definition of
25 "bad faith" is discriminatory intent.

1 JUSTICE JACKSON: No, I understand.

2 But has a single other standard -- circuit
3 applied that outside of this particular context?

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

9 JUSTICE JACKSON: And is your argument
10 that bad faith should apply everywhere?

11 MS. BLATT: Yes, in a -- the statutory
12 text solely by discrimination is the reason for
13 the action is a discriminatory intent standard.

14 JUSTICE BARRETT: And that would be a
15 sea change, right? That's what the other side
16 told us.

17 MS. BLATT: Well, it would be only a
18 sea change in terms of liability. If we're
19 going to talk about what the circuits --
20 Judge Sutton --

21 JUSTICE BARRETT: Well, a sea change
22 in terms of liability is a pretty big sea
23 change. I mean, Justice Jackson's pointing out
24 that no circuit has adopted your rule.

25 MS. BLATT: Well, we're asking the

1 Court to -- to decide this case.

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

7 Now that's in the disparate impact
8 context, and no one has had a basis for saying
9 there's any distinction between reasonable
10 accommodation and disparate impact.

11 JUSTICE BARRETT: But, regardless
12 whether it's technically in the QP, it strikes
13 me as a pretty big deal.

14 MS. BLATT: I -- I think that's right.
15 And so --

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

22 As I suggested to Mr. Martinez, it's
23 possible that if we decided this case in his
24 favor, that then, when it goes back below, this
25 argument that you're making here will be made,

1 and then it can follow our traditional way of
2 letting it percolate up, and then we can address
3 it when we have more information.

4 But this seems pretty -- like a really
5 pretty big deal.

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

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

20 JUSTICE KAVANAUGH: On the -- on the
21 level down/level up point, you're defining "bad
22 faith" so it doesn't require animus.

23 MS. BLATT: Correct.

24 JUSTICE KAVANAUGH: So you're, I
25 think, lowering bad faith from what some people

1 might think bad faith encompasses.

2 MS. BLATT: But no one -- some people
3 is just this conversation. No court has --
4 these courts have said --

5 JUSTICE KAVANAUGH: Some judges.

6 MS. BLATT: They said it requires
7 discriminatory intent. No one has said animus.

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

11 MS. BLATT: Correct.

12 JUSTICE KAVANAUGH: Okay. And then
13 the SG defines "deliberate indifference" to
14 require actual knowledge that a -- that it's
15 substantially likely that you're violating the
16 law.

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

23 MS. BLATT: Well, sure. Any -- and
24 this is the problem with their deliberate
25 indifference test.

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

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

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

19 That is insane. That is not an intent
20 to discriminate. That is just either a
21 disagreement about what the law requires or you
22 had some sort of weird problem that had nothing
23 to do with a child's disability status. You
24 just were deliberately indifferent.

25 If you're going to follow Title VI --

1 and this is the Fifth Circuit. The Fifth
2 Circuit said: I don't know what this deliberate
3 indifference is. Title VI requires intent.

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

9 We agree you could have a deliberate
10 indifference if there were supervisory liability
11 to discrimination against the disabled.

12 JUSTICE KAVANAUGH: Why do you think
13 that's taken hold in all the circuits outside
14 the school context?

15 MS. BLATT: Easy. They cited this
16 case called Monell. I mean, that's just wrong,
17 weird, mistake.

18 So then they said: Well, Davis and
19 Gebser said deliberate indifference, and they
20 just misread it. I mean, the Fifth Circuit got
21 it right.

22 So, if you're going to rule against
23 us, at least wipe the slate clean and say -- if
24 you're going to -- they want to say you have to
25 follow Title VI because they don't make a

1 difference in terms of parties and you have to
2 use intent for damages, then intent for damages
3 should be intent to discriminate just like Title
4 VI.

5 And we do think there is no textual
6 basis. They raised a lot of policy sense --
7 policy stuff between an injunction and loss --
8 and loss of -- sorry -- injunction and damages.

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

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

21 And now federal funding is a big deal.
22 No -- no -- no government has ever threatened
23 the loss of federal funding based on Title --
24 based on the Rehab Act. But you don't need
25 anti-Semitism anymore or encampments. You can

1 just say you violated the reasonable
2 accommodation.

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

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

16 MS. BLATT: Sure.

17 JUSTICE JACKSON: It -- it did not say
18 decide the standard. I'm reading. The question
19 presented is whether the ADA and Rehabilitation
20 Act require children with disabilities to
21 satisfy a uniquely stringent bad-faith-or-gross-
22 misjudgment standard when seeking relief for
23 discrimination relating to their education.

24 MS. BLATT: So that can have two
25 meanings. One, you could put all the emphasis

1 on "uniquely stringent." Should this Court
2 adopt a uniquely stringent standard when it's
3 called bad faith? Or it could mean what we
4 think the end of the petition said it meant.
5 Should a Court adopt the bad-faith standard,
6 which is uniquely stringent? And the last
7 page -- the last line of their petition says you
8 should decide what standard applies in this
9 case.

10 Now, if you want to read it as the
11 "should courts adopt uniquely stringent
12 standards," then you're right. The -- the --
13 the parties agree.

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

23 And you go on at length in talking
24 about the unique nature of this particular
25 context and why it would justify having this

1 standard as opposed to the standard that all the
2 courts have applied in other contexts.

3 MS. BLATT: Well, that's why page 26
4 precedes page 27 --

5 JUSTICE JACKSON: Yes.

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

15 But, Justice Jackson, there's no
16 disagreement that we've always said that there
17 is a big problem with the other side's argument
18 in the school context, because every IDEA
19 disagreement now risks the loss of federal
20 funding and injunctive relief. And so, yeah,
21 that -- that -- that is a big deal. And in
22 terms of damages, that's a big deal too if you
23 have a deliberate indifference standard, which,
24 to be fair to us, does not apply in any other
25 context.

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

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

16 I mean, I -- I thought the -- the
17 Alexander versus Choate line of thinking was
18 that you can have discrimination in this
19 context, say, differently from maybe racial
20 discrimination or gender discrimination when an
21 entity that is responsible for accommodating
22 someone with a disability doesn't act, that --
23 that you have benign neglect, meaning you're not
24 doing it out of some sort of intent to treat
25 this person differently. In fact, what you say

1 is I'm treating this person the same, and the
2 same is a world in which they can't walk up the
3 stairs and they can't see the board and they
4 can't do the things that everybody else can do.

5 In the discrimination-of-disability
6 context, the requirement of the law is to treat
7 them differently --

8 MS. BLATT: Well --

9 JUSTICE JACKSON: -- differently in
10 the sense that you're accommodating them so that
11 they can take and have full enjoyment of the
12 services.

13 MS. BLATT: Well --

14 JUSTICE JACKSON: So it's just a
15 different concept in --

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

22 JUSTICE JACKSON: No, but the whole
23 idea of accommodation is unique --

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

25 JUSTICE JACKSON: Accommodation is not

1 in the statute?

2 MS. BLATT: 504 and Title II, no.

3 That's what this -- I mean, no. That's what
4 Judge Sutton said.

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

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

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

18 MS. BLATT: Correct, and that is
19 glaringly obvious when you look at the seminal
20 statute of the ADA because Title I for
21 employers, Title III for country clubs and
22 hotdog stands, have not only reasonable
23 accommodations provisions, Justice Jackson, but
24 they don't make hotdog stands liable for
25 damages. And a made-up judicial damage remedy

1 comes from thin air.

2 JUSTICE BARRETT: Ms. Blatt, the
3 answer to this is probably clear since you
4 called the two-tier test stupid, but I just --

5 MS. BLATT: I -- that was a --
6 (Laughter.)

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

9 MS. BLATT: Correct.

10 JUSTICE BARRETT: Okay. So there is
11 what Justice Gorsuch has sometimes called
12 radical --

13 MS. BLATT: Radical agreement.

14 JUSTICE BARRETT: -- on that point?
15 Okay.

16 MS. BLATT: There's radical agreement.
17 What there's radical disagreement on is the
18 question presented. And if you just say -- and
19 I know it's sometimes easier for you to say we
20 don't have to do a lot, but you cause real harm
21 to the parties who don't have Supreme Court
22 counsel and lower courts who get confused when
23 you just remand and say we just remand. So, if
24 you could at least set the -- at least set the
25 slate free -- while it is part of your job,

1 Justice Kavanaugh, to set the law sometimes, and
2 I understand it's easier for you, and you have a
3 lot going on, not to set the law, but --
4 JUSTICE GORSUCH: Ms. Blatt --
5 MS. BLATT: Yeah.
6 JUSTICE GORSUCH: -- I -- I confess
7 I'm still troubled by your suggestion that your
8 friends on the other side have lied.
9 MS. BLATT: Okay. Let's pull it up.
10 JUSTICE GORSUCH: Yeah. I think we're
11 going to have to here, and I'd ask you to
12 reconsider that phrase.
13 MS. BLATT: At oral argument --
14 JUSTICE GORSUCH: If I might.
15 MS. BLATT: -- it was incorrect.
16 JUSTICE GORSUCH: If I -- if I --
17 MS. BLATT: Sure.
18 JUSTICE GORSUCH: Incorrect is fine.
19 MS. BLATT: Well, lying --
20 JUSTICE GORSUCH: People make
21 mistakes.
22 MS. BLATT: Okay.
23 JUSTICE GORSUCH: You can accuse
24 people of being incorrect, but lying --
25 MS. BLATT: That's fine.

1 JUSTICE GORSUCH: Ms. Blatt, if I
2 might finish.

3 MS. BLATT: Sure.

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

6 MS. BLATT: Yep.

7 JUSTICE GORSUCH: -- "as applied to
8 the provision of IDEA services, the overlap
9 between these statutes leads to a conceptual
10 particularity that exists only in this context."

11 MS. BLATT: Yep.

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

14 Page 2. "For more than 40 years,
15 courts of appeals considering this unique subset
16 of ADA and Rehabilitation" --

17 MS. BLATT: Yeah.

18 JUSTICE GORSUCH: -- "claims directly
19 challenging IDEA's educational services have
20 widely recognized that plaintiffs must establish
21 more."

22 MS. BLATT: Yep.

23 JUSTICE GORSUCH: "That scheme
24 requires plaintiffs to show that school
25 professionals acted with discriminatory intent

1 by demonstrating that their decisions were
2 premised on bad faith or gross misjudgment."

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

9 MS. BLATT: We say unique throughout.

10 JUSTICE GORSUCH: -- "properly" -- I'm
11 not finished.

12 MS. BLATT: Yeah.

13 JUSTICE GORSUCH: "Properly accounts
14 for the need for deference."

15 Page 27. "As courts have recognized,
16 discrimination claims based on an IEP's adequacy
17 are a conceptual peculiarity that exists in the
18 primary and secondary educational context."

19 Further down: "The
20 bad-faith-or-gross- misjudgment standard permits
21 the courts to adjudicate these novel claims
22 without requiring judges to substitute their own
23 notions of sound educational policy for those in
24 school authorities."

25 MS. BLATT: Correct.

1 JUSTICE GORSUCH: One -- one can
2 interpret those perhaps different ways ---
3 MS. BLATT: Well --
4 JUSTICE GORSUCH: -- but, surely, a
5 reasonable person could interpret them as
6 arguing for a special rule in the educational
7 context, correct?
8 MS. BLATT: No, only because of the
9 text, but --
10 JUSTICE GORSUCH: Ms. Blatt.
11 MS. BLATT: Okay. Well, you -- I
12 mean --
13 JUSTICE GORSUCH: A reasonable
14 person -- all of those emphasized the unique
15 context of primary and secondary education and
16 the need for a special rule, don't they?
17 MS. BLATT: Fine, but what I'm --
18 JUSTICE GORSUCH: Fine?
19 MS. BLATT: -- objecting to --
20 JUSTICE GORSUCH: Fine?
21 MS. BLATT: Can I -- can I --
22 JUSTICE GORSUCH: Then -- then would
23 you withdraw your accusation?
24 MS. BLATT: I'll withdraw it.
25 JUSTICE GORSUCH: Thank you. That's

1 it.

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

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

12 In fact, in Abercrombie, we had a
13 neutral policy that applied to all employees,
14 they can't wear headgear, and we said a neutral
15 policy can still discriminate --

16 MS. BLATT: Absolutely.

17 JUSTICE SOTOMAYOR: -- against
18 religion even though there was no bad faith
19 proven there. It was all hats are out.

20 MS. BLATT: Correct.

21 JUSTICE SOTOMAYOR: All coverings are
22 out.

23 MS. BLATT: Correct.

24 JUSTICE SOTOMAYOR: So I don't know
25 where the bad faith comes from. I'm not even

1 sure where deliberate indifference comes from.
2 But putting that aside, before we rule in a way
3 that suggests that your new definition applies
4 to every statute, that this is the way we now
5 define intentional for every statute, shouldn't
6 we have had that fully aired below --

7 MS. BLATT: Well, if --

8 JUSTICE SOTOMAYOR: -- and accurately
9 aired?

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

16 JUSTICE SOTOMAYOR: Well, but that is
17 gerrymandering the definition because, if
18 it's -- a neutral policy in terms of what you
19 wear can still discriminate.

20 MS. BLATT: Yes.

21 JUSTICE SOTOMAYOR: So --

22 MS. BLATT: So we're in complete
23 agreement that if you have a policy to cancel
24 all field trips because -- and the reason is
25 because you don't want to make accommodations

1 for the disabled, then that is bad faith or
2 that's an intent to discriminate.

3 We are fine with the statutory
4 language "solely" -- or take out the "solely by
5 reason of disability."

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

15 MS. BLATT: Yeah. So --

16 JUSTICE SOTOMAYOR: But they didn't
17 pass the policy with antireligion animus.

18 MS. BLATT: If you -- let me just give
19 you another example.

20 JUSTICE SOTOMAYOR: You're asking --
21 when you're using the words "bad faith," you're
22 talking about animus.

23 MS. BLATT: No, I'm talking about --
24 and you can -- you're in charge, so you can say:
25 Intent to discriminate is the standard. We're

1 not going to use bad faith. We don't like that
2 word. Intent to discriminate. If you say bad
3 faith, please make clear that it only means
4 intent to discriminate, because you could
5 violate the IDEA just because you think disabled
6 children are better off without the
7 accommodation.

8 That is a -- a -- that is a violation
9 of -- of the ADA and the Rehab Act. That is
10 discrimination. It's not animus. It could be
11 benign intent.

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

17 JUSTICE SOTOMAYOR: Counsel, it would
18 have been nice to have known that we were biting
19 off that big a chunk.

20 MS. BLATT: I agree. But in terms of
21 what we had to do when you granted cert was look
22 at the text, and then the blue brief said that
23 there is no intent required. They cited the
24 definition of what a qualified individual was
25 and said --

1 JUSTICE SOTOMAYOR: By the way,
2 intent's not even an issue here because there
3 wasn't an injunction being -- or the lack of an
4 injunction challenged here. They got the
5 injunction under the IDEA, didn't they?

6 MS. BLATT: They want more.

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

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

16 And our point on the damages is part
17 of their whole schtick is that this statute
18 incorporates Title VI, and they -- they say and
19 that requires intent.

20 And so we are saying -- and, again,
21 back to defense of the red brief, when the --
22 both the gray brief and the blue brief say that
23 no intent is required under the statute, we said
24 that's wrong. So --

25 CHIEF JUSTICE ROBERTS: Well, I

1 mean -- I'm sorry.

2 JUSTICE SOTOMAYOR: Go ahead. Never
3 mind.

4 CHIEF JUSTICE ROBERTS: I was going to
5 say the -- the -- the choice is not one standard
6 or another. I would have thought from the
7 framing of the whole case the question was
8 whether you have a different standard in the
9 educational context.

10 MS. BLATT: And if -- if that is --
11 and I agree. If that is the way you define the
12 question presented, then the parties are in
13 radical agreement.

14 If -- as we read, and the last
15 statement of their petition said you should
16 resolve the standard. If you don't want to
17 resolve the standard, then you're correct,
18 there's not much to decide.

19 But you are overturning, in effect,
20 the law of five circuits that affects 40,000 --
21 46,000 schools. And there are 8 million kids
22 on -- that are covered by the IDEA, and there
23 are 30,000 of these complaints, and their view
24 is every IDEA violation is a violation of the
25 statute.

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

7 It could be based on budgets. It
8 could be based on you just disagreed what the
9 accommodation was, as -- as was the case here.

10 And the Court in Monahan said: You
11 need to show discriminatory intent, and it used
12 the phrase "bad faith," meaning the improper
13 purpose.

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

21 JUSTICE SOTOMAYOR: You don't think it
22 was -- that you might have violated Rule 15.2 of
23 our rules that requires counsel of its
24 obligation, Respondents, "to address any
25 perceived misstatement of fact or law in the

1 petition that bears on what issues properly
2 would be before the Court if certiorari were
3 granted?"

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

6 MS. BLATT: We didn't say that. So
7 that -- that is -- just to be clear, we did not
8 say the implications of our textual defense
9 means Monahan or a intent standard would be
10 required outside.

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

18 And then all the circuits but the
19 Fifth Circuit have held -- have said there's
20 deliberate indifference or intent because of the
21 Title VI incorporation.

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

25 So that -- that's right, we didn't

1 point that out because it was only when, you
2 know, we're here briefing on the merits, and I
3 think you would want Respondents' counsel to
4 defend the decision below, the decision below is
5 based on the text, so we started with the text.

6 I mean, what I think the other --

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 MS. BLATT: Sorry. I don't --

10 JUSTICE ALITO: Where do you think
11 that the Petitioner says that a violation of the
12 IDEA necessarily constitutes a violation of the
13 ADA?

14 MS. BLATT: It's JA 20 and at
15 paragraphs 118 and 133. So it's not in the
16 brief. It's in the complaint. I would just say
17 it's not --

18 JUSTICE ALITO: I'm sorry,
19 paragraph 118 and what else?

20 MS. BLATT: And 133.

21 Now paragraphs 119 and 134 say the ADA
22 and the Rehab Act were violated other ways, but
23 part of their complaint is just the violation of
24 the IDE -- it just says the violation of the
25 IDEA itself is a violation of the other

1 statutes.

2 And we would hope that you would clear
3 that up, that that can't possibly be right,
4 because the IDEA can -- you know, can -- can --
5 can be -- go way beyond what might be a
6 reasonable accommodation.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

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

23 What he -- what the complaint says is
24 that the district's violations of the IDEA also
25 violate a plaintiff's rights under Section 504

1 of the Rehabilitation Act, and he says the same
2 thing about the ADA.

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

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor, anything?

12 Justice Kagan?

13 Justice Kavanaugh?

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

19 I just want to -- do you want to
20 respond to that?

21 MS. BLATT: Deliberate indifference is
22 not an intent standard --

23 JUSTICE KAVANAUGH: Okay. That's
24 your --

25 MS. BLATT: -- for discrimination. It

1 can be an intent standard in the prison context.
2 If you know someone's dying and you don't do
3 anything, that means you intentionally acted.

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

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

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

22 JUSTICE KAVANAUGH: Well, they did --
23 that -- that is true, they did say you have to
24 know your legal obligations, but that --

25 MS. BLATT: They said you didn't.

1 Maybe I misheard them. I heard them say --

2 JUSTICE KAVANAUGH: Well, they did --

3 MS. BLATT: -- you don't need to know
4 the law. And I know that's what my friend for
5 the Petitioner said, you don't need to know the
6 law.

7 JUSTICE KAVANAUGH: I don't know how
8 you can know -- this is a helpful question, by
9 the way.

10 MS. BLATT: Yeah.

11 JUSTICE KAVANAUGH: I don't know how
12 you can know that a federally protected right
13 was substantially likely to be violated without
14 having some idea what the law provides.

15 MS. BLATT: Well, I -- we would
16 welcome that if you're going to have a
17 deliberate indifference standard, that it be as
18 high as possible because, if you have these --
19 again, what the school districts are worried
20 about is because you -- you -- you have
21 good-faith disagreements in all -- I mean, these
22 are really tough cases on -- in terms of, you
23 know, how much support. Here, the -- the -- she
24 had 10 specialists. So these are just tough
25 cases. And so the question was how much support

1 she should be given at home.

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

9 MS. BLATT: Yes. If you --

10 JUSTICE KAVANAUGH: -- what's
11 reasonable.

12 MS. BLATT: If you would define it
13 that way, that would be great. I mean, we would
14 appreciate that, although we do think, if you're
15 going to incorporate Title VI, I mean, you're
16 now just saying the Fifth Circuit is wrong. The
17 Fifth Circuit said, oh, I don't know, Sandoval
18 looks likes it says intent; it doesn't say
19 deliberate indifference. And they -- these are
20 all Spending Clause statutes. So Title IX,
21 Title VI, the Rehab Act, the Affordable Care Act
22 incorporates all these. They -- their -- and
23 this is a one area. And Justice Barrett is
24 correct, this is a big, messy area.

25 So I don't blame you for not wanting

1 to get into it, but we would at least appreciate
2 that you make clear that there's a level set
3 particularly on damages.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Justice Jackson?

8 JUSTICE JACKSON: Yeah. I just am
9 still struggling with how you account for the
10 language in the disability discrimination
11 statutes that goes beyond discrimination and
12 discriminatory intent.

13 And so I'm looking, for example, at
14 the Title II language which says, "No qualified
15 individual with a disability shall, by reason of
16 such disability, be excluded from participation
17 in or be denied the benefits of the services,
18 programs, or activities of a public entity, or
19 be subjected to discrimination by such entity."

20 And my understanding of the way at
21 least that courts have been interpreting this is
22 you don't need discriminatory intent in a
23 situation in which a person is alleging, for
24 example, that they have been excluded from the
25 participation.

1 And you seem to be suggesting that you
2 still have to have that element in some way, and
3 I'm confused by that.

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

12 But, even putting that aside, if you
13 don't read it -- if you just look at Titles I
14 and Title III, where they spell out disparate
15 impact, and so that -- if you read that statute
16 in the passive voice to require disparate
17 impact, all the disparate impact and reasonable
18 accommodation provisions and definitions and
19 contours are all superfluous.

20 So that if you just looked at -- I
21 actually think this case is easier under
22 Title II because you don't have the Choate
23 baggage. But, if you just look at Title II,
24 it's an easy case that there is no reasonable
25 accommodations requirement at all. That --

1 that's -- that's our -- that's our stronger
2 case, is under Titles -- Title II, because
3 Titles I and Title III are so chockful of the
4 contours.

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

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Mr. Martinez?

21 REBUTTAL ARGUMENT OF ROMAN MARTINEZ
22 ON BEHALF OF THE PETITIONER

23 MR. MARTINEZ: Your Honors, I'm not
24 going to dignify Ms. Blatt's name-calling here
25 with a response in kind, though I appreciate

1 that she withdrew the charges here, although
2 perhaps a bit under duress.

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

14 We would also encourage you to look at
15 page 23, in addition to all the other pages that
16 were cited, where she said that "the universe of
17 plaintiffs with claims affected by the question
18 presented is narrow. For educational
19 discrimination plaintiffs not covered by the
20 IDEA, such as college students, a bad-faith or
21 gross-misjudgment standard does not apply."
22 That's exactly the opposite of what she's saying
23 now.

24 So what is at issue in this case? I
25 think the most important thing we heard from

1 Ms. Blatt is when she conceded in questioning
2 from Justice Jackson that she is trying and the
3 district arguments here are trying to get rid of
4 the reasonable accommodation claims that people
5 in this country with disabilities have enjoyed
6 for decades. That's what's at stake.

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

23 If you do address some of this stuff,
24 Justice Kavanaugh, I would encourage you to look
25 at the COPAA amicus brief. On pages 18 to 29,

1 it has a very good discussion of the kinds of
2 cases and where the different standards might
3 make a difference.

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

16 In addition to that, I would point the
17 Court to other provisions of the ADA:
18 12101(a)(5), 12131(2), 12201(h). All of those
19 refer to either reasonable accommodations or
20 reasonable modifications. So, with respect, I
21 think that's wrong.

22 Finally, let me just take a step back,
23 Your Honors, and talk about really what's
24 issue -- what's at issue in this case. This
25 case started narrow. It was about a sliver of

1 plaintiffs. It's now quite broad because of the
2 arguments the district is making. If you accept
3 her arguments, think of all the people who are
4 going to be affected. Think of five-year-old
5 Ehlena Fry with cerebral palsy, who needs the
6 help of her service dog, Wonder. Think about
7 George Lane, the Tennessee man forced to crawl
8 up two flights of stairs in order to have his
9 court -- his day in court. Think about Ava, who
10 desperately needs every precious hour of school
11 so she can learn to communicate with her
12 parents.

13 We ask you to reject those radical
14 arguments, and we ask you to vacate the decision
15 below.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 The case is submitted.

19 (Whereupon, at 11:30 a.m., the case
20 was submitted.)

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Official - Subject to Final Review

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