No. 01-682

In the Supreme Court of the United States

KAY BARNES, ETC., ET AL., PETITIONERS

v.

JEFFREY GORMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a punitive damages remedy may be imputed to Congress in an inferred private right of action.

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INTEREST OF THE UNITED STATES

The court of appeals upheld the award of $1.2 million in punitive damages against petitioners in this action under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 (1994 & Supp. V 1999), and Section 202 of the Americans with Disabilities Act of 1990 (Section 202), 42 U.S.C. 12132. The United States has a substantial interest in the scope of the remedies available under those statutes. Section 504 applies solely to programs or activities receiving federal financial assistance. The United States has an interest in assuring that judicially inferred remedies do not unduly interfere with the operation of such programs or activities, or with enforcement actions taken by the Depart-

ment of Justice or other agencies with respect to Section 504 or Section 202.[1]

STATEMENT

1. a. This case arises against the backdrop of interrelated civil rights statutes that prohibit discrimination on the basis of disability. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes the funding of vocational and certain other services for the disabled. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). Section 504 of the Act prohibits discrimination on the basis of disability under any "program or activity" receiving federal financial assistance. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Section 505(a)(2), which was added in 1978, provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [Title VI] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under [Section 504]." 29 U.S.C. 794a(a)(2). Although Section 505(a)(2) provides a textual reference to private claims, it does so by reference to the judicially inferred right of action in Title VI. Principles governing the scope of remedies for inferred rights of action therefore apply in determining the scope of the remedies available in an action under Section 504.

Title VI, in turn, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. 2000d-1. Its express means of enforcement is administrative. Title VI directs agencies that distribute financial assistance to develop requirements to effectuate the statute's non-dis-

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[1] The United States participated as an amicus in the lower court proceedings in this case, and argued that Section 202 and Section 504 cover the conduct of law enforcement officers pursuant to an arrest, and that, if true, the facts alleged by respondent in this case were sufficient to state a claim under those provisions. The federal government did not take a position in the courts below on the question presented in this Court.

crimination principle, and authorizes agencies to enforce those requirements by terminating or refusing to grant financial assistance, or by "any other means authorized by law." 42 U.S.C. 2000d-1(2); see 28 C.F.R. 42.106-42.110. Title VI does not expressly provide a private enforcement mechanism. This Court, however, has inferred a private right of action to enforce Title VI, see *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983), and has stated in the parallel context of Title IX that money damages are available in such an action. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 68, 70 (1992).[2]

The Department of Justice has promulgated regulations implementing Section 504, which are modeled on and incorporate aspects of the Title VI enforcement scheme. See 28 C.F.R. 42.501 to 42.505, 42.530. The regulations require applicants for federal financial assistance to provide assurances that the program or activity receiving such assistance will comply with Section 504. 28 C.F.R. 42.504(a). The regulations also establish a procedure for individuals to file administrative complaints with the funding agency. 28 C.F.R. 42.107(b). If the agency finds a violation of Section 504, the funding recipient may be required to "take the remedial action the Department considers necessary to overcome the effects of the discrimination." 28 C.F.R. 42.505(a). The regulations make clear that a recipient's failure to comply with Section 504 may cause the United States to bring a civil

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[2] *Franklin* involved an inferred private cause of action under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681(a). Title IX prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, *ibid.*, and was modeled on Title VI. See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001). This Court has stated that Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

action against it, to terminate the recipient's federal financial assistance, or to take other measures. 28 C.F.R. 42.108(a).

b. Title II of the Americans with Disabilities Act of 1990 (ADA), unlike Section 504, is not conditioned on the receipt of federal funds. Accordingly, Section 202 of the ADA prohibits discrimination on the basis of disability in *any* public program, activity, or service, not just those that receive federal financial assistance. 42 U.S.C. 12132. Nonetheless, Section 203 of the Act provides that "[t]he remedies, procedures, and rights set forth in [Section 505(a)(2) of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Section 202]." 42 U.S.C. 12133. As a result, the same principles that govern the scope of the remedies available under Section 504 govern the remedies under Section 202. The Department of Justice has adopted regulations implementing Section 202, which, among other things, permit individuals to file complaints with the Department of Justice or other appropriate federal agency. See 28 C.F.R. 35.170. The regulations further authorize the Department of Justice to investigate and resolve the complaint, and to refer it for judicial action. 28 C.F.R. 35.174; 28 C.F.R. Pt. 35, App. A.

c. Separate provisions of the Rehabilitation Act, 29 U.S.C. 791 (1994 & Supp. V 1999) (Section 501), and the ADA, 42 U.S.C. 12112(a) (Section 102), prohibit discrimination on the basis of disability in employment. In 1991, Congress expressly authorized the award of punitive damages in actions alleging intentional employment discrimination in violation of those provisions. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In doing so, however, Congress specified that punitive damages are available in such actions only if the plaintiff shows that the employer acted "with malice or with reckless indifference" to federal law, and even then, punitive damages are capped at an amount

ranging from $50,000 to $300,000 depending on the employer's size. 42 U.S.C. 1981a(b)(1) and (3). In addition, Congress specified in the 1991 Act that punitive damages are not available in such actions when the defendant employer is "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

2. a. Respondent is a paraplegic who uses a wheelchair and lacks voluntary control over his lower torso and legs, including his bladder. In May 1992, he was arrested following an altercation with a bouncer at a nightclub in Kansas City, Missouri. After his arrest, respondent was denied permission to use the restroom to empty his urine bag before being transported to the police station. He was taken to a police van that had no wheelchair locks. Over respondent's objection, police officers removed respondent from his wheelchair, and fastened him to a narrow bench in the back of the van. During the ride to the police station, respondent fell from the bench and ruptured his urine bag. After these events, respondent began experiencing serious medical problems, including a bladder infection, lower back pain, uncontrollable spasms in his paralyzed area, and shoulder problems. His injuries left him unable to work full-time. Pet. App. 2a-4a.

b. In May 1995, respondent filed this action against petitioners—members of the Kansas City Board of Police Commissioners—and certain others, in the District Court for the Western District of Missouri, seeking compensatory and punitive damages for injuries that he sustained in connection with his May 1992 arrest. Respondent claimed that, on the basis of his disability, he had been excluded from participation in or denied the benefits of the programs or activities of the Kansas City Police Department, a recipient of federal financial assistance, in violation of Section 504 and Section 202. Following a three-day trial in April 1999, a jury found petitioners liable and awarded respondent $1,034,817 in

compensatory damages and $1,200,000 in punitive damages. Pet. App. 4a.

c. The district court vacated the punitive damages award on the ground that punitive damages are not available under Section 504 or Section 202. Pet. App. 21a-27a. In so holding, the court "look[ed] to the state of the law at the time the Rehabilitation Act was passed and the course of events that followed its passage." *Id.* at 25a. In particular, the court pointed to the fact that lower courts have consistently held that punitive damages are not available under Section 504 or Section 202, and that—even though it has amended those provisions on several different occasions—Congress has never "indicate[d] any desire to change the established understanding that punitive damages were not available under § 504." *Id.* at 26a. In addition, the district court noted that in 1991 Congress "made punitive damages available—for the first time—under [Section 501 of the Rehabilitation Act and Section 102 of the ADA]," but "did not extend the new punitive damages provision to § 504 [or Section 202]." *Ibid.*

3. The court of appeals reversed the district court's punitive damages ruling and remanded for further proceedings. Pet. App. 1a-20a. The court stated that it was "sympathetic" to the position that punitive damages should not be available in an action under Section 504 or Section 202, but it concluded that this Court's decision in *Franklin* v. *Gwinnett County Public Schools* "foreclosed" that result. Pet. App. 8a.

The court of appeals pointed to this Court's statement in *Franklin* that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Pet. App. 9a. Next, the court stated that punitive damages are "appropriate remedies" within the meaning of *Franklin* because such damages are among the remedies "usually available to American courts." *Id.* at 10a. And, as a result, the court concluded that

"*Franklin* compels the conclusion that absent express congressional statement to the contrary," an implied private cause of action "affords all appropriate remedies, *including punitive damages*." *Ibid.* (emphasis added).

Applying that understanding to this case, the court of appeals reasoned that *Franklin* requires it to "conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI"; that "Congress extended the remedies available under Title VI to [Section 504 and Section 202]"; and that, "[t]herefore, logic dictates, the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202." Pet. App. 11a, 12a.

The court of appeals remanded to allow the district court to determine whether the award of punitive damages was appropriate in this "specific case," explaining that—even though punitive damages are generally available in Section 504 and Section 202 actions—the evidence would not support punitive damages unless it showed that petitioners' conduct was "motivated by evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of [respondent]." Pet. App. 16a (quotation omitted).

SUMMARY OF ARGUMENT

A court should not impute to Congress an intent to allow a punitive damages remedy absent a clear congressional directive.

I. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court approved the award of compensatory damages in a Title IX action based on a presumption in favor of "the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66. Neither *Franklin*'s terms nor the cases on which it relied, however, support a presumption in favor of the availability of *punitive* damages. *Franklin* was grounded on decisions recognizing that federal courts may "*redress* injuries action-

able in federal court." *Ibid.* (emphasis added). The purpose of punitive damages, however, is not to redress injuries, but instead "to exact punishment *in excess of* actual harm." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (emphasis added). By their very nature, punitive damages are not necessary to redress wrongdoing.

In the absence of clear congressional guidance, the proper presumption is the opposite of that applied by the court of appeals below. That is, courts should not infer a punitive damages remedy "[a]bsent clear congressional guidance." *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 52 (1979); see *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). That approach takes into account the penal nature and significant practical consequences of punitive damages, and recognizes that the decision whether to authorize punitive damages is better suited to legislative judgment. In addition, the presumption *against* judicial inference of a punitive damages remedy is consistent with this Court's refusal to expand the scope of inferred rights of action. *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

II. The court of appeals erred in inferring a punitive damages remedy with respect to actions under Section 504 or Section 202, because there is no clear guidance that Congress intended to allow for punitive damages in those actions and, in fact, the evidence strongly supports the opposite conclusion. The Rehabilitation Act incorporates the remedies under Title VI, 29 U.S.C. 794a(a)(2), which, in turn, is silent with respect to punitive damages. At the time Congress cross-referenced the remedies available under Title VI lower courts had repeatedly refused to recognize punitive damages in Title VI cases. In 1991, Congress adopted a *limited* punitive damages remedy under provisions of the Rehabilitation Act and the ADA, but only against non-government actors and only for certain employment discri-

mination claims. Once again, Congress was mum with respect to the availability of punitive damages under Section 504 or Section 202.

Other considerations also weigh against inferring a punitive damages remedy with respect to Section 504 or Section 202. Any need for a punitive damages remedy as a deterrent is offset by the existence of administrative enforcement weapons, including the ability to terminate federal funding with respect to Section 504. At the same time, the availability of an inherently unpredictable punitive damages remedy could frustrate the achievement of programmatic goals under Section 504, and perhaps even discourage entities from accepting federal financial assistance. The imposition of such awards also could divert resources from the advancement of programmatic objectives. For these reasons, decisions about whether to impose penalties for non-compliance with conditions on federal funding are best left to the federal government, rather than delegated to juries.

Inferring a punitive damages remedy under Section 504 or Section 202 would be particularly inappropriate with respect to government actors such as petitioners here. When Congress adopted a limited punitive damages remedy in 1991 for other provisions of the Rehabilitation Act and the ADA, it expressly exempted government actors from that remedy. 42 U.S.C. 1981a(b)(1). In addition, the longstanding "presumption [is] *against* imposition of punitive damages on governmental entities." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (emphasis added). Exposing governments to punitive damages may visit retribution on blameless or unknowing taxpayers, while siphoning off funding from other objectives.

ARGUMENT

A PUNITIVE DAMAGES REMEDY SHOULD NOT BE JUDICIALLY INFERRED IN THE ABSENCE OF A CLEAR CONGRESSIONAL DIRECTIVE

Under our Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981); see U.S. Const. Art. III. Except in certain areas such as admiralty or maritime, the Constitution does not contemplate that federal courts will fashion substantive rules of law. See *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-646 (1981). In rare circumstances, this Court has inferred "a cause of action where Congress has not provided one." *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001). But the Court has recently stated that it has "abandoned" the understanding that led to the creation of such inferred rights. *Ibid.*; see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), concerned the remedies available in the cause of action inferred from Title IX. See *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). In particular, *Franklin* considered whether that inferred statutory action "supports a claim for monetary damages," as opposed solely to injunctive relief. 503 U.S. at 63. In answering that question, the Court stated that "[t]he general rule * * * is that *absent clear direction to the contrary by Congress*, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," including in a judicially inferred action. *Id.* at 70-71 (emphasis added). Finding no contrary statutory directive,

the Court held that "a damages remedy is available for an action brought to enforce Title IX." *Id.* at 76.

In this case, the court of appeals held that *Franklin* compelled the conclusion that punitive damages are available under Section 504 or Section 202, because Congress has not stated a contrary rule. That understanding was mistaken. *Franklin* does not address the availability of punitive damages in an implied private action, and its reasoning does not extend that far. Punitive damages pose vastly different considerations than compensatory damages. Indeed, this Court has held that a punitive damages remedy should *not* be inferred "[a]bsent clear congressional guidance" to the contrary. *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 52 (1979). That presumption, and not the one in *Franklin*, should govern the remedy issue in this case. The presumption *against* punitive damages means that punitive damages are not available under Section 504 or Section 202, because there is no evidence, much less any clear guidance, that Congress intended to authorize such damages.

I. THE PROPER PRESUMPTION IN THE ABSENCE OF CLEAR CONGRESSIONAL GUIDANCE IS AGAINST INFERENCE OF A PUNITIVE DAMAGES REMEDY

A. Punitive Damages Are Not Within The *Franklin* Ambit

Punitive damages are an "extraordinary sanction." *Foust*, 442 U.S. at 48. "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981); see K. Redden, *Punitive Damages* § 2.1, at 24 (1980) (Punitive damages "run[] counter to the normal reparative function of tort and contract remedies."). Thus, punitive

damages "have been described as 'quasi-criminal,'" and "as 'private fines.'" *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). "Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

The threshold issue in this case is whether punitive damages are subject to *Franklin*'s presumption of "availability * * * unless Congress has expressly indicated otherwise." 503 U.S. at 66. For several reasons, it is clear that they are not.

1. *Franklin* did not involve a *punitive* damages remedy and, therefore, the Court in that case had no occasion to consider, much less decide, the question presented here. The question presented in *Franklin* was whether Title IX "allows victims of intentional discrimination to recover *compensatory* damages." 90-918 Pet. at i (emphasis added). The decision makes no reference to punitive damages and, instead, addresses whether federal courts may imply a damages "remedy to make good the wrong done." *Franklin*, 503 U.S. at 66, 76. That is the essence of the compensatory damages remedy, whereas "punitive damages are specifically designed to exact punishment *in excess of* actual harm." *Cooper Indus.*, 532 U.S. at 432 (emphasis added).

Furthermore, in holding that a compensatory damages remedy was available to avoid leaving the plaintiff in *Franklin* "remediless," *Franklin*, 503 U.S. at 76, the Court did not make presumptively available "the full panoply of remedies * * *, including punitive damages." Pet. App. 12a. As this Court has explained, *Franklin* was a "response to lower court decisions holding that Title IX does not support damages relief *at all*." *Gebser*, 524 U.S. at 284 (emphasis added). Accordingly, the Court "made no effort in

Franklin to *delimit* the circumstances in which a damages remedy should lie." *Ibid.* Nor did it *delimit* the types of damages that are—or are not—presumptively available.

2. Equally important, the logic of *Franklin* does not extend to the award of punitive damages, because none of the decisions on which *Franklin* rests supports the proposition that the existence of a federal right presumes that federal courts may infer a punitive damages remedy to *punish* violations of that right.

The Court's decision in *Franklin* is built on the Court's statement in *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*." *Franklin*, 503 U.S. at 66 (emphasis added). The Court explained that this "traditional presumption" was "well-settled" in this Court's precedents, and continued that "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies *to redress injuries* actionable in federal court." *Ibid.* (emphasis added). But it has also been clear from the earliest years of the Republic that the power to define crimes and "affix a punishment" to them belongs exclusively to "[t]he legislative authority of the Union." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Compensatory damages "make good the wrong done" and "redress injuries." Punitive damages, as their name suggests, serve objectives *beyond* redressing injuries. See *Cooper Indus.*, 532 U.S. at 432 ("compensatory damages * * * are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," whereas punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing").[3]

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[3] This Court's decisions leave no doubt about the penal nature of punitive damages. See *Tull* v. *United States*, 481 U.S. 412, 422 & n.7 (1987);

Accordingly, none of the cases from which this Court drew support in *Franklin*, 503 U.S. at 68, for the "general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies" involved a punitive damages remedy. See *id.* at 66-69. And that includes *Bell* v. *Hood* itself. See 327 U.S. at 684 (seeking damages "said to have been *suffered* as a result of federal officers violating the Fourth and Fifth Amendments") (emphasis added).[4] Nor is it surprising that the traditional rule

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Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299, 306 n.9 (1986); see also *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). As this Court has also recognized, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus.*, 532 U.S. at 438 n.11; see *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 422 n.2 (1994). This case, however, deals with a punitive damages remedy that is plainly penal in nature—$1.2 million on top of more than $1 million awarded in compensatory damages, which included damages for pain and suffering as well as for emotional anguish.

[4] See also *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) (suit to recover writ of mandamus); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (suit to recover credits or allowances on contracts for transportation of the United States mail); *Dooley* v. *United States*, 182 U.S. 222 (1901) (suit to recover back duties paid under protest); *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33 (1916) (suit to recover damages for personal injuries); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) (suit to recover damages for securities violations); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (suit for "[c]ompensatory damages for deprivation of a federal right"); *Carey* v. *Piphus*, 435 U.S. 247 (1978) (addressing "recovery of damages * * * appropriate to compensate for injuries caused by the deprivation" of constitutional rights); see also *Davis* v. *Passman*, 442 U.S. 228, 248 (1979) (implying damages remedy so that if plaintiff "is able to prevail on the merits [of *Bivens* action], she should be able to redress *her* injury in damages, a 'remedial mechanism normally available in the federal courts' ") (emphasis added); *Hayes* v. *Michigan*

on which *Franklin* rests is limited in that fashion. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." *Carey*, 435 U.S. at 254-255 (quoting 2 F. Harper & F. James, *Law of Torts* § 25.1, at 1299 (1956)); see *id.* at 255 n.7 (citing cases).[5]

To be sure, "[p]unitive damages have long been a part of traditional state tort law" in this country. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Although, as noted, even in that context, punitive damages often served a compensatory function "[u]ntil well into the 19th century." *Cooper Indus.*, 532 U.S. at 438 n.11; see note 3, *supra*. But whatever the tradition in state common law courts, there is

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Cent. R.R., 111 U.S. 228, 240 (1884) ("[E]ach person specially injured by the breach of the obligation is entitled *to his individual compensation*, and to an action for its recovery.") (emphasis added). The discussion in *Texas and Pacific Railway* underscores the point. There, the Court cited to the "doctrine of the common law expressed in 1 Com. Dig., *tit.*, Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for *the recompense of a wrong done to him contrary to the said law*.'" 241 U.S. at 39 (emphasis added).

[5] That understanding is reflected in Blackstone's own writings. In discussing the "injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury," he stated that "the natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived." 3 W. Blackstone, *Commentaries* *115, *116. He continued: "This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded; or, where that is not a possible, or at least not an adequate remedy, *by making the sufferer a pecuniary satisfaction in damages*; as in case of assault, breach of contract, etc. to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury; though such right be not fully ascertained till they are assessed by the intervention of the law." *Id.* at *116 (emphasis added; footnote omitted).

no tradition in the federal courts of inferring not just a private right of action, but a punitive damages remedy to redress the violation of federal law. More fundamentally, when this Court has inferred judicial remedies, it has done so out of necessity. Rather than leave an individual "remediless" (*Franklin*, 503 U.S. at 76), this Court has provided remedies to victims for whom "it is damages or nothing." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Punitive damages, by definition, are damages in excess of those necessary to provide recompense. They provide a "windfall to a fully compensated plaintiff." *Fact Concerts*, 453 U.S. at 267. That defining feature of punitive damages puts them beyond the rationale of *Franklin*.

B. This Court's Cases Support A Presumption Against, Not For, Punitive Damages

1. In light of the unique nature of the punitive damages remedy, this Court has refused to infer the existence of a punitive damages remedy "[a]bsent clear congressional guidance" to the contrary. *Foust*, 442 U.S. at 52. The question in *Foust* was "whether the Railway Labor Act permits an employee to recover punitive damages for * * * a breach of a union's duty of fair representation." *Id.* at 43 (footnote omitted). As the Court noted, "[t]he right to bring unfair representation actions is judicially 'implied from the statute * * * ,' and Congress has not specified what remedies are available in these suits." *Id.* at 47 (citation omitted). In concluding that punitive damages are not available in such an action, the Court first discussed the "extraordinary" and penal nature of punitive damages. *Id.* at 48. The Court next observed that, "[b]ecause juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial." *Id.* at 50 (citation omitted). In addition, the Court noted "that punitive

damages may be employed to punish unpopular defendants," and could have other disruptive effects on labor relations. *Id.* at 50-51 n.14. "Absent clear congressional guidance," the Court concluded that it was unwilling to infer a punitive damages remedy and "inject such an element of uncertainty" into this area of labor law. *Id.* at 52.

In a situation like *Foust*, where Congress did not provide an express cause of action, "clear congressional guidance" that punitive damages are available will rarely be present. That is also true in the unusual context of the Rehabilitation Act and the ADA, which expressly incorporate remedies available under a cause of action that was itself judicially inferred. But even when Congress provides an express cause of action for which punitive damages are found to be available in certain circumstances, this Court has declined to recognize a punitive damages remedy against municipalities. See *City of Newport* v. *Fact Concerts, Inc.*, *supra.* Although the Court later confirmed the availability of punitive damages under the express cause of action in Section 1983, see *Smith* v. *Wade*, 461 U.S. 30, 34-38 (1983), the Court in *Fact Concerts* did not *presume* that punitive damages were available against municipalities unless Congress said otherwise, *i.e.*, it did not adopt a *Franklin* presumption. Instead, in *Fact Concerts*, the Court first looked to see whether there was any evidence that in enacting Section 1983, Congress had intended to override the "common-law tradition" that punitive damages were not available against a municipality. 453 U.S. at 261; see *id.* at 263-264. And then, the Court considered the practical ramifications of allowing punitive damages awards in this context and held that, "[a]bsent a *compelling* reason for approving such [awards]," it was "unwise to inflict the risk" associated with such awards. *Id.* at 271 (emphasis added).

In discussing the impact of punitive damages, the Court noted that "[p]unitive damages by definition are not in-

tended to compensate the injured party," and "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." 453 U.S. at 266, 267. "Indeed," the Court continued, "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267. The Court also rejected the argument that punitive damages are needed to deter misconduct, noting, for example, that there is "no reason to suppose that corrective action, such as the discharge of offending officials * * * , will not occur unless punitive damages are awarded against the municipality." *Id.* at 269. Moreover, whatever benefits might flow from a punitive damages remedy, the Court recognized that "the costs may be very real," as a result of "unpredictable and, at times, substantial" awards that place a "strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-271.

2. In this case, the Court should make clear that *Franklin* does not extend to punitive damages and that, instead, there is no basis for inferring a punitive damages remedy "[a]bsent clear congressional guidance" that such a remedy was intended. *Foust*, 442 U.S. at 52. That approach is consistent with this Court's decisions in *Foust* and *Fact Concerts*. In addition, it takes into account that *Franklin* is both by its terms, and by the decisions on which it was built, limited to the availability of compensatory damages, and does not justify the award of additional damages to serve broader societal goals of punishment and deterrence. Furthermore, holding that punitive damages are outside the *Franklin* presumption recognizes that the decision whether punitive damages are appropriate in a particular context is a policy matter best suited for legislative resolution.

It is of course the traditional role of the legislative branch to devise the punishment for violation of our criminal laws. In doing so, the legislature must weigh various policy considerations, including the competing goals of deterrence and fairness. Similar considerations enter the mix in deciding whether to allow recovery of the "quasi-criminal" penalty of punitive damages. *Cooper Indus.*, 532 U.S. at 432. Furthermore, the "long-enduring debate" over the "propriety" of punitive damages awards—reflected in the debate running throughout this Court's recent decisions involving the constitutional limits on punitive damages awards[6]—underscores the difficult policy judgments that must be made in determining whether to allow the recovery of punitive damages and, if so, in what fashion. Indeed, legislative penalties are one of the guideposts that police the constitutional limits on excessive punitive damages awards. See *Gore*, 517 U.S. at 583-584.

In recent decisions, this Court has admonished that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to implying the existence of private causes of action, or considering requests to expand the contours of previously implied private rights of action. *Alexander*, 532 U.S. at 287; see *Malesko*, 122 S. Ct. at 519-520 & n.3; *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 180 (1994). In *Sandoval*, the Court specifically refused a request to "revert * * * to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted," which—the Court stated—"is captured by the Court's statement in *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964), that 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional

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[6] See, *e.g.*, *BMW* v. *Gore*, 517 U.S. 559 (1996); *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993); *Haslip*, *supra*; *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

purpose' expressed by a statute." 532 U.S. at 287. That restraint respects the traditional separation of powers under our Constitution. See *id.* at 286-287.

Although *Sandoval* and *Malesko* involved efforts to extend previously inferred private rights of action to new claims or defendants, the same judicial restraint is called for with respect to efforts to expand the range of available remedies. To be sure, with respect to the latter the Court has "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. But restraint is nevertheless called for in exercising such discretion with respect to punitive damages. See *Franklin*, 503 U.S. at 77 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring) ("[W]hen rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well."). In this case, the Court should hold that when Congress does not express a punitives damages remedy, the courts should not infer such a remedy unless there is clear congressional guidance to the contrary.

II. THERE IS NO BASIS FOR JUDICIAL INFERENCE OF A PUNITIVE DAMAGES REMEDY UNDER SECTION 504 OR SECTION 202

There is no clear guidance that Congress intended to allow punitive damages in an action under Section 504 and Section 202. To the contrary, all indications point in the opposite direction.

A. Congress Has In No Way Sanctioned A Punitive Damages Remedy Under Section 504 Or Section 202

The legislative record with respect to Section 504 and Section 202 strongly indicates that Congress did *not* intend a punitive damages remedy to be available under either of

those provisions.[7] To begin with, as discussed above, Section 505(a)(2) of the Rehabilitation Act, which was added in 1978, expressly adopts for Section 504 the "remedies, procedures, and rights set forth in [Title VI]." 29 U.S.C. 794a(a)(2). Title VI, of course, has no express private cause of action at all, so it necessarily does not expressly provide for the availability of punitive damages. Moreover, in 1978, at the time of Section 505(a)(2)'s explicit cross-reference to Title VI, there were no judicial decisions recognizing a punitive damages remedy in a private action under Title VI. In fact, the only reported decision at that time that involved a request for punitive damages in a Title VI action refused to permit damages of *any* kind, including punitives. See *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F. Supp. 534, 537 n.3 (D. Utah 1978).[8]

Furthermore, Congress amended the Rehabilitation Act in 1986, 1987, and 1991, and it adopted Section 202 in 1990. During that period, the overwhelming if not universal position of the lower courts was that punitive damages were not available under Section 504 or Title VI. See Pet. App. 13a-14a ("When Congress enacted the Rehabilitation Act and at the time of the subsequent amendments, courts generally agreed Title VI and section 504 did not afford monetary damages, and were in near unanimity that they did not per-

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[7] The focus of the discussion here is on the legislative record with respect to Section 504. As discussed above, however, Section 202 expressly adopts the remedies available under Section 504. See p. 4, *supra*.

[8] Whatever reluctance there might be to consult the state of the case law at the time of a legislative enactment to determine if Congress ratified the view of the courts, that inquiry seems unavoidable in light of Section 505(a)(2)'s explicit cross-reference to remedies under Title VI. As discussed, Congress has not expressly adopted any private remedies with respect to Title VI. Therefore, Congress's cross-reference must be understood by reference to remedies that had been inferred by the courts at the time of its enactment.

mit punitive damages."); see *id.* at 14a n.9 (collecting cases); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 790 (6th Cir. 1996) (collecting cases). In light of Congress's reference to the remedies available under Title VI (directly in Section 505(a)(2) of the Rehabilitation Act and indirectly in Section 202), Congress must be presumed to have been aware of this case law, and therefore could not have *clearly* intended to make punitive damages available by remaining silent in the face of that case law.[9]

Congress's action in 1991 is perhaps even more telling. As discussed above, in 1991 Congress amended the Rehabilitation Act and the ADA to establish a *limited* punitive damages remedy in intentional employment discrimination actions. See 42 U.S.C. 1981a(a)(2) and (b). The congressional findings enacted as part of the 1991 Act are significant in two key respects. First, they make clear that the Act provides "*additional* remedies." 42 U.S.C. 1981 note (§ 2(1), 105 Stat. 1071) (emphasis added). See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1951 (2001); Pet. App. 15a. Second, the findings state that the remedies were added "to

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[9] The 1986 amendments to the Rehabilitation Act included a provision that stated that in a suit against a State, "remedies (including remedies both at law and in equity) are available for * * * a violation [of Section 504 or other provision] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. 2000d-7(a)(2). As this Court recognized in *Franklin*, that "saving clause says nothing about the nature of those other available remedies." 503 U.S. at 73. And there is no reason to read Congress's glancing reference to "available" remedies as an intent to adopt a punitive damages remedy that was not available under the existing judicial decisions. In *Franklin*, the Court reasoned that the 1986 amendments supported the inference of a compensatory damages remedy under the "traditional rule" on which *Franklin* is grounded. *Ibid.* But as discussed above, that "rule" does not extend to the availability of punitive damages and, therefore, Congress's failure to be more explicit about the particular types of remedies that it had in mind leads to the conclusion that Congress did *not* have in mind punitive damages.

deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. 1981 note (§ 2(1), 105 Stat. 1071) (emphasis added). The 1991 Act thus underscores both that Congress knows how to establish an "additional" punitive damages remedy when it wants to, and that Congress is cognizant of when such an additional remedy is needed to deter wrongful misconduct, a central objective of punitive damages. See *Cooper Indus.*, 532 U.S. at 432.

Moreover, the 1991 Act renders the decision below particularly anomalous. A plaintiff who is subjected to intentional employment discrimination on the basis of his disability is expressly entitled to punitive damages under the 1991 Act, but those damages are expressly capped at $300,000 or less, and are not available against government actors. 42 U.S.C. 1981a(b). So if respondent had sued petitioners under the provisions that expressly provide for punitive damages, he could not recover *any* punitive damages because of petitioners' governmental status. In this case, however, by suing under provisions that do not expressly provide for punitive damages, respondent obtained a $1.2 million punitive damages award (four times the statutory limit with respect to private sector employers) against the municipal defendants. This Court has repeatedly refused to impute to Congress an intent to create *inferred* rights that are broader than the *express* rights in the surrounding statutory scheme, and there is no reason to impute to Congress such an intent when it comes to the availability of punitive damages.[10]

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[10] See, *e.g.*, *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999) ("The Government's enforcement power may only be exercised against the funding recipient, and we have not extended damages liability under Title IX to parties outside the scope of this power.") (citation omitted); *NCAA* v. *Smith*, 525 U.S. 459, 467 n.5 (1999) (same); *Gebser*, 524 U.S. at 289 ("It would be unsound * * * for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's

B. Inferring A Punitive Damages Remedy Would Frustrate Section 504's Programmatic Objectives

This Court has stated that Title VI in effect "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. As explained below, the "contractual nature" of Title VI—from which both Section 504 (by way of Section 505(a)(2)) and Section 202 (by way of Section 504) derive their remedies—"has implications for [the Court's] construction of the scope of available remedies" in an implied private right of action to enforce Section 504 or Section 202, *Gebser*, 524 U.S. at 287, and, more to the point, also cuts against judicial inference of a punitive damages remedy. See *ibid.* ("When Congress attaches conditions to the award of federal funds under its spending power, * * * we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition.").

First, the need for an inferred punitive damages remedy to deter wrongful conduct is offset by the availability of other sanctions that are expressly created by the statutory and regulatory scheme under Title VI, Section 504, and Section 202. As discussed above, Title VI directs agencies that distribute funding to develop requirements to effectuate the statute's non-discrimination principle, and authorizes agencies to enforce those requirements by terminating or refusing to grant financial assistance, or by "any other means authorized by law." 42 U.S.C. 2000d-1(2); see 28

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knowledge or its corrective actions upon receiving notice."); see also *Central Bank*, 511 U.S. at 180 ("[I]t would be 'anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.' ").

C.F.R. 42.106-42.110. The Department of Justice has incorporated the same penalty provisions into its Section 504 regulations, which permit the funding agency to discontinue federal funding. See 28 C.F.R. 42.530. As this Court has recognized, the termination of federal financial assistance is itself a "severe" remedy, *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-705 (1979), and thus a powerful weapon in deterring unlawful discrimination.[11]

The Section 504 and Section 202 regulations establish a less potent but nonetheless effective deterrent short of the termination of federal financial assistance. The regulations permit the filing of administrative complaints with the Department of Justice or funding agency that may be investigated by the federal government and, in appropriate cases, referred to the Attorney General for the filing of an action by the United States. See pp. 3-4, *supra*. The Department of Justice has entered into numerous consent decrees and settlement agreements in response to the filing of such administrative complaints, which typically require public entities to take prospective corrective action in response to alleged discriminatory practices, and at times also provide for a damages payment. Unlike punitive damages awards, which are rendered by juries in individual cases, the regulatory scheme gives the executive branch discretion to choose the remedies best suited to ensure compliance with conditions on funding.[12]

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[11] Of course, the availability of compensatory damages in an implied private cause of action under Section 504 or Section 202 is also a strong deterrent to unlawful discrimination. See *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct.") (White, J., joined by Brennan and Marshall, JJ., concurring in judgment).

[12] The nearly unfettered discretion that a jury has to arrive at a punitive damages award is in stark contrast to the careful procedures that must be followed before an administrative penalty such as a termination in

Second, the availability of punitive damages awards under Section 504 could frustrate the achievement of programmatic goals, and perhaps even deter entities from accepting federal financial assistance that would trigger Section 504. As this Court has recognized, punitive damages awards are both "unpredictable and, at times, substantial." *Fact Concerts*, 453 U.S. at 270-271; see *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) ("Recent years * * * have witnessed an explosion in the frequency and size of punitive damages awards."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."). Moreover, when punitive damages are awarded against a government, they "are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Fact Concerts*, 453 U.S. at 267; see *id.* at 271 (punitive damages awards may place a "strain on local treasuries and therefore on services available to the public at large").

The imposition of large punitive damages awards—on top of compensatory damages—may require recipients of federal funding to divert scarce resources from achieving programmatic objectives. It is a far from obvious inference that the same Congress that appropriates federal funds to provide vocational or similar activities would want to expose funding recipients to unbounded punitive damages awards that could divert funds from achieving federal objectives. The imposi-

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funding may be imposed on an entity that is bound by Section 504's nondiscrimination mandate. See 42 U.S.C. 2000d-1 (prior to administrative action for non-compliance with Title VI the funding agency, *inter alia*, "shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action").

tion of such awards might also affect a recipient's willingness —or financial wherewithal—to enter into a compliance agreement with the federal government to take prospective corrective action that might benefit a broad class of victims. Furthermore, the possibility of such awards may lead private or public entities to forego federal funding altogether, and thus undermine Congress's efforts to fund vocational services and eliminate discrimination through Section 504. The substantial risk that inferring a punitive damages remedy would upset programmatic objectives of assisting the disabled and combating unlawful discrimination is all the more reason to demand a clear directive from Congress before crossing that bridge.

Third, this Court has stated that "an offer of federal funding on a promise by the recipient not to discriminate * * * amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. The longstanding common law rule, however, is that punitive damages are *not* available in breach of contract actions. See 5 A. Corbin, *Corbin on Contracts* § 1077, at 438 (1964); Restatement (Second) of Torts § 908 (1979); see also *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) ("For 200 years, recovery for breach of contract has been limited to compensatory damages."). And this Court of course "take[s] it as given that Congress has legislated with an expectation that [common law] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (quotation omitted).

In the Spending Clause context, moreover, this Court has emphasized the importance in "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" *Gebser*, 524 U.S. at 287; see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28-29 (1981). Especially in light of the inherently unpredictable nature of

punitive damages, the notice principle also counsels against inferring a punitive damages remedy under Section 504.

C. Inferring A Punitive Damages Remedy Would Be Especially Inappropriate With Respect To Government Entities

The conclusion that Congress did not intend a punitive damages remedy under Section 504 or Section 202 is even stronger in the case of government actors, such as petitioners here. First, as noted above, when Congress established a limited punitive damages remedy in 1991, it expressly provided that such remedy did not extend to "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1). Second, longstanding common law—of which Congress is presumed to be aware—establishes a "presumption *against* imposition of punitive damages on governmental entities." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (emphasis added); see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.13 (1985); *Fact Concerts*, 453 U.S. at 259-263. And third, as discussed above, exposing governments to punitive damages raises particularly sensitive policy concerns—including whether such "retribution should be visited upon the shoulders of blameless or unknowing taxpayers," *id.* at 267; see *Vermont Agency*, 529 U.S. at 785 n.15—that only heighten the need for a legislative judgment as to the availability of such damages.

In his brief in opposition to certiorari (at 6), respondent argued that "[p]etitioners have waived their right to argue that punitive damages should not be awarded because the Board of Police Commissioners is a municipality." But even if the Court concludes that that argument is not properly before it, there still would be no basis to impute to Congress an intent to allow the recovery of punitive damages under Section 504 or Section 202. The Court's traditional reluctance to infer a punitive damages remedy against a govern-

ment actor is an additional reason to reverse the judgment below, but it is by no means a necessary reason here.

Moreover, the court of appeals' decision erroneously implies the availability of a punitive damages remedy in *any* action under Section 504 and Section 202, regardless of whether the defendant is a government actor. And its erroneous application of *Franklin* effectively creates a broadly applicable presumption in favor of the availability of punitive damages. Accordingly, in deciding this case, the Court should provide guidance on the application of *Franklin* with respect to the judicial implication of a punitive damages remedy, and make clear that the *Franklin* holds no sway with respect to the availability of that extraordinary remedy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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