No. 01-682

In the Supreme Court of the United States

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

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent does not deny that the question whether punitive damages may be recovered in an implied cause of action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, is both important and recurring. He does not deny that the Eighth Circuit placed itself in direct and acknowledged conflict with an 11-2 en banc decision of the Sixth Circuit, and then (over the dissenting votes of Judges Bowman and Loken) denied petitioners' request for rehearing en banc. And he does not dispute our showing (Pet. 13-15) that this conflict has been widely recognized by courts and commentators alike, or that district courts in other circuits are hopelessly divided over the proper resolution of this substantial question of federal law.

Instead, respondent attempts to chip away at the edges of our submission, contending that the conflict is not yet deep enough and that this case is a poor vehicle for resolving the question presented. As we explain below, these arguments are unavailing.

I. The Conflict in the Circuits

The Eighth Circuit in this case expressly disagreed with both the holding and the "methodology" of the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996). Pet. App. 8a, 12a. Without disputing the existence of a circuit conflict, respondent maintains that the conflict is not as deep as we suggest because neither the Fourth Circuit in *Pandazides* v. *Virginia Board of Education*, 13 F.3d 823 (1994), nor the Third Circuit in *Doe* v. *County of Centre*, 242 F.3d 437 (2001), actually resolved the question. Respondent is mistaken.

a. Respondent acknowledges that the Fourth Circuit in *Pandazides* "stated * * * that punitive damages can be awarded under § 504" (Br. in Opp. 5), but he claims this statement was "dicta." *Id*. According to respondent, the Fourth Circuit's unambiguous statement "was not necessary for a decision in the

case." *Id*. But the issue in *Pandazides* – whether a plaintiff suing under Section 504 has the right to a jury trial under the Seventh Amendment – turned on whether "the remedy available is * * * legal or equitable in nature." 13 F.3d at 829. In order to decide that question, the Fourth Circuit first had to determine precisely what remedies are available in an action under Section 504. It was in this context that the Fourth Circuit ruled – consistent with the Eighth Circuit's decision below – that punitive damages are recoverable in an action brought under Section 504. *Id*. at 830.

Respondent suggests that this ruling was unnecessary, because the Fourth Circuit also held that compensatory damages are recoverable under Section 504 and this conclusion was sufficient to support the court of appeals' resolution of the Seventh Amendment issue. That argument fundamentally misreads the opinion. The Fourth Circuit plainly did not regard its statements about punitive damages as unnecessary to its decision. On the contrary, the court expressly held that, under *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), a Section 504 plaintiff is entitled to seek "the full panoply of damages," without intimating that this "panoply" includes only compensatory, but not punitive, damages. What is more, the Fourth Circuit observed that in a previous case, *Eastman* v. *Virginia Polytechnic Inst. & State Univ.*, 939 F.2d 204 (1991), it had held that punitive damages "were unavailable under § 504," and it then proceeded to rule that *Eastman* was "no longer * * * good law" in light of this Court's decision in *Franklin*. See 13 F.3d at 830. Thus, the language characterized by respondent as "dicta" in fact *overruled* an earlier *holding* of the Fourth Circuit. That is not something dictum is capable of doing.

Not surprisingly, therefore, other courts – including district courts in the Fourth Circuit – have read *Pandazides* as squarely holding that punitive damages are recoverable in an action brought under Section 504. In *County of Centre*, for example, the Third Circuit stated that "the Fourth Circuit held in

Pandazides * * * that the plaintiff could seek punitive damages under Section 504." 242 F.3d at 456. Many other lower courts (and commentators) have acknowledged the *Pandazides* holding by noting that the Fourth Circuit's decision conflicts with the Sixth Circuit's decision in *Moreno*. See Pet. 13-14 n.7 (citing illustrative cases); *id*. at 15-16 n.8 (citing articles and treatises). And finally, as we explained in the petition (at 13 n.5) and respondents do not dispute, district courts in the Fourth Circuit have regarded *Pandazides* as binding and have followed its holding concerning the availability of punitive damages. See *Proctor* v. *Prince George's Hosp. Center*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (rejecting argument "that punitive damages are not available under the Rehabilitation Act" on ground that it "directly contradicts *Pandazides*"); see also *James* v. *Peter Pan Transit Mgmt., Inc.*, 1999 WL 735173, at *8 (E.D.N.C. Jan. 20, 1999) (Denson, Magistrate J.) (relying on *Pandazides* as having established that "punitive damages are available under section 504"). This Court should not regard as dicta language that district courts in the Fourth Circuit treat as binding.

b. Respondent next suggests that the Third Circuit's recent decision in *County of Centre* "does not evidence a circuit split" because it "held that a municipality was not liable for punitive damages under § 504 and Title II under the rationale of this Court's decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)." Br. in Opp. 5. "Unlike this case," respondent says, *County of Centre* "did not consider whether punitive damages are available *generally* under § 504 or Title II." *Ibid*. (emphasis added). While it is true that the Third Circuit relied on a narrower ground in disallowing punitive damages than did the Sixth Circuit in *Moreno*, that hardly detracts from the extent of the conflict in cases such as this. Henceforth in suits brought against municipal governments under either Section 504 or under Section 202 of the ADA in the Third Circuit, punitive damages are *not* available, whereas exactly the opposite is true in the Eighth Circuit under the decision below. Nor could there be any serious dispute that the result *in this case* would have been different had it been litigated in the Third Circuit. This

obvious conflict in result on an issue of federal law whose importance and recurring nature is undisputed should be of serious concern to this Court, even if it was theoretically possible for the Third Circuit to have rested its decision on a broader rationale.[1]

c. In sum, the conflict in the circuits is every bit as deep as we said it was. The Court should grant review now to resolve the 2-2 circuit split, dispel the pervasive confusion and conflicts in the federal district courts, and address the broader confusion over the meaning of *Franklin* that we identified (Pet. 16-17) and respondent does not dispute. Given the undisputed importance of the issue presented, respondent is quite wrong to suggest (at 5-6) that this conflict is tolerable.

II. The Finality of The Eighth Circuit's Decision

Respondent also argues that "[t]his case is not properly reviewable" because a "final judgment regarding punitive damages has not been issued" by the district court. Br. in Opp. 3. Contrary to respondent's suggestion, this Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other federal courts whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1)." STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 195 (7th ed. 1993) ("STERN & GRESSMAN"). Thus,

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[1] The Third Circuit's decision, moreover, was not that municipalities may assert an affirmative defense of immunity from punitive damages that would otherwise be available under Section 504 (and Section 202 of the ADA), but rather that Congress's intent in passing those provisions with respect to the availability of remedies must be understood against the backdrop of established municipal immunities. In other words, *County of Centre* – like the Eighth Circuit's decision in this case – turned on a determination of *congressional intent* as to available and appropriate remedies. Moreover, the Third Circuit flatly refused to apply the "opposing principle" expressed in *Franklin*. In the decision below, in contrast, the Eighth Circuit believed that *Franklin compelled* the opposite result.

there is no question that this Court has the *power* to exercise review in this case.

Respondent fares no better in his more limited contention that this Court should exercise its *discretion* not to grant review at this time. Br. in Opp. 4. The Eighth Circuit's decision dispositively resolves a critically important threshold question concerning the availability and appropriateness of punitive damages in suits brought under Section 504 and under Section 202 of the ADA. The narrow issue left for remand – whether the evidence presented in this case supports a punitive award of $1.2 million – will in no way affect the threshold ruling of the Eighth Circuit. See also Pet. 29-30 (explaining that court of appeals' remand included extremely narrow construction of concept of "appropriateness"). Regardless of the outcome of the remand, the Eighth Circuit's decision will remain circuit law – inviting a proliferation of punitive damages claims and depleting municipal treasuries in the Eighth Circuit through larger settlements – unless and until this Court steps in. And it is undisputed that there would be no need for the district court to reach the narrow issues remanded to it if review were granted and the Eighth Circuit's decision were reversed. The Eighth Circuit doubtless had these concerns in mind when – despite the obviously interlocutory posture of the case – it invited this Court "to inject additional clarity into this area." Pet. App. 16a.

This case therefore fits squarely into the category of interlocutory judgments that this Court has seen fit to review on certiorari. See STERN & GRESSMAN, at 196 ("where * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous cases). In recent years, this Court has accepted many such cases for review. See, *e.g.*, *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441 (2001); *United Dominion Indus.* v. *United States*, 121 S. Ct. 1934 (2001); *Norfolk Shipbuilding & Drydock* v. *Garris*, 121 S. Ct. 1927 (2001); *United States* v. *Hatter*, 121 S. Ct. 1782 (2001);

United States v. *Oakland Cannibis Buyers' Coop.*, 121 S. Ct. 1711 (2001); *Clark County School Dist.* v. *Breeden*, 121 S. Ct. 1508 (2001); *Buckman* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Pegram* v. *Herdrich*, 530 U.S. 211 (2000); *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). And, as we explained in the petition (at 29) and respondent does not dispute, the posture of this case is identical to that of *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 45 (1979), where this Court granted review to determine the availability of punitive damages under a federal statute despite the court of appeals having ordered a remand to the district court for an inquiry into excessiveness. This case has already made three trips to the Eighth Circuit; this Court should not require a fourth before examining the important and recurring issue presented here.[2]

III. Respondent's Waiver Argument

Respondent also argues (Br. in Opp. 5, 6-8) that this case is a poor vehicle because petitioners failed to raise in the lower courts – and therefore assertedly waived – any argument based on this Court's decision in *City of Newport* v. *Fact Concerts,*

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[2] Respondent's reliance (Br. in Opp. 3-4) on a dissenting opinion in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as well as on Justice Scalia's opinion respecting the denial of certiorari in *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993), is misplaced. As the very same page of SUPREME COURT PRACTICE cited by respondent explains, "the majority in the *Estelle* case apparently found" that the decision below, though interlocutory, presented an "important and clear-cut issue of law that is fundamental to the further conduct of the case." STERN & GRESSMAN, at 196; Br. in Opp. 4. As for *Virginia Military Institute*, that case involved a district court's decision rejecting an Equal Protection challenge to an all-male military school, which the court of appeals reversed as to liability and remanded for a determination, in the first instance, of what the proper remedy should be (among various alternatives). Under those rather unusual circumstances, where no remedial issue had been decided by the lower courts, Justice Scalia was of the view that it was "prudent" to await a final judgment before examining the interrelated issue of liability.

Inc., 453 U.S. 247 (1981), and the Third Circuit's decision in *Doe* v. *County of Centre*, 242 F.3d 437 (2001). This contention is meritless.

First, respondent fails to understand that this Court's "traditional rule * * * permit[s] review of an issue not pressed so long as it has been passed upon" by the lower court. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991) (rejecting Solicitor General's request to decline review, and to dismiss case as improvidently granted, where "the Court of Appeals, like the District Court before it, decided the substantive issue presented"). The issue presented in this case is whether "punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA." Pet. i. That *issue* was squarely decided by the Eighth Circuit when it held that petitioners were not officials of an arm of the state (but rather of a municipal government) and that they could be sued for punitive damages. The failure of petitioners to mention one consideration that should inform the inquiry into Congress's intent – the traditional immunity of municipalities from punitive damages awards – does not insulate the issue presented from review. For obvious reasons, this Court has never required that every *argument* on an issue presented be raised in or passed on by a court of appeals before an otherwise certworthy issue may be considered by this Court.

Second, respondent neglects to mention *why* petitioners did not raise arguments in the lower courts concerning the immunity of municipalities. Throughout this litigation, petitioners have consistently maintained that the Board of Police Commissioners of Kansas City, Missouri, is an "arm of the State" entitled to Eleventh Amendment immunity. Only when the Eighth Circuit issued its decision below was that argument finally rejected. It is hardly surprising, then, that petitioners would focus instead on their principal argument, as to which municipal immunity was not relevant. Under these circumstances, petitioners'

failure to make the *City of Newport* argument is entirely excusable.

Third, the Eighth Circuit's broad reading of *Franklin* makes abundantly clear that if petitioner had advanced an argument based on *City of Newport*, it likely would have been rejected out of hand – just as the Eighth Circuit brushed aside compelling evidence of Congress's intent based on the 1991 Civil Rights Act. See Pet. 20-21, 25-26.[3] Under the Eighth Circuit's cramped and indefensible reading of the concept of "appropriateness" (see Pet. 21-22) under *Franklin*, it is hard to see why an argument based on traditional concepts of municipal liability would have been any better received.

Respondent is accordingly wrong to suggest that this case is a poor vehicle because *City of Newport* was not mentioned below, or that any argument based on that case has somehow been waived. The issue presented in this case, which was squarely decided by the lower court, easily encompasses the argument based on *City of Newport*; indeed, it is difficult to see how this Court could be persuaded to ignore the history of municipal immunity in determining Congress's intent. There is no vehicle problem, or waiver, in this case.

IV. The Merits

Respondent makes only the most perfunctory attempt to defend the decision below on its merits. Br. in Opp. 6. He merely quotes the language from this Court's decision in *Franklin* that the Eighth Circuit misunderstood, and asserts that this misreading was in fact correct. Compare Pet. 20-30 (explaining in detail why decision below is incorrect). Not one

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[3] In the lower court's view, *Franklin* compelled it to ignore evidence that when Congress amended *other* provisions of the Rehabilitation Act and the ADA to allow a limited punitive damages remedy subject to a cap, Congress "considered the new language necessary to create a punitive damages remedy under the acts" and "intended to expand, and not contract, the available remedies." Pet. App. 15a.

word of explanation is offered concerning how the Eighth Circuit's reading of *Franklin* can possibly be reconciled with this Court's decisions in *Gebser* v. *Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998), or *Lane* v. *Peña*, 518 U.S. 187 (1996). Nor does respondent even suggest how it would be possible to square the Eighth Circuit's decision with *City of Newport*.

Even the Eighth Circuit came to the decision below without "great satisfaction" (Pet. App. 15a) – recognizing that the Sixth Circuit's contrary ruling was animated by "concerns" that were "hardly misplaced" (*id*. at 13a), and openly inviting this Court to grant certiorari in light of its decision to "part[] ways with [its] sister circuit" (*id*. at 15a-16a). This Court should accept the Eighth Circuit's invitation and reverse the decision permitting an award of punitive damages against a municipal government in an implied cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

CONCLUSION

For the foregoing reasons, and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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