SUPREME COURT OF THE UNITED STATES

No. 01–682

KAY BARNES, ETC., ET AL., PETITIONERS *v.*
JEFFREY GORMAN

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

[June 17, 2002]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

The judgment of the Court of Appeals might be reversed on any of three different theories: (1) as the Court held in *Newport* v. *Fact Concerts, Inc.,* 453 U. S. 247 (1981), absent clear congressional intent to the contrary, municipalities are not subject to punitive damages; (2) an analysis of the text and legislative history of §504 of Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA) indicates that Congress did not intend to authorize a punitive damages remedy for violations of either statute;[1] or (3) applying reasoning akin to that used in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981), that the remedies for violations of federal statutes enacted pursuant to Congress' spending power should be defined by the common law of contracts, third-party beneficiaries are not allowed to recover punitive damages.

Petitioners did not rely on either the first or the third of those theories in either the District Court or the Court of

[1] This was the theory that was adopted by the Court of Appeals for the Sixth Circuit in *Moreno* v. *Consolidated Rail Corp.*, 99 F. 3d 782, 788–792 (1996). It was also the only theory discussed and rejected by the Court of Appeals below.

Appeals. Nevertheless, because it presents the narrowest basis for resolving the case, I am convinced that it is an appropriate exercise of judicial restraint to decide the case on the theory that petitioners are immune from punitive damages under *Newport*. There is, however, no justification for the Court's decision to reach out and decide the case on a broader ground that was not argued below. The Court's reliance on, and extension of, *Pennhurst*—a case that was not even cited in petitioners' briefs in the Court of Appeals—is particularly inappropriate.

In *Pennhurst* we were faced with the question whether the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. §6010, had imposed affirmative obligations on participating States. Relying in part on the important distinction between statutory provisions that "simply prohibited certain kinds of state conduct" and those that "impose *affirmative* obligations on the States to fund certain services," 451 U. S., at 16–17, we first held that §6010 was enacted pursuant to the Spending Clause. We then concluded that the "affirmative obligations" that the Court of Appeals had found in §6010 could "hardly be considered a 'condition' of the grant of federal funds." *Id.,* at 23. "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States." *Id.,* at 24.

The case before us today involves a municipality's breach of a condition that simply prohibits certain discriminatory conduct. The prohibition is set forth in two statutes, one of which, Title II of the ADA, was not enacted pursuant to the Spending Clause. Our opinion in *Pennhurst* says nothing about the remedy that might be appropriate for such a breach. Nor do I believe that the rules of contract law on which the Court relies are neces-

sarily relevant to the tortious conduct described in this record.[2] Moreover, the Court's novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case.[3] In light of the fact that the petitioners—in addition to most defendants sued for violations of Title II of the ADA and §504 of the Rehabilitation Act of 1973—are clearly not subject to punitive damages pursuant to our holding in *Newport*, I see no reason to decide the case on the expansive basis asserted by the Court.

Accordingly, I do not join the Court's opinion, although I do concur in its judgment in this case.

---

[2]The Court queries under what federal law the conduct in issue was tortious, stating "[s]urely not under the Spending Clause statutes themselves." *Ante*, at 4, n. 1. The violation is of Title II of the ADA, which broadly outlaws discrimination in the provision of public services by public entities and was not enacted pursuant to Congress' spending power.

[3]Although rejected by the Sixth Circuit, see *Westside Mothers* v. *Haveman*, No. 01–1494, 2002 WL 987291 (May 15, 2002), one District Court applied the *Pennhurst* contract analogy in order to support its conclusion that Spending Clause legislation is not the "supreme law of the land." *Westside Mothers* v. *Haveman*, 133 F. Supp. 2d 549, 553 (ED Mich. 2001). The Court fortunately does cabin the potential reach of today's decision by stating that "[w]e do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise," *ante*, at 7, n. 2, but whenever the Court reaches out to adopt a broad theory that was not discussed in the early stages of the litigation, and that implicates statutes that are not at issue, its opinion is sure to have unforeseen consequences. When it does so unnecessarily, it tends to assume a legislative, rather than a judicial, role. Reliance on a narrower theory that was not argued below does not create that risk. I am not persuaded that "Chicken-Little," *ibid.,* is an appropriate characterization of judicial restraint; it is, however, a rhetorical device appropriately used by fearless crusaders.