

In the

ORIGINAL

Supreme Court of the United States

BARBARA BLUM, COMMISSIONER OF THE
NEW YORK STATE DEPARTMENT OF
SOCIAL SERVICES, ET AL.,

Petitioners,

v.

WILLIAM YARETSKY ET AL.

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No. 80-1952

Washington, D. C.

Wednesday, March 24, 1982

Pages 1 thru 56

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 o'clock a.m.

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first in Barbara Blum, Commissioner of New York State
4 Department of Social Services, v. Yaretsky. Mrs. Gordon?

5 ORAL ARGUMENT OF JUDITH A. GORDON, ESQ.

6 ON BEHALF OF THE PETITIONERS

7 MRS. GORDON: Mr. Chief Justice, and may it
8 please the Court:

9 New York's alleged involvement in medical
10 decisions about nursing home care for Medicaid patients
11 was found below to constitute state action in two kinds
12 of circumstances. A brief review of the kinds of
13 circumstances in which state action was found to be
14 present is necessary because that inquiry determines the
15 additional question petitioners raise in this case; that
16 is, the district court's jurisdiction under Article III
17 to decide the claims that are now before you, and also,
18 it aids the inquiry, the state action inquiry, in the
19 event the court reaches that inquiry.

20 The first circumstance in which state action
21 was found to be present occurs when a patient's outside
22 physician, or a physician on the staff of a nursing
23 home, decides to decrease or increase the level of the
24 patient's care because his condition has become worse or
25 because it has become better. In our brief, we refer to

1 the decision of the nursing home staff physician as a
2 nursing home decision or transfer, and we refer to the
3 decision of the outside physician as the decision of a
4 private physician, albeit both of those decisions are
5 private action within the constraints of the court of
6 appeals' decision below.

7 The second circumstance in which state action
8 was found to be present occurs when a utilization review
9 committee or a physician member of that committee
10 decides to increase a patient's level of care because
11 his condition has become worse. Parenthetically, it
12 should be noted that utilization review is a
13 federally-required peer review system, that a
14 utilization review decision about a change in care for a
15 patient who is already in a nursing home is made during
16 a portion of that process called continued stay review,
17 and the continued stay review is addressed to whether or
18 not the patient needs nursing home care at all, and if
19 he does, what kind of care he needs.

20 Two further points with respect to utilization
21 review, and that is the utilization review physician's
22 decision to change a level of care is final once made if
23 it is not opposed by the patient's own physician, and
24 that requirement is specific to the federal regulations
25 which are found at 42 CFR 556.336, and 442 CFR 556.436,

1 and the state regulations track the federal regulations
2 in that regard.

3 In addition, if the utilization review
4 physician decides that the patient needs this upward
5 change in level of care and his decision is opposed by
6 the patient's private physician, if two utilization
7 review physicians agree, then the decision of the
8 utilization review committee becomes final, again, under
9 the regulations that I just called to your attention.

10 QUESTION: How much time do these physicians
11 spend in this process as compared with the time they
12 spend taking care of the patients?

13 MRS. GORDON: Well, Your Honor, if you look at
14 42 CFR 456.330 following which describes these various
15 utilization review procedures in quite tedious detail, I
16 think you would have to conclude that he spends a great
17 deal of time. However, I can't, in fact, give you an
18 exact estimate, but certainly we have no indication that
19 the physicians who serve on these committees are not
20 attending to the care of their patients, at least in
21 this record.

22 Petitioners contend that the district court
23 should never have reached the transfers that are at
24 issue and that I just described with respect -- in the
25 circumstances I just described. And that is because

1 there was no plaintiff and no class representative
2 before the district court who could have raised the
3 issues. Not only was there no one who had such a
4 transfer or was threatened with such a transfer, there
5 certainly was no one who had the reality or the prospect
6 of the kind of distinct and palpable injury that Article
7 III requires.

8 QUESTION: But there was a case or controversy
9 of some kind at the time the case began?

10 MRS. GORDON: Absolutely, Your Honor. There
11 was a case or controversy with respect --

12 QUESTION: About some other kinds of movements.

13 MRS. GORDON: Exactly. There was a case or
14 controversy with respect to the claims of the name
15 respondents and the named intervenors, and that case or
16 controversy rested on their claims that you URC's had
17 improperly transferred them to lower levels of care.
18 Not URC's --

19 QUESTION: And that dispute was settled?

20 MRS. GORDON: That dispute was the initial
21 predicate in this case, it was initially decided by a
22 preliminary injunction back in January of 1978, it went
23 up to the court of appeals in the first court of appeals
24 in this case and it was ultimately resolved as you
25 indicate on October 17, 1979 by the first partial final

1 judgment in this case, which was entered --

2 QUESTION: In the district court?

3 MRS. GORDON: Yes, it was resolved in the
4 district court.

5 QUESTION: Then why didn't the case end there?

6 MRS. GORDON: That is exactly my question,
7 Your Honor.

8 QUESTION: Did you ask the court to end it
9 then?

10 MRS. GORDON: Pardon me?

11 QUESTION: Did you ask the court to end the
12 case then?

13 MRS. GORDON: No, Your Honor, the assistants
14 then --

15 QUESTION: And you went right ahead and
16 litigated these other issues?

17 MRS. GORDON: That is correct, Your Honor.
18 The assistants handling the case at that point did
19 indeed go ahead and litigate these other issues through
20 the court of appeals and to this court on the petition
21 here today.

22 QUESTION: And you are raising a case or
23 controversy here for the first time?

24 MRS. GORDON: That is correct, Your Honor.

25 QUESTION: But you submitted these issues in

1 the court of appeals. I mean, you litigated those
2 issues without objection in the court of appeals.

3 MRS. GORDON: The issues, the merits of the
4 issues were indeed litigated without objection in the
5 court of appeals, and I would add one point to that,
6 Your Honor. When it came time to consider the
7 preparation of the petition for certiorari in this case,
8 and Mrs. Siegel was then solicitor general of the state
9 of New York -- she is no longer -- and we, myself and
10 the assistants who aided me, reviewed the record in this
11 case which was quite lengthy, we came to the conclusion
12 that the Article III question was fairly presented by
13 the record.

14 We also observed that it had not been raised
15 before and we had detailed conversations with Mrs.
16 Siegel as to whether or not we should call it to your
17 attention. The conclusion of those conversations was
18 that we could not, consistent with the standards of our
19 practice, fail to call them to your attention, lest this
20 Court reach the merits of the case involving
21 constitutional rulings, which was not adequately
22 presented in terms of Article III.

23 QUESTION: Counsel, if the question were
24 properly before the lower courts, dealing with the
25 transfer to a higher level of care, would New York have

1 stipulated eventually to the procedures for handling
2 them as was done on transfers to lower level of care?

3 MRS. GORDON: That is a very interesting
4 point, Your Honor. At page 14 of our main brief we
5 describe briefly what the state policies were before the
6 judgment on review came up. One of the state policies
7 with respect to URC transfers to higher levels of care,
8 which you just called to my attention, was that those
9 transfers would be, in effect, advisory.

10 In other words, the state of New York, the
11 Medicaid authorities, would not change the level of
12 benefits based on a URC decision; it would simply await
13 what the doctor did, what the URC did. If the patiently
14 ultimately got transferred by virtue of that URC
15 decision, then it would adjust the benefits. If it did
16 not, if the patient did not get transferred, they would
17 leave the benefits intact.

18 Now, aside from substantial equity problems
19 that were involved in that policy which was, of course,
20 superseded by this judgment; namely, there were people
21 in nursing homes who in fact needed a much more
22 intensive level of care and were not receiving it, that
23 being one of the equities on a change of policy side.

24 The federal government came along and advised
25 us that although they had required hearings on URC

1 transfers to lower levels of care, that our FFP, our
2 federal financial participation, was in serious jeopardy
3 if we avoided hearings on higher levels of care. And
4 the letters with respect to that appear in the second
5 supplement to the Joint Appendix, which includes some
6 letters referred to in petitioner's brief -- pardon me,
7 respondents' brief -- at page 4, note 4.

8 In other words, respondents refer to a letter
9 by Commissioner Blum to the federal authorities saying
10 can't we please give hearings on URC transfers to higher
11 levels of care now, since you already told us there is a
12 program requirement -- not as a constitutional
13 requirement -- that we have to give them on transfers to
14 lower levels of care. That is the first letter in the
15 second supplement to the Joint Appendix.

16 QUESTION: All right, so your answer is no
17 from advice of the federal government.

18 MRS. GORDON: Right. The answer from the
19 federal government was that they did not perceive that
20 to be an effective way of utilization review, at least
21 for transfers to higher levels of care.

22 QUESTION: You have, I think, taken the
23 position in your brief that private transfer decisions
24 for patients in nursing homes are medical decisions
25 unaffected by the state. Now, what about a decision by

1 the nursing home itself to transfer, when made by
2 someone other than a physician? Is that a medical
3 decision?

4 MRS. GORDON: Well, it can be or it cannot be
5 depending on how -- what the facts are. And as I
6 indicated, we do not have any plaintiffs who present the
7 facts that would support those kinds of conclusions.

8 However, when we viewed this judgment, we
9 thought of it as pertaining really only to medical
10 decisions; decisions by a nursing home's medical
11 director and therefore medically predicated.

12 There is a possible other reading which
13 plaintiff -- which respondents point out essentially at
14 page 22 of their brief and throughout their brief, that
15 a nursing home, not through its medical director but
16 through its administrator, might want to discharge
17 somebody because he is a bad patient, or for some other
18 non-medical reason.

19 Now, those discharges, in fact, present this
20 case in microcosm, because those kinds of discharges are
21 covered by something called the patient's bill of
22 rights, which is codified in federal regulations and
23 codified in state regulations. And what that bill of
24 rights says is, if you were transferred by your nursing
25 home, -- presumably a human being who has made a

1 decision who is affiliated with the nursing home. If
2 you were transferred for non-medical reasons, for
3 non-payment, for your own welfare, you have a right to
4 challenge that nursing home decision.

5 You do not have a right to bring a Medicaid
6 reimbursement claim against the state in a fair hearing
7 to get money; that does not do you any good. You have a
8 right to bring a private action against the nursing
9 home. And we suggest to you that the kinds of medical
10 decisions that are at issue in this case, made as they
11 are by these private URC's, the facility medical
12 director, the staff physician, your outside physician,
13 present exactly the same kind of private transactions as
14 the purely -- as respondents call them -- the purely
15 non-medical needs decisions, and that the remedy for
16 these, if there is to be a remedy, is against the people
17 who made the decisions. Not in a request to the state
18 to pay you money for a service that an individual in the
19 private sector has already refused to provide you.

20 QUESTION: Let me ask you one more question
21 while you are interrupted. Do transfer decisions, even
22 those made by private physicians, have to be made by
23 applying state-defined criteria?

24 MRS. GORDON: The state prescribes the use of
25 what respondents have called and what are, in fact, a

1 DMS-1 form and a DMS-9 form. Those forms can be found
2 -- they are not referenced in respondents' briefs, but
3 they can be found in Appendix C1 to Volume C of Title X
4 of the New York Code Rules and Regulations. They are
5 displayed there in full.

6 Now, the state has prescribed those forms, and
7 what those forms consist of are, one, a standard sheet
8 which assigns -- in fact, the sheet is called New York
9 State Numerical Standards Master Sheet. That is the
10 DMS-9 form. And the DMS-1 form is called the New York
11 State Long-Term Care Placement form.

12 And what those forms do is describe certain
13 kinds of medical conditions, certain kinds of patient
14 conditions -- in other words, self-care in dressing,
15 needs help, needs total help -- and certain other kinds
16 of conditions such as needs restraints, requires -- is
17 assaultive. And the numerical standards assign certain
18 weights to these depending on when the condition occurs.

19 Now, those two forms used in combination --
20 and they are used throughout this proceed including with
21 respect to these medical decision -- create what are
22 called predictor scores. If you get a score of 60, you
23 are arguably appropriate for an intermediate care
24 facility; if you get a score of 180 you are arguably
25 appropriate for an SNF or skilled nursing facility.

1 QUESTION: Can a patient be transferred who
2 does not meet the state's criteria?

3 MRS. GORDON: Now, respondents say that those
4 forms determine the choice. In other words, the fact
5 that the doctor has to use this form means that the
6 state has made up his mind for him. The answer to that
7 is absolutely no. The specific regulations which
8 control the use of these forms; namely, 10 New York Code
9 Rules and Regulations, Section 415.1A(2) and Section
10 420.1B, state in terms that all the physician who gets
11 this form has to do to say that his patient needs
12 another kind of care that is not consistent with the
13 predictor score, is say so.

14 In other words, the physician has an override;
15 the form does not foreclose the patient's access to the
16 kind of care that the doctor wants to see him have. And
17 it does not determine what the doctor is supposed to do.

18 One other fact --

19 QUESTION: Mrs. Gordon, we have granted
20 certiorari on just two questions here, relatively
21 narrow, and about half of your time is gone.

22 MRS. GORDON: Very well, Your Honor. I would

23 --

24 QUESTION: If you would focus on those two
25 questions.

1 MRS. GORDON: I would just like to point out
2 one other factor with respect to the DMS-1 forms because
3 in the entire array of federal and state laws which the
4 respondents bring to bear on their argument -- which is
5 not the court of appeals' argument -- that state action
6 is somehow found in these transfers because the state
7 forces them, the only point that needs clarification is,
8 in fact, the use of these DMS-1 forms.

9 Justice O'Connor, if I just might finish, the
10 respondents also say that somehow, even if we use these
11 forms and they are not specifically controlled by the
12 state, their results are not specifically controlled by
13 the state, that we at some point review them, and we
14 determine whether they are correctly drawn or
15 incorrectly drawn, and disapprove or approve the
16 physician choices that appear on those forms.

17 That is an absolutely incorrect statement.
18 The portion of the record that the respondents cite for
19 that point is an affidavit by Donald Davidoff, which is
20 document 18 of the record on appeal, and the affidavit
21 simply does not say that, and that is not in fact what
22 we do.

23 We leave the forms as we find them. We do
24 collect them, we use them for statistical purposes, and
25 it is possible that in the course of receiving those

1 forms or in the course of another procedure that the
2 respondents called to your attention which are called
3 periodic medical reviews and independent professional
4 reviews which are audits essentially of the quality of
5 care offered in nursing homes, it is possible that in
6 the course of any of this regulatory complex that the
7 state might, indeed, find a nursing home patient who is
8 inappropriately placed.

9 That did not happen in this case, certainly
10 not on these facts. But if the state were to find that
11 patient and it were to direct that patient's removal
12 from a nursing home, well then, certainly, we would not
13 be here today arguing this case. That would be a state
14 initiated transfer, and New York at least would not come
15 before this Court and claim that state action was not
16 present.

17 But the kinds of transfers that were decided
18 below are all medically initiated for reasons determined
19 by private parties, and have nothing whatsoever to do
20 with the state's control, intervention or forcing of any
21 of the decisions at issue.

22 Returning just briefly to the standing point,
23 Your Honor, respondents make essentially two arguments
24 against the petition -- the petitioner's claim that they
25 lack standing. The first is -- depends on their

1 acknowledge that indeed, in January of 1978, the
2 district court did enjoin the URC transfers to lower
3 levels of care.

4 But they turn around and they say that
5 notwithstanding that injunction, the same individuals --
6 presumably the respondents and the intervenors -- were
7 subject to the same kind of risk, albeit the injunction
8 was enforced, because the nursing home was going to
9 adopt that URC decision as its own. It was going to
10 simply say oh, well, URC, you are enjoined; now we are
11 going to enforce that -- we are going to make the same
12 choice and disregard the order.

13 Well, the argument omits to point out that in
14 the very order that enjoined the URC's -- to wit: the
15 January 5, 1978 injunction -- the nursing homes
16 themselves were also enjoined. And therefore, the
17 argument assumes that the nursing homes would have
18 entered into some kind of subterfuge or circumvention of
19 the order to make the same choice and say it was their
20 own and not a URC order.

21 The record is completely barren of any
22 evidence which even suggests that the nursing home
23 sought to circumvent the order in this regard, and
24 indeed, it is barren of any evidence that the nursing
25 home ever threatened or transferred any of the named

1 respondents in any way whatsoever once the order was
2 issued.

3 Moreover, even if you accept the logic of the
4 argument, it still fails because the injunction upon
5 which it relies; namely, URC transfers to lower levels
6 of care, is not at all coextensive with the claims that
7 the respondents sought to put before the court; namely,
8 including those claims to higher levels of care and to
9 -- and physician transfers to lower levels of care.

10 A second argument that respondents make with
11 respect to our claim that they lack standing relies on
12 the speculation that there must be some other member of
13 this class, even if it is not the named respondents and
14 intervenors, who in fact had a physician transfer to a
15 higher level of care, or a URC transfer to a higher
16 level of care.

17 I suggest to the Court that that argument is
18 impossible because the laws established that the claims
19 of class members can never be broader than the claims of
20 class representatives, and the only class
21 representatives before the court below were indeed the
22 named respondents and the intervenors who only had the
23 URC transfers to lower levels of care.

24 Respondents also called to your attention two
25 letters -- actually, three letters; two are identical

1 and one is slightly different -- in support of their
2 claim that some member of the class had these
3 transfers. The letters are dated a year and a year and
4 a half after the district court entered the last partial
5 final judgment in this case, and they are appended to
6 their brief in opposition to certiorari. And obviously,
7 a transfer, even assuming the person who was receiving
8 it was aggrieved, and these letters do not suggest that
9 they were, a transfer happening to somebody a year or a
10 year and a half after the district court determined the
11 claims that are at issue, cannot serve to place those
12 claims before the district court.

13 QUESTION: Well, do they purport to be
14 transfers of named parties to the action?

15 MRS. GORDON: Two of the letters, Your Honor,
16 dated December 18th, 1980, are to nursing homes and do
17 identify two individuals. As Your Honor reviews those
18 letters I think you will find, as I have found, that
19 what they describe are the enforcement procedures under
20 the partial final judgment that is in issue in this
21 case. In other words, they were telling the nursing
22 home liaison how to comply. And the patient is
23 identified in that context.

24 It is not suggested for a moment that any of
25 the identified patients -- or either of the identified

1 patients -- thought that they should have a hearing
2 right on any of the transfers that are in issue, or even
3 that they had any opinion at all. In other words, they
4 do not show that these individuals were aggrieved by the
5 -- on the same basis as aggrieved by the claims that
6 were adjudicated below.

7 As I indicated before on the state action
8 point, or as I perhaps should have indicated before, we
9 think the stay action analysis is controlled by Jackson
10 versus Metropolitan Edison Co. We think that the close
11 nexus between state and private action that that
12 decision requires must be shown with respect to the
13 state's imprimatur or weight or affirmative conduct with
14 respect to one of the kinds of choices --

15 QUESTION: Before you get too deeply in the
16 state action argument because it is hard for me to keep
17 these proceedings clearly in mind, in the prior
18 proceeding that is not now before us which involved, as
19 I understand, downward decisions by a URC and which
20 might result I guess in the discharge of a patient from
21 a nursing home, was it decided that there was state
22 action involved there?

23 MRS. GORDON: No, Your Honor. The issue never
24 arose because in 1976, while a district case was in
25 progress before the Southern District, the federal

1 government advised us that hearings had to be held on
2 URC transfers to lower levels of care. In other words,
3 there was a Medicaid program requirement --

4 QUESTION: In other words, the hearing
5 requirement was imposed by federal regulation.

6 MRS. GORDON: Exactly. Right. And indeed,
7 when they so advised us -- and their exchange of letters
8 on this point is referred to in our brief at page 6 in
9 the footnote there -- they characterized our antagonism,
10 if you will, to providing hearings in that context as
11 not the most reasoned approach to fair hearings -- to
12 utilization review decisions. But they did, indeed,
13 impose that requirement.

14 QUESTION: Now may I ask just one more
15 question. The last section of your opponent's brief, as
16 I remember it, and I have not glanced at it right now,
17 suggests that federal regulations or state regulations
18 require hearings on everything that is before us now.
19 Are those the same regulations that govern your decision
20 in the downward URC transfers? Or do they apply to both
21 of them?

22 MRS. GORDON: Those are the same regulations
23 which the federal government told us to apply in the
24 downward URC transfers. Which, as I just noted to you,
25 characterizing themselves as not the most reasoned

1 application of the regulations. And the reason that it
2 is not the most reasoned application is what makes -- is
3 what makes those regulations inapplicable here and, in
4 fact, Your Honor, I will close with that. The
5 regulations require fair hearings for agency action
6 reducing or terminating assistance or denying a service,
7 essentially.

8 And they are much like the fair hearing
9 regulations in Goldberg vs. Kelly or available in other
10 assistance programs.

11 The decision to transfer a patient, at least
12 in the context of this case, is not an agency decision,
13 and so much is revealed by the exhibit letter from the
14 federal government which is attached to our brief,
15 wherein the letter acknowledges that if a physician made
16 this choice, not the URC, then there would be no fair
17 hearing requirement obligations.

18 In other words --

19 QUESTION: Let me just get this one question
20 out and then I will -- why, if there is a URC decision
21 to increase the level of care which would require moving
22 a patient from one place to another and which might give
23 rise to this phenomenon of transfer trauma, why wouldn't
24 the regulation apply to that? Because it would be, in
25 effect, a denial of the existing care.

1 MRS. GORDON: As the federal government used
2 the regulations, a transfer to a higher level of care
3 normally results in an increase in assistance, all
4 right, not a reduction or termination of assistance. So
5 in that sense, it is inapposite, although there are some
6 exceptions in New York because we have a varying rate
7 system. But certainly, our rate system is not
8 coextensive with all transfers, so it out on that basis.

9 Second, it is not agency action, and it is out
10 on that basis. No matter how one characterizes it,
11 albeit the federal government did and would withhold our
12 FFP if we disagreed with them on URC down-transfers,
13 under the decision in this case, the court of appeals
14 decision, the URC is a private body, not the state
15 agency, and therefore, it could not make a relevant
16 decision.

17 But perhaps more importantly, if we want to
18 put aside all the technical deficiencies in the terms of
19 the regulations, I think we come back to what I
20 indicated to Justice O'Connor before, and that is that
21 the fair hearing does not address the issues. The
22 dispute here is between the URC and the patient, the
23 physician and the patient. If I take a fair hearing and
24 the state therefore then says to me, well, all right, we
25 will continue to reimburse Mrs. X's SNF care. That does

1 not mean that her doctor is going to give her that
2 care. That does not mean that the facility medical
3 director is going to give her that care.

4 That decision to provide the facility with
5 money does not change the doctor's mind. Thank you.

6 CHIEF JUSTICE BURGER: Mr. Kirklin?

7 ORAL ARGUMENT OF JOHNE. KIRKLIN, ESQ.

8 ON BEHALF OF THE RESPONDENTS

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

11 The respondents contend that the record in
12 this case clearly discloses the existence of a
13 justiciable controversy between the parties. The
14 justiciability inquiry focuses properly on three main
15 areas of concern: the circumstances of the named
16 plaintiffs at the time of the consent judgment, the
17 joint pretrial order in this case, and the standing
18 allegations of the organizational plaintiff, the Grey
19 Panthers.

20 With the entry of the consent judgment, which
21 ended the implementation of adverse utilization review
22 committee determinations, the named plaintiffs and class
23 members came under the immediate threat of being
24 transferred out of their facilities by the facilities
25 themselves. It is the unequivocal command of applicable

1 state law that a nursing facility must promptly
2 transfer, without a hearing, any Medicaid patient who is
3 thought not to need that level of care.

4 Thus, Section 505.20 of the state department
5 of social services regulations state simply and clearly
6 that patients who no longer need skilled nursing or
7 health-related facility care shall be discharged
8 promptly.

9 QUESTION: What are the sanctions which the
10 state attaches to a violation of what you describe as
11 its command?

12 MR. KIRKLIN: Your Honor, the penalties that
13 can ensue if a facility fails to promptly discharge a
14 Medicaid patient are retroactive denial of reimbursement
15 for services rendered, fines and suspension from the
16 Medicaid program itself.

17 QUESTION: But it is not a question of a
18 public health type of regulation where they would shut
19 down the facility if they failed to comply, I take it.
20 It is more like a regulation governing a contractor with
21 the state.

22 MR. KIRKLIN: I imagine that might be the
23 case. What is significant is that the state commands
24 the result; it backs it up with certain kinds of
25 sanctions.

1 QUESTION: But I take it the nursing home is
2 perfectly free to say we will go without the money and
3 operate as we choose.

4 MR. KIRKLIN: Well, Your Honor, we assume that
5 nursing homes, like everybody else, will comply with the
6 law.

7 QUESTION: So supposing that the state of New
8 York is contracted for the production of 20,000
9 envelopes or something like that with a contract, and it
10 has certain sanctions attaching to the contractor's
11 failing to comply with certain production regulations.
12 Now, if the contractor does not comply, he will not get
13 paid by the state of New York, but you would not say
14 that the contractor is commanded to comply with those
15 regulations.

16 MR. KIRKLIN: Let me distinguish two
17 situations, it might be helpful. If a private doctor,
18 for example, were providing services to a Medicaid
19 patient and the state, as in your hypothetical, declined
20 retroactively to pay the physician, it is true that the
21 physician might, in the future, decline to provide
22 services. Now, that is in sharp contrast to what
23 happens here.

24 The state here does not just say that if you
25 do not do something, we -- it does not simply say we are

1 reottractively possibly going to deny compensation for
2 services rendered. It directly requires -- it
3 specifically says to the facility if that patient does
4 not need that level of care, you shall promptly
5 discharge that patient without a hearing. It has behind
6 it obviously certain sanctions like any affirmative
7 command of the state, but it is the nature of that
8 command which does not just impose an indirect harm on
9 the patient, but it interferes directly with that
10 patient's right to be in that facility.

11 The conduct of the government directly
12 commands that the facility must move the patient.

13 QUESTION: And the sanction is not that the
14 facility becomes unlicensed or goes to jail, but simply
15 that money is cut off which it otherwise would have
16 received.

17 MR. KIRKLIN: More than that, Your Honor. The
18 facility stands not just to lose compensation for
19 services rendered; it stands to be fined, it stands to
20 lose its right to participate in the Medicaid program.
21 And that is pretty serious in the state of New York
22 because more than 90% of the patients in nursing
23 facilities in New York state are Medicaid patients.
24 Literally, the facility depends for its very survival on
25 being part of the Medicaid program.

1 QUESTION: What is the fine?

2 MR. KIRKLIN: The fines I believe, Your Honor,
3 can be up to \$1000 a day for violations.

4 QUESTION: So it does have some aspects of a
5 public health regulation, then?

6 MR. KIRKLIN: To that extent I guess it does.
7 But in addition there are these other serious
8 sanctions. And sanctions which, if applied with --

9 QUESTION: Do those sanctions apply, counsel,
10 to a failure to move the patient up to a higher, more
11 expensive level of care?

12 MR. KIRKLIN: That is right, Your Honor. The
13 state regulation that I cited at 505.20 specifically
14 requires a facility to move a patient who does not need
15 that level of care. The regulations of the state
16 department of health additionally say that a facility
17 must promptly transfer a patient whose care is
18 inadequate; that is, who should be moved to a higher
19 level of care.

20 Further, those same regulations require that a
21 patient must be promptly moved, again without a hearing,
22 if the patient is otherwise inappropriately placed
23 because of a behavior problem, emotional disorder, some
24 other problem that jeopardizes the welfare of that
25 patient or of other patients in the facility.

1 QUESTION: Well, you still have the problem of
2 the fact that the decision to transfer is not the
3 state's, at least in the first instance.

4 MR. KIRKLIN: In some sense, it is the
5 state's, Your Honor, for this reason. The regulation
6 that I cited of the state department of social services
7 also states that the facility's judgment about whether a
8 patient needs a level of care as provided there must be
9 based on the assessment of that patient as against the
10 state's long-term care assessment form, called the DMS-1.

11 QUESTION: Right, so that the standard is
12 applied by the state.

13 MR. KIRKLIN: That is right.

14 QUESTION: But the decision is made not by a
15 state official but by a private party, and you have to,
16 nevertheless, say that that private action is state
17 action.

18 MR. KIRKLIN: That is right, Your Honor, and
19 we --

20 QUESTION: And what is your bridge? How do
21 you get to that?

22 MR. KIRKLIN: The bridge, Your Honor, is the
23 argument that when the state puts its weight on the side
24 of private conduct, even if that initiative comes from a
25 private party, by ordering it, by compelling it, by

1 directing it --

2 QUESTION: Compelling what?

3 MR. KIRKLIN: Compelling the facility --

4 QUESTION: They compel the decision to be made.

5 MR. KIRKLIN: More than that.

6 QUESTION: Then they provide the standars.

7 MR. KIRKLIN: More than that. The state

8 requires that the facility kick the patient out.

9 QUESTION: Not until the decision is made.

10 QUESTION: By a private party.

11 QUESTION: Not until the decision is made.

12 You still have to decide that the decision is a state
13 decision.

14 MR. KIRKLIN: Respondents contend that where
15 -- even if the initiative came from a private party --

16 QUESTION: Initiative? This is the decision
17 -- the decision that someone needs less or more care.

18 MR. KIRKLIN: The decision, the standard is
19 whether the person needs that level of care. That is
20 correct. That is no different than --

21 QUESTION: That is the decision I am talking
22 about. Is that -- and you must claim that that is a
23 state decision.

24 MR. KIRKLIN: We submit that when the state
25 enforces that result by requiring the facility to kick

1 the patient out, the state is involved. And that
2 eviction of the patient from the facility is sufficient
3 to require the state -- when a state requires it, the
4 state should hold a hearing to decide whether there is a
5 violation of applicable federal and state law which
6 prohibits a facility from kicking out an --

7 QUESTION: So you say the enforcement
8 mechanism is the -- involves the state sufficiently to
9 be blamed for the decision to transfer or to -- to some
10 other facility.

11 MR. KIRKLIN: That is our primary argument;
12 that when the state directs --

13 QUESTION: May I just inquire, is this
14 argument limited to nursing homes? Say you had a
15 hospital and the state -- say there is a shortage of
16 hospital beds and rooms so the state passes a law and
17 says that when a patient reaches a certain level of
18 recuperation that the hospital must discharge him if the
19 doctor thinks it is okay to do so. Would those be state
20 decisions to discharge? Say a mother delivers a child
21 -- must be discharged in 48 hours --

22 MR. KIRKLIN: I think it is true that there
23 are similar requirements for Medicaid patients.

24 QUESTION: Would those decisions then be by the
25 doctor to say well, you are well enough to go home be a

1 state decision, under your analysis?

2 MR. KIRKLIN: Yes. We maintain that if the
3 state, again, --

4 QUESTION: Or say they had a state law that
5 said don't prescribe a certain drug unless certain
6 symptoms are present -- don't give him too much
7 aspirin. And everytime a doctor prescribes aspirin, is
8 that state action?

9 MR. KIRKLIN: Again, Your Honor, the
10 difference there is that the state does not tell a
11 doctor, you cannot provide care that you think is
12 required. It would merely say in the case of a Medicaid
13 patient that perhaps retroactively, you will not be paid
14 for that. The state does more here, and that is the
15 point that --

16 QUESTION: Well, in my hypothetical I was
17 assuming it was a firm requirement of law. You just do
18 not over-prescribe medicine, don't keep people in the
19 hospital too long; otherwise, you will be sanctioned by
20 fines and all the rest. That would make it a state
21 action everytime the doctor --

22 MR. KIRKLIN: No, it would not, because we
23 maintain there is a difference --

24 QUESTION: And what is the difference?

25 MR. KIRKLIN: The difference is this: that if

1 the state merely said in this case to a nursing
2 facility, you ought not to provide inappropriate care,
3 with the consequences that might follow, that if they
4 did so they might not be paid, we do not insist that
5 that is state action.

6 It is state action, though, when the state
7 goes beyond that and says to the facility, if that
8 patient is improperly there, kick him out immediately
9 without a hearing, indeed the whole incentive -- the
10 incentive of the state to do this is self-evident. It
11 is a cost-containment concern. It is not a concern that
12 the facility --

13 QUESTION: Well, Mr. Kirklin, that is the
14 point. I thought we were dealing here only with
15 transfers to higher levels of care. I thought that was
16 what was left and what we were concerned with. Is that
17 right?

18 MR. KIRKLIN: It is not just that issue, Your
19 Honor.

20 QUESTION: As I read the briefs, the questions
21 that we have here involved only the questions of
22 transfers to higher levels of care, and secondly,
23 whether there was an Article III standing problem. I
24 thought those were the two questions.

25 Now, the court resolved below the question of

1 simply terminating the care altogether or assigning the
2 patient to a lower level of care. And in fact, the
3 parties stipulated that in those situations, a fair
4 hearing would be required. And I understood that the
5 litigation below and your argument below was based on
6 the reduction of benefits that would ensue, and that
7 gave the state its financial interest.

8 Now, when you are talking about a higher level
9 of care, the state does not have the same interest; it
10 is going to cost the state a lot more money, and they
11 are not eager to send some patient to a higher level of
12 care and pay more money.

13 So now you are making a totally new argument
14 that I understand was not made in the courts below at
15 all; that because of state regulation on the standards,
16 that that makes the physician's decision state action.
17 Have I summarized it correctly?

18 MR. KIRKLIN: Your Honor, let me explain what
19 happened below. There was a consent judgment; that
20 consent judgment resolved the controversy between
21 plaintiffs and defendants about implementation of
22 utilization review committee determinations. Ms. Gordon
23 has explained utilization review committees.

24 Those determinations were to discharge a
25 patient, transfer him to a lower level of care. We

1 settled that. The state said we are not going to
2 enforce those determinations; they are too traumatic,
3 they are too harmful to the patient.

4 Now, what that left was the following: it
5 left the facilities themselves capable -- not only
6 capable but required, as I have explained -- to move
7 those patients if they do not need that level of care.
8 The state never maintained these people did not need
9 that level of care, the state never retreated from its
10 support of the so-called DMS-1 instrument as a way of
11 assessing that level of care.

12 When the utilization review committee route to
13 moving patients was closed, then these plaintiffs came
14 under the threat of the state law that I described, that
15 facilities must promptly move them. Before that time,
16 the facilities could rely upon the utilization review
17 process as a way of moving in appropriately placed
18 patients.

19 Now, both parties in the lower court
20 understood full well that the threat that the facilities
21 themselves would move these patients crystallized with
22 the entry of the consent judgment. With the entry of
23 the consent judgment, which the state resisted up to the
24 last minute, the utilization review route was suddenly
25 closed shut as a way to move these plaintiffs. Each one

1 of these plaintiffs, though, had been assessed against
2 the state's DMS-1 instrument and had been found by that
3 evaluation which the plaintiffs challenged, not to need
4 that level of care.

5 Now, with a consent judgment entered, the only
6 way that the facilities could comply with the
7 requirement of state law that they must promptly without
8 a hearing move inappropriately-placed patients was to
9 move them themselves. The utilization review route was
10 closed.

11 The plaintiffs moved quickly when that threat
12 existed to have the issue adjudicated simply because any
13 delay in the resolution of that question obviously
14 carried with it the serious risk that these transfers
15 would be accomplished --

16 QUESTION: But Mrs. Gordon informed us -- and
17 maybe I misunderstood her -- that the injunction
18 prohibited the nursing homes from doing just that. Was
19 I wrong in understanding that?

20 MR. KIRKLIN: That is not a correct statement
21 of the situation. By the consent judgment, the state
22 agreed that for its part, it would not approve or
23 enforce adverse utilization review committee
24 determinations. The consent judgment left facilities
25 free to move patients, and indeed, the state --

1 QUESTION: But they were no longer required to
2 because they were freed of the compulsion, as I
3 understood it, of the URC determination. Isn't that
4 right?

5 MR. KIRKLIN: They were free of the obligation
6 -- when the state adopts the URC's --

7 QUESTION: In other words, to put it
8 differently, weren't they free to say we are going to
9 keep this patient here and there is nothing the state
10 can do to us if we do.

11 MR. KIRKLIN: No.

12 QUESTION: They were not?

13 MR. KIRKLIN: They were not. The state no
14 longer was going to make the facility move the patient
15 out because of a review committee determination.
16 However, the facilities were left free to move patients
17 if they thought they were not properly placed. And
18 indeed, state law requires facilities on their own,
19 wholly apart from the review committee functions, to
20 move out patients not properly there. That is the
21 distinction.

22 The state for its own part -- the state said
23 we tie our hands; we are not going to be responsible
24 anymore for making facilities move patients because
25 there has been an adverse review committee

1 determination. The state thought that too harmful, too
2 traumatic.

3 The parties both recognized -- and that is why
4 the state has fought this issue -- that the facilities
5 themselves not only were free but should be free to move
6 patients on their own. And respondents contend that the
7 state law is clear that they have to. Indeed, that is
8 the only way that the facilities now could discharge
9 their obligation under law to move any inappropriately
10 placed patients.

11 Indeed, it is precisely --

12 QUESTION: What is the prohibitant from doing
13 it right now?

14 MR. KIRKLIN: What prohibits them now, Your
15 Honor, is the deterrent effect of a hearing at which
16 these plaintiffs would test the validity of --

17 QUESTION: What kind of a hearing? A state
18 hearing?

19 MR. KIRKLIN: What the district court required
20 after finding that there was state action and due
21 process protection was that the state had to provide a
22 hearing forum in which the plaintiffs, the named
23 plaintiffs, --

24 QUESTION: The state had to provide a hearing
25 forum to decide as to whether a private hospital could

1 change its status of a patient?

2 MR. KIRKLIN: To decide whether the decision
3 upon which the facility based its transfer was, under
4 federal and state law, correct. Federal an state law
5 says a facility cannot move a patient unless it is for
6 good medical reasons --

7 QUESTION: What federal law says that in this
8 case, in this posture, with this injunction, cannot do
9 it? What federal law says that hospital A
10 privately-owned, privately-financed, cannot change the
11 status of a patient?

12 MR. KIRKLIN: Well, Your Honor, that is the
13 traditional barrier that is imposed by the law in the
14 context of a review committee determination.

15 QUESTION: I am talking about federal law now.

16 MR. KIRKLIN: Federal law requires it there,
17 for example, if doctors --

18 QUESTION: What federal law requires a private
19 hospital to give a hearing?

20 MR. KIRKLIN: The regulations -- the federal
21 regulations that Ms. Gordon discussed that state when a
22 review committee determines a patient should be moved
23 and that there is a Medicaid adjustment at issue, the
24 state has to provide a so-called fair hearing.

25 QUESTION: Well, this was not the court of

1 appeals' decision. The court of appeals went on the
2 constitutional basis, and I thought your submission was
3 constitutional, too. I thought your answer might be to
4 Justice Marshall, it is the Fourteenth Amendment that
5 requires a hearing.

6 MR. KIRKLIN: Well, we maintain that it does,
7 of course.

8 QUESTION: But you say, you now say it is the
9 federal regulation.

10 MR. KIRKLIN: We say both. I was trying to
11 respond Justice Marshall's --

12 QUESTION: You were trying to get a private
13 hospital, under the Fourteenth Amendment. That is what
14 I understood you to be trying to do.

15 MR. KIRKLIN: Well, we are trying to do that
16 because this case is unique.

17 QUESTION: It sure is.

18 QUESTION: If you are right about the
19 regulations, we really should not reach any
20 constitutional questions here.

21 MR. KIRKLIN: That is correct.

22 QUESTION: Did you talk about the regulations
23 before the court of appeals?

24 MR. KIRKLIN: Yes, we did.

25 QUESTION: And they -- did they reject your

1 view of the regulations?

2 MR. KIRKLIN: They did not reach that issue.

3 QUESTION: How do you know they didn't? They

4 just did not write about it.

5 MR. KIRKLIN: That is true, they did not write

6 about it.

7 QUESTION: Well, if they were construing --

8 deciding the case in an orthodox manner, if they reached

9 the constitutional question they must have rejected your

10 claim under the regulations because presumably, they do

11 not reach a constitutional question if there is a

12 statutory or a regulation way of disposing of the case.

13 MR. KIRKLIN: I guess that is true. We --

14 QUESTION: So they rejected your regulatory

15 submission?

16 MR. KIRKLIN: Impliedly, as Justice Rehnquist

17 characterized it --

18 QUESTION: Was it briefed in the court of

19 appeals?

20 MR. KIRKLIN: Yes, Your Honor, it was.

21 QUESTION: On both sides?

22 MR. KIRKLIN: Yes.

23 QUESTION: Was the department -- did the

24 federal people take any position on the matter as amicus?

25 MR. KIRKLIN: Not officially before the court,

1 no.

2 QUESTION: How did they construe their own
3 regulations? Or do you know? Or is it in the record?

4 MR. KIRKLIN: There is nothing officially in
5 the record about HHS's position, but --

6 QUESTION: Well, insofar as transfers to
7 higher levels of care are concerned -- and I still think
8 that is one of the issues before us, as I understand it.

9 MR. KIRKLIN: Yes, it is.

10 QUESTION: Is not the federal position that no
11 hearing is required for the transfers to higher levels
12 of care?

13 MR. KIRKLIN: That is right, Your Honor.

14 QUESTION: You concede that, so you are not
15 here making that argument to us, that it is required by
16 federal regulation.

17 MR. KIRKLIN: I am not here making the
18 argument that federal and state fair hearing regulations
19 apply to transfers up.

20 QUESTION: Okay. But you are saying that the
21 Fourteenth Amendment requires it.

22 MR. KIRKLIN: That is right. And as well, we
23 are saying that these fair hearing regulations apply to
24 transfer to a lower level of care or out of a facility
25 into an adult home or the community, because there is a

1 reduction --

2 QUESTION: And you and the petitioners differ
3 on whether the consent decree covers those transfers to
4 a lower level or out --

5 MR. KIRKLIN: We do not disagree about that at
6 all. We both understand that discharges because of
7 utilization review committee determinations are
8 forbidden. We are in full agreement that the consent
9 judgment does not apply to facility initiated transfers
10 or discharges.

11 QUESTION: And you did argue below only on the
12 basis of the reduction in financial benefits as the
13 basis for holding that there was state action, is that
14 right?

15 MR. KIRKLIN: No, we did not, Your Honor. We
16 argued with respect to transfers to a higher level of
17 care and to a lower level of care. The Fourteenth
18 Amendment requires prior hearings with respect --

19 QUESTION: You do not -- I take it your
20 submission here on the state action is not -- certainly
21 is not in defense of the court of appeals' rationale, is
22 it?

23 MR. KIRKLIN: We do not retreat from the court
24 of appeals' rationale, but we believe that there is a
25 simpler method of disposing of the state action question

1 which is that --

2 QUESTION: The state enforces a decision.

3 MR. KIRKLIN: Requires it, orders it, that is
4 right.

5 QUESTION: So wouldn't you say the same thing
6 then if there was a general state law about trespass or
7 something, and the home decides to move a patient and
8 the patient refuses to go, so the court -- so the home
9 goes to court and gets an order, just for
10 self-protection gets an order to move the person out.
11 That is state enforcement of the private decision.
12 Would you say that is automatically state action?

13 MR. KIRKLIN: Well, no. I would say that when
14 the state provides a forum for deciding whether there is
15 state -- there is a violation, that the mere provision
16 of a judicial forum by itself --

17 QUESTION: Well, but the trespass action would
18 not give any hearing on the validity of the private
19 decision; it would just say are you here without consent.

20 MR. KIRKLIN: Well, the question, Your Honor,
21 in this context is that again, if the federal and state
22 regulations themselves say that a facility cannot move a
23 person unless for valid medical reasons --

24 QUESTION: Well, the general law says a person
25 cannot stay on somebody else's property without

1 consent. And a court will enforce it.

2 MR. KIRKLIN: Here it is a question of -- Your
3 Honor, we think that, for example, in the Moose Lodge
4 case where this Court had not trouble saying that if the
5 state liquor control board has a regulation that says we
6 are going to enforce a bylaw of a private club, even
7 though it is neutral in its terms, that is state
8 action. We submit that this is no different where the
9 state says that regulation that says we are going to
10 enforce or direct a nursing home to kick out a patient
11 if the patient is not thought to be appropriately there,
12 we think that is a state action as well.

13 QUESTION: Or to raise the standards, you said
14 before. If you enhance the care, given them higher
15 care, more benefits, you also have to have a due process
16 hearing.

17 MR. KIRKLIN: We maintain that we do, that it
18 is required because there are due process protected
19 interests there as well because the reg is again saying
20 even if --

21 QUESTION: On that theory you would be saying
22 that under Goldberg against Kelly, if some welfare
23 director wants to increase the welfare payments to a
24 recipient they would have to have a hearing, a Goldberg
25 v. Kelly hearing.

1 MR. KIRKLIN: No, we would not because there
2 is no property interest under law that protects someone
3 against getting more benefits. Here the regulations say
4 you cannot transfer a patient up or down or out unless
5 for good cause. And that is the difference.

6 QUESTION: What is the property interest if
7 the transfer is to a higher level of care?

8 MR. KIRKLIN: Your Honor, the federal and
9 state regulations state that a nursing facility may not
10 transfer or discharge -- that is the language --

11 QUESTION: Well, I am asking you what the
12 property interest is. Do you have a property interest
13 if somebody wants to give you more money? A property
14 interest, to decline it?

15 MR. KIRKLIN: The property interest is the
16 interest which is embedded in positive state and federal
17 law that says that you should be free of having to move
18 to a higher level of care unless there is good reason to
19 do it. And the reason why that is done is not
20 surprising because as indicated in a deposition in this
21 case, when people are asked to go to a higher level of
22 care, they think they are dying. And the trauma which
23 --

24 QUESTION: How do we know that that makes them
25 think they are dying? Is there something in the record,

1 a medical opinion to that effect?

2 MR. KIRKLIN: Not to that precise effect.

3 What is in the record, Your Honor, is the whole
4 underpinning of the consent judgment -- and it is in the
5 record that the defendants made it very clear, affidavit
6 statements and the commissioner's letters to the federal
7 government, that the reason why it refused to enforce
8 review committee determinations was because the move
9 itself is so devastating and so harmful to patients that
10 it should not be done.

11 QUESTION: Do you think there is no trauma
12 involved in an adversary hearing?

13 MR. KIRKLIN: There is, of course, trauma
14 involved, but we do not maintain that a finding of
15 transfer trauma is necessary for the -- on the narrow
16 issues that, as Your Honor pointed out, are before the
17 Court, which is whether there is state action, and on
18 the standing issue as well, that this Court did not take
19 the questions of whether there are protected property or
20 liberty interests involved. We do not think that they
21 are critical.

22 QUESTION: Well, how can the hearing -- the
23 Chief Justice's question makes me wonder, how could the
24 pre-transfer hearing provide protection against this
25 concern you expressed about the consequences of a

1 transfer to a higher level? If the reason is that there
2 is greater danger of mortality, does that --how does it
3 help to make them spell it out in a hearing for the man
4 or woman?

5 MR. KIRKLIN: Because that is not the only
6 issue, Your Honor.

7 QUESTION: But that would be in part. I mean,
8 if that is one of the reasons you are saying the patient
9 must be given the bad news in detail, is what you are
10 saying.

11 MR. KIRKLIN: That would be part of the
12 issue. The other part, again, in the regulations which
13 talks about that a transfer cannot be accomplished
14 unless it is in the interest of the patient or his
15 welfare, is that if that patient could show that he or
16 she had lived in a nursing home for 20 years and they
17 propose to send that patient out of New York City to
18 upstate New York on some erroneous medical judgment --

19 QUESTION: Well, is there a case at all like
20 that in this record before us?

21 MR. KIRKLIN: There are --

22 QUESTION: I can imagine some cases with
23 extreme facts might present a problem, but do we have to
24 decide -- is there anything in this record that requires
25 us to decide a case of that kind?

1 MR. KIRKLIN: Of the transfers to a higher
2 leve of care?

3 QUESTION: Yes. Where it is harmful to the
4 patient to give him the added protection.

5 MR. KIRKLIN: The evidence that we have here
6 as part of the joint pretrial order is that during the
7 period in which this case was in litigation, and when
8 the state did provide hearings -- at one point it did --
9 there were, the defendants state, at least 10 cases of
10 transfers to a higher level of care; five were reversed
11 at hearing.

12 QUESTION: Yes, but are any of those litigants
13 that are involved in this case?

14 MR. KIRKLIN: Those litigants, those persons,
15 were members of the class; none of them are named
16 plaintiffs in this case.

17 Your Honor, I want to briefly point out some
18 significant aspects of the joint pretrial order in this
19 case. In that case, in that joint pretrial order, there
20 were the allegations made that a substantial proportion
21 of facility transfers of Medicaid patients are improper
22 under federal and state law. Defendants did not
23 controvert that particular allegation. That is, at the
24 stage of the case where in affidavit form and in
25 statement under local court rules the defendants

1 identified what allegations of the plaintiffs they
2 disagreed with, they did not controvert that.

3 And we submit that it is significant here when
4 the class was defined without objection, without appeal
5 by the defendants to include all Medicaid patients in
6 nursing facilities in New York state, and given this
7 allegation that class members were transferred
8 improperly, not controverted by the defendants, standing
9 was never interposed as a basis for objection below,
10 that that class certification can bridge the gap between
11 the allegations of the named plaintiffs and the
12 allegations, unrefuted, unobjected to by the defendants
13 concerning class members, when there was no objection
14 taken to the certification of the class, no appeal taken
15 in the statement of controverted issues that the
16 proposition, that allegation about class members was not
17 contested.

18 QUESTION: Well, your time has expired, Mr.
19 Kirklin. Do you have anything further, Mrs. Gordon?

20 ORAL ARGUMENT OF JUDITH A. GORDON, ESQ.

21 ON BEHALF OF THE PETITIONER -- Rebuttal

22 MRS. GORDON: Yes, Your Honor, I have just a
23 few points.

24 QUESTION: May I ask before you start, are the
25 Grey Panthers parties to this case?

1 MRS. GORDON: Not so far as I am concerned,
2 Your Honor, because --

3 QUESTION: They are not listed as parties?

4 MRS. GORDON: They are listed as parties, they
5 were apparently parties in the first half of this case
6 which ended with the consent judgment back in 1979, the
7 October one. But if Your Honor turns to the pretrial
8 order which starts at, I believe, page 250 of the
9 Appendix -- pardon me, 150 of the Appendix, -- you will
10 find that in the description of the nature of the action
11 in proceedings and in the nature of the parties, which
12 is on page 151 --

13 QUESTION: Mrs. Gordon, if you will stay on
14 the microphone we will hear you better.

15 MRS. GORDON: I am sorry. That in the
16 description of the nature of the action in proceedings
17 at page 150 and following at page 151, the nature of the
18 parties, the Grey Panthers are not described, and we
19 have considered, as we indicated in our brief, that
20 their claims were abandoned. If they were not
21 abandoned, we also believe that their standing was not
22 made out.

23 QUESTION: Now, rules require that the parties
24 be identified. Are they identified in the petition for
25 certiorari?

1 MRS. GORDON: I beg your pardon, Your Honor, I
2 could not hear you.

3 QUESTION: Our rules require that parties be
4 identified. I did not find that they were included in
5 the list of parties in the Petition for Certiorari.
6 Were they or not? Maybe counsel on the other side could
7 tell us.

8 MR. KIRKLIN: Yes, Your Honor, they are listed
9 among the parties before this Court. Yes.

10 QUESTION: Where, what page?

11 MR. KIRKLIN: The petition itself, --

12 QUESTION: That is all right, I do not want to
13 detain you.

14 MR. KIRKLIN: They are definitely listed among
15 the parties.

16 QUESTION: They are, thank you.

17 MRS. GORDON: Justice O'Connor, just a point
18 of clarification, it is not only URC transfers to higher
19 levels of care that are in issue in this case; it is
20 also the medical decisions of the outside physician and
21 the nursing home physician that are in issue.

22 With respect to whether or not there was
23 anything in the record which spoke to the federal --
24 whether or not HHS was requiring hearings in the
25 circumstances before the court, I call your attention to

1 the exhibit that concludes our brief, wherein HHS, then
2 HEW, states at page 2(a), "A change in medical care
3 ordered by a patient's physician does not represent an
4 agency proposal to terminate, suspend or reduce
5 assistance payment. If a patient disagrees with his
6 physician's determination of medical necessity for a
7 specific service, his recourse is to the practitioner or
8 his professional association, not to the medical
9 assistance agency."

10 And again, I call your attention to the second
11 supplement to the Joint Appendix, where in the letters
12 that follow, Commissioner Blum's letter, show that the
13 federal government not only did not consider URC
14 transfers upward subject to fair hearing rights, but
15 they threatened to withdraw FFP if we provided fair
16 hearing rights with respect to them.

17 QUESTION: Mrs. Gordon, on this matter of the
18 Grey Panthers, this petition is yours, isn't it, the
19 state's?

20 MRS. GORDON: Yes, it is, Your Honor.

21 QUESTION: And it says Barabara Blum, et
22 cetera, against -- and it names a number of people --
23 and the Grey Panthers, New York Chapter.

24 MRS. GORDON: Yes. It is not --

25 QUESTION: You thought -- when this was filed

1 you thought they were respondents, didn't you?

2 MRS. GORDON: Yes. It was not that they are
3 not technical parties. They were listed in the caption,
4 Your Honor. It is just that they, one, had no standing
5 in the original case, and to the extent that one has to
6 rely on the post-consent judgment claims which are now
7 before you, the Grey Panthers --

8 QUESTION: Well, the judgment of the court of
9 appeals mentions them.

10 MRS. GORDON: Yes, they are listed --

11 QUESTION: And that is the judgment that is
12 here.

13 MRS. GORDON: That is correct, Your Honor.

14 QUESTION: Well, aren't they here?

15 MRS. GORDON: Yes, Your Honor, they are
16 parties here in terms of their technical inclusion in
17 the caption. However, they made no sufficient claims at
18 the outset --

19 QUESTION: They are here also as technically
20 in the judgment.

21 MRS. GORDON: Yes, Your Honor.

22 QUESTION: And that is not quite technical;
23 that is the judgment.

24 MRS. GORDON: Yes, Your Honor.

25 QUESTION: You haven't made any objection to

1 that, have you?

2 MRS. GORDON: I do not have an objection to
3 their appearing in the caption. I have an objection to
4 finding by reason thereof or any other predicate that
5 they had standing in the first instance in this case, or
6 that they had any claim specifically --

7 QUESTION: And where did you raise that
8 objection? Right now?

9 MRS. GORDON: As I indicated earlier, --

10 QUESTION: You raised it now.

11 MRS. GORDON: That is correct, Your Honor.

12 QUESTION: You did not raise it before.

13 MRS. GORDON: That is correct, Your Honor.

14 QUESTION: Isn't it a little late?

15 MRS. GORDON: That is correct, Your Honor, but
16 for the fact that it is a jurisdictional objection and
17 cannot be waived, and as I indicated earlier, would not
18 have been presented to this Court were it not for
19 serious conversations on that point with the Solicitor
20 General.

21 QUESTION: I am not bound by your serious
22 conversations with your solicitor general.

23 MRS. GORDON: That is certainly true, Your
24 Honor.

25 I would call the Court's attention to one

1 portion of the legislative history with respect to
2 utilization review, which I think makes it abundantly
3 clear that utilization --

4 CHIEF JUSTICE BURGER: Your time has expired,
5 Mrs. Gordon.

6 MRS. GORDON: Thank you, Your Honor.

7 (Whereupon, at 11:15 a.m. the oral argument in
8 the above-entitled matter was concluded.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Barbara Blum, Commissioner of The New York State Department of Social Services, Et Al., Petitioners, v. William Yaretsky Et Al. - No. 80-1952

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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