

**ORIGINAL**

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-63

**TITLE** CITY OF REVERE, Petitioner  
v.

**PLACE** MASSACHUSETTS GENERAL HOSPITAL  
Washington, D. C.

**DATE** February 28, 1983

**PAGES** 1 thru 41



ALDERSON REPORTING

(202) 628-9300  
440 FIRST STREET, N.W.  
WASHINGTON, D.C. 20001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

CITY OF REVERE, :

Petitioner :

v. : No. 82-63

MASSACHUSETTS GENERAL HOSPITAL :

- - - - -x

Washington, D.C.

Monday, February 28, 1983

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
2:03 p.m.

APPEARANCES:

IRA H. ZALEZNIK, ESQ., Boston, Massachusetts, on  
behalf of Petitioner.

MICHAEL BROAD, ESQ., Boston, Massachusetts on  
behalf of Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
IRA H. ZALEZNIK, ESQ.,	
on behalf of the Petitioner	3
MICHAEL BROAD, ESQ.,	
on behalf of the Respondent	23
IRA H. ZALEZNIK, ESQ.,	
on behalf of the Respondent - Rebuttal	41

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

2                    CHIEF JUSTICE BURGER: We will arguments next  
3 in the City of Revere against Massachusetts General  
4 Hospital.

5                    Mr. Zaleznik, I think you can proceed whenever  
6 you are ready.

7                    ORAL ARGUMENT OF IRA H. ZALEZNIK, ESQ.,  
8                    ON BEHALF OF THE APPELLANT

9                    MR. ZALEZNIK: Thank you, Your Honor.

10                   Mr. Chief Justice, and may it please the  
11 Court. The issue before this Court is whether a  
12 municipality is obligated by the Constitution to  
13 reimburse a hospital for the cost of medical treatment  
14 rendered to a person suspected of a crime.

15                   Let me briefly summarize the facts.

16                   On September 20th, 1978, the Revere police  
17 were called to respond to a reported burglary at a  
18 dwelling house in Revere, Massachusetts. The police  
19 arrived at the scene, observed an individual leaving the  
20 home with a suitcase and a pillow-case, and this  
21 individual was later identified as one Patrick Kivlin.

22                   As a result, the police sought to detain him,  
23 and Mr. Kivlin attempted to flee. After repeated  
24 warnings and a warning shot, Mr. Kivlin was shot by a  
25 police officer for the City of Revere.



1           QUESTION: That is when the Supreme Judicial  
2 Court of Massachusetts said he was under arrest, since  
3 that bullet hit him.

4           MR. ZALEZNIK: Yes, Your Honor, except that  
5 the Revere police secured an arrest warrant from the  
6 Chelsea District Court, the local court of appropriate  
7 jurisdiction.

8           QUESTION: Later on.

9           MR. ZALEZNIK: Later on, after -- while Mr.  
10 Kivlin was still in the hospital.

11          QUESTION: When they picked him up off the  
12 street to take him to the hospital, was he arrested  
13 then?

14          MR. ZALEZNIK: We would submit that he was  
15 not, other than in the practical sense that he was  
16 incapacitated and could not move away on his own. But  
17 we would not contend that there is any meaning to  
18 custody at that stage.

19          As a practical matter, the suspect was in need  
20 of emergency medical attention, and the police officers  
21 for the City of Revere did the appropriate thing, they  
22 called an ambulance, the ambulance arrived and took Mr.  
23 Kivlin to the emergency ward at Massachusetts General  
24 Hospital.

25          QUESTION: Does the record show why they took

1 him to MGH rather than Boston City?

2 MR. ZALEZNIK: It does not, Your Honor, except  
3 that geographically Massachusetts General Hospital is  
4 closer.

5 QUESTION: Much? Not very much.

6 MR. ZALEZNIK: It depends upon the time of  
7 day, but I believe that as a matter of course --

8 QUESTION: Does the time of day make the  
9 distance --

10 MR. ZALEZNIK: In terms of traffic conditions  
11 at the scene, Your Honor.

12 QUESTION: But at least Boston City was a  
13 municipal hospital. MGH, theoretically, is a private  
14 one.

15 MR. ZALEZNIK: Yes, that is correct, Your  
16 Honor.

17 QUESTION: What was the reason for taking him  
18 to MGH, other than closeness in terms of traffic?

19 MR. ZALEZNIK: I would think no other, Your  
20 Honor. I believe that the judgment exercised in this  
21 regard was exercised by the ambulance driver.

22 QUESTION: The result is that you are imposing  
23 this cost on a private hospital in contrast to imposing  
24 it on a municipal hospital.

25 MR. ZALEZNIK: We are not claiming in this

1 litigation, Your Honor, that it is the private hospital  
2 that must bear this burden.

3 We are simply saying, and the issue before  
4 this Court is whether or not the city must bear this  
5 burden as a matter of constitutional mandate. Who bears  
6 the burden is --

7 QUESTION: Aren't you weaseling the words  
8 there? The city doesn't want any responsibility for  
9 it. Let somebody else pay for it.

10 MR. ZALEZNIK: The decision of who pays is  
11 necessarily a legislative one, and properly belongs with  
12 the legislature or the Congress and not the courts, at  
13 least under the circumstances of this particular case.

14 QUESTION: May I ask this question. As a  
15 matter of Federal law, as soon as the person was shot,  
16 did the police or the City of Revere have any Federal  
17 obligation to him at all; could they just let him lie  
18 there?

19 MR. ZALEZNIK: No, Your Honor, I would not  
20 contend that --

21 QUESTION: What Federal obligation, if any,  
22 did they have to the man before they picked him up and  
23 took him to the hospital?

24 MR. ZALEZNIK: I believe that the police  
25 officers had the obligation to call the ambulance, to

1 provide him with access to emergency medical attention.

2 QUESTION: As a matter of Federal  
3 constitutional law?

4 MR. ZALEZNIK: Yes, because I believe --

5 QUESTION: What if when the ambulance driver  
6 picked him up and took him to the hospital, the hospital  
7 said: "We are not going to take him unless we know who  
8 is going to pay the bill."

9 MR. ZALEZNIK: Then that is not a deprivation  
10 of rights that Revere has visited on --

11 QUESTION: But if that had happened -- If that  
12 had happened, would the City of Revere had any further  
13 Federal constitutional obligation at that point in  
14 time?

15 MR. ZALEZNIK: I believe not, Your Honor.

16 QUESTION: Not even to take him to some other  
17 hospital?

18 MR. ZALEZNIK: I do not believe so.

19 QUESTION: You say that they have the  
20 obligation to pick him up and put him in an ambulance,  
21 but they don't have any obligation to make sure that the  
22 ambulance gets any place that will do him any good.  
23 Isn't that a strange Federal obligation.

24 MR. ZALEZNIK: The reason, I would submit,  
25 Your Honor, is out of the negative. Were they to leave



1 him lying on the street or were they to take him to the  
2 station house and attempt to undergo the normal booking  
3 procedures while he was injured and in need of medical  
4 attention, that would be a way of inflicting punishment  
5 upon him. That is where, I believe, they would run  
6 afoul of the constitutional requirements.

7 QUESTION: Could one not say precisely the  
8 same thing about leaving him in an ambulance unattended  
9 in a parking lot of a hospital?

10 MR. ZALEZNIK: No, because as a practical  
11 matter the ambulance -- the ambulance driver doesn't  
12 simply leave him there, and really the threat that you  
13 speak of is simply a hypothetical one.

14 QUESTION: Yes. I am asking not the driver,  
15 but the city. You say that the city had the obligation  
16 to put him in an ambulance in order to avoid the risk  
17 that he would just suffer great pain on the street, I  
18 guess.

19 MR. ZALEZNIK: Yes, Your Honor.

20 QUESTION: But if he continues to suffer pain  
21 in the ambulance and there is no doctor around to  
22 alleviate that pain, does their duty terminate, or do  
23 they have a continuing duty until they find somebody who  
24 will take care of him. That is what I was asking.

25 MR. ZALEZNIK: I do not believe the duty is

1 continuing, but it is a fact pattern that is not  
2 presented in this case as being --

3 QUESTION: What is the duty?

4 MR. ZALEZNIK: The duty is --

5 QUESTION: You say that it is not continuing  
6 duty, but what is it?

7 MR. ZALEZNIK: The duty is not to deny him  
8 access to medical attention.

9 QUESTION: You say that that is not  
10 continuing?

11 MR. ZALEZNIK: It is simply not to inflict  
12 punishment on him by refusing to --

13 QUESTION: Then when he is carried to the  
14 hospital, and he sits out there and the hospital won't  
15 take him, and they put him out in the grounds and they  
16 leave him there; is that the end of the duty?

17 MR. ZALEZNIK: I do not believe that the city  
18 has a continuing obligation at that stage.

19 QUESTION: I think you have bit off a little  
20 more than you are going to be able to chew.

21 QUESTION: The point is, if I understand your  
22 position, if you win the hospital will not get paid.  
23 Presumably, they will just turn these people away. So  
24 what happens as a result of the Federal constitutional  
25 duty then, don't they just sit in the parking lot in an

1 ambulance?

2 MR. ZALEZNIK: That danger is really a  
3 hypothetical one, and as demonstrated in the facts of  
4 this particular case, the hospital will not simply turn  
5 the people away. The hospital is under a series of  
6 obligations.

7 QUESTION: They had no guarantee they would be  
8 paid when this person was dumped at their door, did  
9 they?

10 MR. ZALEZNIK: They had no guarantee  
11 whatsoever.

12 QUESTION: They still took him.

13 MR. ZALEZNIK: Nonetheless, they took him, and  
14 what's more under the facts of the case, they took him a  
15 second time fully a week after the Chief of the Revere  
16 Police Department notified them that Revere had no  
17 intention of paying this particular bill.

18 QUESTION: Are there any Federal or State laws  
19 that require private general hospitals open to the  
20 public to take emergency cases, counsel?

21 MR. ZALEZNIK: There is an express law in the  
22 Commonwealth of Massachusetts by statute which provides  
23 that any hospital with an emergency wing must provide  
24 emergency medical care to all those who need it. The  
25 fact is, it is a matter of policy and custom, as well as

1 law, that hospitals provide emergency medical care to  
2 those in need without regard to the source of payment.  
3 That is the language of the particular statute.

4 QUESTION: Is this hospital a tax-exempt  
5 organization, do you know?

6 MR. ZALEZNIK: Massachusetts General Hospital  
7 is a non-profit organization, and if you look --

8 QUESTION: There is some sort of a quid pro  
9 quo in your intimation that if you have got that kind of  
10 benefit, you take on some burdens like emergency  
11 treatment.

12 MR. ZALEZNIK: Necessarily, when the hospital  
13 opens its doors and says to the public that it has an  
14 emergency wing, it must necessarily provide the  
15 emergency services that are required.

16 The difference, and what may well have  
17 occurred under -- had the hospital realized that Revere  
18 would not pay this bill, perhaps the hospital would not  
19 have permitted the patient to stay in the hospital for  
20 the full 10 days.

21 At that stage, after stabilizing him and  
22 giving him the emergency medical treatment, they could  
23 have transferred him to Boston City Hospital, or another  
24 publicly supported institution.

25 QUESTION: Why should Boston City accept him?



1           MR. ZALEZNIK: Because Boston City is a  
2 publicly supported institution.

3           QUESTION: But it isn't a Revere hospital.  
4 Revere is not part of the City of Boston, is it?

5           MR. ZALEZNIK: But it is obligated to accept --

6           QUESTION: It is fine for you to say that MGH  
7 should take care of the emergency, and then what, put  
8 him on the street? Suppose that Boston City said, "We  
9 are full."

10          MR. ZALEZNIK: Boston City is under an  
11 obligation, as are publicly supported hospitals, to  
12 treat those in need.

13          QUESTION: The emergency rooms -- Why couldn't  
14 MGH say, "We have a fine emergency facility here, even  
15 though you have to wait for 20 hours sometimes." Why  
16 couldn't they say, "We'll take emergency paying  
17 patients," period?

18          MR. ZALEZNIK: Because State law says --

19          QUESTION: Suppose you had no such State law,  
20 then what?

21          MR. ZALEZNIK: I think there is a common law  
22 obligation.

23          QUESTION: What your argument implies, I am  
24 not saying it's wrong, is that maybe MGH should close  
25 its emergency wing.

1           MR. ZALEZNIK: If it sought to avoid the  
2 outcome in this case, and if its appeals to the  
3 legislature to do something with regard to the specific  
4 facts of this case we are unveiling, that might well be  
5 their alternative.

6           QUESTION: Don't hospitals accepting Medicare  
7 or federally funded patients have a requirement to  
8 provide certain emergency services?

9           I mean, aren't they required under Federal  
10 regulations to offer a certain range of services in  
11 order to qualify?

12          MR. ZALEZNIK: Yes, Your Honor.

13          Under certain circumstances, hospitals that do  
14 accept Federal aid are required to provide treatment to  
15 indigents, and there are a series of legislative  
16 enactments in this area, but perhaps not one that  
17 satisfies this particular case.

18          QUESTION: Let me try another hypothetical on  
19 you addressed at testing the Massachusetts Court's  
20 theory about arrest as soon as this fellow was hit with  
21 a bullet.

22          Suppose the policeman hadn't been such a good  
23 marksman, and instead of hitting this man, he had hit a  
24 tourist or a spectator, and that person was taken to the  
25 hospital and given all the same treatment. Now we have

1 removed the arrest there. What about that situation?

2 MR. ZALEZNIK: In that situation, assuming  
3 that the individual did not have a State law tort remedy  
4 against the individual officer, so that assuming that  
5 there is no fault, as there is no indication in this  
6 case that there was any fault on the part of the Revere  
7 police, the hospital is left in the identical  
8 situation. An individual hurt, in need of medical  
9 attention, goes to the hospital and must receive  
10 treatment.

11 QUESTION: Then this fanciful theory about  
12 being arrested when the bullet hit him is irrelevant in  
13 your view to the case?

14 MR. ZALEZNIK: In my view, it is irrelevant  
15 and ought not to be viewed as dispositive by this  
16 Court.

17 If I may elaborate on your hypothetical.  
18 Suppose Mr. Kivlin, the suspect, had had a gun, and in  
19 the circumstances of this case had fired a shot that hit  
20 that bystander prior to the time that the policeman  
21 felled Mr. Kivlin with his bullet.

22 Under that circumstance we would have had two  
23 ambulances, or two people in the ambulance, one suspect  
24 and one innocent bystander, left in the same position  
25 under the Supreme Judicial Court's formulation. The

1 suspect would have a guaranteed right to free medical  
2 care, and the innocent bystander clearly would not.

3 I think it demonstrates that the injured  
4 suspect in this case was in no different position from  
5 any citizen who is injured on the street and in need of  
6 emergency medical care.

7 I would like to address a threshold issue for  
8 a moment, that is, Massachusetts General Hospital's  
9 challenge to the jurisdiction of this Court.

10 According to Massachusetts General Hospital,  
11 only State law issues are involved in this case, and  
12 there is -- or at least there is an independent and  
13 adequate State law remedy to support -- State law  
14 grounds, excuse me, to support the judgment below.

15 This view rests on a single premise that the  
16 opinion below was based upon a State created  
17 implementing rule, a matter of State law, and that what  
18 the Supreme Judicial Court did was merely create a  
19 so-called implementing rule.

20 This viewpoint distorts the clean language of  
21 the opinion below as well as the State law precedents  
22 relied on by the Supreme Judicial Court in the court  
23 below. The language of the opinion could hardly be  
24 plainer.

25 After rejecting all forms of State law



1 contractual recovery, the court below held and I quote:  
2 "We hold that the constitutional prohibition against  
3 cruel and unusual punishment embodied in the Eighth  
4 Amendment to the United States Constitution requires  
5 that Revere be liable to the hospital for the medical  
6 services rendered Kivlin during his first stay."

7           Later in the opinion, in its section entitled  
8 "Eight Amendment," the court characterizes the position  
9 of the hospital as follows: "The hospital argues that  
10 the prohibition against deliberate indifference to the  
11 medical needs of prisoners contained implicitly in the  
12 Eighth Amendment compels a government agency, or  
13 division responsible for supplying those medical needs,  
14 to pay for them." In response to this assertion, the  
15 Supreme Judicial Court responded with two words, "We  
16 agree."

17           The opinion below that Revere must be liable  
18 to the hospital is clearly a matter of Federal law and  
19 is clearly derived in the minds of the Supreme Judicial  
20 Court from the Eighth Amendment. There can be no  
21 independent and adequate State law ground to support the  
22 judgment below since the Supreme Judicial Court held in  
23 the first part of the opinion that it would be illegal  
24 for Revere, under the circumstances of this particular  
25 case, to pay Massachusetts General Hospital.

1 Under the law of the Commonwealth,  
2 Massachusetts has strict rules against allowing any form  
3 of contractual recovery against a municipality unless  
4 the prerequisites to a valid contract are in place.  
5 Therefore, the phrase that Mass. General uses in this  
6 context, its implementing rule, is simply a polite way  
7 of trying to reintroduce its theory of an implied  
8 contract, implied contract that requires that Revere pay  
9 the bill of Mass. General.

10 This theory was rejected by the court below.  
11 Therefore, there is no State law ground upon which to  
12 rest the judgment below. Rather the judgment below  
13 clearly rests upon the Supreme Judicial Court's  
14 erroneous interpretation of the United States  
15 Constitution.

16 With respect to the standing issue, I would  
17 suggest to the court that the prudential concerns behind  
18 the standing doctrine ought to operate to deny Mass.  
19 General the right to raise the constitutional rights of  
20 the suspect in the context of this particular case.

21 In this case, based upon the record, no rights  
22 of the suspect were violated, and the only threat, if  
23 indeed there is one, comes from the implied threat of  
24 Massachusetts General Hospital not to treat in future  
25 cases.

1           QUESTION: Mr. Zaleznik, are we in a position  
2 to impose our rules as to standing on the highest court  
3 of the State?

4           MR. ZALEZNIK: In this circumstance, in the  
5 context of this case, Your Honor, this Court is free to  
6 judge by Federal rules of standing, since it is clear in  
7 the court's footnote in the opinion below that it was  
8 applying Federal laws of standing. Therefore, it is a  
9 Federal question that this Court is free to consider.

10           Had they applied State law rules of standing,  
11 then I would agree, Your Honor, the issue would be  
12 foreclosed. But under these circumstances, I think the  
13 issue is open to this Court.

14           QUESTION: Which footnote is it that you rely  
15 on for that?

16           MR. ZALEZNIK: This is footnote No. 7 on pages  
17 26 and 27 of the record appendix.

18           QUESTION: Thank you.

19           MR. ZALEZNIK: The citations are to the  
20 Barrows case and to a treatise on the Federal Courts by  
21 Professor Wright.

22           QUESTION: Of course, they also say in that  
23 footnote that there was no standing question raised or  
24 argued in the briefs and they deem it waived.

25           MR. ZALEZNIK: Yes, Your Honor, but

1 nonetheless submit that the issue is properly before the  
2 Court.

3           The Supreme Judicial Court, when it ruled that  
4 the Eighth Amendment itself contains an obligation to  
5 pay on the part of Revere, went beyond anything that was  
6 argued in the court below. What Mass. General argued in  
7 the court below was that the constitutional duty  
8 involved created the duty upon which to rest an implied  
9 contract.

10           So that they only invoked the Constitution as  
11 creating this duty of the municipality to the hospital,  
12 and then the right to force payment was resting as a  
13 function of implied contract. Therefore, since the  
14 issue was not framed the way the Supreme Judicial Court  
15 framed it and there is no opportunity to raise a  
16 standing question in this fashion, I believe this issue  
17 is still properly before the Court.

18           Even if this Court were to not accept that  
19 contention, I would submit that the issue is properly  
20 before this Court because the Supreme Judicial Court,  
21 although it suggested that the issue was waived,  
22 nonetheless proceeded to decide it. Having decided the  
23 question, the issue is now properly before this Court.

24           QUESTION: Let me ask you a question about  
25 that. Supposing we agreed with you on your standing



1 argument, and we concluded that Mass. General has no  
2 standing to raise the Federal constitutional question.

3 Should we then not ourselves refuse to reach  
4 the merits of the Federal constitutional question, and  
5 merely vacate the judgment and send it back to the  
6 Massachusetts Supreme Judicial Court, and let it  
7 determine whether as a matter of State law there is  
8 standing?

9 I think you are arguing we do not have  
10 jurisdiction to review the merits of the Federal issue.

11 MR. ZALEZNIK: My argument is not an Article 3  
12 argument, Your Honor.

13 QUESTION: Well, but even if it is prudential,  
14 you are saying, as a matter of our own prudential rule,  
15 we should not address the matter.

16 MR. ZALEZNIK: Yes, but --

17 QUESTION: Isn't that like saying that, in  
18 effect, the Massachusetts Court has given an advisory  
19 opinion on a Federal constitutional question?

20 MR. ZALEZNIK: In the context of this  
21 particular case, it was not an advisory opinion, Your  
22 Honor. They clearly decided the question, and if it  
23 were up to this Court, then the Court is free to simply  
24 reverse the judgment below, and there is no need for a  
25 remand in this context.

1                   QUESTION: Supposing the State had a procedure  
2 whereby its Supreme Court could render advisory  
3 opinions, and they were asked to render an advisory  
4 opinion on this very issue. They said, "The bill has  
5 been paid in this case, but we want to set the law for  
6 the future." They said, "As a matter of Federal Eighth  
7 Amendment law, these bills must be paid by the city."  
8 This Court couldn't review such an advisory opinion,  
9 could it?

10                   MR. ZALEZNIK: That is correct, Your Honor,  
11 but in this circumstance the issue of standing was heard  
12 and determined as a matter of Federal law.

13                   QUESTION: Right. But you are saying that we  
14 should reverse their determination of standing. It  
15 seems to me, once we do that, we should not have the  
16 power to go forward, or maybe I miss your argument, and  
17 decide the merits.

18                   MR. ZALEZNIK: At that point, I believe the  
19 judgment should be reversed.

20                   QUESTION: At least he is right.

21                   MR. ZALEZNIK: My only disagreement is whether  
22 or not there should be a remand at that particular stage  
23 to the Supreme Judicial Court.

24                   The only issue that they decided was one of  
25 Federal law, and I believe that there is no need --

1           QUESTION: But you are telling me that they  
2 decided two issues of Federal law. One, the merits; and  
3 two, the standing question.

4           MR. ZALEZNIK: Yes, Your Honor, but they  
5 decided standing simply as a matter of Federal law.  
6 There is no State law of standing intertwined with that  
7 opinion.

8           QUESTION: It is sort of pendant jurisdiction.

9           MR. ZALEZNIK: Excuse me.

10          QUESTION: Sort of a pendant jurisdiction.

11          MR. ZALEZNIK: But it was not raised at any  
12 point in the proceeding --

13          QUESTION: If it wasn't raised, it is not  
14 here.

15          MR. ZALEZNIK: I agree that the only issue  
16 before this Court --

17          QUESTION: It wasn't raised, and the  
18 Massachusetts Supreme Court just went completely off,  
19 what, base, and decided a Federal question which they  
20 had no right to decide, either one of them. Is that  
21 your position, because if that is your position, you  
22 don't win.

23          MR. ZALEZNIK: They had the right to decide,  
24 but we believe that they decided in both circumstances  
25 in an erroneous fashion.

1           Ultimately, the broad issue as to whether  
2 there is any obligation to reimburse the hospital is a  
3 policy question, and this policy question ought to be  
4 directed towards the State legislature or perhaps even  
5 to the Congress, and not to the court. This is a matter  
6 of State law, not constitutional law.

7           I would respectfully submit that there is no  
8 constitutional entitlement to the funds in these  
9 circumstances. Since there is no constitutional  
10 entitlement to reimbursement, I would respectfully  
11 request that this Court reverse the judgment of the  
12 Supreme Judicial Court of the Commonwealth of  
13 Massachusetts.

14           Thank you. I reserve any remaining time to  
15 rebuttal.

16           CHIEF JUSTICE BURGER: Mr. Broad.

17           ORAL ARGUMENT OF MICHAEL BROAD, ESQ.

18           ON BEHALF OF THE RESPONDENT

19           MR. BROAD: Mr. Chief Justice, may it please  
20 the Court. The initial question in this case is in fact  
21 the question of jurisdiction and the question of  
22 standing.

23           The Petitioner, of course, has the burden of  
24 establishing that jurisdiction. Nonetheless, the  
25 Petitioner comes to this Court arguing now that the



1 hospital lacks standing. The hospital suggests to the  
2 Court that on the basis of that allegation and that  
3 argument, the Court should properly dismiss the writ of  
4 certiorari, accepting the Petitioner's claim that there  
5 is no standing in the Federal sense.

6 I suggest that the resolution ought to be to  
7 dismiss the writ and not to reverse the court below,  
8 because, of course, the State court is freer to fashion  
9 a broader rule of standing than the Federal court would  
10 be.

11 QUESTION: But your point contends, as I  
12 understand it, Mr. Broad, that the Massachusetts Supreme  
13 Judicial Court didn't do that. By citing Barrows  
14 against Jackson, they simply followed or intended to  
15 follow the Federal rule of standing.

16 MR. BROAD: I think in order to determine what  
17 the court in fact did, Justice Rehnquist, we might look  
18 very closely at that footnote 7 on page 26 of the  
19 Appendix to which my Brother has already referred. The  
20 footnote consists of two, and only two paragraphs.

21 The first paragraph acknowledges that there  
22 may be a question of standing but finds it waived,  
23 clearly as a matter of State law, citing the applicable  
24 State rule of appellate procedure.

25 My Brother construes the second paragraph as a

1 decision on the Federal question of standing, and I  
2 firmly disagree.

3           The second paragraph starts out, "Furthermore,  
4 standing to litigate constitutional issues is sometimes  
5 granted to persons." The court is making clearly the  
6 observation that it would not be unheard of, as a matter  
7 of jurisprudence, for a third party to have standing in  
8 a case like this, but I find nothing whatsoever in that  
9 paragraph that suggests that the Supreme Court purports  
10 to decide or in fact has decided that issue.

11           Indeed, the two references in the paragraph to  
12 which my Brother has already referred, the two Federal  
13 references, are preceded by a C cite and a CF cite, and  
14 I suggest that is not the way that the court would have  
15 decided the Federal issue, if it purported to do so.

16           So on the basis of that --

17           QUESTION: We have to get out the Blue Book of  
18 citations to decide whether there is an adequate and  
19 independent State --

20           MR. BROAD: I suggest that what the Court has  
21 done is decided it as a matter of State law, Your Honor,  
22 pointing out in passing, and this is not so uncommon for  
23 a State court --

24           QUESTION: Which State law were they passing  
25 on?

1           MR. BROAD: The waiver question, Your Honor,  
2 as a matter of State law.

3           QUESTION: Which State law?

4           MR. BROAD: Whether as a matter of State law,  
5 the question of standing can be waived.

6           QUESTION: You said they were passing on State  
7 law, and I am asking you which State law.

8           MR. BROAD: I am not saying, Your Honor, a  
9 State statute. I am saying a State rule of procedure  
10 and a State rule of waiver.

11          QUESTION: Common law?

12          MR. BROAD: It is in part common law. It is  
13 in part codified in the rules of appellate procedure  
14 16(a)(4) cited on the bottom of page 27.

15          Where the Federal court might properly decide  
16 that a standing issue is jurisdictional and can never be  
17 waived, the State court may properly take a different  
18 approach, and that is exactly what has happened in this  
19 case.

20          In fact, in other cases, the Supreme Judicial  
21 Court has expressly declined to follow Federal rules of  
22 standing. In this case, where the State Court parted  
23 company with the Federal rule, with the Federal  
24 approach, I submit, is on the question of waiver, and  
25 found that that issue had been waived.

1               QUESTION: What makes you think that that is  
2 parting company with the Federal rule?

3               MR. BROAD: Perhaps I have over-spoken, Your  
4 Honor, and it is certainly not essential to my argument  
5 that that would be parting company, just that it is  
6 clearly presented here in the first paragraph solely as  
7 a State law issue.

8               I suggest, therefore, that because it is open  
9 to the State court to adopt a rule of standing that  
10 allows waiver, whether or not the Federal court would  
11 have done the same thing under those circumstances, is  
12 fully appropriate for a State court as a matter of State  
13 law.

14              It would be improper for this Court, with all  
15 respect, to reverse the State court on that ground and  
16 tell the State court that it had to do something  
17 different, that it had to follow a different rule  
18 because perhaps that would be the Federal rule.

19              In the rest of the decision in this case, the  
20 hospital suggests that the State Supreme Court was  
21 recognizing, implicitly or explicitly, certain special  
22 circumstances in Massachusetts that ought to govern the  
23 resolution of this case.

24              My Brother has stood before the Court this  
25 morning -- this afternoon, I am sorry, and announced



1 that this is a question that should be decided as a  
2 matter of policy, and we agree. We think it was decided  
3 as a matter of policy and that the decision below fully  
4 reflects the State policies.

5 In Massachusetts, unlike most states, there is  
6 both a State Rate Setting Commission that sets hospital  
7 rates, that fixes the rates that we can charge, and  
8 there is also a revenue account that places a ceiling, a  
9 limitation on the aggregate gross revenue of a  
10 hospital. So that in two different ways, a hospital's  
11 revenue are severely curtailed by the State.

12 Recognizing that fact, which has received an  
13 incredible amount of publicity in the State, and  
14 recognizing also, as the Supreme Judicial Court did in  
15 the early section of this opinion, that none of the  
16 traditional elements of the State common law would have  
17 provided a payment rule, it was, we submit, fully  
18 appropriate for the Court to go on and ask the obvious  
19 next question, which is, at least, given the current  
20 financial circumstances in the State of Massachusetts  
21 and the fact that hospitals, such as the Massachusetts  
22 General Hospital, have found it necessary to impose, for  
23 example, wage and salary freezes, that some hospitals  
24 have started laying off employees --

25 QUESTION: Is the City of Revere overloaded

1 with money?

2 MR. BROAD: Overloaded with money?

3 QUESTION: Is it?

4 MR. BROAD: I don't know the answer. I

5 suspect the answer is no. But what the City of Revere  
6 is trying to do in this case, Your Honor, is to shift  
7 its burden, its obligation on to the hospital. We think  
8 that is inappropriate.

9 It certainly would be open to the City of  
10 Revere, if it felt it desirable --

11 QUESTION: First we have to know if there is  
12 an obligation to shift, don't we?

13 MR. BROAD: That is true, Your Honor. I think  
14 I heard counsel very clearly start out this afternoon by  
15 acknowledging that there is at least some obligation to  
16 do at least something to provide treatment.

17 I suggest that he stopped too soon in  
18 expressing that obligation, and that, for example,  
19 merely picking up the injured party who was, by the  
20 acknowledgement of the Revere police -- this appears in  
21 the Appendix at page 11, that Revere police came to the  
22 hospital and informed hospital personnel that the  
23 suspect was then under arrest.

24 QUESTION: Are you talking now, Mr. Broad,  
25 about a Federal constitutional obligation?

1 MR. BROAD: A Federal constitutional  
2 obligation. Your Honor, not to be deliberately  
3 indifferent to the medical needs of a person in  
4 custody. I think the State Supreme Court took that  
5 underlying constitutional obligation as essentially  
6 undisputed.

7 Yes, Revere argues a bit about whether the  
8 person was really in custody or not in this case, and  
9 the State court disposes of that rather quickly.

10 QUESTION: Perhaps questions from the Bench  
11 have side-tracked you from what I thought was your  
12 argument that this is basically a State law ground  
13 ultimately that the Supreme Judicial Court has taken. I  
14 had not understood you at this point to be defending the  
15 Federal constitutional basis.

16 MR. BROAD: I think Your Honor understands my  
17 argument correctly and has stated it, in fact, quite  
18 well.

19 All I'm pointing out is that I think in  
20 fashioning the State rule, the State implementing rule,  
21 that the State Supreme Court could legitimately have in  
22 mind the burden of protecting the underlying  
23 constitutional argument.

24 QUESTION: But you are here to defend an  
25 opinion of the State Supreme Court, the highest court,

1 that there is a Federal basis for the obligation, a  
2 Federal constitutional basis for the obligation that you  
3 have talked about; is that not so?

4 MR. BROAD: That is not how I would read the  
5 opinion.

6 QUESTION: What is the Eighth Amendment  
7 discussion about?

8 MR. BROAD: I think, Your Honor, that what the  
9 State Court did was to fashion a rule to protect an  
10 underlying constitutional right, without saying that the  
11 particular implementing rule was itself required by the  
12 Constitution.

13 It is not unusual, Your Honor, to see in cases  
14 a question of remedy, and the essence of structuring a  
15 remedy is, of course, making a choice among various  
16 alternatives that might be open.

17 QUESTION: But wouldn't you think, if it were  
18 an implementing rule that is State-based, assuming that  
19 the Justices of the Supreme Judicial Court of  
20 Massachusetts know how to write opinions as well as  
21 everyone else, that that would have appeared in the  
22 first part of the opinion, where you are talking about  
23 various State law bases for recovery, not as your  
24 opponent has quoted, the first two sentences of the  
25 section called "Eighth Amendment" on 5a, where they say,



1 "The hospital argues the prohibition against deliberate  
2 indifference compels a government agency or division  
3 responsible for supplying those medical needs to pay for  
4 them." Then they say, "We agree."

5           There is no intimation that there is any  
6 bridge there between the constitutional obligation and  
7 the result.

8           MR. BROAD: The transition there, Your Honor,  
9 I agree, may be a bit choppy. If I could refer the  
10 Court to the top of page 29 of the Appendix, and the  
11 bottom of page 28, this is the part of the opinion where  
12 the Court is really getting into the discussion of the  
13 issue as opposed to the preliminaries.

14           The Court says that the person in question was  
15 brought to the hospital as a prisoner -- I am reading  
16 from the bottom of page 28 -- and that Revere has a  
17 legal duty to supply him with necessary medical care.

18           Then it goes on to say: "To ensure the  
19 prisoner's right to medical care." I think that speaks  
20 of implementing, "to ensure medical care, Revere must be  
21 held liable to the hospital." Notice, Your Honor, that  
22 the two citations that follow that are citations to  
23 State cases, not to Federal cases, not to Federal  
24 constitutional cases.

25           So I would suggest that perhaps the Court

1 would not have reached that question if it had not been  
2 concerned with ultimately protecting an acknowledged  
3 Federal constitutional right, but that a State Court  
4 ought to have greater latitude to fashion the means for  
5 protecting the right than perhaps a Federal Court would,  
6 because obviously the intrusion that a Federal Court can  
7 justify into the State sphere is limited, and this Court  
8 has held that repeatedly in cases like *Milliken versus*  
9 *Bradley*.

10 QUESTION: Why couldn't the Court have simply  
11 said that when a policeman, who is not a Federal officer  
12 in Massachusetts, shoots anyone there is an obligation  
13 to take care of their own. That would be totally State  
14 law, wouldn't it?

15 MR. BROAD: That would be.

16 QUESTION: It wouldn't be any of our business  
17 by which gyrations they arrived at that conclusion,  
18 would it?

19 MR. BROAD: But it could be put as a matter of  
20 State law.

21 It could also have been put, that  
22 hypothetical, as a matter of Federal constitutional  
23 law. But the next question is, is it open to a State  
24 Court, as opposed to the Federal Court, to go a step  
25 further and specify the means by which the prisoner's

1 medical treatment is to be guaranteed.

2 Certainly, the State Supreme Court had to  
3 realize that it would have been open to a prisoner whose  
4 constitutional rights were violated to bring an action  
5 under, for example, 1983. In such a case, we might have  
6 expected to see in the State Court repeated inquiry into  
7 the particular special circumstances of each of the  
8 individual cases.

9 QUESTION: What about the Chief Justice's  
10 earlier question that he missed the culprit and shot an  
11 innocent bystander, the same policeman, Revere wouldn't  
12 be responsible for that bill, would it?

13 MR. BROAD: There is no underlying  
14 constitutional obligation to provide care for an  
15 innocent bystander. So I agree, Your Honor, under this  
16 opinion --

17 QUESTION: So the thug gets protection and an  
18 ordinary citizen doesn't get it.

19 MR. BROAD: Generally, Your Honor, when a  
20 person is in custody --

21 QUESTION: It may be in general, but that is  
22 not normal.

23 MR. BROAD: Your Honor, I suggest --

24 QUESTION: That is not generally held.

25 MR. BROAD: In Harris v. McCrea, this Court

1 very clearly held that the government does not in  
2 general have an obligation to provide funding to allow  
3 its citizens to exercise what may otherwise be their  
4 constitutional rights.

5 But there are cases of this Court, and the  
6 cases are legion in the lower Federal courts, in which  
7 the State has clearly been found to have an obligation  
8 and an obligation to pay to ensure the constitutional  
9 rights of a very limited class of people, and I am  
10 talking about those people who are in State custody, in  
11 State institutions or in State schools for people who  
12 are mentally disabled.

13 QUESTION: But tell me what your argument is.  
14 If I heard you correctly, you said there are a multitude  
15 of cases in Federal District Courts on that, and this is  
16 a State Court decision.

17 MR. BROAD: That is correct.

18 QUESTION: Not a Federal Court decision, which  
19 is the point we have been trying to get through to you.

20 MR. BROAD: I suggest that anything, Your  
21 Honor --

22 QUESTION: You say that it is no different.

23 MR. BROAD: I suggest, if anything, the State  
24 court ought to have greater deference and greater  
25 opportunity to fashion the rule than a Federal Court



1 would.

2 Yes, this is clearly a State Court decision.

3 If this were a Federal Court decision, then I think this  
4 Court would be required to review it quite closely and  
5 carefully.

6 QUESTION: You had better stick to this one,  
7 and not try to decide other ones.

8 MR. BROAD: I think that would be the case if  
9 it were a Federal Court decision, because the Federal  
10 Court would have had to limit carefully its intrusion  
11 into State affairs. But in a State Court decision, that  
12 is not the case.

13 QUESTION: Mr. Broad, may I ask you a question  
14 about the opinion that begins the Eighth Amendment  
15 discussion and has the footnote 7 about waiver in it,  
16 and then they say, "We agree." The argument, "The  
17 hospital argues that the prohibition against deliberate  
18 indifference," and so forth, "includes an obligation to  
19 pay."

20 Your opponent, as I understood his argument,  
21 said that the reason there shouldn't be waiver, as the  
22 Court says in the footnote, is that you really didn't  
23 make the argument that the Massachusetts Court said you  
24 made. Is that correct?

25 MR. BROAD: I was not trial counsel, Your

1 Honor, so I don't know what happened at that argument in  
2 the case. But in reading the brief, I think it may be,  
3 in all candor, a little bit unclear exactly what  
4 argument was made.

5 It is clear that the hospital raised the  
6 Eighth Amendment, I think correctly it should have been  
7 the 14th Amendment, I would probably say, with an idea  
8 of alerting the State Court to the fact that there was  
9 an underlying responsibility --

10 QUESTION: But he says the argument was that  
11 the Eighth Amendment created a duty to take him to the  
12 hospital, but that gave rise an implied contract to pay,  
13 and that as of State law you can't have such an implied  
14 contract.

15 MR. BROAD: That is not stated at least so  
16 clearly in the brief, Your Honor, to be able to  
17 determine which way it came down.

18 I would suggest that consistent with the  
19 opinions of this Court, insofar as it may not be  
20 entirely clear whether we have a Federal law decision, a  
21 State law decision, or some amalgam intertwining the  
22 two, that it would be appropriate for this Court to  
23 remand the case to the State Supreme Court under a  
24 Minnesota versus National T approach, and suggest  
25 respectfully that the State Court might clarify that

1 issue, because as this Court has observed --

2 QUESTION: That way it stands on a State Court  
3 opinion, which gives the State Court the right to decide  
4 a Federal standing point.

5 MR. BROAD: I suggest, Your Honor, that the  
6 Federal --

7 QUESTION: Doesn't it?

8 MR. BROAD: I don't believe, with all respect,  
9 that the Federal standing question was decided in this  
10 case. It may be that we are reading that note  
11 differently, but I think it was decided --

12 QUESTION: But there is a possibility.

13 MR. BROAD: That might also be.

14 QUESTION: Should we leave that possibility  
15 there?

16 MR. BROAD: You might also -- If it is unclear  
17 to the Court what the basis was for that section of the  
18 decision, it might also be remanded under a national --

19 QUESTION: Frankly, it is not unclear to me,  
20 but I can only speak for one.

21 MR. BROAD: I understand.

22 I would like to address, at least briefly,  
23 some questions that were raised by the Court in the  
24 City's argument, the question of other obligations that  
25 might exist for the provision of care by the hospital.

1           My Brother made a reference to a State law, by  
2 which I assume he meant the patient's bill of rights in  
3 Massachusetts -- Massachusetts' general law is Chapter  
4 111 Section 70(e) -- which in fact did not become  
5 effective until the year following the events that gave  
6 rise to this case and, therefore, as at least a  
7 technical matter, has no bearing here. But I would like  
8 to read the first words of the relevant section of that  
9 part of the statute that talks about the right of a  
10 hospital patient.

11           It gives the hospital patient the right to  
12 prompt lifesaving treatment, not emergency treatment,  
13 prompt lifesaving treatment in an emergency. Clearly  
14 the State Legislature in that statute has cut out a much  
15 more circumscribed area of medical care than my Brother  
16 would have suggested, I think, in his argument.

17           In our brief, we have also cited relevant  
18 sections from the Medicare Hospital Manual at footnote  
19 58 on page 34 of the brief, where the Federal  
20 government, at least an agency of the government, very  
21 clearly takes the position that medicare payment may not  
22 be made for services provided to prisoners because the  
23 State or other governmental agency is already  
24 responsible for their medical care.

25           In general, the position of the hospital is,



1 first, that the Court ought not reach the merits because  
2 it should find that the State Court was free to have  
3 decided the case under State rules of standing, but  
4 that, as argued by the Petitioner, this Court ought not  
5 to proceed to decide this case, the standing question on  
6 the merits, should accept the allegation of Petitioner,  
7 and should dismiss the writ for lack of standing.

8           But if the Court were inclined to go further,  
9 we suggest, first, that the decision is not a  
10 constitutional decision, but is an implementing  
11 decision. While the State Courts do not have the  
12 authority to misinterpret the Constitution, they should  
13 clearly be allowed the authority to craft a remedy that  
14 might be somewhat broader than a Federal Court could do  
15 in seeking to protect the underlying constitutional  
16 rights, in order to protect in advance and make it  
17 unnecessary for a prisoner later to bring an action for  
18 damages, clearly a less satisfactory alternative.

19           Finally, insofar as there may be some  
20 disagreement among Members of the Court, or some  
21 uncertainty in the mind of the Court as to the exact  
22 basis of the decision on either point, whether State or  
23 Federal, the hospital suggests in conclusion that that  
24 it would be more appropriate to ask the State Court what  
25 was intended than to presume to tell it.

1 CHIEF JUSTICE BURGER: Do you have anything  
2 further, Mr. Zaleznik?

3 REBUTTAL ARGUMENT OF IRA H. ZALEZNIK

4 ON BEHALF OF THE PETITIONER

5 MR. ZALEZNIK: Just one point, Your Honor.

6 My Brother points to a single sentence at page  
7 29 of the Appendix and at page 779 of the Opinion as  
8 justifying reading the court below as creating a State  
9 implementing rule, but that sentence was followed by two  
10 sentences saying that inadequate funding will not excuse  
11 the deprivation of constitutional rights, and that even  
12 though a payment may be in violation of a State or local  
13 law, it will not avail Revere of any relief.

14 So that it is clear that what the court below  
15 did was to base its ruling on an erroneous  
16 interpretation of the Federal United States  
17 Constitution, and not any sort of State law implementing  
18 remedy.

19 Thank you very much, Your Honor.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
21 The case is submitted.

22 (Whereupon, at 2:52 p.m., the court adjourned,  
23 to reconvene at 10:00 a.m., Tuesday, March 1, 1983.)  
24  
25

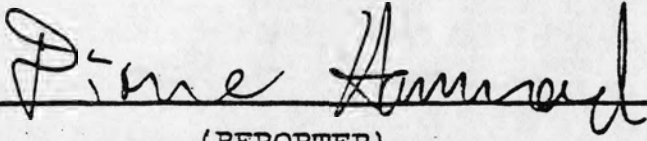
CERTIFICATION

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: CITY OF REVERE, Petitioner v. MASSACHUSETTS GENERAL HOSPITAL # 82-63

---

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

BY

  
(REPORTER)

RECEIVED  
SUPREME COURT U.S.  
MARSHALS OFFICE

903 MAR 8 AM 2 37