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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-727

**TITLE** LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE,  
ET AL., Petitioners v. HERSEL CHOATE, ET AL.

**PLACE** Washington, D. C.

**DATE** October 1, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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LAMAR ALEXANDER, GOVERNOR OF THE :  
STATE OF TENNESSEE, ET AL., :  
:  
Petitioners : No. 83-727  
:  
v. :  
:  
HERSHEL CHOATE, ET AL. :  
:  
- - - - -x

Washington, D.C.

Monday, October 1, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:05 a.m.

APPEARANCES:

W. J. MICHAEL CODY, ESQ., Attorney General of Tennessee,  
Nashville, Tenn.; on behalf of the Petitioners.

PAUL M. BATOR, ESQ., Deputy Solicitor General, Department  
of Justice, Washington, D.C.; as amicus curiae.

G. GORDON BONNYMAN, JR., ESQ., Nashville, Tenn.; on  
behalf of the Respondents.

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

2 CHIEF JUSTICE BURGER: Mr. Attorney, General,  
3 I think you may proceed whenever you're ready.

4 ORAL ARGUMENT OF W. J. MICHAEL CODY, ESQ.,  
5 ON BEHAIF OF THE PETITIONERS

6 MR. CODY: Mr. Chief Justice, and may it  
7 please the Court:

8 This is a case involving the interpretation  
9 and application of Section 504 of the Rehabilitation Act  
10 of 1973, which prohibits discrimination against the  
11 handicapped in federally funded programs. At issue is  
12 whether the Tennessee Medicaid program discriminated  
13 against the handicapped by reducing the number of  
14 inpatient hospital days provided each Medicaid recipient  
15 in a fiscal year from 20 until 14.

16 The district court ruled that the change did  
17 not violate Section 504. A three-judge panel of the  
18 Sixth Circuit in a split decision found a prima facie  
19 violation of Section 504, reversed and remanded in order  
20 to allow the state to rebut the prima facie case.

21 The change which the Tennessee Medicaid  
22 program took in this case was an across-the-board  
23 deduction in inpatient hospital days from 14 -- from 20  
24 days to 14 days. It excluded no one. It applied  
25 equally to the handicapped as well as the



1 nonhandicapped. This change was necessary because the  
2 Tennessee constitution prohibits deficit spending, and  
3 our program was in a condition that it would run out of  
4 money unless certain changes were made in order to  
5 reduce the financial commitment of the state. And this  
6 change itself was made along with others which made the  
7 budget possible to have the Medicaid program run  
8 throughout the year and serve the public recipients.

9 This change, the state submits, was authorized  
10 by the Medicaid statutes and the regulations. Congress  
11 has given the states discretion in setting benefit and  
12 service levels. There are two restrictions that  
13 Congress places on those levels of services. First, the  
14 level must be sufficient in amount, in duration, and in  
15 scope in order to achieve the purpose of the program;  
16 and secondly, the level must be set equally for everyone.

17 In addition to the Medicaid law, the State of  
18 Tennessee submits that the change is consistent with the  
19 purpose of Section 504 and the specific regulations  
20 under Section 504 which refer to benefits and services.

21 The purpose of Section 504, we submit, is the  
22 evenhanded treatment of handicapped, not affirmative  
23 action in order to overcome disabilities which are  
24 caused by handicapped.

25 In the regulations which particularly refer to

1 benefits and services, the regulation says that services  
2 are required to be equally effective, but in order to be  
3 equally effective, the benefits are not required to  
4 produce the identical result or level of achievement for  
5 the handicapped and the nonhandicapped persons, but must  
6 afford handicapped persons equal opportunity to obtain  
7 the same result.

8 In order to violate Section 504, we submit, we  
9 would have had to extend a lesser number of inpatient  
10 hospital days to the handicapped than to the  
11 nonhandicapped. The district court recognized this and  
12 found that there was no discrimination under 504 when an  
13 equal number of hospital days were provided. The court  
14 of appeals, however, felt that a prima facie case was  
15 made because on the statistics introduced, the 14 days  
16 limitation was unable to meet the hospital needs of the  
17 handicapped to the same extent as the nonhandicapped.

18 So even if an effects test is applied, a  
19 violation or a prima facie violation of Section 504  
20 requires a finding that the handicapped were affected  
21 unequally with respect to some program benefit. Here,  
22 the benefit which the state is providing, the 14 days of  
23 inpatient hospital care, is provided equally to all  
24 eligible for the program.

25 QUESTION: I'd like to ask, General Cody, if

1 an effects test is appropriate in this case. How could  
2 you -- how could you have the finding about whether the  
3 treatment is equal or unequal without letting it go to  
4 the hearing? In other words, is a prima facie case made  
5 out on the facts such as existed here with the  
6 resolution of the effect to be made thereafter?

7 MR. CODY: Justice O'Connor, we do not believe  
8 that that would be the result, and it's the error we  
9 think that the court of appeals made. They -- we  
10 contend that the benefit which is provided in this  
11 service is a certain number of inpatient hospital days.  
12 And I might add as the Solicitor General points out in  
13 his brief, if you look at the studies, the  
14 disproportionate result is even greater at 19 days than  
15 it is at 14, so the cut -- the figures would show that  
16 less handicapped needs proportional to nonhandicapped  
17 are met at 19 days than at what we cut it back to at 14.

18 But what we think the statute does is it  
19 provides equal access to the program, to the benefits,  
20 equal opportunity to receive those benefits, and not an  
21 equal result. And that's what these figures really are  
22 dealing with; that it takes more hospital days to have  
23 certain handicappeds reach full recovery or to get all  
24 of their hospital benefits.

25 QUESTION: Do you -- do you agree that the

1 case decided by this Court last term, Consolidated Rail  
2 v. Darrone, if that is the correct pronunciation,  
3 indicates that Congress incorporated into Section 504 an  
4 effects standard -- in other words, the standard adopted  
5 by HHS regulations?

6 MR. CODY: Justice O'Connor, I do not believe  
7 that it did, and we -- we have made an argument in our  
8 brief that --

9 QUESTION: But there certainly is language to  
10 that effect in the opinion, isn't there?

11 MR. CODY: Yes, there is, but I think the  
12 Darrone regulation --

13 QUESTION: So was that just wrong, in your  
14 view?

15 MR. CODY: No. I think that -- that Darrone,  
16 the regulations there relate to a different situation  
17 than we have here. Those are specific employment  
18 regulations. In the benefit and services regulation we  
19 have argued in our brief, first, that if you go back to  
20 Title VI or Section 504 and look at Bakke and this  
21 Court's majority opinion in Guardians, that Section 504,  
22 as Darrone indicates, is a mirror image of Title VI, and  
23 that Title VI only prohibits intentional discrimination.

24 Justice Stevens, I think, went further,  
25 however, and said if -- if that's correct, the



1 regulations can provide an effects test even if the  
2 statute does not; but he qualified that to say if the  
3 regulations are in furtherance of the statute, and  
4 that's where we think there is a problem here in  
5 applying effects regulations to benefits and services  
6 afforded.

7 The handicapped are not a homogenous group of  
8 people. There are many different subtypes of handicaps  
9 that require tremendous social services. And in this  
10 particular situation, any time that you have users of  
11 social welfare programs such as the handicapped in this  
12 case, if you place any limits on the benefit, you're  
13 going to have this disproportionate result occur. But  
14 we contend that that disproportionate result is not  
15 disparity or discrimination within the meaning of -- of  
16 Section 504.

17 And the important consideration, I think, for  
18 the Court to see is that 504 requires equal access to  
19 the services. As the respondent argues, is a person  
20 excluded from the program when he runs out of the 14  
21 days? Isn't that lack of access to the program, or have  
22 we excluded that person from the program?

23 I don't think that we have when it is merely a  
24 limit on the program and one which is consistent. When  
25 that service runs out or the benefit runs out, it's just

1       been used up, and it doesn't mean that that person is  
2       excluded from the program.

3               If this case -- if we had to go to a prima  
4       facie finding just on the basis of disproportionate  
5       results that the handicapped didn't receive as much  
6       health care as they might need and nonhandicapped did,  
7       then you would allow litigants every time that any  
8       change is made in a social welfare program such as this,  
9       that they could come in and if they are greater users,  
10      they would show this disproportion, and the state would  
11      have to litigate each and every one of those situations,  
12      and you would find that a very uncertain program would  
13      be present.

14             QUESTION: You -- you say that -- that you  
15      should win because there's no discrimination. This is  
16      really not much different from what the United States  
17      argues, is it? They just say that even if you take an  
18      effects test, there's no difference in effect.

19             MR. CODY: That's -- that's right, Justice  
20      White. We -- we have only --

21             QUESTION: Isn't that just as good a way of  
22      putting it?

23             MR. CODY: I think it's a better way of  
24      putting it. I think the Solicitor General has put it  
25      better. And you never even need to reach these

1 questions, because under the alternative argument there  
2 is no discrimination.

3 CHIEF JUSTICE BURGER: Mr. Bator.

4 CEAL ARGUMENT OF PAUL M. EATOR, ESQ.,

5 AS AMICUS CURIAE

6 MR. BATOR: Mr. Chief Justice, and may it  
7 please the Court:

8 The Government's central concern here is to  
9 show why the particular version of the discriminatory  
10 impact theory that was adopted by the court of appeals  
11 in this case, why that version of this theory is really  
12 quite radically wrong. And for that purpose I'll start  
13 out by emphasizing that this case is not simply about  
14 the validity of the 14-day rule, or about the validity  
15 of a reduction from 20 to 14 days.

16 Suppose Tennessee today abandoned its 14-day  
17 rule, went back to its previous 20-day rule. Would this  
18 quarrel be over? Not at all. It's perfectly clear from  
19 the record that a rule that limits reimbursements for  
20 inpatient hospital care to 20 days has a more severe  
21 differential impact on the handicapped than the 14-day  
22 rule; that is to say, the handicapped form a larger  
23 percentage of those who need more than 20 days of  
24 hospitalization than of those who need 14 days. In  
25 fact, the odd thing about this case is that the higher

1 the Tennessee limit went, if Tennessee had a 60-day  
2 limit, we might get to the point where those who have a  
3 -- are excluded by such a limit may constitute 100  
4 percent of the people with chronic and handicapped  
5 condition.

6 Or take the alternative that the court of  
7 appeals seemed to find attractive, which is to limit not  
8 the number of days of inpatient care, but the number of  
9 admissions. It seems to the Government clear that that  
10 rule would be incredibly vulnerable to the theory of the  
11 court of appeals, because it would cut against all of  
12 those who suffer from those illnesses that need very  
13 frequent hospitalizations; that is, people who suffer  
14 from chronic and therefore handicapping conditions.

15 And the respondents' own solution here, which  
16 is to have the limit set in terms of the number of days  
17 per admission, would that rule not have a disparate  
18 impact on the handicapped under the theory of the court  
19 of appeals? We don't think so. I think if you set a  
20 limit of three days in the hospital for an appendectomy,  
21 or six days in a hospital for a heart bypass, it seems  
22 clear that that's most likely to be insufficient for  
23 those who suffer from some other complicating chronic or  
24 handicapping condition.

25 So the point here is that the court of



1 appeals' version of the discriminatory impact is fatal  
2 to any across-the-board attempt to limit or allocate  
3 Medicaid funds. Any funding limit or allocation is  
4 going to entail some kind of differential in terms of  
5 result on some members of some protected group. That's  
6 why we think that there has to be something very  
7 fundamentally wrong with the theory of the court of  
8 appeals, and in our brief we try to clarify what has  
9 gone wrong here.

10 We think that analytically what has gone wrong  
11 is that the court of appeals tried to solve the question  
12 of what is discrimination without first analyzing what  
13 is the relevant program or activity or benefit as to  
14 which 504 prohibits discrimination. We submit that that  
15 question cannot be answered by reference to 504. That  
16 question must be solved by looking at what program  
17 Tennessee has set up here and what program the Medicaid  
18 statute funds.

19 The -- Tennessee is free to set up whatever  
20 program it wants to. That program must, of course, be  
21 harmonious with the federal subsidy statute, here the  
22 Medicaid Act. Now, this is the matrix as to which 504  
23 applies, and here we think the relevant program or  
24 benefit which has been undertaken and subsidized is not  
25 the satisfaction of health needs, but the provision of a

1 given level of health services.

2 Now, the other point I'd like to make, Your  
3 Honors, is that at a conceptual level what is troubling  
4 here is that the court of appeals' theory of  
5 discrimination simply dissolves all possible  
6 distinctions between nondiscrimination on the one hand  
7 and a major affirmative action program to aid the  
8 handicapped on the other.

9 QUESTION: Mr. Bator --

10 MR. BATOR: That's the very --

11 QUESTION: -- Can I ask you one question you  
12 answer whenever it's convenient in your argument? Could  
13 you state a test of discrimination under this statute  
14 that -- in -- in the shorthand fashion in some way that  
15 I could tell whether it applies to this case or not?

16 MR. BATOR: We feel, Your Honor, that insofar  
17 as the statute incorporates an impact test at all -- a  
18 question which we, the government, has elided here --  
19 but on that assumption, assuming that no intentional  
20 discrimination needs to be proved, that a discriminatory  
21 impact within the meaning of 504 exists only if the  
22 effect of the practice adopted by the state bars the  
23 handicapped from equal access to or an equal opportunity  
24 to get the benefits of the program.

25 Now, that may sometimes require special

1 measures for the handicapped.

2 QUESTION: When you say bars the handicapped,  
3 do you mean bars an individual handicapped person or the  
4 class of persons who fit the statutory definition of  
5 handicapped? Which are you saying?

6 MR. BATOR: Well, I think either or --

7 QUESTION: Because here it clearly seems --

8 MR. BATOR: -- Either or both. I think that  
9 if the practice is one which has the effect of saying a  
10 rampless hospital does not give the handicapped equal  
11 access to Medicaid funds. The Lau case establishes --

12 QUESTION: Intentional or unintentional?

13 MR. BATOR: We are assuming that with that --  
14 with respect to that kind of practice, intention need  
15 not be shown. That's the assumption on which we write  
16 our brief. But that's not this case, because there is  
17 no barring of the handicapped from access to this  
18 program or from an equal opportunity, unless you reduce  
19 equal opportunity again to what we think is an  
20 unacceptable form of formulation, which is that there  
21 must be an equal satisfaction of all health maintenance,  
22 that the result has to be exactly the same.

23 Now, as I say, we do admit that special  
24 measures for the handicapped, as the Lau case shows, may  
25 sometimes be necessary in order to create equal access

1 or an equal opportunity; but again, that is not this  
2 case.

3 I also want to reassure the Court about --

4 QUESTION: May I just ask one -- one other?  
5 Equal opportunity to get what?

6 MR. BATOR: Equal opportunity to receive the  
7 benefits that Tennessee has provided, which is a given  
8 measure --

9 QUESTION: Well, that's -- that's --

10 MR. BATOR: -- Of health care.

11 QUESTION: It's not equal opportunity to get  
12 the health care they need. Obviously you lose if that's  
13 the case. It's equal opportunity to get what Tennessee  
14 offers, as I see it.

15 MR. BATOR: That form of words, Justice  
16 Stevens, makes the word "opportunity" totally  
17 inoperative.

18 QUESTION: And if you say equal opportunity to  
19 get what they've offered, it seems to me you  
20 automatically win.

21 MR. BATOR: Equal opportunity to take what  
22 they've offered and that the federal government has  
23 chosen to subsidize. Now, that means that the practice  
24 or measure adopted by Tennessee must satisfy the  
25 reasonableness and also the equality standards of the



1 Medicaid Act, which do very carefully provide that equal  
2 provision with respect to scope, amount, et cetera, of  
3 service is required. So it is not the case that  
4 Tennessee here is wholly free to sort of gerrymander the  
5 handicapped out of this statute. That is not this case.

6 We'll reserve the rest of our time.

7 CHIEF JUSTICE BURGER: Mr. Bonnyman.

8 ORAL ARGUMENT OF G. GORDON BONNYMAN, JR., ESQ.,

9 ON BEHALF OF THE RESPONDENTS

10 MR. BONNYMAN: Mr. Chief Justice, and may it  
11 please the Court:

12 Let me say first what this case is not about.  
13 It is not about whether the State of Tennessee can  
14 reduce its Medicaid program or any other  
15 federally-assisted program. The case is not about  
16 whether the state has to resort to affirmative action to  
17 satisfy Section 504. The case is simply whether when it  
18 does impose a reduction in social program it can do so  
19 in a manner which disproportionately imposes upon the  
20 handicapped or any other protected group a grossly -- in  
21 this case grossly disproportionate burden of bearing the  
22 brunt of that cutback.

23 QUESTION: How many days would it be required  
24 -- would there be required to produce the result that  
25 you argue for?

1 MR. BONNYMAN: Your Honor, I think the record  
2 is not -- the record is not clear, but it suggests that  
3 an annual limit itself is problematic; that the -- the  
4 evidence that was produced below suggests that -- it  
5 doesn't just suggest; it is very clear that we were  
6 talking about a limitation that the State of Tennessee  
7 employs that very few other states employ, and that  
8 there are a range of other ways of defining the  
9 service. And I think this is critical. What is it that  
10 the Medicaid program funded by Congress is designed to  
11 give? And what it is designed to do if you look at the  
12 Medicaid Act itself is hospitalization.

13 Now, the state and the Solicitor General --

14 QUESTION: Mr. Bonnyman, I think General Cody  
15 and the Solicitor General take the position that if your  
16 position is sustained, any across-the-board reduction in  
17 hospital services would at least be subject to a prima  
18 facie finding and an individualized hearing in court as  
19 to whether it could be sustained.

20 Now, do you agree with that?

21 MR. BONNYMAN: I do not agree, Your Honor, and  
22 -- and I think --

23 QUESTION: Okay. Now, what -- what kind of an  
24 across-the-board reduction could Tennessee have made in  
25 this case? Could it have gone from 20 days to 18 days?

1 MR. BONNYMAN: No. Again -- again, Justice  
2 Rehnquist, I think if you look at the evidence regarding  
3 an annual limit on the number of days -- and keep in  
4 mind, there's nothing in the Medicaid Act under which  
5 these -- these services are provided that enshrines an  
6 annual limit on the number of days. If you look at that  
7 particular method of limiting the care, it is probably  
8 problematic.

9 QUESTION: Well, when you say problematic, you  
10 mean bad under the Sixth Circuit's decision.

11 MR. BONNYMAN: Yes, Your Honor, I do.

12 QUESTION: Now, would that be true if  
13 Tennessee imposed an initial limitation of 20 days for  
14 the first time if it had had no limitation before?

15 MR. BONNYMAN: I think that -- I think that is  
16 -- is true, Your Honor. On the record in this case --  
17 and I should say preliminarily that -- that the -- that  
18 the record is uncertain, as we point out in our -- in  
19 our brief, reply brief, because of the number of changes  
20 that have taken place in the program since it's been on  
21 appeal.

22 QUESTION: Well, now, how -- how about if --  
23 the court of appeals said, didn't it, that the --  
24 Tennessee could have gotten by with limiting the number  
25 of visits per year?

1 MR. BONNYMAN: Yes, Your Honor. That,  
2 frankly, is -- is incorrect.

3 QUESTION: Yes. You don't agree with that, do  
4 you?

5 MR. BONNYMAN: No. I think that what -- and  
6 we are not proprietary about the particular alternative  
7 that we put on evidence.

8 QUESTION: Well, but I'm trying -- I'm trying  
9 to find out from you exactly what the state might have  
10 done without having the court of appeals decide it if it  
11 had to go to court and sustain this on a hearing. How  
12 about the number of days per admission?

13 MR. BONNYMAN: That would not be problematic,  
14 Your Honor. A -- a-- a limit that is based -- that many  
15 other states use of screening --

16 QUESTION: Well, but -- but the fact that many  
17 other states use -- use it certainly wouldn't insulate  
18 it from the court of appeals' reasoning in this case.

19 MR. BONNYMAN: No, Your Honor, but I think --  
20 I only point to the experience of other states to make  
21 the point that it is feasible. And if you -- if you  
22 look at the way this annual limit operates, it operates  
23 -- we are not talking about degree; we are talking about  
24 kind. At a certain point in the fiscal year these  
25 people, overwhelmingly handicapped, are -- are



1 absolutely barred from the hospital.

2 QUESTION: But that's true of any -- any limit  
3 on days in the hospital, isn't it?

4 MR. BONNYMAN: Any annual limit on the number  
5 of days in the hospital. That is not true, Your Honor,  
6 with regard to most of the ways of calculating the  
7 hospitalization benefit afforded by this --

8 QUESTION: Well, supposing we turn to number  
9 of days per admission. Now, couldn't some showing be  
10 made in all probability that particular people, perhaps  
11 with different handicaps than those who made their  
12 showing in this case, would be discriminated against, in  
13 your view, by limiting the number of days per admission;  
14 the kinds who once they have admission perhaps need a  
15 fairly long stay in the hospital?

16 MR. BONNYMAN: Well, Your Honor, that may be  
17 why the Sixth Circuit said we had only established a  
18 prima facie case, and it ought to be remanded for that  
19 sort of justification, if it exists to be offered.

20 QUESTION: Well, but, I -- I'm not talking  
21 about the -- the plan that Tennessee actually went with  
22 here. I'm talking about what I thought was your  
23 submission of a proper plan, which would limit the  
24 number of days per admission.

25 MR. BONNYMAN: With no limit on the number of

1 admissions.

2 QUESTION: Yes.

3 MR. BONNYMAN: Well, I think our point there  
4 is that if you look at the way -- if you look at the  
5 expert testimony about the way the hospitals respond to  
6 these limits and the way Medicaid recipients gain  
7 admission to the hospital, that would afford access to  
8 hospitalization, as would the host of other alternatives  
9 used by other states.

10 QUESTION: But wouldn't it discriminate  
11 against some types of handicapped people who need fairly  
12 extensive stay in the hospital once they get admitted?

13 MR. BONNYMAN: Well, the -- the regulations,  
14 Your Honor, the HHS regulations on which we rely do not  
15 -- and I think this is very important -- do not, as the  
16 Solicitor General suggests we are arguing, guarantee an  
17 equal result. You couldn't legislate an equal result in  
18 terms of health care even if you wanted to.

19 QUESTION: Well, then you reject that part of  
20 the court of appeals' opinion, I take it.

21 MR. BONNYMAN: No, Your Honor. I think the  
22 court of appeals' decision needs to be read more  
23 carefully than -- than the way it is being read by the  
24 Government. And the court of appeals said only what the  
25 regulations which were upheld in the Darrone case say,

1 and that is not that there have to be equal results, but  
2 that there has to be an equal opportunity to achieve the  
3 benefit for the results afforded by the program.

4 QUESTION: Well, doesn't that depend on how  
5 you define benefit?

6 MR. BONNYMAN: Exactly, Your Honor.

7 QUESTION: Well, if you define the benefit as  
8 medical services, how can you prevail?

9 MR. BONNYMAN: Well, I think if you define it  
10 in terms of hospital services -- and I think that's the  
11 correct way to define it, because that's the way the  
12 Medicaid Act defines it -- the state, after all, is not  
13 free to go out and make up another definition. If you  
14 define it in terms of hospital services, then what that  
15 means in terms of equal opportunity to gain the benefits  
16 of that service is an equal opportunity to gain  
17 admission to the hospital to receive that care.

18 QUESTION: Mr. Bonnyman?

19 MR. BONNYMAN: Yes, Your Honor.

20 QUESTION: Can I get back to the Chief  
21 Justice's question? How many days are you opting for?

22 MR. BONNYMAN: Your Honor, we would suggest on  
23 the record that there are probably -- that this -- this  
24 basic way of casting the coverage probably on the  
25 evidence adduced below -- and again, that evidence may

1 have changed with the changes in the program -- that  
2 that particular way of casting the coverage is probably  
3 not acceptable under 504. That still leaves an array of  
4 alternatives available.

5 QUESTION: Let me be specific.

6 MR. BONNYMAN: Yes, Your Honor.

7 QUESTION: Using the figures 1, 2, 3, 4, how  
8 many days?

9 MR. BONNYMAN: We think that probably none of  
10 those days would be acceptable.

11 QUESTION: Well, let me put it this way. How  
12 many more days than a nonhandicapped person is entitled  
13 to is a handicapped person?

14 MR. BONNYMAN: No more days, Your Honor,  
15 because --

16 QUESTION: Well, what are you arguing about?

17 MR. BONNYMAN: Well, what we are arguing about  
18 is that -- that there are -- and that's the whole  
19 problem with this particular method that Tennessee and  
20 -- has chosen, because we are not asking for more days  
21 for the handicapped and the nonhandicapped. We are  
22 simply asking for a result which is fair in effect --

23 QUESTION: Like what?

24 MR. BONNYMAN: -- As well as in form.

25 QUESTION: Like what?

1 MR. BONNYMAN: Like, for example --  
2 QUESTION: I mean in words. What would the  
3 orders say that you want?  
4 MR. BONNYMAN: It -- it --  
5 QUESTION: Now, the handicapped person is  
6 entitled to blank days?  
7 MR. BONNYMAN: No, Your Honor. What we are  
8 looking --  
9 QUESTION: The handicapped person is entitled  
10 to more consideration than another person?  
11 MR. BONNYMAN: No, Your Honor.  
12 QUESTION: Well, what do you want the  
13 handicapped person to have that he doesn't already have,  
14 which according to the state is equal access?  
15 MR. BONNYMAN: Well, according to the state --  
16 QUESTION: I'm not arguing that; that's what  
17 the state's arguing.  
18 MR. BONNYMAN: Right. The state can only make  
19 that claim by ignoring the reality of what happens once  
20 you reach the 14 days, which is you simply do not -- and  
21 we're talking about lifesaving care, as the record  
22 indicates -- we do not have access to that care at day  
23 14 -- after day 14. And what --  
24 QUESTION: Was that brought before the  
25 legislature, a committee or anybody?



1 MR. BONNYMAN: Pardon me?

2 QUESTION: Did the handicapped people appear  
3 before anybody when these rules were set up?

4 MR. BONNYMAN: There was a duly constituted  
5 Medicaid advisory committee which was comprised of  
6 patients and representatives and consumers, and -- and  
7 it roundly condemned this particular -- this particular  
8 cutback, and the state legislature has said it makes no  
9 sense because of its impact on hospitals.

10 QUESTION: Did the state legislature hold  
11 hearings?

12 MR. BONNYMAN: It did, Your Honor.

13 QUESTION: It did not hold hearings?

14 MR. BONNYMAN: It did hold hearings after the  
15 fact, and -- and we cite a legislative finding there  
16 that the effect of this particular way of cutting has  
17 been --

18 QUESTION: Was there anything in the hearings  
19 that shows that the state intended to treat handicapped  
20 people differently from others? Is there any word in  
21 that?

22 MR. BONNYMAN: No, Your Honor. And -- and  
23 that brings us to the nature of handicapped  
24 discrimination and the -- the reason why 504, if it is  
25 not construed to reach discriminatory impact absent

1 intent, is simply going to be meaningless; because the  
2 nature -- we do not have a history of people burning  
3 crosses on the lawns of the handicapped or painting  
4 swastikas on the sides of rehabilitation centers.

5 QUESTION: Well, what does burning crosses on  
6 the lawn got to do with medical treatment?

7 MR. BONNYMAN: Well, we would say in this case  
8 nothing, Your Honor. I mean that's my point; that --  
9 that we are not talking about malevolence. We are  
10 talking about simple obliviousness. The -- the state  
11 was very candid in saying we never thought about the  
12 impact of this on the handicapped, never gave it a  
13 moment's thought, and we don't have to. We don't have  
14 to.

15 QUESTION: Well, even assuming an effects test  
16 is incorporated, that doesn't mean you necessarily  
17 prevail, because if the Solicitor General is correct,  
18 you don't look at the results; you look at the  
19 opportunity for a particular medical service.

20 MR. BONNYMAN: Well, I -- I think critical to  
21 the -- to the Solicitor General's position are two  
22 fallacies. One is a characterization of our argument  
23 and the court of appeals' decision as mandating equal  
24 results. And again, we are not asking for that. We are  
25 only asking for what the regulations mandate, which is

1 an equal opportunity.

2 If -- if someone, for example, is quadriplegic  
3 and has pneumonia, as is common among -- commonly occurs  
4 among people who are quadriplegic, goes to the hospital  
5 in June, the chances are he's not going to be admitted.  
6 If he is not handicapped, the chances are very likely  
7 that he will be.

8 QUESTION: Well, you're equating the benefit  
9 with the particular advantages that one might gain from  
10 the benefit, and that's the point. Maybe you don't have  
11 to do that. And that's what the Solicitor General is  
12 saying.

13 MR. BONNYMAN: Well, I think if you -- if you  
14 adopt the Solicitor General's approach to impact tests,  
15 it's going to be very easy for any defendant in these  
16 case to resort to the tautology that the benefit, which  
17 is being distributed unequally, is whatever we define it  
18 to be. We have defined this benefit as 14 days. Well,  
19 clearly everybody has access to 14 days. But that is  
20 not the benefit that Congress was concerned about.  
21 Congress, when it put out the billion dollars of  
22 Medicaid dollars that this state had received had prior  
23 to the filing of the case in the district court, was  
24 concerned about meeting the health needs of people and  
25 mandated that states who receive this money provide

1 hospital services. So they were -- I think you'd have  
2 to turn the Medicaid Act on its head to say Congress  
3 wasn't concerned about the effect on treatment of  
4 patient conditions. It was only concerned that you pump  
5 out these dollars.

6 QUESTION: Only in a generic sense perhaps by  
7 the fact that Congress encouraged states to provide some  
8 medical services available to all. Isn't that true?  
9 And the overall effect of that for the nation as a whole  
10 might be improved care.

11 MR. BONNYMAN: Well, it's clear that Congress  
12 did not mandate that they meet all of the needs of  
13 everyone, and -- and that's why it's important to go  
14 back to our first concession from the moment the  
15 complaint was filed. We do not contend that the state  
16 cannot reduce its program. We're not trying to  
17 hamstring that part of their operation. We're simply  
18 saying when they do it, they have to do it in a way  
19 where the -- I mean they've -- they conceded in their  
20 brief to the Sixth Circuit the impact of this reduction  
21 falls with disproportionate effect on the handicapped as  
22 compared to the nonhandicapped.

23 QUESTION: Mr. Bonnyman, may I ask you a  
24 question about the disparate impact? In your view does  
25 the disparate impact arise from the fact that a larger

1 percentage of the people in the handicapped class need  
2 hospitalization for long periods of time or,  
3 alternatively, that if you have a person in the  
4 handicapped class and one in the nonhandicapped class  
5 with the same ailment that the nonhandicapped person by  
6 virtue of his handicap will need longer hospitalization?

7 Do you understand what I'm asking?

8 MR. BONNYMAN: Yes, Your Honor. And -- and I  
9 think it is -- it is both of those, but primarily the  
10 latter. I mean let's look again at the example of  
11 someone --

12 QUESTION: It's primarily the latter, that if  
13 --

14 MR. BONNYMAN: That, in other words --

15 QUESTION: If a nonhandicapped person and a  
16 handicapped person both have pneumonia, the handicapped  
17 person may need to stay in the hospital longer than the  
18 --

19 MR. BONNYMAN: May have to stay longer and --  
20 but more importantly, given the fact that what we're  
21 concerned about is simply getting access to the hospital  
22 to begin with, he is more likely to have been in the  
23 hospital previously within the fiscal year so that he's  
24 already exhausted the state's --

25 QUESTION: But perhaps possibly for some other



1       ailment then.

2               MR. BONNYMAN: Or the same one. I mean I cite  
3 pneumonia simply because that does tend to recur among  
4 people with quadriplegia or --

5               QUESTION: But, see, if it's for some other  
6 ailment, then you'd really be in the other branch of my  
7 hypothetical.

8               MR. BONNYMAN: Yes, Your Honor.

9               QUESTION: I mean if you're suggesting -- I  
10 mean if -- if your theory is that handicapped people as  
11 a class are more apt to need hospital care, I don't see  
12 how you can possibly lose the case.

13              MR. BONNYMAN: Well, I -- I don't --

14              QUESTION: Even if they go back for --

15              MR. BONNYMAN: Well, Your Honor, I think -- I  
16 think that -- that the way we can lose the case is if we  
17 go back on remand --

18              QUESTION: Yes.

19              MR. BONNYMAN: -- And the state shows that  
20 there are no alternatives, as have been suggested here;  
21 there are no alternatives which won't have the same  
22 impact.

23              QUESTION: No alternatives except giving the  
24 handicapped people say 28 days and the nonhandicapped 14.

25              MR. BONNYMAN: Right. And we say we concede

1 from ab initio that that is not required by 504 because

2 --

3 QUESTION: You do concede that.

4 MR. BONNYMAN: We concede that. This cut is  
5 gratuitous.

6 QUESTION: Well, where --

7 MR. BONNYMAN: On the evidence now before the  
8 Court it's gratuitous.

9 QUESTION: Where do you come up with this  
10 alternatives, because ordinarily I would have thought  
11 that if you -- if the statute requires a showing of  
12 disparate impact, you show disparate impact, coming up  
13 with alternatives which might have been used and instead  
14 the state saying we have no alternative, then you say  
15 well, all right, then you're entitled to use this thing  
16 with disparate impact, that is not the kind of analysis  
17 we ordinarily engage in.

18 What you're arguing for sounds more like an  
19 impact statement type of thing. The -- show that you've  
20 considered the problem of the handicapped, that you  
21 thought it over and considered alternatives that might  
22 have done better than. And if you've considered it and  
23 say they aren't feasible, then you can go ahead and use  
24 something that has disparate impact. But that's kind of  
25 a hedgepodge of statutory requirement.

1 MR. BONNYMAN: Well, Your Honor, I think if  
2 you just analyze this in -- in -- in the way impact,  
3 disparate impact cases go, we have -- we have gone  
4 beyond our initial burden. I mean we have shown an  
5 alternative that -- because we realized that the concern  
6 of any court was going to be -- isn't, as Justice  
7 Stevens alluded -- I mean the handicapped are going to  
8 need more health services generally, and it isn't  
9 anything subject to challenge. And we simply wanted,  
10 not because we're proprietary about a particular  
11 alternative, we just put on proof to show that there are  
12 a range of alternatives, that the one we've talked about  
13 being one of them, which are available. And the Sixth  
14 Circuit was obviously concerned that they got no  
15 response from the state on that.

16 QUESTION: But what -- what makes you think  
17 that the alternative you have proposed which, as I  
18 understand it, is a limit on the number of days per  
19 admission but no limit on the number of admissions per  
20 year, that some group of handicapped people, perhaps  
21 unknown to you, couldn't show that that discriminated  
22 against them, because once they got admitted they needed  
23 to stay longer than most people, than unhandicapped  
24 people?

25 MR. BONNYMAN: Well, I -- I think if you look

1 at the regulations and you look at our contentions, we  
2 are not talking about -- we are -- we're not talking  
3 again about degree; we're talking about kind. We are  
4 talking about not the sort of gradations that were at --  
5 at issue in the Rowley case, but an absolute bar to the  
6 benefits of this program. I mean that's the way this  
7 cut operates.

8 QUESTION: But a limit on the number of days  
9 per admission would mean you're thrown out of the  
10 hospital at the end of six days.

11 MR. BONNYMAN: No, Your Honor. I mean that --  
12 again, that goes back to the evidence that was adduced  
13 at the trial, and the expert testimony was that that is  
14 not the way -- that is not the way it works. You will  
15 not get into the hospital to begin with if you have  
16 exhausted your days, but you will be readmitted so long  
17 -- the hospitals -- and this goes into the question of  
18 bed vacancies and marginal economic gain to the hospital  
19 -- but the hospitals are happy to have you, basically,  
20 if you have a few days available at the time that you  
21 apply for admission.

22 QUESTION: And they'll keep you as long as you  
23 have to stay?

24 MR. BONNYMAN: Yes, Your Honor.

25 QUESTION: Well, then, really when you say

1       there is a way of doing it, it's a way of doing it  
2       because the hospitals don't enforce what you say they  
3       might be entitled to enforce.

4               MR. BONNYMAN: Right. And -- and --

5               QUESTION: So there really is -- there really  
6       is no way of doing it.

7               MR. BONNYMAN: No, Your Honor. You can't  
8       divorce -- like all cases which are context specific,  
9       you can't divorce this -- these questions from the  
10      record. And there is a very concrete record, none of  
11      which was contradicted by the state, about the way, the  
12      specific way in which this limit operated to bar access  
13      to the hospitals.

14              QUESTION: Well, but your suggestion that  
15      there is another limit that would have some bite to it,  
16      that would be acceptable, turns out on examination that  
17      the limit would have no bite to it at all.

18              MR. BONNYMAN: I'm sorry. Would not have any  
19      bite to it, I don't --

20              QUESTION: Well, you -- you -- you say well --

21              MR. BONNYMAN: It would save the state the  
22      money, if that's what you're concerned with.

23              QUESTION: Well, you say the state could have  
24      used a limitation on the number of days per admission,  
25      but then as I understand your response to questions, the



1 -- the reason that works is because the hospitals don't  
2 enforce the number of days limitation.

3 MR. BONNYMAN: Do not -- once you're in the  
4 hospital, that is correct. That is correct. They do  
5 not get paid for that. Again, that goes to -- it is in  
6 their interest to take you if you have even a few days  
7 and they know you're going to stay longer simply because  
8 there are a lot of vacant beds, and there is a marginal  
9 economic incentive for them to take you.

10 QUESTION: Mr. Bonnyman, I'm still not 100  
11 percent sure I understand your position. Tell me this.  
12 Before Tennessee reduced the 20 days to 14 days was its  
13 program invalid?

14 MR. BONNYMAN: Well, we don't have evidence on  
15 that, Your Honor, because the way --

16 QUESTION: Do you think it's a matter of  
17 evidence?

18 MR. BONNYMAN: Pardon me?

19 QUESTION: I say would it turn on a matter of  
20 evidence?

21 MR. BONNYMAN: It does.

22 QUESTION: With respect to each claimant?

23 MR. BONNYMAN: No. Well, with respect to the  
24 statistical impact on the class as a whole. In other  
25 words, we -- we simply do not because -- because there

1 are no records of use beyond 20 days, and everybody is  
2 lumped in at 20 days, there's -- we don't know actually  
3 what the impact was of 20 days per se.

4 QUESTION: So that if this case were here from  
5 Florida that provides 45 days, you'd still have to have  
6 a litigation?

7 MR. BONNYMAN: I -- I don't know that, Your  
8 Honor. I mean one point we make in our brief again is  
9 that there have been a number of changes in the program.

10 QUESTION: Yes.

11 MR. BONNYMAN: And that when we go back on  
12 remand, we're going to have to reassess.

13 QUESTION: Well, is it correct then that your  
14 position is not focused on the fact that there was a  
15 reduction from 20 to 14 days?

16 MR. BONNYMAN: Well, I think again there -- we  
17 -- we did not have enough proof, I think, to challenge  
18 the 20 days.

19 QUESTION: Yes, yes. But you didn't challenge  
20 it before, did you?

21 MR. BONNYMAN: That's correct. That's  
22 correct. And -- and again, if you -- excuse me.

23 QUESTION: Well, I was simply going to repeat  
24 my question as to whether or not the change makes any  
25 difference. I suppose it does not in my understanding

1 of it.

2 MR. BONNYMAN: I don't think it does, Your  
3 Honor.

4 QUESTION: Right.

5 MR. BONNYMAN: I think this -- and -- and  
6 there seems to be an inference to be drawn from the  
7 Solicitor General's position that somehow the -- the  
8 annual limit was enshrined in the Medicaid Act, and  
9 that's a central fallacy. What's enshrined in the  
10 Medicaid Act is the meeting of patient needs through the  
11 delivery of hospital services; and they've created this  
12 tautology of --

13 QUESTION: Mr. Bonnyman, could HHS by  
14 regulation impose a limitation on the state's authority  
15 to fix the number of days?

16 MR. BONNYMAN: It can and it has, Your Honor.

17 QUESTION: It has?

18 MR. BONNYMAN: Well, I mean it has -- what it  
19 has said in the context of -- it can do so in two ways.  
20 It can do so under its authority as administrator of the  
21 Medicaid program under Title 19 of the Social Security  
22 Act by saying there are certain services that you have  
23 to provide, and inpatient hospital care is one of those  
24 services.

25 QUESTION: Without regard to the number of

1 days it may take of hospitalization?

2 MR. BONNYMAN: No, Your Honor. That has --  
3 that has never been finally resolved.

4 QUESTION: No, but does HHS have that  
5 authority under the statute?

6 MR. BONNYMAN: I think it probably does.

7 QUESTION: But you say it has or has not?

8 MR. BONNYMAN: Well, under -- under the  
9 Medicaid Act it has not defined what would be minimally  
10 necessary in the number -- in the amount of hospital  
11 services to satisfy the Medicaid Act. Our contention,  
12 of course, is that HHS under its regulatory authority  
13 under 504 has limited that. I mean that's central to  
14 our position; that the regulation which says the state  
15 cannot employ methods of administration which have the  
16 effect, if I may be permitted to read it, "methods of  
17 administration that have the effect of substantially  
18 impairing accomplishment of the objectives of the  
19 recipients program with respect to handicapped  
20 persons." That's 45 CFR 84.4. And they are employing a  
21 method of administration that they -- they are basically  
22 putting form above substance.

23 The substance under the Medicaid Act is  
24 meeting the need for hospital service -- again, not  
25 completely. It's not a guarantee that all needs will be

1 met, but that is the focus, meeting that need. Section  
2 504, which is attached to that as a funding condition,  
3 says in meeting that need or in imposing a limit on the  
4 extent to which you're going to meet that need, you may  
5 not employ a method of administration which impairs the  
6 accomplishment of the objectives of the program for the  
7 handicapped. And that's exactly what this annual limit  
8 does.

9 QUESTION: Suppose a nonhandicapped person  
10 needed more than the allotted days. Could he get action  
11 --

12 MR. BONNYMAN: No, Your Honor, because he's  
13 not -- Congress -- Congress has not chosen to -- to  
14 protect that person. Congress has enacted Section 504  
15 specifically for the protection of the handicapped with  
16 knowledge of the needs of the handicapped, and we are  
17 here traveling under that statute.

18 QUESTION: May I ask you two questions?  
19 First, you argued about -- earlier, I think, about the  
20 possible difference between the statutory command and  
21 the regulatory command which might, at least in my view,  
22 possibly go beyond the statute itself. Do you rely on a  
23 specific regulation in support of your position, and if  
24 so, what is it? Is there one regulation that you think  
25 really sheds a bright light on this issue?



1 MR. BONNYMAN: Yes, Your Honor. It -- it is  
2 Section -- 45 CFR Section 84.4.

3 QUESTION: 84.4.

4 MR. BONNYMAN: 84.4. And there is a subpart.

5 QUESTION: (b)(4)?

6 MR. BONNYMAN: (a)(4), the section I just  
7 read, and then there is a separate provision -- I'm  
8 sorry. I said (a). It's subsection (b).

9 QUESTION: You meant (b).

10 MR. BONNYMAN: 84.4(b)(4), and 84.4(b)(1) and  
11 then small Roman numeral iii.

12 QUESTION: Okay.

13 MR. BONNYMAN: And it says, "You cannot  
14 provide a qualified" -- that latter section that I had  
15 not read before -- "provide a qualified handicapped  
16 person with a benefit or service that is not as  
17 effective as that provided to the others. For the  
18 purpose of this part you do not have to guarantee equal  
19 results" -- again, the argument which is being imputed  
20 to us by the defendants -- "but must afford handicapped  
21 persons equal opportunity to obtain the same result, to  
22 gain the same benefit or to reach the same level of  
23 achievement in the most integrated setting appropriate  
24 to the person's needs.

25 QUESTION: And my second question is, because

1 I've never quite understood, as I understand it, the  
2 court of appeals ordered a remand.

3 MR. BONNYMAN: That's correct.

4 QUESTION: Let the other side have a chance to  
5 rebut your case. How could they possibly rebut your  
6 case?

7 MR. BONNYMAN: I think they could rebut our  
8 case by bringing in some of the proof that's been  
9 alluded to in some of the questions of showing that  
10 there are no alternatives that would not have a  
11 disparate --

12 QUESTION: In other words, you would say the  
13 statute or regulations would not be violated even if  
14 there is the kind of discrimination that you rely on as  
15 long as there's nothing they can do about it.

16 MR. BONNYMAN: Right, exactly. I mean if --  
17 if you can't avoid this -- this impact on the  
18 handicapped regardless of what you do --

19 QUESTION: Well, you surely could avoid it by  
20 giving them a longer period in the hospital. You could  
21 have an affirmative action --

22 MR. BONNYMAN: Right. And we don't -- we  
23 don't contend that that is necessary in this case. We  
24 are suggesting that there are in this case -- again,  
25 each case is context specific -- in this case there are

1 alternatives which would not require differential  
2 treatment of the handicapped or the nonhandicapped.

3 QUESTION: But if they prove they in fact  
4 would result in differential treatment, then you lose  
5 the case.

6 MR. BONNYMAN: Well, I think that gets into  
7 the question of -- of how far do they have a duty to  
8 accomodate, and I think they clearly have some duty to  
9 accomodate.

10 QUESTION: Well, but that's quite a different  
11 answer than you gave me 30 seconds ago.

12 MR. BONNYMAN: Well, again, it -- it involves  
13 anticipation of what --

14 QUESTION: Well, which is your position? Is  
15 there any affirmative duty to accommodate or merely a  
16 duty to prove you can't avoid discrimination entirely?

17 MR. BONNYMAN: There is an affirmative duty to  
18 accomodate, Your Honor. Our --

19 QUESTION: Then they can't possibly win the  
20 case.

21 MR. BONNYMAN: Pardon me?

22 QUESTION: Then they can't possibly win the  
23 case.

24 MR. BONNYMAN: Well, let me just say that --  
25 that -- that the Court has already said in Southeast

1 Community College v. Davis that a fundamental change in  
2 the program --

3 QUESTION: Well, maybe you're right. I'm just  
4 trying to get your position. Your position is there is  
5 a duty to accommodate.

6 MR. BONNYMAN: There is a duty to accommodate,  
7 and let me just say that we are at the opposite poll  
8 from Southeast Community College v. Davis, because the  
9 proof on the record right now is that this -- this  
10 impact is gratuitous in the sense that there are other  
11 alternatives which would not have this impact of barring  
12 people from the hospital, and they've offered no -- no  
13 reason. They're simply saying we don't have to have a  
14 reason.

15 QUESTION: Well, maybe not have this impact,  
16 but I thought you were going to -- you said they had to  
17 prove that their alternatives would not have any impact,  
18 any differential impact.

19 MR. BONNYMAN: Well --

20 QUESTION: If you base it --

21 MR. BONNYMAN: I'm -- I'm sorry, Your Honor.

22 QUESTION: I just don't really know what would  
23 happen on remand if we were to affirm. I just don't --  
24 I have an awful difficult understanding of exactly what  
25 your position is.

1 MR. BONNYMAN: Well, what would happen on  
2 remand if you were to affirm, Your Honor, is that they  
3 would be able to come forward and refute our case, if  
4 they can, by putting on proof showing, a) that -- and  
5 again, the first question is the -- the record says that  
6 we're not moot, but we are muddled because there have  
7 been changes in the statistical evidence since then  
8 because of changes in the program. They would come back  
9 and show the statistics are no longer valid.

10 The other thing that they could do on remand  
11 is come back and say conceding the impact of the cut to  
12 14 days, any of the other alternatives available to us  
13 would either have the same disparate effect or --

14 QUESTION: Well, no, you say here there's a 5  
15 percent disparate impact on the handicapped and 1  
16 percent on the nonhandicapped, as I -- the gross  
17 figure. Supposing they came back and said all right, we  
18 have an alternative that would have a 3 as opposed to 1  
19 percent, then who wins? It's the only other  
20 alternative. There's some disparate impact, but not  
21 quite as severe as this one.

22 MR. BONNYMAN: Well, I think they would have  
23 to go with -- with -- with the method which has, absent  
24 other factors, which has a lesser impact on the  
25 handicapped.



1 CHIEF JUSTICE BURGER: Your time has expired  
2 now, counselor.

3 MR. BONNYMAN: Thank you.

4 CHIEF JUSTICE BURGER: Do you have anything  
5 further, Mr. Attorney General?

6 MR. CODY: I do not.

7 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
8 The case is submitted.

9 We'll resume at 1:00.

10 (Whereupon, at 11:57 a.m., the case in the  
11 above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#83-727 - LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,  
Petitioners v. HERSEL CHOATE, ET AL.

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

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