UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, et. al.,	)	Case No. SA-10-CV-1025-OG
Plaintiffs,	)	
VERSUS	)	San Antonio, Texas
	)	September 12, 2012
RICK PERRY, et. al.,	)	
Defendants.	)	

Oral Argument Hearing
BEFORE THE HONORABLE ORLANDO L. GARCIA
UNITED STATES DISTRICT COURT JUDGE

TRANSCRIPT ORDERED BY: Nancy K. Juren

APPEARANCES:

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(September 12, 2012)

THE COURT: I'll call Steward and others versus Governor Perry and others, Cause No. 10-CV-1025. I'll have some announcements, please.

MR. CORBETT: Your Honor, my name is Garth Corbett. I am an attorney with Disability Rights Texas. I am accompanied by my colleague Sean Jackson with Disability Rights Texas; Steven Schwartz from the Center for Public Representation along with Debbie Dorfman from the Center for Public Representation and a representative from the law firm of Weil Gotshal, Casey Burton.

THE COURT: Okay. Anyone else present on this side?

MS. RUSH: Good morning, Your Honor, Regan Rush on behalf of the United States, and I'm also here with my colleague Robert Koch on behalf of the United States.

THE COURT: All right. Any other person representing the plaintiffs?

MR. CORBETT: No, Your Honor.

THE COURT: Okay. Let me hear from the State of Texas.

MS. JUREN: Yes, Your Honor. I'm Nancy Juren from the Attorney General's Office representing the defendants in this lawsuit, and here with me today from the Attorney General's Office is Darren Gibson and Eric Vinson, who will be arguing some of the motions. I also have representatives of

the client here if you would like their names.

THE COURT: No, that won't be necessary at this time.

MS. JUREN: And also we have from the Office of the Solicitor General, we have Andrew Oldham, who will also be arguing. Thank you.

THE COURT: All right, thank you.

MR. CORBETT: Thank you, Your Honor. What I'd like to do is to give a brief, ten-minute overview of the case and will start with the motions from there.

THE COURT: All right, that would be helpful. Go ahead.

MR. CORBETT: Congress enacted the National Home Reform Amendments and its PASRR, that's Preadmission Screening Resident Review provisions of that act as part of the Omnibus Reconciliation Act of 1987 because Congress recognized that the states were under pressure to close and downsize mental-retardation facilities in order to save money, and they were transferring individuals with intellectual and developmental disabilities from these facilities to nursing facilities where they rarely receive the level of services that they need and they were placed in inappropriate residential placements.

Now what our case is about is about the core deficiencies in both the Texas PASRR and Community Services Program. And when I refer to PASRR, that's the Preadmission

Screening Resident Review program.

More than 20 years after the enactment of PASRR, Texas still, unjustifiably, segregates individuals with intellectual and developmental disabilities in nursing facilities resulting in deficit PASRR -- PASRR and Community Service programs.

For many years, in spite of the passage of the Americans with Disabilities Act and the Nursing Home Reform Amendments, which is what PASRR is part of, it's called the NHRA, continues to engage in policies and practices of relegating individuals with intellectual and developmental disabilities to nursing homes, a placement that cannot meet their needs and prevents them from living in their most integrated setting.

Now in terms of the overall deficiencies of Texas' PASRR system, the Texas nursing home facility system includes policies and practices that fail to do the following:

One, they fail to properly screen individuals being admitted to nursing facilities to determine whether they have an intellectual or developmental disability, and for those that are determined to have an intellectual and developmental disability, the State fails to assess them in order to determine their need for specialized services such as occupational therapy, speech therapy, vocational and habilitative [sic] programming.

In addition, Texas fails to provide a range of specialized services in an amount, intensity and frequency to meet federal standards for active treatment, and Texas fails to provide the same range of specialized services to persons in nursing facilities that Texas provides to persons with intellectual and developmental disabilities who happen to live in intermediate-care facilities for persons --

THE COURT: Are you saying that Texas, the State does not do any of these things any of the times or they don't do enough of these things?

MR. CORBETT: The former, Your Honor. I think the evidence that we have been able to get up to this point, for example, indicates that of the individuals -- we're alleging that 4500 people are in the class. The State acknowledged in an open-letters request to us that only 28 people, less than a half a percent, or less than one percent of one -- one-tenth of one percent actually receive specialized services. And they acknowledge that none of the individuals that fall within the intellectual and developmental disability group have been found appropriate for -- or, rather, that a nursing facility is not considered to be their inappropriate placement. They have not moved from a nursing facility into a less restricted community-based program.

So Texas Community Service system for individuals with intellectual and developmental disabilities is

insufficient.

Texas administers funds and plans their Community Services program that cause individuals with developmental and intellectual disabilities to be confined to nursing homes. Additionally, the manner in which Texas administers its community programs are the result of policies and procedures and practices that exclude people with intellectual and developmental disabilities from its Community Service system.

And, finally, Texas policies and practices establish discriminatory eligibility criteria for community services that result in unnecessary institutionalization of individuals, again with intellectual and developmental disabilities.

As a result, these persons remain segregated in nursing facilities and those that are being admitted to nursing facilities who could be better served in the community remain at a very high risk of being institutionalized in a nursing home.

Texas also has an inadequate PASRR community service system and this has an adverse impact on the plaintiffs as well as members of the plaintiff class. As a result of Texas failing to identify and -- accurately identify people with intellectual and development disabilities, their needs for specialized services and alternate placement community options cannot be assessed.

Under the law, Texas has an obligation to identify whether a person has an intellectual disability. As the six plaintiffs in our case indicate Texas, for example, failed to identify any of those individuals.

In terms of people with intellectual and developmental disabilities in nursing facilities, they're neither diverted to the appropriate community placement nor do they get the specialized services that they need. As a result, they are unnecessarily institutionalized and very often their condition deteriorates.

Now while the defendants following the initiation of this litigation have made some changes to the PASRR system, these changes, while necessary, are still insufficient and they have not resulted in individuals either getting identified or provided specialized services and it has not resulted in individuals leaving nursing facilities and moving to community-based placements. Because individuals with intellectual and developmental disabilities do not have meaningful access to Texas community-based services, they're admitted to nursing facilities, remain unnecessarily institutionalized, isolated and segregated.

Now prior to filing this lawsuit we undertook a fairly extensive effort to meet with the State and discuss the issues that we're talking about here today. Prior to filing the case, we went to great effort to resolve these issues in

the hope of averting litigation. Following an extensive investigation of these issues -- and we looked at this issue probably for ten months to close to a year before we contacted defendants initially, and following our extensive investigation, as well as assistance from the Center for Disability -- Center for Public Representation, we sent -- Center for Public Representation, along with Disability Rights Texas, sent a letter to Governor Perry; Attorney General Greg Abbott; the then Executive Commissioner of the Health and Human Services Commission Thomas Suehs -- the Executive Director -- who was the executive director as I said for Health and Human Services; as well as Chris Traylor, who is the Commissioner of DADS. And we sent that letter in January of 2010.

The letter consisted of 12 pages, five attachments that consisted of a total of about 40 pages, and we set forth our concerns regarding the deficiencies, the State PASRR system and common failure to comply with federal law as it related to the ADA, Section 504 and provisions of the NHRA as well as other provisions of the Medicaid Act.

In our letter we requested that the State meet with us to discuss the steps it needed to take to comply with the requirements and obligations under federal law. The plaintiffs, we outlined our specific suggestions and changes that we believe were needed in order for the State to reform

its PASRR program so that --

(Court Reporter's Note: Mechanical malfunction, some (information lost.

MS. JUREN: ...cannot effect the removal of any officer that he appoints and certainly does not have direct authority over who the commissioner of DADS is. And these are the officials, Your Honor, who will carry out and do carry out the administration of the Medicaid program.

Yes, the Governor has general executive powers, such as compiling a proposed budget or holding budget hearings, and he can, of course, use the line item veto, we said that in our brief, but it is the legislature ultimately who determines what the State's budget is and not the Governor.

Furthermore, Your Honor, with regard to the specific claims asserted in this lawsuit, the claims regarding the PASRR process, specialized services and placement into the community from nursing facilities or in lieu of going into a nursing facility, certainly the Governor of the State of Texas has no direct authority over any of that. And so the plaintiffs have not met their redress-ability requirement of standing, do not have standing to sue the Governor with regard to the main thrust of their complaint because the Governor himself cannot effectuate the relief that they're seeking.

I don't believe anything that they're seeking is a specific recommendation to the budget for the budget, or a

proposed budget recommendation. I don't see that in their requested relief. I don't see that they have asked that the Governor be compelled to not appoint some executive commissioner of the HHSC that they don't think is doing a good job. I don't think that they have asked to have the Governor not approve the commissioner of DADS.

So the relief that they're seeking just does not implicate the powers of the Governor of the State of Texas, Your Honor. And for the same reason, the Governor, then, enjoys Eleventh Amendment immunity from suit because under *Okpalobi* and other cases cited in the brief, he is not the person with the connection to the case -- or to the issues raised in the case who can get the job done if the Court does, in fact, issue injunctive relief.

And I think basically that covers our points.

THE COURT: As to the Governor's inclusion in the lawsuit?

MS. JUREN: Excuse me?

THE COURT: That covers your argument about the Governor's inclusion in the lawsuit?

MS. JUREN: Yes.

THE COURT: Okay. Let me ask the plaintiff to address the issues raised by defense counsel; that is, the Governor has no direct involvement in any of the affairs or matters in which you're seeking relief.

MR. CORBETT: Well, Your Honor, I think that the very core of the case is that the funding and the direction of the, for instance, the PASRR program, the decision that there is going to be a restriction via policy on services means that, which is the policy of the department, DADS, means that funding is not necessary to request -- is not necessary to support specialized services. That's the conclusion. In other words, if the policy says there will only be four types of specialized services available to people in Texas in nursing homes, then the Governor has no responsibility. And the Governor hasn't exercised any authority -- hasn't taken any action.

It is quite untrue, as Ms. Juren says, that our complaint does not seek action from the Governor. We want the Governor to be able to both request funds and not turn around and tell the agency to cut funds that are directly mandated by federal law.

THE COURT: What role, if any, does the Governor, as pointed out by the Attorney General's Office, or counsel, does he have in terms of assessing these persons or making decisions where they're to be placed in a community-based facility or environment versus a nursing home environment?

MR. CORBETT: He is not involved either, you know, directly or in any significant way in the individualized decisions --

THE COURT: Well, what is he involved in?

MR. CORBETT: He is involved in --

THE COURT: Other than the budget.

MR. CORBETT: No, that -- his involvement in the budget, both on the requesting side and on the vetoing side, is what makes all the difference to a person.

THE COURT: Is that the only involvement he has, then?

MR. CORBETT: It is the only involvement that --

THE COURT: In the whole process?

MR. CORBETT: It is the central involvement that he has in the whole process.

THE COURT: That is the budget process?

MR. CORBETT: That's right, the funding for the services and for the community program.

THE COURT: And what harm would be caused upon the plaintiff if the Governor were not to be included in the lawsuit?

MR. CORBETT: I could answer that two ways, Your Honor.

THE COURT: Well, answer it the way you think it's most effective.

MR. CORBETT: That he has the ability to significantly frustrate any action taken by this Court in any aspect of the case to provide a remedy just as he has done in

the last several months in terms of restricting the funding for the agencies. As I said a moment ago, if the United States' intervention is authorized, is approved, then that frustrating ability that the Governor can do to undermine the relief in this case, undermine the actions that are necessary to insure compliance with federal law, that would not be a problem. And so we recognize and we are acknowledging that the Governor's role that we are concerned about is necessary if the United States is not involved, and if the United States is involved with the defendants --

THE COURT: Let me ask you, who are the other defendants in this matter?

MR. CORBETT: They're the Executive Director of the Health and Human Services Commission, the recently-appointed doctor that Ms. Juren mentioned, and the Director of DADS, temporarily, Mr. Weisman [sic].

THE COURT: Okay. Let me ask you if -- and I'm not suggesting that they should be defendants, but if your argument about the Governor is true -- or correct, rather -- that he has a role in the budgetary process and that affects the entire process, why is not Speaker Straus or -- again, I'm not suggesting they ought to be defendants, I'm trying to see why the argument does not apply to either Speaker Straus or Lieutenant Governor Dewhurst.

MR. CORBETT: Well, with respect to the Speaker or

any other member of the legislature, you know, there are prudential concerns, federalism concerns about litigation against an entirely separate legislative body and the Supreme Court and others have spoken that where there are constitutional claims, which are not present here, that may be -- they may be involved, but where there are not constitutional claims involving legislators and representatives, senior representatives of the legislature are not appropriate.

In terms of the other members of either the executive chain of command, I think what we tried to do both for efficiency and for direct responsibility was to say that the Commissioner of DADS has the direct responsibility for operating the PASRR program and for the Community Service system. The Executive Director of Health and Human Services has the direct responsibility for operating the Medicaid program. The Governor of the State of Texas has the direct responsibility for seeking and not vetoing the funding necessary to make relief whole to the plaintiffs.

THE COURT: Okay, what about the Eleventh Amendment immunity claim by the State?

MR. CORBETT: Well, their claim, I think, with respect to the Governor really goes to the (b)(6) problem because they're saying he isn't doing anything that -- the defendants are saying, "He isn't doing anything that we are

asking him to do and he's not responsible for correcting the wrongs."

As to the Eleventh Amendment point, that's really just, I think, an extension of the same argument but trying to put it in constitutional dimensions and, in so doing, the line is: Is there sufficient connection between his actions? If there's a sufficient connection between his actions to include him as a party, meaning we have stated a claim under Rule 12(b)(6) against him, then that's another way of saying that he clearly does not have immunity.

Governors don't have immunity for the actions of their state agencies or of their state including -- for instance, this Governor and Governor Bush had both enacted executive orders. If there was a failure to comply with the executive order, which is essentially -- you know, we're not making that as a legal claim but, as a practical context, there is. The Governor has said people with disabilities have a right to live in the community. We have 4,000 people in nursing homes who are not living in the community and who are regularly denied access to the community programs that Texas provides. That executive order is not being implemented. He has enough of a connection -- he's decided he has enough of a connection in enacting such an order, has enough of a concern about the operation of those programs that he would enact an executive order.

So I think the immunity claim really rests entirely on is there some connection, some general connection. The Fifth Circuit has said there doesn't have to be a special relationship, some connection is enough. I think there clearly is that.

THE COURT: Do you have the citation to that Fifth Circuit, or is that in your brief?

MR. CORBETT: It is in our brief, Your Honor.

THE COURT: Okay. All right. Any response to that? Thank you, Counselor.

MS. JUREN: Yes, Your Honor. I think, although I can't find that Fifth Circuit case either, I think that Fifth Circuit case found that -- they did discuss whether there just needed to be some connection or a special connection as is discussed in *Okpalobi*, and they found that in that case that the official satisfied both. So they did not really address specifically that a special connection is not required. They didn't go into detail on that. They found that in that case it satisfied both, both standards.

And it's not just any old connection however peripheral. In *Okpalobi*, you know, they talked about that the Governor and the Attorney General were not the ones to enforce the statute that was relevant there. And here I have again looked through the plaintiffs' amended complaint and nowhere did they complain about the Governor vetoing a line item in

the budget. They have not made a claim like that. Nowhere have they claimed that there is an imminent threat that the Governor is going to veto a line item in the budget that would affect the programs and services that they're talking about in this lawsuit. Again, the Governor can only make recommendations to the legislature, he can't control what the legislature appropriates.

Again I just want to emphasize, they have not claimed in this lawsuit that the Governor has been an impediment to the funding for waivers or specialized services. It just doesn't appear there. And nowhere in their request for relief on the last pages of their complaint do they say anything about enjoining the Governor with regard to funding.

Also, just one more thing with regard to executive orders. Again, the Governor can issue executive orders, the Governor cannot enforce them. He has no authority to enforce them. He cannot even remove -- he has no authority to remove an official who refuses to follow through on an executive order. And certainly if the Governor were to be dismissed from this case as defendants believe that he should be, certainly the Executive Commissioner of HHSC and the Commissioner of DADS can carry out whatever injunctive relief this Court deems appropriate. And particularly because the relief sought is programmatic in a way, expanding programs that may have implications for budget, it's the Executive

Commissioner and the Director who will be coming up with those proposals not the Governor. Thank you, Your Honor.

THE COURT: What about the line item veto on the budget as regards or as affecting this agency? Doesn't he have a role then at that time?

MS. JUREN: I suppose theoretically that could be possible. That's remote here, and as I say, there is no, there's no assertion in this lawsuit of any problem like that. If I could, to answer your question, let me consult?

THE COURT: Sure, of course.

MS. JUREN: Well, I'll just end by saying again there's been no evidence in the past that that's been a problem with this administration line item vetoing Medicaid budget items and, again, nor have the plaintiffs even pled such a thing.

THE COURT: Okay. Why don't you stay there, Counselor, and if you'll address your request or claim that the claims asserted under the Medicaid Act be dismissed for lack of standing or failure to state a claim. If you'll get into that motion?

MS. JUREN: I think I've covered the standing with regard to the Governor, Your Honor.

THE COURT: Right, okay.

MS. JUREN: The organizational plaintiffs lack standing, Your Honor. They have brought claims purportedly

on their behalf and on behalf of their members. The organizational plaintiffs being the Arc of Texas and the Coalition of Texans With Disabilities.

With regard to standing in their own behalf, Your Honor, they have not pled in their complaint any injury to the organization as a whole, any organizational injury directly related to alleged failures of the State defendants in this lawsuit, nor do the two affidavits that they submitted in response to the motion to dismiss, nor do those affidavits set out any particular harm that these agencies have been suffered, and expenditure of organizational resources alone is not sufficient to satisfy that standard.

> "The fact that an organization redirects some of its resources to litigation is insufficient to impart standing on the organization."

I was just quoting from the *ACORN* case out of the Fifth Circuit. And they have not even attempted to show how anything related to this lawsuit has caused them to do anything different in their usual advocacy endeavors.

With regard to standing on behalf of their members, I believe, you know, their members have problems of their own, the plaintiffs, that would be the same analysis as the plaintiffs, the named plaintiffs in this lawsuit. And I believe that we focused on the standing to assert the

1396n(c)(2) allegations. Those are the ones that were for freedom of choice.

THE COURT: Right.

MS. JUREN: The freedom of choice, and again I'm getting into also the failure to state a claim. I guess it really all kind of dovetails together. That section of the Medicaid Act, 1396n is a section of the Medicaid Act that deals with waivers and what the n(c)(2)(B) talks about is the evaluation of the need for inpatient hospital services at the time that a person is being evaluated for enrollment in a waiver. It's for the purpose of determining whether the individual may be eligible for a particular waiver program because only individuals who were determined to require an institutional level of care specified for the waiver may be enrolled in the waiver.

So that section is not -- it applies when someone is being considered for entry into the waiver program. This section, 1396n(c), has two sections that they're claiming under. One is (b), which requires an assessment, and that assessment falls at the time when the person is entering the waiver. It does not fall at the time when the person enters the nursing facility. And they're conflating the requirements of PASRR and things that are required under a different section of the Medicaid Act, you know, for the PASRR review. They're conflating that with the requirements of

1396n(c)(2)(B), which is a different kind of assessment.

So they have failed to state a claim and they also have no private right of action to enforce that section because they are not someone who -- their claims as persons who are about to enter or have entered a nursing facility and have not been given the proper assessments are not claims related to failure to be assessed for appropriateness for institutionalization in a nursing facility at the time you're going into a waiver. I know this sounds complicated. I'm sorry.

The second section that they're claiming under is n(c)(2)(C), which is an informational requirement. (B) is an assessment requirement. (C) is an informational requirement and it provides that -- well, actually, it falls under the section of the Medicaid Act that talks about the requirements for a state plan and it says the Secretary of Health and Human Services cannot grant or approve a state plan unless it provides that:

> "Individuals who are determined to be likely to require the level of care provided in a nursing facility are informed of the feasible alternatives, if available, under the waiver."

And, again, this is at the time that a person is going into a waiver, they're in a nursing facility, they have -- their

number has come up on the wait list, interest list for a waiver, they're being assessed to go into the waiver and the Medicaid Act requires that they -- essentially it's to determine whether this is an appropriate person to go into this waiver. Since this is funding, spending clause legislation, most of the requirements in the Medicaid Act are geared toward determining whether the money being given to the states is being spent appropriately, and this is one of them.

So, because the plaintiffs are not making allegations that they have been -- you know, their time was up to go into a waiver and they were not assessed for their appropriateness of being in a nursing facility, and because they're not alleging that at the time they were going into a waiver they were not assessed of the feasible alternatives to the nursing facility, they have suffered -- they have not pled that they've suffered any injury because of this and they lack standing. They also have failed to state a claim under the Medicaid Act because they're talking about something different in the assessments that they're concerned with.

With regard to -- let's see if I've covered all the standing --

THE COURT: Okay, let me hear from the plaintiff as to the State's --

MS. JUREN: I have --

THE COURT: Yes?

MS. JUREN: I have not covered everything with regard to failure to state a claim. I think you said both of those at the same time, but if you want to take it in pieces I'm happy to do that.

THE COURT: Go ahead, do that now.

MS. JUREN: Oh, okay. All right. With regard to the claims under the NHRA, those are brought under 42 USC Sections 1396r(b)(3)(F), 1396r(e)(7)(A), (b)(2) and (c), and none of these state a claim under the Medicaid Act.

Starting with 1396(b)(3)(F), that --

THE COURT: That's 1396 --

MS. JUREN: "r." Sorry. 1396r(b)(3)(F).

THE COURT: Okay.

MS. JUREN: That section imposes obligations only on nursing facilities, not the State. So failure to comply with 1396r(b)(3)(F) would be a failure of the nursing facility not of the State. The plaintiffs have not said that nursing facilities are not doing what they're supposed to, they've claimed that the State is failing in its obligations. And they really don't argue otherwise.

Again, that requirement, 1396r(b)(3)(F), requires a determination of medical necessity and the need for specialized services. It does not require an assessment for alternative placement or a program of active treatment or dictate the scope of specialized services as the plaintiffs

are claiming it does. But, at any rate, that section is directed to nursing facilities, not to the State.

And with regard to the Section 1396r(e), those provisions that they're claiming under? Those sections also do not require -- contain a requirement for active treatment and do not dictate the scope of specialized services and/or nor do they require an assessment for alternative placement or to advise the applicant of the availability of alternative placement. So the plaintiffs are simply misconstruing those sections of the Medicaid Act.

And with regard to, again, the provisions related to active treatment, again, Your Honor, plaintiffs have failed to state a claim under the NHRA to the extent that they are attempting to impose requirements on the State that are not required under the Medicaid Act and, therefore, have failed to state a claim. They have asserted that the entire section of the requirements of -- this is 42 CFR 483.440(a) --

THE COURT: Give me that cite again.

MS. JUREN: Yes. 483.440(a). (a)(1) is all that's required for the provision of active treatment in a nursing facility and that requirement for a nursing facility active treatment is set out in Section 483.120(a)(2). That's where it says that specialized services for nursing facility residents with developmental disabilities are, quote:

"The services specified by the State

which, combined with services provided by the NF or other service providers, results in treatment which meets the requirements of 483.440(a)(1)."

(a)(1) only, not (a)(1) and the rest of that section of the regulations.

So to the extent that plaintiffs are attempting to assert claims beyond that, they've failed to state an actionable claim under that section of the Medicaid Act.

With regard to the reasonable promptness claim, that's under 1396a(a)(8). The plaintiffs make two -- have two parts to this claim. They first say that the claim is the defendant limits community-based services and supports, and they say that defendants limit specialized services, and this results in a violation of the Reasonable Promptness Provision of a(a)(8).

With regard to the specialized services -- well, excuse me just a minute. Again, with regard to the specialized services, to the extent that they're saying that defendants have failed to provide the specialized services required in excess of what the Medicaid Act really requires for persons in nursing facilities, they've failed to state a claim under a(a)(8).

THE COURT: Because?

MS. JUREN: Because those services are simply not

required. So there's no question of failure to provide something with reasonable promptness when you're not required to provide it at all.

With regard to the community placement part of the claim, their claim is that:

> "Defendants limit the provisions of medically-necessary community-based services and supports, resulting in extended delays and the outright denial of medically-necessary care."

All right. Again, this goes to what I've talked about earlier. Community care in Texas is provided through Medicaid waivers and the very nature of a Medicaid waiver is the State may limit its scope and size, and the character of it, and who it covers, and what exact services are provided. And there's case law in the motion that talks about even the State is allowed to make harsh distinctions here. These are additional services that the State is authorized to make under the Medicaid Act, they're not required services.

The *Arc of Texas* case from the Ninth Circuit found, for example:

> "The Reasonable Promptness section of the Medicaid Act is not a tool for forcing a state to expand its waiver program."

And essentially, Your Honor, I believe that's what the

plaintiffs are trying to do here. They're trying to force the State to expand its waiver programs by claiming -- making these claims under the Medicaid Act, as well as under the ADA.

So Texas is permitted by federal law to place limits on the number of waiver slots that are available and to set additional eligibility requirements. With regard to eligibility requirements which plaintiffs are complaining about, they're saying that Texas doesn't make the eligibility requirements such that people in nursing facilities can go into the one waiver that they prefer, which is the HCS waiver, which also pays for a residential component.

The Reasonable Promptness provision of the Medicaid Act only applies to eligible individuals. And in this context, a person is only eligible if they are up for a waiver slot and have been determined to be appropriate for a particular waiver. So where the waivers are full, as they are in Texas, the cap has been met, individuals are not eligible individuals who are entitled to that reasonable promptness criterion.

Frankly, plaintiffs' own pleadings admit that they are able to bypass the interest lists for certain waivers: the class waiver, the CBA waiver, the Star Plus waivers, and access services and supports provided under these waivers. And that's in their pleadings. So they have failed to state a claim under a(a)(8) with regard to specialized services to the

extent they're seeking to enforce more than the Medicaid Act requires, and with regard to community placement, because they're not eligible individuals and there is no requirement under the Medicaid Act to have a wide open waiver program where anyone can get in. So restricting eligibility criteria under the Medicaid Act is perfectly fine, and failure to do so does not state a Medicaid Act claim.

THE COURT: Okay.

MS. JUREN: And with regard to their claim under 1396a(a)(10)(B), that's known as the comparability requirement. Basically here, Your Honor, what the plaintiffs are saying is that all of the programs and services that are provided in an ICFMR should be provided to individuals with intellectual and developmental disabilities in a nursing facility. That's essentially what their argument boils down to.

This just flies in the face of the whole structure of the Medicaid Act, which sets out separate programs and requirements for different placements. The ICFMR has its requirements, nursing facilities have separate requirements. And, actually, their claim results in an absurdity. That every program would have to provide all those services and assistance provided under every other program is essentially what they're arguing, and it's just not the way the Medicaid Act is set out.

I have set out in the briefs the statutes covering nursing facilities and the statutes covering ICF's MR in the motion, and have given the support and the citations to support that in both the statute and the regulations, nursing facilities and ICFMR services are listed as completely separate services. They each have their own requirements.

I think, Your Honor, I have covered all of their sections.

THE COURT: Okay. Let me hear from the plaintiffs as to the defendants' various motions to dismiss various claims.

MR. SCHWARTZ: Thank you, Your Honor. The defendants really make, first, a very high-level argument that I would like to address first if the Court is interested.

THE COURT: Go ahead. Take as long as necessary.

MR. SCHWARTZ: Okay.

THE COURT: I don't want anyone to feel that we're rushing.

MS. JUREN: Your Honor, may I make one comment?

THE COURT: Of course.

MS. JUREN: My co-counsel here has reminded me that we have other arguments for why this case should be dismissed and I was addressing only the failure to state a claim at this time --

THE COURT: I'll let you come back.

MS. JUREN: -- yes, and not the no private right of

action issue. So just to clarify that. Thank you.

THE COURT: Sure. And be assured I'm not going to rush this hearing. This, as every case, is important. Each counselor will have sufficient time and if you need more time, we can take all day. If we need to come back -- I don't mean that facetiously -- if we need to take all day, we'll do that. If we need to come back tomorrow, we will do that. So at the end of the day, if you feel that you have missed something that you need to come back or -- and address or further elaborate or clarify, you will have it. So I don't want you to sit here and say -- I was going to say oops, but let me not say that particular word -- you'll have that opportunity. Okay, come on.

MR. SCHWARTZ: The defendants make a high-level argument in their brief that the Medicaid Act doesn't create any rights. Then they make specific arguments with respect to four particular sections of the Medicaid Act.

THE COURT: Well, I think part of their claim is that the Medicaid Act has certain requirements and they don't extend to State action or it doesn't mean the State needs to do any further work on it. But go ahead.

MR. SCHWARTZ: All right. That's what I was referring to as their high-level claim. And then they take aim at four specific sections of the Medicaid Act: the Nursing Home Reform amendments, the Comparability provision, the

Freedom of Choice provision, and the Reasonable Promptness provision. And within each of those specific provisions they are really making, first, an argument that we haven't stated a claim under that provision and, second, even if we did, we don't have a private right of action under Section 1983 to enforce that.

So if it is acceptable to the Court, I'll take that in that order --

THE COURT: Yes, please do.

MR. SCHWARTZ: -- and Ms. Juren may want to come back and say certain things in response.

THE COURT: I'm sure they will. Go ahead.

MS. JUREN: Yes, since I did not cover that first point.

THE COURT: That's fine.

MR. SCHWARTZ: So let me start with their first point, the high-level argument. The high-level argument says that -- and this is a central argument, about a quarter of their reply brief is addressed to this -- that the Medicaid Act doesn't create any rights or duties by anybody.

THE COURT: By what?

MR. SCHWARTZ: By anyone. Not by the State and not any rights by Medicaid beneficiaries or recipients.

THE COURT: Okay.

MR. SCHWARTZ: This argument is not simply the one

that was considered and rejected by the Supreme Court in *Wilder v. Virginia* where the Supreme Court said that the Medicaid Act can be enforced by private individuals under Section 1983.

Nor is it the argument -- nor is it the more focused argument that was made and rejected by the Supreme Court in a case called *Rancho Palos Verdes* -- all of these cases are discussed in our brief --

THE COURT: Right.

MR. SCHWARTZ: -- where the states were arguing that there is another enforcement mechanism that surpasses and obviates the need for private right of actions under 1983 by individual beneficiaries.

Nor is it the argument that was made by two dissenting justices but rejected by the Supreme Court in *Farmer v. Walsh*, which is that Medicaid is a contract. It's a contract between the federal government and the state, each have their responsibilities and private individuals, private Medicaid recipients don't have any rights to enforce the contract because they would be third-party beneficiaries.

It's neither of those three arguments. Instead it's actually quite broad and quite dramatic. It says that the Act does not establish any rights for anyone, and it doesn't establish any obligations on the part of anyone. So despite the statutory provisions that the Congress has enacted, the

one set Ms. Juren was just going through, and a variety of others like due process hearings, and despite the commitments that the State makes in its plan to fulfill those provisions, that neither the obligations nor the plan can be enforced. That's what the argument comes down to.

They actually go so far as to say that Texas is not required to do anything under the Medicaid program. It can accept the federal billions of dollars in Medicaid funds and it's not required to do anything.

That argument, Your Honor, has never been accepted by any court anywhere. In fact, just learned sort of yesterday that the almost identical argument was made by the Indiana Attorney General in almost identical words as in the reply brief and was rejected by that court. This is the one decision we just saw yesterday that is not in our brief called *Planned Parenthood v. the Commissioner of Indiana, Department of Health* at 794 F2d, 892 at 901, 902.

THE COURT: Okay, that's 794 F2d, 892 at where?

MR. SCHWARTZ: 901, 902. There Judge Pratt rejected this same argument that the Medicaid Act creates no rights and, therefore, there is no -- can't be a violation of the Act by anybody.

THE COURT: And this was issued yesterday?

MR. SCHWARTZ: No, I'm sorry, we just discovered this yesterday, Your Honor.

THE COURT: Oh, I see, okay.

MR. SCHWARTZ: It was issued in 2011. But it wasn't cited by the defendants in their brief as an explicit rejection of their argument.

THE COURT: Okay.

MR. SCHWARTZ: In the more than 40 years that the Medicaid Act has been in place, in the more than half dozen Supreme Court decisions that have interpreted the Medicaid Act, no court, no judge anywhere has ever adopted this rather extreme argument that the Act creates no rights. Not *Wilder*. And, in fact, Justice Scalia in *Rancho Palos Verdes* indicated as an example of a statute that does create rights the Medicaid Act. So Justice Scalia in writing the majority in *Rancho Palos Verdes*, which was a decision around the Telecommunications Act, said:

> "Although the Telecommunications Act doesn't create rights that are enforceable by private parties, a good example of an act that does is the Medicaid Act."

And the argument that the defendants made about Medicaid not creating rights -- if you remember these briefs were exchanged by the parties during 2011 -- 2010, 2011. So a key provision, a key element of their argument was that the Medicaid Act provisions that were reenacted in the Affordable Care Act, that is the Act that the Supreme Court just

declared constitutional, well, the defendants were kind of projecting based on what had happened in Florida and one or two other places that that act might be held unconstitutional. And in 2010 and 2011 that was a distinct possibility.

But we now have a decision of the Supreme Court in *National Federation of Independent Businesses v. Sebelius* at 132 Supreme Court 2566, we submitted this with a notice of supplemental authority, Your Honor, that the Affordable Care Act is constitutional. The Affordable Care Act includes numerous provisions of the Medicaid program and the Medicaid Act, and those provisions the Supreme Court upheld. All the Supreme Court did was to say that the Secretary's funding cutoff authority would be limited to certain provisions and she couldn't cut off funds for the entire Medicaid program based on the new provision called the Individual Mandate.

So, the Supreme Court in declaring the ACA constitutional essentially rejected the defendants' arguments because it said the Medicaid Act creates enforceable rights, it creates duties, and what the Secretary's authority in cutting off funds may be, restricted in certain ways, that doesn't in any way mitigate either the ability of Medicaid recipients to enforce the Act or the duty of states to comply with the Act.

Second, in terms of this very broad-based argument, the defendants are ignoring the line of cases that they

subsequently talk about which are called the Private Right of Action cases. The Supreme Court has what's often called by various courts the Private Right of Action Triology: *Wilder v. Virginia*, *Blessing v. Freestone*, and *Gonzaga v. Doe*. Those three cases taken together shape and describe when private citizens can enforce federal statutes under 1983.

The key concept of *Blessing*, the middle decision, was that when courts analyze whether statutes create enforceable rights, it needs to look at discrete provisions because, in the words of the Supreme Court, that allows us to conduct an analysis in manageable bites.

Here, the defendants are trying to circumvent that because they're not talking about particular provisions of the Act, they're saying the entire Act. They are ignoring that Supreme Court directive to do things sectionally and are asking to do it sweeping across the entire statute.

Lastly, with respect to this broad-based argument, the defendants rely on a concept that, well, because the Medicaid Act, like certain other statutes, are spending clause statutes enacting pursuant to the constitutional provision to give Congress the authority to spend funds, that that really changes the analysis dramatically. It allows for a wholesale declaration that the Act does not create any rights.

But the primary Supreme Court decision that speaks about spending clause statutes and speaks that Congress has a

somewhat narrow authority under that clause, that the State's brief rely [sic] on heavily, called *Pennhurst v. Halderman*, cites the Medicaid Act and particularly its reasonableness and promptness, as a prime example of a provision that creates rights.

And so the Supreme Court in *Halderman* and the Supreme Court in *Wilder* and then the Supreme Court in *Blessing*, which was another spending clause statute, and the Supreme Court subsequently in *Rancho Palos Verdes* and in *Anoka*, are consistently saying the Medicaid Act requires states to do certain things. The Medicaid Act affords private citizens the right to enforce that Act if, and only if, the particular provision of the Act -- and I'll get into that in a second -- the particular provision of the Act meets the *Wilder-Blessing-Gonzaga* test of describing actions that benefit individuals, that speak unmistakably in individual terms, that impose unambiguous obligations on the states and that are clear.

And so as long as -- and that's a strict test. That's a tough hurdle for plaintiffs, individual Medicaid recipients, to overcome. When they overcome that hurdle with respect to discrete provisions of the Act, they can enforce the Act because the Act creates enforceable rights.

And so we suggest that this broad-based argument that somehow the Medicaid Act can't create any rights has been

rejected by the Supreme Court. The Fifth Circuit has indicated in two separate decisions, *S.D. v. Hood*, cited in our brief, and *Fraser v. Gilbert*, that the Medicaid Act, particularly certain sections benefitting children, create rights. Every circuit court in the United States that has addressed provisions of the Medicaid Act has found that it creates rights, although certain sections it might not. Certain sections it does and the sections we're going to talk about in just a second are ones where courts have routinely found they do create rights.

Let me turn now to the sectional analysis that the Supreme Court says must occur and address each of the four provisions of the Medicaid Act that the State is seeking to first say we haven't stated a claim and then say even if we did, we can't enforce the claim.

The key one that I want to begin with and the key one in our case are the Nursing Home Reform amendments. This is all found in 1396r. So the Medicaid Act was modified and amended in 1987 through what's known now as the NHRA, the Nursing Home Reform Amendments. And there were multiple provisions in the NHRA that changed the Medicaid Act.

As Mr. Corbett explained in the just short introduction, the reason Congress changed the Medicaid Act for nursing home residents for people with disabilities was grounded actually in a study done by the Comptroller and the

General Accounting Office where it found, as Mr. Corbett said, states had been told by Congress in the early '80s, "If you want to run institutions for people with intellectual and developmental disabilities," which carry the term intermediate care facilities for persons with mental retardation or ICFMR, that's the acronym, ICFMR, Congress said, "If you want to run an ICFMR program and you want us to pay for it, you have to make sure that people get at least minimally-adequate care." And they told the Secretary, "Establish standards for what minimally-adequate care requires." And the Secretary promulgated regulations and the term of art that she used was called active treatment.

So it told the states, including Texas, in its state living centers in cases that were actually pending in the United States District Court here in Texas, that Texas had to run, like every state had to run, its ICFMR programs in compliance with these active treatment requirements.

A study by the General Accounting Office found that as soon as Congress established these standards, in order to avoid compliance with the standards states sent thousands of individuals from those ICFMR facilities to nursing homes where they didn't have to comply with active treatment. So Congress said, "Essentially this is an end run," and they enacted, Congress enacted the Nursing Home Reform Amendments.

When it did so, it required three things. First, it

required that the states establish this PASRR program that you've heard about, which would identify any person on the way in and see did that person have a disability, an intellectual or developmental disability. If it did, that is -- that's called the Screening Provision -- then it would conduct an assessment of whether they needed to be in a nursing facility or they could live somewhere else. And if they decided they needed to be in a nursing facility, they'd conduct a second assessment of what services they needed in the nursing facility. And the last step in this process was it mandated, Congress mandated that the state provide the services that the assessment identified. It called them specialized services.

So that's the three-part program, the Nursing Home Reform Amendments. It did so in a couple of different sections of the Medicaid Act because the Medicaid Act is complicated and so one section said, "Nursing homes, you can't admit people who haven't been screened." Another section, it said, "States, you must run a program that screens, assesses and serves people." And then it finally said, "This is a complicated matter so we're going to explicitly delegate to the Secretary the authority to write regulations and we want her to write regulations that describe how this whole process works, what the services that have to be provided are, what happens if states don't do it," et cetera.

And so unlike some other provisions, the delegation to the Secretary was actually found in the statute. And the Supreme Court has subsequently held in a number of cases that where Congress explicitly delegates authority to the Secretary to define terms, like specialized services or screening and assessment, et cetera, that those -- that delegation is under the case called *Gray Panthers, Schweiker v. Gray Panthers*, has legislative effect. So the Secretary's regulations have always been interpreted and given chevron deference because of the complexity of the Medicaid Act and because of the explicit delegation in the Act to the Secretary. So that's the structure of the Act.

Every court which has looked at the Act -- this is the Nursing Home Reform Amendments, excuse me -- has found that the combination of the words of the statute that individuals must be screened, that individuals must receive services that the assessment indicates, and the words of -- the statutory delegation to the Secretary and the words of her regulations, called the PASRR regulations, that when you take that picture together, that each of these courts have found that the statute and the regulations create rights. The First Circuit in *Rolland*, the Third Circuit in *Grammer*, these are cases all cited; every district court that has looked at this question, that is: Can Medicaid recipients -- do Medicaid recipients have rights under this Act? The district courts in

Ohio, Missouri, the District of Columbia, and Massachusetts and Maine, and in Connecticut have uniformly, without exception, held that the Nursing Home Reform Amendments does create rights. It creates rights for individuals and individuals can enforce those rights under Section 1983. And it has done so by looking first at the language of the Act, the ones I just mentioned; the sequence, the screening assessment services, and, lastly, the regulations of the Secretary that defines what a nursing home placement is.

Now one key aspect of the Secretary's definition was she was asked by Congress to say what are the services people get if they have to stay in the nursing home. So if they are screened and they are assessed and they're determined to need habilitation, some type of treatment for their intellectual and developmental disabilities, what kind of services they have to get.

And the Secretary's regulations, which were put out by public comment, and there's comments from -- thousands of pages of comments from nursing homes and advocacy groups and individuals and professional societies, they all focused heavily on that question: What are the services people get if they're in the nursing home? And the Secretary determined, based on Congress' intent, that what Congress was trying to avoid was this -- what the Comptroller General, the General Accounting Office called a wholesale warehousing of people

with intellectual disabilities in nursing homes. They wanted to stop this transfer from the ICFMR's to the nursing facilities because the states thought they could be off the hook.

So what the Secretary did, rather common sense, was to say, "If you do transfer a person, if you do admit a person with intellectual disabilities to nursing facilities, you have to give them the same services as you gave them -- as you would have to give them in the ICFMR. You can't avoid it by just flipping the location."

THE COURT: That they would have otherwise been required to do.

MR. SCHWARTZ: That's correct. And so what the Secretary did was to say the definition of -- because she was asked by -- told, excuse me -- told by Congress to define specialized services. And she said, "Specialized services mean the same thing in nursing homes as they do in the ICFMR's," the other institutions, "and the coincidence of which institution a person with intellectual disabilities happens to be located in is not going to determine what level of care they receive."

And so she did that by using two words. First she said, "Specialized services means active treatment," and she said, "Active treatment is the same term I used as the standard of care for the ICFMR's." And then when asked by --

in the commentary to her, in the public comment period, "Well, do you really mean, Secretary, that it's the same kind of active treatment that we have to provide in the ICF's?" The Secretary's response, found in the *Federal Register*, all cited in our brief, is, "I mean exactly the same thing because that's what Congress meant and so you have to do exactly the same thing."

Now, what she did say later on, I mean what is true is there are many other regulations that apply to ICFMR's; for instance, environmental regulations: how the sprinkler systems work, what the fire doors look like, a variety of other things. There are some restraint regulations. She said, "I'm not talking about those. I'm not saying that you have to run a nursing home that makes it every single dotted line has to be exactly like an ICF, but I do say that it has to be the same level of care." That's what she said.

Now this issue came up to the First Circuit in *Rolland v. Romney*. You know, one of the cases that -- the only case that's gone to the First Circuit that is almost identical to this one. A class of individuals who are with intellectual and developmental disabilities, sent to nursing homes. The issue was what kinds of -- there was an ADA claim there too, also, but what kinds of services -- what the screening assessment and service program should look like. And the state took the position in *Rolland* that, "Active

treatment can't be the same thing in nursing homes as it is in the ICF's. The Secretary didn't mean to equate the two."

The First Circuit said, "Yes, they did. They exactly meant that." They said that the PASRR provisions are enforceable by recipients, that the PASRR statute and the terms needed to be defined by the Secretary, the Secretary's regulations helped give meaning to the statute and the concepts and the program, and the Secretary's definition of active treatment means not just one paragraph but it means the various paragraphs that are covered by active treatment.

So that's essentially the PASRR program. And as I said, every single court, two circuit courts and, by my last count, approximately ten district courts have issued decisions saying the statute means what it says, the regulations are enforceable, the regulations require the states to do that. The only cases that the defendants cite are by nursing facilities or damage cases against nursing facilities. For instance, the Second Circuit in *Concourse* says, "This Act does not create any rights for nursing facilities. Nursing facilities can't go and argue with the state Medicaid agency under this Act how we have to be treated. This act is about individuals. It's about people with intellectual and developmental disabilities or people with mental illness, and so while it doesn't create any rights for nursing facilities, it does for recipients or nursing facility residents."

And similarly it said -- similarly these courts say regularly that -- each of those courts that I mentioned, *Grammer*, *Rolland*, First and Third Circuit, all the district courts have consistently, and without exception, rejected the arguments the State's making here today that the Nursing Home Reform Amendments aren't enforceable, that the regulations aren't enforceable, that it doesn't create rights, that Section 1983 doesn't apply.

So the State's arguments about private right of action, as I've tried to explain, really have never been supported by anyone when the plaintiff is a nursing home resident and where the defendant is the state agency running the PASRR program, if the defendant's the nursing home. It doesn't work if the defendant is the state agency that's responsible under the Act. And so arguments like this is all about regulating nursing homes and things like that have all been rejected.

The defendants' only argument they make under Rule 26 -- Rule 12(b)(6), stating a claim, with respect to the NHRA is a pretty narrow one. They don't say that we have failed to state a claimed act of treatment, because we have said people are not getting active treatment. They say that we have failed to state a claim that active treatment means what the First Circuit says it means. It means that it covers multiple provisions not just one subsection of (a).

So, Your Honor, just to help explicate this because I know it's complicated, within the ICFMR regulations there are nine big subsections. The subsections begin -- are 483.400 and in sequence. Okay? And so there's a 483.410, 420, 430, 440, all the way up to 480. Each major subsection addresses a different component of the ICFMR facility. One program, one component deals with the environment: fire code issues. One deals with restraint. One deals with rights. One deals with -- so on and so forth.

One main one, 483.40 [sic] deals with active treatment. The heading over the section is "Active Treatment." It then has several itself, 440 has several subsections. It defines active treatment, 440a(1), it says, “In order to get active treatment you must have a team" -- you must have a plan, a service plan, a treatment plan for the person. Another subsection says the treatment plan must be written by qualified professionals. Another subsection says if they're going to send you out of the ICF, they must give you a certain kind of discharge plan. Those are all part of Active Treatment. They're all under the heading 440.

What the First Circuit said in *Rolland* was:

> "Active Treatment, and the subsections of Active Treatment, apply in nursing homes."

The other sections of the ICFMR, the environmental modifications, the resident rights, you know, there's nothing

that indicates the Secretary was intending to make the nursing homes comply with those, but there was to comply with Active Treatment.

So the defendants' only argument here under (b)(6) is that the plaintiffs are wrong. The plaintiffs are wrong in claiming that the Secretary and their -- our clients, that the Secretary meant to apply Active Treatment, the various parts of Active Treatment.

They don't claim that our assertion that the State is not providing active treatment at least under the one subsection that they concede is relevant, they don't claim we failed to state a claim there. So we're saying -- we replied back, and what we urge the Court to do now is, the legal question that the First Circuit has addressed and resolved -- which the Fifth Circuit, by the way, has not ever had an opportunity to address. The Fifth Circuit has said in a case called *Grant v. Gilbert* that:

> "We assume the Act creates rights for recipients. We are not addressing exactly what active treatment means here."

That question, that legal question actually is a common contention we're going to talk about in the class certification motion. It's a question the Court will undoubtedly, by our briefs, be asked to resolve exactly what the scope is of the Active Treatment mandate that the

Secretary's regulations impose on the State of Texas and every other state.

But it doesn't go to whether we stated a claim. Because we've stated -- we have stated a claim that folks in nursing homes are not getting active treatment, regardless of what exactly active treatment means.

THE COURT: Right.

MR. SCHWARTZ: All right. And we have made clear that that claim is privately enforceable. And, finally, we have argued, and I think identified an unbroken line of cases from district courts and courts of appeals saying both of those things are true and that the defendants have done neither of those.

If I may, let me turn to the other Medicaid claims that Ms. Juren spoke to which the State is seeking to dismiss. They really break down, I think, into -- there's three additional other ones. There's comparability, freedom of choice and reasonable promptness.

Comparability, which is the one that Ms. Juren cited as 42 1396a(a)(10), essentially says that people who are equally situated, who are eligible under the same Medicaid provision, they're called "categorically needy." Categorically needy means you're poor. Congress has said that if a state has a Medicaid program, it has to offer the same services to the categorically needy in one place that it

offers to the categorically needy in another. And then, as I've just sort of described, there's a special provision because of the Nursing Home Reform Acts that says the Secretary and the Congress have determined that the services that you offer to residents of nursing homes with intellectual disabilities, they need to be the same as the ones you offer to the persons with intellectual disabilities in the other institutions you run called ICFMR's because both facilities must meet the same level of care, the same professional standard.

Active treatment is really a buzz word of sorts for a professional standard of care. It's another way of saying from the -- the disability professionals use that to mean adequate care: active treatment. And so by the sections that I've run through before, it says that -- the Congress has said that comparability means for nursing facility residents the same active treatment, the same specialized services that you give to ICFMR residents.

So the Comparability Provision -- so our claim is that not only under the active treatment provisions of the NHRA but under the Comparability Provision of the Medicaid Act, folks in nursing homes who have intellectual disabilities are entitled to the same basic services as the folks in the other institutions.

The defendants try to mischaracterize this argument

and saying we're saying -- and we are not saying -- that people in nursing homes with developmental disabilities are entitled to all the other services that Medicaid gives them in the community or waivers or anything else like that. That's way off. Way off.

What we are saying is that because of the coterminous active treatment standard that applies to nursing facilities and ICF's, because you're not supposed to take federal money for people with intellectual disabilities in nursing homes if you don't give them active treatment, just like you're not supposed to take federal money if you don't provide people in ICFMR's active treatment, that because of that the State is violating comparability. We say very clearly they are not providing the same services. There's no doubt they are not. They don't deny that they are not. They don't make any allegation that folks in nursing homes get the same habilitative services as folks in ICFMR's.

Rather they say that they're not obligated to do so, and we understand that as a legal argument, but that doesn't mean we haven't stated a claim. It means we have stated a claim to active treatment and will ask this Court, as the district court in the First Circuit was asked in *Rolland*, you know, exactly what that provision means. But, clearly, we have stated a claim. By the way, the states don't -- the defendants don't make any argument that comparability can't be

enforced by private citizens, except the general provision that I talked about before, the sweeping Medicaid doesn't create any rights argument.

So courts have been unmistakably clear, and without exception, finding that comparability, that is Sections a(a)(10), create a private right of action. And so that's essentially the claim. The Fifth Circuit has also said that a(a)(10) creates a private right of action enforceable both in *S.D. v. Hood* and in *Blanchard v. Forrest* both of us discussed in our brief.

So because there is no contention that comparability requirements of Medicaid are -- cannot be enforced by private citizens because flip side there's an acknowledgment that they can, the only argument made here goes to what the scope of the Active Treatment Provision is and we strongly suggest to the Court that that's not a (b)(6) problem. The statute is enforceable. The statute says active treatment. We are entitled to the same active treatment, and the Court can, at another day, you know, on summary judgment or some other place, you know, after you hear from experts, for instance, or discovery or we can gather certain facts and this record is made, you know, more robust, at that point we can come forward to you and say, "Here's why they're not getting it and here's what it actually means."

Next let me turn to the next provision, the Freedom

Of Choice provision.

THE COURT: I need a brief recess.

MR. SCHWARTZ: Sure.

(Recess; resuming on the record.)

THE COURT: Let's continue.

MR. SCHWARTZ: Your Honor, we've covered both the broad sort of sweeping argument about Medicaid and then two of the four, by far the most important, discrete provisions, Nursing Home Reform Amendments and comparability. Let me turn to the last two, and I'll be brief.

The next provision that the defendants focus on and make quite a bit about has to do with Freedom of Choice. Freedom of Choice, which is, as Ms. Juren said at 1396n(c), was Congress's deliberate attempt to make sure that people were going to actually be given a choice. If they were going to enroll in the Medicaid program and if they were going to get services from the state in terms of intellectual and developmental disability services, it wanted to make sure that people were given a choice between going to an institution to get those services and getting them in the community.

It wasn't going to tell the state they had to do certain -- how much they had to do, but they said, "If you're going to operate both programs, community and institutions, you have to give people a choice." And it said, "By the way, you have to give them some information so they can make an

intelligent choice."

So the question is: When do people get the information? That's what we're fighting about.

The defendants don't claim that they're giving residents -- people who are on their way to the nursing facility a choice about community. They're not claiming they give them even information about the choice. They just say they don't have to do that. In fact, they recognize that they are not giving people information about the community waiver program or their other services, whatever else they run, before they go to the nursing home.

THE COURT: Well, what, if anything, is the State of Texas doing in your view?

MR. SCHWARTZ: I'm sorry, what are they doing?

THE COURT: What, if anything, is the State -- you're saying they don't give them a choice, they don't give them --

MR. SCHWARTZ: What they --

THE COURT: Assuming that's true, what else do you claim -- or, rather, assuming that's even true, what are they doing?

MR. SCHWARTZ: Well, the purpose of this section was that folks would be given -- families would be given some information sort of on their way towards the nursing home before they made the choice to enter the institution: "You can go to the institution, here's what it offers. You can go

to the community and here's what we have available. Sometimes we don't have any slots. Sometimes we do. Sometimes we have a program over here but not over there." That would be the information that a family would need to make an intelligent choice. And they would be given that information before they make a choice, before they elect to go into the institution. Because what good is the information about choice once you've made the choice? It just doesn't make any sense.

So the information that would be given, that Texas does not give, is information to prospective nursing facility residents about what community programs are or are not available. And to the extent that they said, "We have a good community program over here but we don't have any vacancies and we don't anticipate any vacancies for a period of time," then the families would be able to make an intelligent choice. If the period of time they'd have to wait was relatively short, perhaps they'd choose to see if they could keep their loved one out of the institution. If the period of time they'd have to wait was very long, perhaps they'd choose to go to the institution. That's what choice is about and that's the purpose of information.

Now the Fifth Circuit in *Grant* said, "There is an informational right" -- an informational right, a right to information -- "and the information" --

"if you're not given information,
that constitutes an adequate injury."

So the difference here, the defendants don't challenge the fact that we have a right to information, nor do they claim that they're actually providing the information. Rather, what they're saying is they don't have to give the information about the community programs until people are sort of on the verge of entering the community program; that is, they have applied for it or they've come and asked questions about it. But that's backward -- and they don't have to give it when the people are going to the institution. And we're suggesting to you, Your Honor, that just doesn't make sense, that's just backwards.

You know, we're not arguing that they have to give them, you know, a particular slot that isn't -- or change their waiver. What we are arguing right now is that they have to give people information so they can make an intelligent choice. And they have to give them that information at the time that the persons make the choice, which is, you know, right before the front door of that nursing facility.

So that information about choice is relevant and necessary prior to institutionalization. Once the person's chosen to go into the institution, and once they're in the nursing facility, the choice about where to go is already moot. Of course, it's a nice thing if they would give them

some information about how they might get out, you know, that's desirable, but that's not what Freedom Of Choice provision -- Medicaid doesn't require that once a person's institutionalized you give them a lot of information about how to get out. It does require that you give them information before they make the choice.

So the crux of the claim here, which the parties -- the parties don't dispute there is a right to information. The parties don't dispute that people are entitled to an assessment and they have to meet a particular need.

What the parties dispute here, I think, is when the choice is -- when the information must be given. The defendants say, as they've already explained to you, doesn't happen until you're ready to walk into the waiver, into a community program, and we're saying at that point it doesn't make any sense. We're saying it should be done prior to the nursing home. We have stated very clearly in our complaint that there are a number of the plaintiffs who were not given any information about community alternatives before they went to the nursing home and that's why we've stated a claim.

The defendants don't really make an argument that the Freedom of Choice provision cannot be privately enforced by Medicaid recipients; again, with the exception of the sweeping claim that Medicaid can't be enforced by anybody, even the United States. But as to the Discrete provision, Freedom of

Choice, they don't really claim that and the Ninth Circuit has held in *Ball v. Rogers* rather recently, post *Gonzaga*, that because the provision speaks in terms of individuals, because like the Fifth Circuit said in *Grant* there is a right to information, or a constant and ongoing injury if you're not given information, that because of that, you know, we've stated a claim and the claim is privately enforceable.

Last provision of the Act that I want to address is Reasonable Promptness. Promptness is found in 1396a(a)(8).

THE COURT: Tell me that again.

MR. SCHWARTZ: 1396a(a)(8).

THE COURT: Okay.

MR. SCHWARTZ: Promptness means that you're entitled -- that when you are entitled to services you get them within a reasonable period of time.

THE COURT: Is that defined in the law as to what is a reasonable period of time?

MR. SCHWARTZ: It is not. The Secretary has not also defined what promptly means, but the Eleventh Circuit has defined it as no more than 90 days.

THE COURT: Okay.

MR. SCHWARTZ: But that's a range. So the Court gets a range. And with respect to that claim we say that for all the reasons I've been through before, or just a little while ago before the break, about specialized services that

residents of nursing homes are not getting the specialized services they need. They're not getting them today, they're not getting them in 90 days from today, they're not getting them ever. They're not getting them. They are not getting the active treatment program that they're entitled to.

And our plaintiffs, all of whom are individuals with intellectual disabilities, all of them who, by the way, either never got a PASRR, or if they did get a PASRR, it said they didn't have a disability. Remarkable coincidence. Six people, plaintiffs, all of whom have long histories, cerebral palsy, developmental disabilities, intellectual disabilities, mental retardation, all of whom, born or developed, a substantial disability. This is not a close question where you can't quite see based on an IQ test whether a person is properly labeled as intellectual disability or not.

These are folks if you met them, Your Honor, you would have no doubt that they have an intellectual and developmental disability. Yet their PASRR said they didn't have a disability. They never -- if they got a PASRR at all, it said they didn't have a disability. So they never got the assessment. They never got the services. And so there's a chain. Obviously you don't get services unless you're assessed you need the services. You don't get the assessment unless you're found to have a disability. So if things are screwed up on the front end, they're going to be screwed up on

the back end. And that's essentially the claim here.

So people are not getting specialized services in a timely way because they're not getting them -- a lot of them are not getting them at all.

The Inspector General of the United States did a study of the PASRR programs around a number of states. It found that in Texas 82 percent of the people who needed services weren't getting them. That Texas was failing or in noncompliance with the PASRR requirement that they get specialized services 82 percent of the time. So that, essentially, is the promptness claim.

There is no argument that the Reasonable Promptness provision of the Medicaid Act cannot be enforced by private citizens. The defendants don't make that argument. They couldn't make that argument. Supreme Court said in *Halderman v. Pennhurst* that the Reasonable Promptness provision is the quintessential example of a privately-enforceable right. And so the fact -- you know, there is a second argument that I don't think we really need to -- which is whether, whether and to what extent the reasonable promptness claim applies to the community services.

For the purposes today of have we stated a claim, whether we state it as to the community or we state it as to specialized services, we stated a claim. And so our claim stays in. It stays in the case because we have described to

the Court and given examples through our named plaintiffs, evidence through various documents and Inspector General reports that people are not getting specialized services in a timely way, or at all for that matter.

That concludes the part on Medicaid. Ms. Juren did talk about the standing of the organizational plaintiffs, if you'd like me to address that now or come back to it?

THE COURT: You can do it now.

MR. SCHWARTZ: Okay. There are two organizational plaintiffs in this case. One is the Arc of Texas, one's the Coalition of Citizens with Disabilities. The Arc of Texas, as the Court may be aware, is the oldest and largest volunteer organization in the entire state. It has, according to the affidavit of its executive director, over 3,000 members. Many of those members are in nursing facilities in Texas.

The Arc of Texas has been an organizational plaintiff in a number of other pieces of litigation involving developmental disability services in Texas, including *Arc v. Cavannagh*, *McCarthy v. Hawkins*. The courts have found that the Arc of Texas has both organizational standing, because it works hard on these issues, and associational standing.

The Coalition for Texans with Disabilities also has thousands of members. Some of them, many of them are individuals in nursing homes. So they -- and, in effect, the defendants don't challenge the associational standing of

either the Arc or the Coalition. And there are some other more minor standing arguments in this question or that.

Ms. Juren described in some detail about what do you need to have standing under freedom of choice, or other complicated question, but they don't really challenge the associational standing of the Arc and the Coalition to bring, for instance, the NHRA claims, or the ADA claims. Nor could they. You know, these are two organizations that have lots of members who are in nursing homes who aren't getting specialized services. They have lots of members who are in nursing homes who are unnecessarily segregated, you know, because they are -- you know, and want to leave.

Mr. Bright in his affidavit talks about -- you know, and they misconstrue that affidavit because Mr. Bright talks about, "I've been to nursing homes and I know there's hundreds of our members, hundreds of people I have seen or personally have observed who are in nursing homes, they don't want to be there and they should be getting out. They don't -- they're qualified to live in the community. They'd benefit by integration."

All right. Mr. Bright was not saying there's only 300 people in all of Texas, you know, in nursing homes who are qualified to get out. He's saying, "There's at least that many because I know that many." He's had to submit that affidavit based on personal knowledge. So he had to speak

about the hundreds of people he knows. He doesn't know all 4,000 people in Texas nursing homes. He knows a couple of hundred and he spoke about those. And so those organizations have associational standing.

We also suggest, as we set forth in our brief, although it's not as critical, that they have organizational standing as well as associational standing and they have organizational standing because their executive directors have averred in their affidavits that they only have a limited amount of resources. They have a few people who work for the organization. They advocate for thousands of people. They advocate at the Governor's Office or they advocate at the Legislature, and if they're focusing on -- and they have been and they say in their affidavits, "We have been focusing on getting people out of nursing homes." You know, the tragedy of having thousands of people with intellectual disabilities stuck in nursing homes not getting out, not getting access to the community programs, and not getting the services while they're in the specialized services and active treatment, and we've been working on that. We have to -- and we've spent a lot of time and energy in a variety of different forms trying to change what they call the broken PASRR program in Texas.

Well, of course, if they're spending a lot of time on that issue, it's kind of common sense, they're going to

have less resources and opportunities to spend on other issues. So for that reason, the fact that they have targeted a reasonable portion of their resources, including information to members, advocacy work at various, different public forums, to these nursing home issues, they have met the organizational standing.

But as I said a moment ago, you know, there's no question, really no substantial challenge to the fact that they meet the associational standing. And, of course, as long as they have associational standing, they have standing, they're in the case, that's the end of the matter.

So I think we've demonstrated, especially as supplemented by those affidavits, that both organizations have standing; that the sweeping Medicaid argument that no one has rights is wrong; that the four Medicaid provisions, NHRA, comparability, freedom of choice and promptness, we've stated a claim; that they're privately enforceable and, therefore, the motion to dismiss in those regards should be denied.

Thank you for the opportunity to address you, Your Honor.

THE COURT: Certainly. Any other plaintiff lawyer wishes to address any of the points? Well, you're not in the lawsuit yet.

MS. RUSH: I'm sorry, Your Honor, I didn't quite hear you. Were you asking whether the United States --

THE COURT: I said you're not in the lawsuit yet, but you might be. So go ahead and take a seat. Any response to any of the matters raised or spoken?

MS. JUREN: Yes, Your Honor, we do have responses. We're going to respond to the first issue that Mr. Schwartz raised, which is what he characterized as the global issue with regard to whether there's a private right of action to sue to enforce the Medicaid Act. We're going to address that first if that's okay with the Court.

THE COURT: Of course.

MS. JUREN: And that's going to be Mr. Oldham who will address that issue. And then I will follow up with the other specific matters related to private right of action and failure to state a claim on the four provisions of Medicaid Act.

THE COURT: All right. Go ahead, Counselor. Will you state your name again for the record?

MR. OLDHAM: Good morning, Your Honor. May it please the Court, my name is Andrew Oldham for the State of Texas defendants.

THE COURT: Holden?

MR. OLDHAM: Oldham.

THE COURT: Oldham?

MR. OLDHAM: Yes, sir.

THE COURT: Okay, go ahead.

MR. OLDHAM: We've spent a fair amount of time in the weeds this morning and so I'm hoping that I can give the Court an easy way, if we sort of take a step back, an easy way to resolve the Medicaid claims in this particular case. And in that regard I'd like to make two brief points.

THE COURT: Okay.

MR. OLDHAM: The first is our argument that no provision of the Medicaid Act is enforceable under Section 1983. And then the second is a response to some of the misconstructions of that argument that you've seen in the papers from the plaintiffs and from the Department of Justice.

First I want to be very clear about what we're arguing. The Medicaid Act does not unambiguously create a private right for anyone. It's a reimbursement statute. It dangles a carrot in front of the states and it promises them federal money if they agree to provide certain services to their citizens. Nowhere does it create a private right to those services. So we've argued at length in our brief that the Fifth Circuit's decision, its 2007 decision in *Equal Access for El Paso*, compels that result, and the plaintiffs have said nothing to the contrary.

In fact, I find it a little remarkable that we've heard so much about all of the cases that say that this argument is misguided given that equal access, the most recent pronouncement on the issue, is discussed at length in the

motion to dismiss, it's discussed at length in the reply brief. The plaintiffs said nothing in their opposition to the motion and they said nothing about it today.

Instead, they've relied on other cases. For example, *S.D. ex rel*, which is a 2004 decision, written by the same judge, Judge Dennis on the Fifth Circuit that wrote *Equal Access*, and in *S.D.* and other cases that are discussed in that, including *Blessing*, the courts have applied a multi-factor balancing test to discern whether and to what extent a particular federal statute enacted pursuant to Congress' spending clause powers creates a right that would be vindicable under Section 1983.

In *Equal Access*, Judge Dennis, speaking for a unanimous Fifth Circuit, said that analysis, that is, the analysis espoused in *S.D. ex rel*, the analysis espoused in the decisions preceding that, and all of the other cases that the plaintiffs and the Department of Justice have cited for the *Blessing* balancing test, the three-factor, multi-factor balancing test, do not survive what the Court said in *Gonzaga*, which is:

> "Notwithstanding all of the prior things that we have said about how do you determine whether and to what extent something is privately enforceable, we now say, in *Gonzaga v. Doe*, that nothing short

of an unambiguously conferred right will do."

And that is what our argument is today, that there is no unambiguously conferred right in the Medicaid Act to private plaintiffs anything. That the State of Texas provides that subject to the reimbursement requirements in Section 1396b and if the State of Texas fails to substantially comply, which is the standard in 1396c, to provide the services set out in the State plan, there is a remedy for that and it is for the United States, through its Secretary of HHS, to cut off the spigot of funding.

The second point I'd like to make is to be very clear about what we are not arguing. We are not arguing now, nor have we ever in this case, that spending clause legislation is always and never, that is to say it's never enforceable through Section 1983. Quite to the contrary. There are examples, we've cited some in our briefs, the plaintiffs have cited others, where Congress can make spending clause legislation enforceable through Section 1983 by using language that says something to the effect of no state that accepts funds under this chapter, under this article or under this act may do X or Y.

That's what Congress did in, for example, Title VI of the Civil Rights Act which prohibits discrimination on the basis of race for programs that accept federal funds. That's

what Congress did, for example, in Title IX of the education amendments of 1972 where Congress said no state that accepts funds under this chapter will discriminate on the basis of gender. And that's what Congress did in, for example, ARLUPA, which says that any state -- or any government, it's actually broader than just states -- any government that accepts federal funds shall not impose a substantial burden on the exercise of religion.

So Congress can in fact write statute that way. Our only point is that the Medicaid Act doesn't. Congress simply said, "If a state does X or Y, then we shall reimburse a certain portion of the state's cost pursuant to an extraordinarily complicated formula," which the Court has heard nothing about this morning but it's set forth in some of the briefs. The conditional congressional promise to reimburse some of the state's funds is far, far, far, far from the clear, unmistakable and unambiguous language demanded by *Gonzaga* and demanded by *Equal Access*. And that alone demands dismissal of the Medicaid Act claims.

The second clarification I want to make is that our argument has nothing at all to do with *Sea Clammers*. Again, this is an issue we haven't talked about today but is discussed at length in the brief, and I want to explain what we mean when we say it's not *Sea Clammers*.

As the Court will recall, a state has two bases for

avoiding a Section 1983 suit brought to vindicate spending clause legislation. One is the one I just discussed, which is to say there's no unambiguously conferred right under *Gonzaga*. And then the second is to say even if there is an unambiguously conferred right, there is nonetheless a comprehensive remedial scheme that would somehow foreclose the use of the Section 1983 remedy, and that's what happens in *Sea Clammers*. It's also what happens in the *Rancho Palos Verdes* case, which you heard from plaintiffs' counsel earlier this morning. That's not what we're saying at all.

Oh, I should hasten that. *Gonzaga* Footnotes 4 and 8, I direct the Court's attention to those where it makes this distinction. It explains that in *Gonzaga* type cases, like the one we're making here, we're just talking about the unambiguously conferred right or the lack thereof, and in *Sea Clammers* cases we're talking about a comprehensive remedial scheme. Again, not our argument here. All we're saying is that there's not an unambiguously conferred language -- I'm sorry, not an unambiguously conferred right.

I'd like to make two brief rebuttal points to what we heard from plaintiffs' counsel. One is the remarkable suggestion that *NFIB v. Sebelius*, the Supreme Court's pronouncement on the Healthcare Act somehow supports the plaintiffs' position in this case and not only is that not true, it's emphatically the opposite.

As the Court may recall from that decision, the Supreme Court talks at length about the Medicaid Act and the Medicaid expansion provisions which were at issue in that case. And the Court makes very, very clear that Medicaid requires one and only one thing and that is that states must have, as an incident of their co-equal sovereignty, a bona fides choice to participate in the program. The federal government is not allowed under any set of circumstances, and this is the Court's language:

"... to hold a metaphorical gun to the head of the states."

That is why the Court struck down the Medicaid expansion in *NFIB v. Sebelius*. The Court said were we not to do so, we would run afoul of many, many, many different spending clause decisions that we've discussed; most appropriately, *Prince v. United States* and *New York v. United States*.

So *Prince* involves the handgun registration provisions of the federal spending clause statute. *New York v. United States* required states to take titles to certain portions of nuclear waste, another statute enacted pursuant to the spending clause. And in both of those cases the Supreme Court found that the federal government had unconstitutionally commandeered the state governments for federal purposes.

So they're not allowed to use spending clause power to commandeer the effect of the states. And what the

plaintiffs in this case are effectively doing is to say, "Well, sure, maybe the federal government can't use spending clause legislation to hold a metaphorical gun to your head but we can use Section 1983 and bring a suit that would compel you, State of Texas, to adhere to Section -- our interpretation of what Section 1396a of the Medicaid Act requires." And that's not at all -- it's certainly not what the Court said in *NFIB v. Sebelius*, and I would submit to the Court that it's not at all an accurate description of the Medicaid Act.

The second point I'd like to address, we heard at length about the various provisions of the Secretary's regulations, that there's a *Chevron* deference and how those give rise to all sorts of rights that are vindicable under Section 1983. And, again, that is squarely foreclosed by Supreme Court precedent. In a case called *Alexander v. Sandoval*, discussed in both parties' briefs at length, the Supreme Court made very, very clear that when it comes to finding a right that a private plaintiff wants to bring into court and vindicate under Section 1983 there is one and only one touchstone, and that is statutes enacted through bicameralism and presentiment by the United States Congress presented to the President for his signature and signed into law.

You cannot under any set of circumstances look at

something that is not in the statute but is some extra gloss promulgated through a federal regulation, even if it's done through notice and comment, even if it's published in the *Federal Register*, even if it's upheld under *Chevron* or whatever else, as the source of that private right.

So to put some meat on the bones, in *Alexander v. Sandoval*, the Court was talking about a racial discrimination provision. So Title VI, as I mentioned earlier, says any state that accepts money under this title shall not discriminate on the basis of race in the programs receiving those funds. That, the Court has said, is enforceable through Section 1983 because it is phrased in those terms; that is, if you take this money, you shall not do this other thing, that is discriminating on the basis of race.

What happens in *Alexander v. Sandoval* is the administrative agency says, "Fair enough. We'd like to add an additional gloss on that which is you shall not do -- take steps that cause disparate impacts on the basis of race." And then a private plaintiff tried to vindicate that regulatory right through a Section 1983 suit and the Supreme Court said, "No, that is not how it works."

So when the Court sits down to write its opinion and to analyze these issues, I would just hasten to point out that to the extent that the Court finds a right, it has to be in the statute. And if the Court goes through and looks at each

one of the statutory provisions under which the plaintiffs have claimed in this case, they simply say, "If a state wants money from the federal government pursuant to the Medicaid Act, it must do this following thing."

It would be no different from me saying to the Court -- or me saying to my friend, "Friend, if you want $10 from me, you must do ten pushups." My friend could do ten pushups and I would give him $10. My friend could do no pushups and I would give him no dollars. My friend could do ten pushups today, no pushups tomorrow and I would give him $10 today and none tomorrow, or he could do ten today and five tomorrow, I'd give him $10 today and none tomorrow. But under no set of circumstances could you ever say that my friend -- or, I'm sorry -- that I or anybody else would have a right against my friend if he failed to do pushups, if he failed to do ten pushups, or if he altogether just refused to do any.

And that is what the Medicaid Act does and we've argued it at length in our brief and we've not heard a response from the plaintiffs or from the United States. Thank you.

THE COURT: Any response about the *Equal Access* case?

MR. SCHWARTZ: The *Equal Access* case addressed a particular point in the Medicaid Act. It was actually an important point. It's whether the Act, quite similar to what you just heard, whether the Act is just an insurance program

that pays bills or whether the Act creates rights to services. And there were several Courts of Appeals that came down on the insurance side and said, "The Act doesn't" -- looking at the Reasonable Promptness provision, it says that -- it said, and *Equal Access* was one of the Courts that said that the Act doesn't create enforceable rights in that way.

Congress then turned around and amended the Medicaid Act. It amended the Medicaid Act and explicitly defined -- by the way, the *Equal Access* decision rests on a analysis of the opening provision of the Medicaid Act, 1396a, the definition of medical assistance. So the Act begins with "Medical assistance means," and *Equal Access* and one or two other Courts said when you look at that definition it says that the state must pay for, doesn't have to provide the service. That's the narrow -- the focused holding of *Equal Access*, that the definition of medical assistance requires a state to pay for but not provide medical services.

Congress turned around after *Equal Access* and one or two other courts and said, "That is fundamentally not what we were talking about. That decision, *Equal Access*, that interpretation of medical assistance is contrary to what we tried to do in 1966 when we created the program, it's contrary to what we did when we have modified the program over many years." And, rather -- and it redefined, Congress redefined medical assistance to mean the payment for services or the

services themselves.

So the Medicaid Act has been modified after *Equal Access*. *Equal Access*, as a result, which is essentially an interpretation of the words medical assistance in 2007, is no longer controlling and everyone agrees that -- I mean the Congress agrees and the Supreme Court agrees because the Supreme Court said, in *National Federation* -- one of the issues that came up in *National Federation* was is the clarification, we could call it, or the amendment of the medical assistance definition binding on the states. The Supreme Court said it was. It is. The Medicaid expansion, you know, despite the characterization that you just heard, the Supreme Court said in *Federation* that the Medicaid expansion is permissible.

What's not permissible is for the Secretary to cut off funds for the states who are not willing to expand their program to more people. Medicaid expansion was essentially every state should cover more people. And as the Congress originally wrote the bill, it said, "If you don't cover the more people, we're not going to give you money to cover the old people. We're going to cut off all your money." And under the decisions that you just heard defendants talk about, the Supreme Court, speaking through Justice Roberts, said, "You can't do that. You can't cut off money from the old program," you know, the original Medicaid program, "because a

state chooses not to expand the number of people it serves. You can cut off money for the old program if they don't do what the old program says, you can cut off money for the new program if they don't do what the new program is, but you can't lock them together." That's what would be coercive.

So the Supreme Court in no way struck down -- in fact, it said -- it says, you know, the other provisions of the Medicaid Act are -- remain intact. One of the provisions of the Medicaid Act that remain intact is Congress's change, amendment to the term "medical assistance."

So we didn't address *Equal Access* because of two things. One is that the law had changed by that time, but as the defendants said in their brief and as we said back on the time we filed these briefs, the Supreme Court hadn't spoken. So we were going to -- you know, no one -- it didn't serve this Court, any good for people to speculate about what the district court in Florida was saying, or the Eleventh Circuit or the Fourth Circuit because everyone knew this case was going to the Supreme Court. And we knew, we all knew, and I think the defendants ultimately conceded that the final arbiter or what the "medical assistance" means and what the Medicaid Act means would be the Supreme Court in *National Federation*.

The one last thing I just want to mention is there was a strong point, or a point about the regulations that we

spoke at length about, the defendants' claim are not enforceable. We don't dispute, by the way, the controlling decision that was just cited. *Alexander v. Sandoval*, speaks to when agencies are able to create -- are able to enact regulations and when those regulations are enforceable.

Alexander was decided in 2001, I think, or just on the edge of 2002. The First Circuit's decision in *Rolland* discussed the regulations post *Sandoval*. It said:

> "Applying the *Sandoval* test that the Supreme Court has articulated, we hold that the PASRR regulations are enforceable."

They meet that test.

> "And we hold that for two reasons. One is because the Congress has instructed the Secretary to enact regulations and the Supreme Court and this Court," that is the First Circuit, "have always given the Secretary's regulations some deference in the Medicaid context; and, second, because the literal words of *Sandoval*" -- "the literal instructions in *Sandoval* are met."

The Third Circuit agreed. The District Court in Massachusetts agreed. The District Court in Missouri agreed, in Connecticut, in Maine, in the District of Columbia, in New

York, and in Ohio. Every single District Court that has considered the question or the enforceability of the regulations post *Sandoval* have said they're enforceable, and the defendants don't point to one case, not one case in which a District or Appellate Court have held that those PASRR regulations are not enforceable. In fact, the only thing, the only citation they give you is a dissenting judge in the Third Circuit who said that he doesn't think they are enforceable. But (a) he wasn't in the majority; (b) the defendants in this case are constantly saying, "Decisions of other courts, of other circuits like the First Circuit in *Rolland*, or the Third Circuit in *Grammer* are not controlling." They are. They're right, they're not controlling, they're influential, they're precedential, and they give this Court guidance.

And so I think there's no disagreement between us that *Sandoval* sets the test. There's no disagreement between us that every court post *Sandoval* that has applied the test has found the regulations enforceable. And there's no disagreement between us that no court post *Sandoval* has ever found the regulations unenforceable. Thank you.

THE COURT: Yes. Go ahead.

MR. OLDHAM: I'm sorry, Your Honor, just one brief response on the *Equal Access* case. I can't speak to whatever statutory amendments may or may not have been made after 2007 because they weren't cited in the plaintiffs' brief. There's

no mention -- if you look in the table of authorities of the plaintiffs' opposition, there's no reference to *Equal Access*. So they never explain exactly in their brief why Congress would have overturned it.

But I would point the Court's attention to Page 704 of the *Equal Access* decision, and this is what we think is the relevant part. And if I might, I'll just quote it briefly.

THE COURT: Go ahead.

MR. OLDHAM: "We may no longer, as we did in *Evergreen*" -- as an aside, *Evergreen* is the prior decision underlying *S.D. ex rel*, the ones that you've heard before. So this is where they're abrogating their prior motive analysis.

> "We may no longer, as we did in *Evergreen*, resolve the ambiguities in *Blessing*, *Wilder* and the Equal Access Provision in favor of finding a congressional intent to authorize Medicaid recipients to bring Equal Access Provision suits under Section 1983. We are forced by *Gonzaga*" -- that's *Gonzaga v. Doe* -- "to abjure the notion that anything short of an unambiguously conferred private individual right rather than the broader or vaguer benefits or interests" -- those are quotes from *Wilder* and from *Blessing* -- "may be

enforced under Section 1983."

And that is the portion that is controlling on this, on what co-counsel has described as our, quote, "broad argument." But our argument that Section 1983 does not create the unambiguous private right -- I'm sorry, that the Medicaid Act does not create the unambiguous private right vindicable under Section 1983. Thank you, Your Honor.

THE COURT: Okay.

MR. SCHWARTZ: Your Honor, may I make one more point?

THE COURT: Yes.

MR. SCHWARTZ: I apologize for not addressing this when you asked me about *Equal Access*.

As you just heard in the quote -- that's triggered my recollection -- the Fifth Circuit has previously defined -- had decided that a particular provision of the Medicaid Act called the Equal Access Provision -- that's 1396a(a)(30). It had decided that that particular provision, 1396a(a)(30), was privately enforceable.

Then *Gonzaga* came down. The Fifth Circuit revisited that earlier determination in *Evergreen* and said, just as the quoted provision mentioned that:

"We are now forced in applying *Gonzaga*" --

"when we apply *Gonzaga* to change our mind."

That particular provision, a(a)(30), which is called Rates, it affects the Rates Provision, are providers entitled to a fair

amount of money to provide the services? That provision is no longer enforceable. We agree. We don't dispute that.

In addition to Equal Access, several other Circuit Courts of opinion on that particular provision have agreed that the Equal Access -- the Supreme Court just decided another decision under Medicaid called *Independent Living Centers* in which that question was raised: If it is not enforceable under 1983, might it be enforceable under the supremacy clause? All right.

The Equal Access Provision of Medicaid, are providers entitled to fair rates, is not an issue in this case. We don't disagree on that proposition. Using the quoted language, *Gonzaga*, is -- the issue for this Court is whether the Comparability Provision, the Reasonable Promptness Provision, the Nursing Home Reform Amendments and the Freedom Of Choice Provisions are enforceable. And every court that has looked at those provisions, barring none, have found post *Gonzaga* that they are. Thank you.

THE COURT: Go ahead, Counselor, address the motion to dismiss, any other argument you wish to add.

MS. JUREN: Yes, Your Honor. I want to go back to -- I'll touch briefly with regard to each section on whether the defendants have asserted no private right of action even under the *Blessing*, *Gonzaga* type analysis, or *pre-Gonzaga* analysis. I think that Counsel has misstated the defendants' position on

some of those things.

I want to start first, though, with discussing this issue of specialized services because Counsel I believe has not only misrepresented the actual wording of the regulation, whether or not it's enforceable, the wording of the regulation, but also the holding of the case that he keeps citing to, *Rolland v. Romney*, the First Circuit case at 2003.

In that case, and I'm looking at Page 57 of that case, that's at 318 F3d 42, and I'm at Page 57. The Court is discussing there the requirement under 42 CFR, Section 483.120(a)(1), which sets out the standard for specialized services for both the mental illness and what they call mental retardation in this regulation. And it quotes there, it says just what I told the Court before:

> "For individuals with mental retardation, the Secretary crafted a definition of specialized services that incorporated the active treatment standard traditionally applied to ICFMR's. The Secretary defines specialized services for these individuals as, quote" -- and they're quoting right from the reg here -- "'The services specialized by the state, which combined with services provided by the NF or other service providers, results in treatment

which meets the active treatment requirements of Section 483.440(a)(1).'"

And Section 483.440(a)(1) is just part of Section 483.440 which the plaintiffs have said that the defendants have failed to satisfy those requirements, which they're including as part of the requirements for active treatment in a nursing facility because they are set out as requirements for active treatment in an ICFMR.

483.440(a)(1) simply says:

"Each client must receive a continuous active treatment program which includes aggressive, consistent implementation of a program of specialized and generic training treatment, health services and related services described in this subpart that is directed toward the acquisition of the behaviors necessary for the client to function with as much self-determination and independence as possible, and the prevention of deceleration or regression or loss of current optimal functional status."

And so it's clear just from the face of the regs themselves that the applicable standard for specialized services for nursing facilities, which is defined in 483.120(a)(2), cites

only to one section of 483.440, not to a bunch of sections. And it also is clear that specialized services need not -- can be looked at in terms of other things that are provided by the nursing facility, not the list of requirements for an ICFMR.

And in the *Rolland* case, in the footnote, in Footnote -- no, I'm sorry, still on Page 57. The Circuit Court there held just about the opposite of what Mr. Schwartz represented to be the holding of the Court and it says:

> "Thus the regulations require states to provide specialized services in such a manner as to constitute active treatment to mentally-retarded individuals when combined with the services provided by others" -- and that's essentially what the reg itself says. And then it says:
>
> "However, they do not impose on states, when serving mentally-retarded nursing home residents, the considerable onus of complying with every obligation placed on them in their broader role in ICFMR's."

And that is exactly what the defendants have been saying, Your Honor.

With regard to the Nursing Home Reform Act Amendments, I think plaintiffs have misrepresented that the defendants are not challenging the right to privately enforce

those provisions of the Medicaid Act. They are challenging that, and that's set out both in the motion and in the reply.

In addition to the broader argument made by Mr. Oldham under the more traditional analysis, the Section 1396r(e), as I said before, that's one of those sections that they're challenging and that provision is focused on the regulated agencies here not, not on Medicaid recipients. And that particular one, r(e), sets out a requirement for the state to develop a state plan. And the defendants would urge the Court to adopt the position here of the dissent in the *Grammer* case that plaintiffs have cited which takes the position that in 1396r(e), the mandatory language is directed at what the entity must do to receive federal funds and not directed to the residents themselves or any right that they might have.

And our position with regard to 1396r(e) is that:

> "The references to the nursing home residents are" -- and I'm quoting from *Gonzaga* -- "in the context of describing the type of policy or practice that triggers a funding prohibition and not to impose particular requirements for the residents that would trigger a private right to enforce."

I believe that the plaintiffs have conceded that

1396r(b), which applies to -- which is directed to nursing facilities, NRF, which sets out the responsibilities of the Secretary of Health and Human Services relating to nursing facility requirements, I believe that they have conceded that those two sections do not create enforceable rights to the individual plaintiffs.

MR. SCHWARTZ: Would you like me to address that now, Your Honor?

THE COURT: Yes.

MR. SCHWARTZ: We have not conceded that they do not apply. We have not conceded that they don't create rights. We have said that the statute creates the rights within Section (c) and then in a separate section delegates to the Secretary the regulations. The delegation section is not privately enforceable. We are not trying to enforce. What we are saying is because when you look at the statute, you see that Congress chose to put the rights in one section, the prohibitions on nursing homes in another section, and the Secretary's delegation in another section, that the proper way to analyze this is all together. But that the actual creation of the rights is in the middle one, (c).

THE COURT: Okay. Go ahead.

MS. JUREN: I'm just going by the sections under which they've asserted claims.

THE COURT: Right.

MS. JUREN: And I'm trying to summarize what those sections -- what entity those sections addressed.

THE COURT: Right.

MS. JUREN: And, again, with regard to the NHRA claim, I believe I've addressed the active treatment requirement and that's what they seem to be focusing on almost entirely as the defendants' position. I think it's clear language that the full range of so-called active treatment in an ICFMR is not required in a nursing facility. To the extent that plaintiffs have claimed otherwise, or asserted otherwise and seek -- have asserted a claim otherwise, they have failed to state to claim under 1983.

THE COURT: Okay.

MS. JUREN: With regard to -- oh, okay. Well, with regard to the so-called Freedom Of Choice sections, which is 1396n(c)(2)(B) and (C), again, Counsel has totally glossed over where that section shows up in the Medicaid Act, which is under the Waiver provisions of the Medicaid Act and what it actually requires. And what the Secretary has said about when those -- it's the assurances, it's the -- excuse me -- it's the requirement for an assessment of eligibility for a waiver and the information, provision of information relative to alternatives to the waiver.

I have cited in the briefs that the Secretary has actually -- confirms that when this provision is triggered is

at the time that somebody is going into the waiver. It is not, as they try to blend it in, when the person comes into the nursing facility to begin with.

There are different provisions of the Medicaid Act that relate to different requirements. There's the PASRR requirements that do relate to when someone is about to come to a nursing facility, the two levels of assessment that are required at that time, and as part of the Level 2 assessment, there is the looking at the appropriateness for community placement. That is part of the Level 2 PASRR assessment. But that, 1396n(c) is not that requirement. 1396n(c) is a different requirement and it's not applicable to the -- in the way that the plaintiffs are making it out to be. And I think that's been set out already.

With regard to 1396a(a)(8), the reasonable promptness claim, and 1396a(10)(B), the comparability claim, defendants have made an argument that these are not -- these sections are not privately enforceable by the Medicaid recipients even in addition to the broader argument.

With regard to the comparability requirement, Counsel cited to *S.D.*, I believe *S.D.* -- related to a different section not a(10)(B), maybe a(10)(A). But, at any rate, we're asserting that *S.D.* should be revisited or overturned in light of *Gonzaga*.

And certainly with regard to stating a claim, where,

as here, the waivers are full, there is no requirement for reasonable promptness. And certainly Judge Sparks in the *McCarthy* case agreed with that.

I think I have covered the reasonable promptness, the comparability, the general NHRA allegations, and then that particular one regarding specialized services.

THE COURT: Okay.

MS. JUREN: If the Court has any more questions?

THE COURT: Not from me. Any other defense counsel wants to add anything? Okay. When we reconvene, let's see, at 1:45, we'll take up the U.S. Government's Motion to Intervene, and one other matter I believe. I'll let you know at that time. Motion to intervene, class certification, and any other matter. Okay, we're in recess till then. Thank you.

(Recess; resuming on the record.)

THE COURT: Okay, you may be seated. We'll proceed now to the -- Mr. Schwartz, I understand you have a -- what time is your flight?

(Discussion re: flight time.)

THE COURT: If we need to reconvene, we're going to do that because I'm going to give you all sufficient time. So don't feel constrained to finish. On the other hand, like I tell lawyers, don't feel compelled to take all the time granted. Okay, let me hear from the Government on the motion

to intervene.

MR. KOCH: Good afternoon, Your Honor, Robert Koch on behalf of the United States.

THE COURT: Okay.

MR. KOCH: Under controlling Fifth Circuit precedent, all of which we cited in our briefs, the United States is entitled to intervene as of right under Federal Rule 24(a)(2). In addition, the United States satisfies the requirements for permissive intervention under 24(b)(2).

The State's main argument against either form of intervention is that, according to the State, the United States did not satisfy statutory prerequisites to suit. Those prerequisites apply to just that, filing a lawsuit. They do not apply to intervention. And, even if they did apply, the United States satisfied the plain text of the relevant statute.

So, first, intervention as of right. The Fifth Circuit has a four-part test to determine whether a party is entitled to intervene, which is delineated in *Doe v. Glickman*, 256 F3d 371:

> "The motion to intervene must be timely. The intervenor must assert an interest related to the basis of the controversy. The case at issue must have the potential to impair or impede the intervenor's

interest."

And:

"The existing parties cannot adequately represent the intervenor's interest."

Part 1: Timeliness. The State does not challenge the timeliness of the United States' intervention motion. They only challenge Parts 2 through 4. And our briefs lay out why we satisfy the four-factor framework for timeliness that is laid out in *Glickman*. So I'll proceed along to Parts 2 through 4.

Part 2: The Intervenor Interest. In *Glickman* at Page 378, the Fifth Circuit stated that:

"The interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently-concerned persons as is compatible with efficiency and due process."

There are two cases on point where the Fifth Circuit found that a federal agency had an interest in the litigation because the case concerned a federal statute under that agency's authority. In *Heaton v. Monogram Credit Card Bank*, that case concerned the FDIC overseeing safety and integrity of the Federal Deposit Insurance system, and in *Ceres Gulf v. Cooper*, that involved the Office of Workers' Compensation programs and the Longshore and Harbor Workers' Compensation

Act.

Here, DOJ has a unique role in enforcing and interpreting Title II of the Americans With Disabilities Act and its implementing regulations. The State conceded in its briefing that Congress gave DOJ the authority to enforce the ADA under 42 USC 12133. Congress said that one purpose of the ADA was to ensure that the federal government play a central role in enforcing the ADA. And it said that in 42 USC 12101.

The State attempts to distinguish the Fifth Circuit cases on point by pointing to the fact that they involve different federal agencies than DOJ; however, that's a distinction without a difference. The legal reasoning of those cases concern the fact that the agencies administered the federal statute and therefore had a broader public interest. Consequently, the United States asserts a broad public interest related to the basis of the controversy in this case.

Part 3: Potential Impairment. In *Heaton* at Page 424, the Fifth Circuit held that:

> "The stare decisis effect of an adverse judgment constitutes a sufficient impairment that compels intervention."

The Court in *Heaton* reasoned that:

> "A district court ruling on a federal statute, part of the regulatory scheme of

> a federal agency, would undoubtedly, unless changed, be relied upon as a precedent in future actions involving that federal agency."

In that case it was the Federal Deposit Insurance Act and the FDIC. The same holds true here with the ADA and the Department of Justice. Consequently, the case at issue here could impair or impede the United States' interest in enforcing the ADA.

Part 4 of the intervention as of right: Adequacy of Representation. In *Glickman* at Page 380 the Fifth Circuit noted that:

> "This is a minimal burden." That, "An intervenor need only show that the representation in the case may be inadequate towards its interests."

And then at Page 381 in *Glickman*, the court found that this requirement was met "when a federal agency represents the broad public interest versus private plaintiffs' individual concerns in the case."

Additionally, in *Heaton* at Page 425, the Fifth Circuit noted that:

> "Even if a federal agency and private plaintiffs share common ground at the beginning of a case," as we do here, that

"those interests may diverge down the line because the agency represents the public interest."

Here, Congress said that one purpose of the ADA was to ensure that the federal government play a central role in enforcing the ADA and gave DOJ the explicit authority to enforce it and represent the national public interest versus potential statewide or individual interests of plaintiffs.

In its briefing the State cited a 1984 case, *Bush v. Vitorino*, to argue that the representation here is adequate; however, the case, the *Bush* case that the State cited did not involve a federal agency that was representing the broad public interest. Consequently, the United States satisfies the fourth part and warrants intervention as of right.

I would like to turn at this point to one of the State's arguments that the State challenges DOJ's notice to the State of its failure to comply with the ADA and challenges DOJ's determination that compliance could not be secured voluntarily.

I note at the outset that as our briefing discusses these statutory prerequisites are not required in terms of intervention. Intervention is governed by Federal Rule 24 and that rule does not indicate that those prerequisites are factors for intervention. 42 USC 2000d pertains to the United States filing its own independent enforcement action. And

analogously, the EEOC is permitted intervention in discrimination cases without satisfying suit prerequisites. And we cite those cases in our briefs.

Regardless, DOJ satisfied the -- I'm sorry, Your Honor?

THE COURT: No, go ahead.

MR. KOCH: Regardless, DOJ has satisfied the requirements in 42 USC 2000d. We did exactly what the statute requires. We advised the appropriate person or persons of the State's failure to comply with the requirements of the ADA and we determined that compliance cannot be secured by voluntary means before we intervened.

Our letter to defendants, dated June 1st, 2001, stated:

> "Texas' administration of its programs results in the unnecessary segregation of individuals with developmental disabilities in nursing facilities in violation of Title II of the ADA and Section 504 of the Rehabilitation Act."

Our June 1st letter also offered settlement discussions to try and secure voluntary compliance. On June 15th we provided additional requested information regarding our finding.

The State did not accept our offer of settlement discussions. After three weeks of no substantive engagement

on our notice, we determined that voluntary compliance could not be secured. The determination was ours to make, we made it, and we pled it in our complaint. That determination has been confirmed by the fact that in the 15 months since we filed for intervention, the State has never accepted our offer of settlement discussions or engaged with us on our notice in any substantive way. Never mind the State's failure to -- I note that the State also was unable to settle the plaintiffs' similar claims after a year of negotiations.

Analogously, this situation parallels the case in *Smith v. City of Philadelphia*, 345 F2d 482. In that case the United States determined that voluntary compliance could not be secured after three weeks with no response from the defendant.

The one case that the State cites in support of its argument is *United States v. Arkansas*. However, that case is inapposite to the one here, because in that case the letter at issue never said that the State had failed to comply with the ADA and never indicated that voluntary compliance had been attempted. Those pieces were the basis for the Court's holding.

I'd also like to address the fact that the State notes that other letters that we have sent to states have more detail than the notice that we provided here. The statute at issue does not prescribe the level of detail that the notice

must contain, only that we provide notice of the violation, which we provided here. The level of detail provided by DOJ in one case does not create a floor requirement for another case. We do what makes sense based on the case-by-case determination while satisfying the requirements of the statute.

The Supreme Court in *Federal Express Corporation v. Holowecki* noted that:

> "An agency requires deference when it is interpreting the position of a statute that it enforces."

And I also add that Executive Order 12250 gives the Attorney General the authority and discretion on the standards and procedures under 42 USC 2000d for taking enforcement actions. Consequently, DOJ satisfied the notice and determination steps of the statute at issue.

Turning now to permissive intervention. I note that Rule 24(b)(2) says that:

> "A court may permit intervention of a federal agency if a party's claim or defense is based on a statute administered by that agency."

The State doesn't dispute that DOJ is tasked with enforcing the ADA. And, indeed, the gravamen of the United States' complaint that the State unnecessarily segregates individuals

with developmental disabilities in nursing facilities in violation of the ADA shares common questions of law and fact with plaintiffs' claims. Our motion was timely and the United States has important enforcement interests in this case.

The State essentially claims prejudice because the United States allegedly failed to satisfy the statutory prerequisites, which I've already discussed. We did satisfy. But the State also makes reference to -- argues prejudice because of a full-scale enforcement action of whatever scope the United States deems necessary. To be honest, Your Honor, I'm not sure what that's referring to but I'll just note that we filed our complaint in intervention which delineated our claims and we are bound by the rules of discovery.

The State also suggested that we should participate as amicus in this case rather than intervene. However, the equivalence of those two positions was rejected by the Fifth Circuit in *Heaton* at Page 424 where it noted that:

> "Denying intervention deprives a party an opportunity to exercise the legal rights associated with formal intervention; namely, briefing of issues, presentation of evidence and the ability to appeal."

The State is not entitled to decide how the United States should protect its interest in this case.

In short, the United States is entitled to intervene

as of right under *Glickman*, *Heaton* and *Ceres Gulf*. Alternatively, the United States qualifies for permissive intervention under 24(b)(2) to vindicate the broad public interests in the enforcement of the ADA. Thank you.

THE COURT: Okay, thank you, Counsel. Does the State wish to respond?

MR. VINSON: Yes, Your Honor, if I may?

THE COURT: Go ahead.

MR. VINSON: Your Honor, if I may approach, I have just a binder with the relevant briefing. This issue is limited enough that it can fit into a binder. If I may approach?

THE COURT: Okay, go ahead. Give it to Jessica, please.

MR. VINSON: My name is Eric Vinson, V-i-n-s-o-n.

Your Honor, if it may please the Court, it is indeed correct that the State opposes the Department of Justice's attempt to intervene into this case and there are really three primary arguments, and there's a fourth that's sort of a bit of a corollary issue about the propriety of various parties.

The first one is relatively straightforward and it relates to this issue as to whether the Department of Justice meaningfully complied with the statutory prerequisites to intervention and whether those are in fact applicable.

Secondly, it is the State's view that there is no

good argument that under 24(a) that the Department of Justice has a right to intervene and that the only possible avenue of intervention would be the permissive venue under 24(b).

The last issue is, again, a question of parties, but that presumes, I think, the presence of the DOJ and so I'll table that unless the Court has any questions about that particular issue.

Your Honor, it's interesting. Counsel is on some level correct. There was, indeed, a notification on June 1st of 2011 that the United States intended to intervene into this lawsuit and that the option that was presented to the State as an alternative to intervention was the negotiation of a consent order essentially in which the defendants, the State itself would capitulate and agree that it was doing the things that the Department of Justice and the plaintiffs in this case had alleged.

We asked over and over for specific information about how it was that we were violating the ADA, how we were not in compliance with *Olmstead*, what particular aspects of our program did not comply with the Department of Justice's view on how that program is supposed to be operated and run and it was very clear from the outset that there was not going to be any meaningful dialogue along those lines.

We asked for a copy of the motion to intervene, you know, so we could take a position on whether to agree to it or

not, and we were not given that opportunity. We were not given the ability to even review the motion to intervene before it was filed. We were simply asked, "Agree, essentially, that you are not complying with the ADA or the *Olmstead* decision or we're going to intervene."

And the reason, Your Honor, that we view this as a meaningful issue is because the statute -- there is a statutory prerequisite to participation by the Department of Justice in a situation like this and it does involve a -- not simply a technical, box-checking exercise where you give an entity notice that you're going to intervene, it requires a meaningful investigation and a meaningful dialogue between the relevant stakeholders so that one of several things can happen. Ideally, the parties can reach some resolution of the alleged issues and then move forward on that basis without making necessary a trial process.

Another opportunity or another possibility is that, in fact, you could agree on some areas and narrow those issues down that need to be litigated. Right? "We agree that the State's doing this properly but, you know, there's some area here where the Department of Justice may disagree." We never got to have that opportunity. And allowing the parties and requiring the parties to engage in that type of meaningful dialogue, to allow them simply to intervene in a lawsuit that happens to mention the term *Olmstead* and the Americans with

Disabilities Act is essentially an end around, around what's called, and even Counsel concedes, a prerequisite to suit. And to allow them to do that I think is a disservice to the process, certainly not in line with the spirit or intent of that requirement.

I want to talk a little bit about the requirements under 24(a) when it -- if there's any -- to make clear that there is no good argument that intervention is one of right in this case. When you look at the 24(a) cases, they all relate to the traditional, typically state law cases but they obviously -- they fall under federal law, too, that involve property interests and leaseholders and multiple parties who are going to be literally affected by some resolution relating to a corpus of some sort: some identifiable property, some identifiable money, something along those lines. And in those cases, of course it's appropriate to allow a party as a matter of right to intervene in another dispute in which they may not have been named as a party.

The interest that is present here that the DOJ has articulated of course is one purely of interpretive and enforcement acts relating to compliance with the Americans with Disabilities Act. It is not the type of corpus, the type of interest around which courts will typically allow parties to intervene as a matter of right.

Now, obviously we've gone through the various stages

of the analysis in terms of the actual steps but they actually -- I think it makes more sense to articulate those and talk about those in the permissive context as opposed to in the necessary com- -- or the mandatory context because the idea of mandatory intervention is just not one that is terribly compelling.

I think perhaps the most important issue when we look at the elements and the protection of the United States' interest in this case is -- so far the only interest the United States has expressed is one that is, I think, undisputedly in line with that of the plaintiffs. However, in order to intervene in a case, even under 24(b), there needs to be some showing that the interest may diverge in a way that is meaningful and necessary and appropriate for the party to intervene yet not so divergent that, in fact, you'll add what the courts consider a layer of complexity to the litigation.

The Department of Justice's counsel has articulated the standard correctly. It is a low burden. However, other than citing the possibility that there may be a divergence and repeating the language, they have not yet identified how it is possible for the interests in this case to diverge. And the answer matters. The answer definitely matters because if, if it is something that truly fits in the classic 24(b) intervention mold, that is, something that is not meaningfully different, will not add layers of complexity, then I think

it's easier for the Court to analyze how or whether to grant the intervention or not. But at some point the divergence could be so significant that, in fact, you are not gaining the efficiency of joinder that this rule contemplates but, instead, what you're looking at is the additional layers of complexity.

Indeed, we did cite the *Bush v. Vitorino* rule for the proposition -- and, indeed, it is not a case involving the federal government; however, it is a case that gives courts guidance on what to do when somebody tries to intervene in a case in which their interests appear to be represented. And the *Bush* court in 1984 wrote, and I'm quoting directly:

> "When the party seeking intervention has the same ultimate objective as the party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion or nonfeasance."

And there is no suggestion here that any of those three issues are present and that's clearly not at issue, there is a robust litigation between the existing plaintiffs and the defendants in this case.

Both parties are expressing -- that is, both the plaintiffs and the Department of Justice are expressing an

interest in the State's compliance with the *Olmstead* Integration Mandate, and compliance with the ADA. When you look at the briefing, indeed, that the State provided -- excuse me, the DOJ provided to this Court before the attempted intervention, they literally stood in the shoes of the plaintiff and advocated in opposition to the defendants' motion to dismiss on the various issues that they felt necessary to advocate on.

Your Honor, unless there are other questions, I feel that the issue's pretty straightforward for Your Honor to figure this out one way or the other. These statutory prerequisites, they have to have meaning, they have to mean something and here, in less than three weeks, the DOJ said they wanted to intervene and they did intervene. There was no meaningful opportunity for the State to respond or even understand what component of their program was not being run properly. Thank you very much.

THE COURT: Thank you. Any response from the Government?

MR. KOCH: Real quickly, Your Honor. Regarding the statutory requirement under 42 USC 2000d, the State is saying that it requires meaningful engagement. They refused to engage with us; thus, we made a determination that voluntary compliance could not be reached. It's our determination to make and we made it and we pled it.

There were two other arguments that I heard under intervention as of right. The second part of the four-part requirements, the divergence of the interests. Counsel for the State indicated that it must be an interest in property or money. The cases just don't support that. I'd point the Court to *Heaton*, 297 F3d at 424, and *Ceres Gulf*, 957 F3d at 1203. Both of those concern the federal agency interest, a broad public interest and that sufficed for intervention in those cases.

And then the last piece, adequacy of representation. Once again, *Heaton*, 297 F3d at 425, when there's a federal agency and private plaintiffs, even though they may have common ground, the possible divergence between the two because of the federal agency's broad public interest, that suffices for intervention as well. Thank you.

THE COURT: So are you saying that any time parties are involved and involved application or dispute with federal statute that the Government always has a right to intervene in that lawsuit?

MR. KOCH: No, Your Honor. In this case the DOJ, the Government has been given expressly the statutory authorization to enforce the ADA, and so it's not just any federal statute. But here the United States, the DOJ has been given the statutory enforcement authority for that statute.

THE COURT: Okay.

MR. KOCH: Thank you.

THE COURT: All right, thank you. Now let's proceed to the motion to certify as a class. And let me hear from the plaintiffs.

MR. SCHWARTZ: Just for the record, we want to put on the record that the plaintiffs support the Department of Justice's motion and for reasons set forth in their brief.

THE COURT: Okay.

MR. SCWARTZ: Let me address the class certification now. This case primarily challenges the defendants' failure to plan, administer, operate and fund its developmental disability services and provide those in the most integrated settings for people who would otherwise be institutionalized. It also alleges that that failure to provide those services in the most integrated setting violates the ADA, Section 504 of the Rehab Act. And, finally, it challenges the defendants' PASRR program and the failure to operate that program by accurately screening, reasonably assessing and serving people with active treatment. Or in the words of Federal Rule 23(b), it claims that defendants have, quote:

> "Acted on grounds generally applicable to the class by denying all qualified individuals with disabilities the opportunities to receive services in the most integrated settings."

It seeks a single injunction requiring the defendants to provide those developmental services in the integrated setting and to conform their PASRR program to federal law. The single injunction "would cure," in Justice Scalia's terms, "in a single stroke those violations," and I want to emphasize, would not require any individual determinations, by this Court, of either liability or remedy.

The motion that we have presented is supported by detailed evidence of the deficiencies of the defendants' developmental disability services. It shows why those services result in unnecessary segregation, about the defendants' knowledge of those deficiencies in the exhibits, about their unfulfilled promise to remedy those deficiencies, and of the pervasive and persistent harm that the deficiencies cause the plaintiff class.

The evidence that we submitted in support of the motion contains -- includes numerous reports that were prepared by the defendants themselves or by agencies of the State of Texas. Those reports recognize the deficiencies. It describes the defendants' interest and acknowledgment of them and what defendants think would be necessary to cure them. Those are Exhibits 4 through 7 and 9 to our motion.

Significantly, we also support that motion with evidence from two federal agencies. First, as you've just heard, the findings letter of the Department of Justice that,

based on its assessment of the situation in Texas, concluded that there was a pattern and practice that violated the ADA and Section 504. Those findings leave no doubt that the defendants' operation and funding of their service system unduly relies on segregated institutions.

In addition, there's the findings of the U.S. Inspector General that evaluated the PASRR's program in Texas. It found that in 37 percent of the cases people didn't receive timely screens. It found that in 52 percent of the time they didn't get proper assessments, and 82 percent of the time they didn't get specialized services.

And, finally, the evidence includes two declarations from two different disability professionals attesting to the pattern and practice that gave rise to these deficiencies, the impact on individual class members, the need for action, and what was necessary to cure that. Those are both the affidavits of the Executive Director of the Arc, as well as an evaluation by a nationally-recognized health expert, a nurse with over 30 years of experience in serving people with complex medical needs in community settings and her evaluation of individuals. This evidence, in *Walmart's* terms, is more than sufficient to meet the obligations that plaintiffs have to support a class action motion.

Let me turn a little unconventionally to the requirements of 23(b)(2) because the defendants make -- focus

on that and then I'm going to backtrack to the requirements of 23(a).

This case, like most civil rights cases, focuses on the defendants' conduct, not the plaintiffs' needs. The defendants plan, administer and fund a developmental disability service system and, in doing so, they've engaged in a pattern of standardized conduct that's resulted in the inability of people with intellectual and developmental disabilities in nursing homes to access their community service system.

It's also resulted -- they also operate that PASRR system that we've talked about this morning, and they, in operating that system, have promulgated policies and engaged in practices that result in the inaccurate identification of people with intellectual disabilities -- that is, they don't even know which people have intellectual disabilities, like our five or six named plaintiffs -- in the inappropriate assessment of their needs for services and the failure to provide them specialized services according to the requirements of the NHRA.

This pattern and practice of standardized conduct towards the putative class, who are currently institutionalized or at risk of such, is precisely the conduct that Justice Scalia was looking for that would be susceptible to a remedy in a single stroke. And that is what we've pled

and we've supported that with evidence.

The amended complaint, in other words, seeks an injunction to alter that conduct to compel compliance with federal law and to insure that people in nursing homes are provided services in the most integrated setting. And it says, as Justice Ginsburg says in *Olmstead*, that states -- if states operate a service system, as Texas does, for persons with developmental disabilities, it must comply with the ADA's Title II mandate, often called the Integration Mandate, that the services that it does provide are provided in the most integrated setting.

The First Circuit Court of Appeals recently was asked in that *Rolland* case that you heard about this morning to -- a class had been certified in that case in 1999. The class is virtually identical to the class we're asking to certify here. The plaintiffs at that time appealed to the First Circuit under 23(f); their appeal was denied. Ten years later some individual -- excuse me -- the defendants, strike that -- the defendants appealed the certification of the district court, the First Circuit denied the appeal.

Ten years later certain other individuals who had concerns who were in nursing homes sought to decertify the class. They lost in the district court. The district court, in other words, found once again that certification was appropriate in *Rolland v. Patrick*. Those individuals

appealed again in the First Circuit and the First Circuit in a recent decision that flips the names a little bit, called *Voss v. Rolland*, found that -- and this is cited in our brief -- found that certification was appropriate, decertification was not, and that all of the standards for Rule 23(a) and (b) had been met.

The First Circuit subsequently acknowledged in another nursing home case, *Hutchinson v. Patrick*, that a similar definition was appropriate because those definitions -- and that was an ADA case -- challenge the standardized conduct of the defendants.

We've given you 40 ADA cases in which courts have certified classes under the ADA generally and Title II specifically in the Integration Mandate. There is no case that the defendants have pointed to in which an ADA class was not certified. This is true *pre-Walmart* and *post-Walmart*. The district court in Oregon just a month ago in *Lane v. Kitzhaber*, we gave that to you in a supplemental authority, certified a class under the ADA. The defendants made precisely the same challenges they are making here. And I'll go through them. But they made precisely the same challenges. District Judge Stewart rejected them.

Similarly, other federal district courts in *Oster* [phonetic], in California in *Gray* [phonetic], which involved ADA accessibility requirements, in *Pashby* which required ADA

and Medicaid requirements, and in *Dominque* [phonetic], all cited in our brief, courts have uniformly -- these are all *post-Walmart* cases in which the courts have conducted the rigorous analysis and the standards, that the defendants rightly point to, as required by *Walmart*.

Now, of course, there are differences in the abilities and the disabilities of people in nursing homes. People with disabilities don't look all the same just like all other people don't look the same. And individuals with intellectual and developmental disabilities do not have the same disability. That does not impact them in the same way. They do require supports and habilitation and places to live that can differ in terms of the intensity or the frequency of the support.

We are not claiming, we never would claim that all people in nursing homes look exactly the same, require exactly the same services, think exactly the same way, have exactly the same preferences or vote exactly the same way. Nevertheless, at the proper level of analysis for class certification, the focus is on the adequacy of the defendants' actions and inactions in providing supports and services to the individuals.

At that level of analysis, the defendants acknowledge, and their report's document, that many individuals remain in nursing facilities solely because of the

way that the administration and funding of the community services, that is, the eligibility criteria for those services, the decisions that the State has made from the Governor down to the relevant secretary and director about which services it would give to which people and which things they won't do or will not engage in.

While the State has an enormous amount of discretion in determining what programs it wants to operate, and it has an enormous amount of discretion in setting criteria and various other factors for those programs, the Supreme Court has made clear that they do not have the discretion to unnecessarily segregate people or require people to go to nursing homes in order to get the basic supports that they need. And that's precisely why there are 4500 people in nursing homes. People are going to the nursing homes, people with intellectual disabilities, because there are not services in the most integrated settings, and that's the violation of the ADA.

The Court need not and should not be involved in individual determinations of which specific persons require which specific services. The Department has what is known as an Individual Service Planning process, or ISP. It's a treatment planning process. It brings together professionals as well as the consumer, the person with disabilities, and their parents or family members, or a guardian if they have

one, in the service planning process. People look at who the individual is, what he or she prefers, what he or she needs, and they determine their services. We believe that that is the appropriate, professionally-available method of determining exactly who out of the nursing home population would leave, what they require, when they go, what they feel, what they prefer, et cetera.

So this Court is not -- we're not asking this Court, we're not in any way suggesting that any of the 4500 individuals need come to this court to seek individual relief. We're not seeking any kind of expert panel or judicial mechanism to determine which people need which service.

So unlike the complaint in *M.D. v. Perry*, the Fifth Circuit's recent decision on class certification, where the plaintiffs in that case were seeking a judicial panel for every child who remained in state custody for more than a certain amount of time, and it was that panel, that involvement of the district court that the Fifth Circuit found demonstrated that the plaintiffs were seeking individualized relief and you couldn't have the solution in a single injunction.

THE COURT: How is that not the case here?

MR. SCHWARTZ: For two reasons. One is that we are relying on the State's, as I said, treatment planning process to make the determinations, and, conversely, we are asking

this Court to make the single injunction, the broad-based assessment, the evidence you will hear as the case moves forward on behalf of the class. We'll be not asking you to decide how many individuals require community placement, or how many people need what level of services. We're going to be presenting to you the policy and practice of the PASRR program, the policy and practice of the unnecessary segregation.

Conversely, we would ask you as --

THE COURT: And that that be implemented?

MR. SCHWARTZ: That's right. And there will be -- the remedy that we seek, the injunctive relief that we seek is specific to correcting those deficiencies. When those corrections -- excuse me. When those deficiencies are corrected then individuals will sort of march through a compliant PASRR process and a compliant specialized services evaluation. All right.

So the defendants, I think with respect to -- and ending my argument on 23(b). The defendants look at the *Olmstead* case, and the ADA actually more generally, and even Medicaid more generally, and they say all the claims that the plaintiffs have pled in this case, including ADA and Medicaid, are not susceptible, ever, to broad-based, single-stroke injunctions, and that all of them can only be resolved by having a federal judge make individualized treatment decisions

for each individual.

Well, Your Honor, that argument essentially says that courts cannot ever certify a class in an *Olmstead* case; that courts can never certify a class in an ADA case, because they would say that the ADA makes clear that individuals' preferences are relevant. And so if every remedy, every case required a federal judge to decide what does each individual class member prefer and what does each individual class member need, then we would never have classes certified. It would essentially mean that under the defendants' interpretation 20 years of ADA decisions, the 40 decisions we've given you as Exhibit A to our motion, all have been vacated, all have been overridden by *Walmart*. *Walmart* doesn't say that. No court has ever said that. And the courts that have considered it, the six or seven I just listed, have said exactly the opposite.

Let me turn to the requirements of Rule 23(a) because they also implicate the *M.D.* decision.

There's no challenge here to 23(a)(1), numerosity. Nor is there any -- sorry?

THE COURT: Go ahead.

MR. SCHWARTZ: Nor is there any challenge to the first prong of 23(a)(4), adequacy of representation; that is, there is no statement that the Disability Rights Texas, Center for Public Representation or Weil Gotshal won't provide

competent representation to the class, or that there's some conflict lurking within the class. So, really, the focus of the defendants' Rule 23(a) challenge goes to commonality, (a)(2).

M.D., as well as *Walmart*, affirm the basic proposition in *General Falcon* that either a common question of law or a common fact would do. What they did want to make clear is that in trying to analyze the presence of a common fact or a common law, there needed (a) to be evidence, the court needed to conduct a rigorous analysis, it needed to be provided with some evidence, not just the mere pleading, and it needed to be able to say that with respect to the common question of fact or the common question of law, or both, that there was a clear pathway, a clear way to describe what the plaintiffs were asking for and what their common contention was. That's the single most important concept that *Walmart* and *M.D.* elaborate on.

Here, we have both. With respect to the ADA claims and 504 claims, the core issue in the case, as was found by the *Lane* court, the *Oster* court, the *Pashby* court, the *Schwarzenegger* court, and each of the other post-ADA, as well as *post-Walmart* as well as *pre-Walmart* cases, the core claim is whether or not the defendants are operating a developmental disability services in a way -- in the most integrated setting possible. The ADA regulation says:

"A public entity must operate its services" -- doesn't say they have to operate a service, but if they choose to operate a service or a benefit, they must do it "in the most integrated setting possible."

That's the core contention, we're saying they don't. The defendants have planned, developed and operated a system that unduly relies on segregated facilities. That's a common fact.

Another common question or common contention is: Whether the defendants have employed eligibility criteria for their community services that effectively deny access to people in nursing homes with intellectual and developmental disabilities;

Whether the defendants discriminate against persons by virtue of their disabilities in the way they have constructed, operated and funded their community service system;

And, finally, and most important -- not most importantly, but importantly, under the ADA whether the defendants have failed to make reasonable modifications to their community service system to allow persons who are institutionalized equal access or fair access.

That was precisely the question the Supreme Court addressed in *Olmstead* and found that Georgia could make reasonable modifications to its community mental-health system

to allow L.C. and E.W. to move from the Georgia State Hospital to the community.

There are also, by the way, common issues of fact and law with respect to the PASRR claim. And I think we've been through them. I'll just quickly recite them:

Whether the defendants failed to accurately identify who has a disability;

Whether they failed to accurately assess whether the persons with disabilities need services;

Whether their policy -- they have an explicit policy that says what services they will cover to provide active treatment -- whether that policy comports with federal law;

And, lastly, the debate that you heard this morning, whether the defendants are required to provide essentially the same range of habilitative services to people in nursing homes that they apply to their similarly-situated brothers and sisters in ICFMR cases.

In all the cases that we've cited post-*Walmart*, that includes *Lane*, *Oster*, *Gray*, and *Pashby*, the courts have said that common contention with respect to the ADA post-*Walmart* constitutes a common question for which there can be a common answer. As I said, this Court doesn't have to determine what services are necessary to avoid institutionalization, but in the words of *Walmart* and *M.D.*, just "whether there

is a question that admits of a class-wide

resolution."

So take for example, Your Honor, the issue of specialized services. The defendants say that we can pick a few of them and we say that the defendants must provide approximately the same services as people in ICFMR, or, in any event, services that are necessary to meet the federal standard for active treatment.

That is a common question that would admit of a class-wide resolution. If this Court says -- whatever the Court says about that question, it will be applied to everyone. The fact that some people will get these many services and somebody else maybe none because they don't need any more than what the State is already offering or something like that, that's not what you have to decide. That's not appropriate for the federal court.

What the class certification motion seeks is a resolution by this Court of that common question and we can indicate, as we have argued here and in our brief, that the resolution of that question will affect everyone. It won't affect everyone exactly the same, but it will affect everyone's right to relief.

So in *Walmart's* terms, those common questions, be they about the PASRR program or about the unnecessary segregation, are the glue that binds the reasons for the unnecessary institutionalization. That is, there are common

operative policies, practices that Texas engages in. We claim they are inappropriate. But whatever the Court's decision about them, you will have resolved a common question that will admit of class-wide relief, that is -- and then we will go to the single decisions that are not part of this case.

So the evidence that we gave you goes far beyond the pleadings and allows you to do that rigorous analysis. And as the Fifth Circuit has said in *M.D.* -- oh, let me say. The Fifth Circuit in *M.D.*, when it criticized the district court's failure to do the commonality analysis, it really recognized two points.

First, in fairness to the district court, it issued its original decision before *Walmart* was decided. So it wasn't quite guided by the same analysis or the same prerequisites that the Fifth Circuit considered.

And, second, the Fifth Circuit didn't say in any way, shape or form that there weren't common questions that admitted of common answers. In fact, the Fifth Circuit said that the district court might well be right that the lack of staffing for social workers that leaves kids with -- kids who are in the welfare or the foster care system without appropriate attention, that might well be a common contention that admits of a common answer in a single stroke. The problem was the district court hadn't just tied that together. In fairness to the district court, it didn't know it was

exactly supposed to tie it together because it made its decision pre-*Walmart*.

So the Fifth Circuit didn't reverse, it remanded. I mean it did not reverse and say no class was possible, it just remanded to the district court and said, "You need to look at the evidence. It's okay if you certify a class. You might well have commonality. We can imagine some common questions that would admit of common answers, but we need you to tie those together and button that up properly."

And so a determination here of whether Texas' administration of its community service system, or the eligibility criteria that it establishes for those services are denying access to people in nursing homes or, put the other way, causing their unnecessary segregation. That's exactly the common contention that admits of a common answer and would allow for the Court, as all of the Court of Appeals keep doing, repeating Justice Scalia's admonition in a single stroke.

Walmart did not overrule the long line of ADA or Medicaid cases that said class certification for beneficiaries are appropriate. Remember in a Medicaid case, the basic entitlement to services thing, is to get what is medically necessary. That's the standard in the Medicaid Act.

Well, what is medically necessary for me is not medically necessary for my co-counsel, Mr. Corbett. And each

of us have our own, individual medical needs. But for 40 years the Supreme Court and others have approved of class certification where the issues were what services are -- what services people are eligible for. And they did that because they saw rules or practices, not just policies, but practices that might have had different impacts on different people but the plaintiffs could point to the practice.

Here, we have pointed to a practice in the PASRR program, I won't repeat it all, and we've pointed to a practice that is causing the segregation of people in nursing homes. Those common practices, some of them are actually on a piece of paper like a rule or a policy; some are the way the system operates. So, you know, there isn't a policy, for instance, that says the defendants when they screen people should inaccurately identify people. It doesn't say that. It says there's a policy that says they screen people. But the practice is, as found by the Inspector General, that they don't accurately identify people. That people who have intellectual disabilities are entered into nursing homes and they never either get a PASRR, or if they do get a PASRR, they're not found to have intellectual disabilities.

That's a sort of stunning practice and in light of the very first question that you asked Mr. Corbett when this hearing opened: Does every one of those practices affect a hundred percent of the people in the class exactly the same

way? No. But does the practice constitute an illegal practice for which we are making a common contention, a common question for which there's a common answer? Yes, there is. And once those practices are corrected, if the Court were to rule in favor of the plaintiffs' challenges, then each of the individuals, not with oversight from this Court or an expert panel or anything else, would be able to seek relief.

And the same issue here, by the way, applies in the Seventh Circuit's decision, *Jamie S.*, that the defendants speak of --

THE COURT: What was that case?

MR. SCHWARTZ: *Jamie S.*, which is a Seventh Circuit case that the defendants speak a lot about. The court in *Jamie S.* found just like the *M.D.* court here, the Fifth Circuit found in *M.D.*, that the plaintiffs were seeking -- they wanted the court, the judge to make, either by him or herself or through his master or panel, individualized determinations. In Milwaukee they asked the district court to set up a review process with the independent monitor and to look at each individual kid who hadn't -- for which there was a problem.

We are not asking for that type of relief. We're asking for the Court to hear the evidence, issue an injunction, and then the State will, thorough its administrative processes -- and, by the way, each of those --

that team process that I mentioned to you that makes treatment plans, because this program operates pursuant to the Medicaid statute, individuals have a right to an appeal, not to you but to the State Administrative Law Judge, an ALJ.

So the Medicaid Act guarantees each family member, each Medicaid recipient who believes they are not getting what they are entitled to, to an administrative appeal. And it's that due process that both insulates the Court from individual remedies and allows individual Medicaid recipients to get a fair shake.

Let me just touch on typicality and then conclude with the definition.

There is some argument the defendants make that the individual named plaintiffs aren't exactly typical of the rest of the class. Of course, the *M.D.* court, which it really didn't address typicality, and the *Walmart* court, which also didn't, reaffirmed the basic principle that people don't have to be in exactly the same situations. People don't need to be identical to be typical. Typical means that their claims are similar and that the resolution of one, that is for the named plaintiffs, will resolve it for the others.

Here, we can identify nine specific ways in which the named plaintiffs are typical of all the class. First, all of them have a significant intellectual or developmental disability. Second, all the named plaintiffs, with the

exception of Mr. Holmes, who was discharged from a nursing home after we filed the case, are currently living in segregated settings. Third, all of those individual plaintiffs have no contact whatsoever with non-disabled peers, other than paid staff, in violation of the specific mandate or the ADA.

All of those plaintiffs want to live in the community. All of them are qualified to live in integrated settings. None of them are being provided with active treatment as required by federal law. All of them are similarly impacted by the defendants' administration and funding of their disability service system as well as of their PASRR program. And, ninth, they all, other than Mr. Holmes, the exception, suffer the same injury as unnamed class members and have factual situations that are similar. Not identical I want to stress, not the same disability, but all are similar.

THE COURT: Are they being afforded specialized services while in the nursing home?

MR. SCHWARTZ: They are not. And the affidavit -- or, excuse me, the declaration of Ms. McGowan, the nurse I mentioned before, which is attached to support our motion, was an independent clinical review that she did of just three of them, and she documents in some detail why they're not, and how they are not being provided with the range of specialized services that would be necessary to meet the federal active

treatment standard.

With respect to adequacy of representation, I mentioned that most of that is not really challenged by the State. The one place they do challenge is Mr. Holmes. Mr. Holmes they say is not an adequate representative of the class and we believe they're wrong in this respect.

The class is defined pursuant to the ADA and Department of Justice regulations as individuals who are institutionalized or at serious risk of institutionalization. Mr. Holmes had lived in the community at some long time in the past. He then had a health condition that sent him to a nursing home for years. He very recently, after the filing of the lawsuit, was placed back into the community. But he's the perfect example of what's known as the at-risk group because his health conditions put him, you know, at a real -- he has a real and present danger for being admitted to the nursing home. And we're not just speculating about that as a possibility, it actually happened to him. And so his day-to-day experience over the last ten years demonstrates that he can be placed in the community and he can be returned to the nursing home. And whether he needs to in a certain situation is not the factual question this Court has to address, it's just that he has standing and represents that class.

And so we've asked you to define a class, I think you

see the words in our motion, mention that that class mirrors, almost identical, the class that was certified by the district court in the *Rolland* case and affirmed by the First Circuit. It is true, as the defendants point out, that not every one at the same moment, that is not all -- I'm willing to bet that not all 4500 people who are in nursing homes today have exactly the same needs. And I'm willing to also bet that not every single one of them as of today have exactly the same preferences for what services or where they want to live.

But if this Court were to limit the class to the people who today had the needs and wanted to leave, you would be involved in a constantly uncertain class. Every day people would change their mind. In fact, many people who might not explicitly ask to leave the nursing home, they might not be asking that because they never got information, the freedom of choice issue we talked about before, or there weren't services. And so, you know, you only ask people to make choices about something that's available.

So if the State corrects the deficiencies, people might make choices way different than they are today. We're not criticizing the choices they make today or in the future, we're just saying that part of having a class, and the reason why the district court in *Rolland* certified a class, is it didn't want to know every single day we could never figure out who was in the class or how many people. So we ask you to

certify that class.

Finally, recognizing that the Court must conduct the rigorous analysis required by *Walmart*, mention that having a certified class as promptly as possible in light of the Court's other demands is important both so that we can finally initiate our -- serve our discovery, which would affect the entire class, and it's also necessary, to be frank with you, Your Honor, to avoid, you know, mootness because it's always easy for a few people to leave and then we could come back, we have four more people, if we need to, to substitute in tomorrow, but then we'll have another hearing on another group and this will be a never ending struggle.

So thank you very much for the opportunity.

THE COURT: Okay, thank you. Any response from the State?

MR. GIBSON: Good afternoon, Your Honor, Darren Gibson for the defendants.

THE COURT: Go ahead.

MR. GIBSON: Thank you, Your Honor. I want to take a step back and describe what I think is the plaintiffs' view of the world following *Walmart*, or what they would have the Court believe is the state of the world. In plaintiffs' view, the *Walmart* case didn't really mean a lot, didn't really change anything. They use languages [sic] like "reaffirmed what was previously the law, it has not yet affected ADA class actions,

it merely sort of restated what we all already knew." That's what they would have this Court believe. I would like to just read a little bit from the Fifth Circuit opinion in *M.D.* to tell this Court what the Fifth Circuit thinks actually happened in *Walmart*.

> "Although the district court's analysis may have been a reasonable application of pre-*Walmart* precedent, the *Walmart* decision has heightened the standards for establishing commonality under Rule 23(a)(2) rendering the district court's analysis insufficient."

In large part, the court went on to recognize that:

> "The pre-*Walmart* case law found that the test for commonality was not demanding," citing to the *James* case, which plaintiffs themselves rely on. The court went on to cite to the *James* case and other pre-*Walmart* Fifth Circuit cases to say, quote:

> "Before *Walmart*, the rule in this circuit provided that in order to satisfy commonality, the interests and claims of the various plaintiffs need not be identical."

THE COURT: Need not be what?

MR. GIBSON: Need not be identical; need to not be

identical.

THE COURT: All right.

MR. GIBSON: "Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members."

This is all pre-*Walmart*, right? Further, the court's pre-*Walmart* case law held that:

"The fact that some of the plaintiffs may have different claims, or claims that may require some individualized analysis is not fatal to commonality. However" -- or it went on to say:

"However, in *Walmart*, the court expounded on the meanings of its precedent providing that commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. After *Walmart*, Rule 23(a)(2)'s commonality requirement demands more than the presentation of questions that are common to the class because any competently-crafted class complaint literally raises common questions.

"Further, the members of a proposed class do not establish that their claims can productively be litigated at once merely by alleging a violation of the same legal provision by the same defendant. Instead" -- and I'm almost finished, Your Honor --

THE COURT: No, that's okay, take your time.

MR. GIBSON: "Instead, the court held that the claims of every class member" -- every class member -- "must depend on a common contention of such a nature that it is capable of class-wide resolution. Which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

"Thus the commonality test is no longer met when the proposed class merely establishes that there is at least one issue whose resolution will affect all or a significant number of the putative class members."

THE COURT: Could that or might that refer to commonality -- strike that. Isn't the plaintiffs' argument that the commonality refers to the process and not the

individual treatment?

MR. GIBSON: So, the plaintiffs here despite, in my view, what one would glean from their complaint, which asks for all sorts of individualized-based relief, if you read the actual language of their relief that they seek at the end of their complaint, plaintiffs are now suggesting that they will not seek any individualized relief, they're not going to have any sort of this, but really they're focused on the process. Okay?

The problem with that in this case is that the process is by no means common to each individual class member. And, more importantly, the alleged deficiencies in that process are not common to each class member. That is what is required, that literally there is some alleged deficiency, and they have a litany of alleged deficiencies, but there is an alleged deficiency which applies to every single class member the same way such that the resolution of whether or not that alleged deficiency is actually deficient under the law will resolve each one of those claims, quote, "in one stroke."

It may seem harsh from a pre-*Walmart* perspective, but this is the law as stated by the Supreme Court in *Walmart* and as applied very clearly by the Fifth Circuit in *M.D. v. Perry*, and by the Seventh Circuit in *Jamie S.*, what I would consider probably the most on-point case regarding a very similar type of claim that we have here.

So, Your Honor, that's how I wanted to start our discussion to recognize that the law has changed. We are in a different world after *Walmart*, as recognized very explicitly here by the Fifth Circuit. And the commonality standards are much more rigorous and it is no longer sufficient to say we are all individuals with developmental disabilities who reside in nursing facilities who are alleging an *Olmstead* claim. That is not sufficient.

Number one, they all actually have to have an *Olmstead* claim, which I'll get to, that actually the vast majority of the class does not even have an *Olmstead* claim in this case under the evidence proffered by the plaintiffs, and even if they did, the reason for the harm would have to be common across the entire class. I will in particular point to -- talk about a couple of the cases that the plaintiffs rely on which have certified classes in the ADA, *Olmstead* arena following *Walmart*, which are very, very different from the type of super claim, programmatic, across-the-board claim that the plaintiffs are making in this lawsuit.

In the defendants' opposition we, of course, talk thoroughly about the *Walmart* decision, about *M.D. v. Perry* and about *Jamie S.* And then we go on to discuss the various deficiencies in the putative class. I'm not going to go too much further into *Walmart* in the case law as it exists.

On the overview, what our problems are with this

purported class, as I stated, this class does not meet the rigorous analysis of commonality as set forth in *Walmart* and *M.D. v. Perry*, as I'll explain more thoroughly. The various claims purported problems and alleged deficiencies in the funding, the administration, the various ways that the State runs this program are in no way common or across this entire class. Plaintiffs essentially -- plaintiffs admit that and provide evidence supporting that in their materials with their motion, and there is no question that these claims are not common and, in fact, the majority of the plaintiff class doesn't even have these claims.

Secondly, the named plaintiffs are not typical. For instance, they do not -- they desire to be placed in the community. They want to not be in a nursing facility. As plaintiffs' own data suggests, 90 percent of individuals with developmental disabilities have expressed no interest to leave. Okay?

THE COURT: How do we know that?

MR. GIBSON: That data is collected -- it's data that was presented by the plaintiffs in their -- Mr. Corbett's declaration. I can get the exhibit number if it would be helpful to the Court.

THE COURT: No, I'll get it.

MR. GIBSON: And defendants also offered an affidavit that was attached to their response which confirmed that the

approximately 10-percent rule applies; meaning only 10 percent of individuals having expressed an interest to be placed in the community.

In addition, the named plaintiffs lack standing to bring all of the claims. Standing to bring all of the claims asserted is a prerequisite to being an appropriate class representative and the named plaintiffs do not have that standing. That's partially for reasons that were discussed this morning and I won't go into that again because that's tied into the motion to dismiss. But it also relates to Mr. Holmes, the issue that was discussed earlier; one of the named plaintiffs who is no longer in a nursing facility.

In addition to commonality, the *Walmart* case and its progeny really, you know, changed -- modified the law on what it means -- what's an appropriate Rule 23(b)(2) class. Of course Rule 23(b)(2) applies to classes seeking injunctive relief, not damages. And in the *Walmart* case the discussion was really about the limited portion of relief that related to back-pay damages for the allegedly discriminated women that had worked for *Walmart*. And the court really made this discussion of what's an appropriate relief for 23(b)(2) class in that context. But in *M.D.* the Fifth Circuit went well beyond that and made it very clear that those strict requirements apply to all Rule 23(b)(2) classes, including that not only the elements that Mr. Schwartz talked about but

additional elements that I'll also discuss.

Finally, an issue that was raised in our opposition which, surprisingly, the plaintiffs nor the Government has even addressed, which is that Fifth Circuit law requires that a class be ascertainable and clearly defined and this class is not. Which I will explain in a few minutes.

Plaintiffs have served four different causes of action which were discussed in detail this morning. They seek a class of all Medicaid eligible persons over 21 years of age, quote, "with mental retardation or related

> condition, collectively referred to as persons with developmental disabilities, in Texas who currently, or will in the future, reside in nursing facilities, or who are being, will be or should be screened for admission to nursing facilities," pursuant to the PASRR statute and regulation.

They seek an injunctive -- a variety of injunctive relief "relating to screenings of persons with

> disabilities, the provision of services and supports, and the administration of the community-based waiver programs."

As to commonality, let's focus on the *Olmstead* integration claim. Plaintiffs allege that essentially

everyone in this class has been harmed by being -- by the mere fact that they are in a nursing facility. Okay? *Olmstead* makes very clear that that is not the standard for a harm for an undue institutionalization. Right? In fact, many people need nursing facility care. There is a level of care that one receives in a nursing facility that is not available in other settings. And there's a reason that the -- all of the regulations for Medicaid programs create all sorts of -- not only contemplate but have a very robust regulatory environment for Medicaid patients in nursing facilities.

There is no harm, per se, by merely being an individual in a nursing facility. Instead --

THE COURT: Isn't the harm alleged by the plaintiff that they ought not be there in the first place?

MR. GIBSON: That's correct, Your Honor, that's what they allege. And they allege that every one -- every single developmentally disabled person -- well, is harmed because maybe -- they don't ever really say this, but maybe all of them could be in the community. But, of course, their own data and their own allegations in their complaint make very clear that that's not the case. Right?

To have an *Olmstead* integration claim, there's essentially three elements: That community placement has to be appropriate for the individual as determined by the State's professionals. And these are the elements set out very

clearly in *Olmstead*.

The individual does not oppose transfer to a more integrated setting.

And that the placement can be reasonably accommodated without creating a fundamental alteration to the state's Medicaid program.

I do not think that the plaintiffs -- well, maybe the plaintiffs believe that every single one of these individuals should be put in the community regardless of their needs. It's unclear whether that's their position or not. They clearly have asserted that they're all harmed. Of course, there is no harm under *Olmstead* unless you are qualified for community placement and do not oppose transfer. You actually have to want -- be qualified for and want that placement for there to be a harm in the first place.

And yet the plaintiffs allege that for 80 percent -- only 80 percent of the class is qualified for community placement. That is clearly stated in their complaint. That means, first off, a fifth of their purported class doesn't even qualify, as they themselves allege. We are not -- this is their own allegations. More importantly, approximately 10 percent, somewhere around 10 percent would oppose transfer. So based on the evidence, they support -- they provided any evidence, we provided.

Now Mr. Schwartz speculated, hypothesized that maybe

it's possible if maybe all of these alleged wrongs were remedied, maybe that 10-percent number might be greater. I think the Court and the parties need to look over the evidence that's before the Court, and the evidence that they, themselves, provided, which is 10 percent oppose. That means 90 percent of this class does not have an *Olmstead* claim, period. If 90 percent of the class doesn't have a claim, I don't see how in the world commonality can be established under *Walmart*.

Walmart, *M.D.* and all of these cases clearly contemplate that you actually have to have a claim. Right? Not only do they contemplate that, they have to contemplate that your claim, that every class member has this claim and that the claims can be resolved by a common question in one stroke. So if you don't have the claim, how in the world can your claim be resolved in one stroke when you have no claim in the first place?

Clearly I don't think that the court in *Walmart* would have contemplated a class that included women who did not allege they were discriminated against. Or maybe included men as well as women in the *Walmart* claim. Or maybe in *M.D. v. Perry*, it included children who had been adopted but weren't in foster care. I mean, it -- and maybe this is just me, Your Honor, but I am flabbergasted to think that a class could be certified where 90 percent of the class does not even have the

claim under the elements clearly stated by the Supreme Court. Furthermore, even if -- even taking that 10 percent, okay, that 10 percent has to have a common question of law or fact that allows their claim to be for class-wide resolution in one stroke.

In this case, it's clear that that 10 percent does not share that. Some of these people allege, or the plaintiffs allege that some people are improperly segregated in nursing facilities because they didn't get an appropriate PASRR. Or maybe they didn't get an appropriate Level One PASRR, or maybe they didn't get an appropriate Level Two PASRR. Some maybe are on a really long waiting list for HES waiver slot, or maybe others are on some other waiting list for some other waiver slot. Others maybe should be getting services that -- in ICMFR's which they're not getting in nursing facilities. It's a whole litany of different causes, different reasons why these individuals are purportedly segregated in nursing facilities and not receiving community placement.

Those reasons are not common. They are, in fact, uncommon as the very data provided by the plaintiffs show. It is not the case that every single person in Texas is not receiving a PASRR. Texas has had a PASRR process for years and years. It has been modified before with the input of various stakeholders, including the federal government, and it

continues to be modified and improved based on the input of the federal government.

They do not allege that even the problems with the PASRR are common. Some people, you know, get treated this way, some people get treated this way. And nor have they identified the common reason or problems with the PASRR requirement process. They haven't said that the form is wrong or that the training is improper, that all of the training on PASRR is improper, or that the implementation is improper because you're doing it this way instead of this way. They don't allege that.

And their own report offered by the Office of the Inspector General recognized that there's a litany of reasons why someone may or may not get an appropriate PASRR review. It could be the insufficient training at the nursing facility side. It could be for all sorts of different reasons: insufficient oversight by the federal government itself in its consistent oversight.

And so it's as if you have someone, you know, all the people who got into wrecks with the State with state cars saying, "We're going to have a class action lawsuit suing the State for all of its negligent equal accidents," which, of course, are all caused by a variety of different reasons. Some of them are bad drivers, some of them are bad -- we allegedly haven't maintained the fleet properly, "But we're

just going to lump them all together because we allege we've all been harmed the same, because we've all been in an accident with a State vehicle." That is clearly not sufficient under *Walmart*. You have to have a very clear level of commonality that allows for class-wide resolution of the claim based on common issues. Common dispositive issues. That's the real key, common dispositive issues.

Going to the Medicaid Act claim -- and before I go on to other claims, Your Honor, the plaintiffs are seeking a class of all of these individuals for all of these claims. They have to show commonality for all the of the claims. It is not allowed in class actions to say, "We have one claim" -- let's say we have a Federal Securities class action and all the plaintiffs are all the people who bought that claim -- or bought the stock.

You can't say, "We're going to allow that case to proceed as a class action but we're also going to let all of the class members who may" -- let's say there's a securities class action against Bridgestone for misstatements regarding their tires. We're not also going to allow those named plaintiffs -- or those class members to litigate their product liability action in the same lawsuit unless there's commonality on that claim as well. We have to establish commonality on every claim that's being asserted here for that claim to be litigated on a class-wide basis.

THE COURT: By all the class members?

MR. GIBSON: That's right. And the plaintiffs have not proposed subclasses, breaking this apart, nothing. They want, they have asked for one gigantic class of all of these individuals to litigate all these claims together. And to do that, they have --

THE COURT: Isn't it more efficient that way, though?

MR. GIBSON: *Walmart* and the Fifth Circuit have made it clear that if there are differences among the class that you have to have subclasses. In particular, *M.D. v. Perry* is very clear about the consideration of subclasses. None of those have been presented, it hasn't been discussed, we don't think it's -- I mean, I have raised it because of, really for its lack of discussion here. And certainly the defendants have no -- it's really up to the plaintiffs whether or not they want to try that, and not that that would even be appropriate in this case, but we don't even have anything on the table to discuss. We are discussing solely one mega-class to address one super claim, as the *M.D. v. Perry* court called it, of a litany of alleged failures and problems all affecting the various class members differently even to the effect that they affect -- even to the level that they affect them because most of the don't even have an *Olmstead* claim as we discussed.

Going to the Medicaid Act claim. Of course, there are different provisions under the Medicaid Act that they

cite. Going to the reasonable promptness claim. It states:

> "The State plan must provide all individuals which may make application for medical assistance under the plan...shall have an opportunity to do so and such assistance shall be furnished with reasonable promptness to all eligible individuals."

They say that the reasons for the delay are arbitrary policies. This is what they state in their brief in their amended complaint. There's simply no glue, as required by *Walmart*, holding these claims together for the reasonable promptness.

Again, they admit that it's numerous different policies. Some policies affect some class members, some policies affect other class members. Again, some are delayed due to their failure to receive specialized services because of the definition of specialized services. Some have alleged violations of the reasonable promptness standard based on insufficient PASRR reviews because if the PASRR review would have been sufficient, they would have had a more prompt assessment of their needs and prompt provision of services. Others claim that the reason for the reasonable promptness standard not being met is because they're on a really long entrance list for a waiver program. Again, these claims are

just a multitude of claims, none of which are common across the entire class.

The same goes for the freedom of choice claim. Plaintiffs admit that the application of this provision is limited to those who are eligible for waiver services; amended complaint Paragraph 97. Yet plaintiffs also admit that a significant portion of the class is not qualified for community-based placement.

So if only 80 percent of the class is qualified and only 10 percent actually want community-based placement, and how in the world could a provision, a freedom of choice provision that only applies to those who are eligible for community-based waiver services be common across the class when a lot of people aren't qualified and haven't applied and will never, ever be determined to be eligible or not?

As to the NHRA, or what I call the PASRR claim, the PASRR process claim, that claim also lacks commonality. They allege that the screening fails to identify some but not all people as those with developmental disabilities. Some people, they would admit, even by their own evidence, receive a level -- PASRR Level 1 screening, are appropriately identified as persons with developmental disabilities, receive an assessment and receive those services.

I mean, the percentages that they have are like a funnel, right? Only 80 percent get Level 1, 50 percent get a

Level 2, 20 percent get the appropriate thing. Which means there are other people outside of that funnel which are getting the appropriate level reviews. And so, again, it just shows that there is no commonality for why these people are harmed, allegedly harmed.

This "some but not all" sort of idea just pervades their entire complaint. Some but not all are on the entrance list for the waiver programs and aren't getting in. Some but not all have an *Olmstead* claim. Some but not all have received an improper PASRR review. Some but not all should be receiving specialized services. I mean, it's just, again, replete throughout their entire idea of what this case is and they would take their litany of alleged transgressions and say, "Based on all of these, everyone's been harmed."

It's like Venn diagrams that never meet anywhere. There's just a bunch of Venn diagrams that sort of overlap but there's no center where it all comes together. There's no glue. That's where the glue would be, and based on the allegations and the evidence before the Court, there is no glue for any sub-population, they have not established that any sub-population here has all of the claims that they allege. Even their own plaintiffs, one of them is in a nursing facility. Right, his claims are moot. Even he doesn't have all the claims.

So and this also goes -- I'm going to move on to

typicality. Before I do, just to summarize, there's no way in my view, Your Honor, to be, to be perfectly honest, that this claim meets the standard set forth in *Walmart* and *M.D. v. Perry* on commonality. I just don't see it. I don't see how when 90 percent of your class doesn't have your primary claim, admittedly cannot meet the elements of the primary claim in the lawsuit, how we can certify a class including those people to litigate that claim. I just don't understand it, Your Honor, and I'm surprised -- I was actually surprised that following the decisions in *Walmart* and *M.D.* when the plaintiffs filed their amended motion that they filed it as they did.

In terms of typicality, plaintiffs aren't typical of the class. In fact, as their own evidence shows, and I know I keep harping on this, 90 percent of the class does not desire community placement. Only 80 percent of the class is qualified for community placement, under their own purported facts, which is what the record is here.

Yet, all of them purportedly qualify for community placement and all of the named plaintiffs would like to be placed in the community. They do not represent the interests of those people who do not, who actually wish to remain in a nursing facility, which is the vast majority of individuals. They do not represent the one-fifth of all individuals, under their own admissions, that do not qualify for community

placement.

Just as with commonality, merely asserting a common legal theory does not establish typicality when proof of a violation requires an individualized inquiry. Merely asserting that we are representing a class that has all of the same -- asserting claims under common statutes does not meet the typicality requirement.

As far as the adequacy of the class representatives, at this stage, Your Honor, we really are -- make two simple arguments. Number one, to be an adequate class representative you have to have standing to assert all the claims. That's a very clear requirement. The law is set forth in our brief. As discussed this morning, we argue that the plaintiffs do not have standing to assert the freedom of choice claims nor standing to assert claims against the Governor, and for that reason, we would assert they are inappropriate class representatives for those claims.

In addition, Mr. Holmes is currently placed in the community and is not a member of the class except for the fact that plaintiffs allege there is some risk that he will be placed again in a nursing facility. As we argue in our brief, Your Honor, his claims are now moot. He is not in a nursing facility. He certainly doesn't have an *Olmstead* claim anymore and he is not an adequate class representative.

Moving on to the other critical and sort of

game-changing holding in *Walmart* and *M.D.* and *Jamie S.* is the requirement of Rule 23(b)(2) cohesiveness. Despite the assertions in plaintiffs' reply brief and as well as in the government's, the federal government's brief on class certification, *Walmart* and *M.D.* make it very clear that:

> "Injunctive relief is only appropriate if the injuries are uniform and essentially the same across the entire class."

Those are the words used by the Fifth Circuit in *M.D. v. Perry* at 847 to 848. In addition, the claim cannot -- the requested relief cannot request individualized relief on behalf of individual class members. It has to be common across the entire class.

And, finally, the relief must be particular. Again, one of the reasons that -- Mr. Schwartz suggested that the only reason that the court in *M.D. v. Perry* had an issue with the relief requested was due to the panel, expert panels that the plaintiffs were requesting in the foster care case. That is clearly not the case. The court in *M.D. v. Perry* also took -- had problems with the fact that the relief requested was not sufficiently particular and said that, quote:

> "Finally, injunctive relief must be crafted to describe in reasonable detail the acts required."

I've looked at the purported relief in the back of

the amended complaint, I don't think it's very particular. It's a lot of sort of platitudes and goals. It is not particularized relief. It does not say how we would get to the provision of services in community-based settings. It does not say what changes are necessary to the PASRR program. It does not say what changes are necessary to the waiver programs. None of that's in there. It does not say a particular law should be overturned, a particular policy should be changed. It doesn't say any of that. It has a lot of platitudes about goals for insuring that the class members are -- have opportunities for community base -- based on, quote, "Their individualized needs," end quote. And individualized needs and individualized assessments is all over the requested relief in this lawsuit.

For that reason, defendants took umbrage with the requested relief and said that it would require improper individualized assessments. And we took them at their word that that's what they meant when they put those words in their requested relief.

In addition, three of the named plaintiffs filed a motion for preliminary injunction in this lawsuit. They sought -- and, again, they've alleged -- plaintiffs have alleged that they've all been harmed very similarly. So we thought that the requested relief which they sought to address their harms, that they said, "We can't wait anymore, we have

the harms which are common," they alleged common to the entire class, "and the way to address those harms are very specific, individualized relief that we are now asking for in this preliminary injunction motion."

We took them at their word and said, "Well, if that's the way to address the harms that you allege in this lawsuit, this is what you think is necessary to meet -- the relief needed for these claims, then presumably that's the relief you're going to request on behalf of all class members." Of course, if they're not going to request that relief, that also questions whether they are adequate class representatives. Why was that relief sufficient for the named plaintiffs and it's not sufficient for the entire class?

So, and if you look at that relief, it's very clear that it is a very individualized, case-by-case assessment of needs, service needs, placement needs, where those needs can be met, and monitoring by this Court of all of those decisions as to whether or not the defendants would be meeting those needs as alleged by the plaintiffs.

Really this goes back, these two ideas are tied together, commonality and (b)(2) cohesiveness. Because the claims aren't uniform, because the claims aren't common, there is no uniform injunctive relief that will remedy a common claim. Okay, they've alleged that they've all been harmed allegedly the same way, but as we pointed out, in fact, 90

percent of the class does not even have a harm under *Olmstead*.

So what is the relief that will address a common claim? They haven't offered any such relief; a particular change to a waiver program, a particular change to the PASRR program. We have none -- none of that has been proposed here and that all -- again, that violates the particularity requirement of the Fifth Circuit.

Finally, Your Honor, the Fifth Circuit has made it clear that classes must be clearly ascertainable, adequately defined so we know who's in it: Who are these people? The way they have defined this class they have first all Medicaid eligible persons. They don't have all Medicaid recipients, they have all people who are Medicaid eligible.

The State has no way of identifying who's Medicaid eligible. Those decisions are only met when a person applies for Medicaid. At that point eligibility is determined. So if a person never applies, there's no way to determine that.

Secondly, they state, "People who have developmental disabilities." Again, they themselves alleged that the way of determining that under the PASRR process is flawed and does not identify people with developmental disabilities. So how are we supposed to know who is in this class if we can't rely on who -- on the PASRR process to identify who the class members are? Again, it would be necessary to conduct a, quote, "intensive, individualized, factual inquiry," end

quote, to identify class members which was found to be improper in the *Jamie S.* case at Page 496.

To close, Your Honor, I want to talk about a couple of the cases that plaintiffs talk about that have been certified following *Walmart*. In the *Pashby* case, that case involved a change in the law. North Carolina put a specific provision that changed services that were going to be provided to a very specific population of Medicaid recipients. In particular, it changed eligibility and the services provided for what is called personal care services. And the class in that case was defined not as everybody receiving Medicaid, the class was defined as adults affected by the new rule resulting in termination or reduction of services. All right?

So we're talking about a specific law that affects specific people and with specific changes in service. All of them, every person who was receiving those services was going to be affected the same way.

The relief that was sought was an injunction, enjoining enforcement of the particular rule. Okay? It was very clear. There was one policy at issue. It affected a very specific population. And the relief was enjoining the enforcement of this new policy so that those service changes wouldn't take effect.

It's not surprising that the court found that, quote:

"A determination that Policy 3E is valid

or invalid on its face will resolve the claims of all potential plaintiffs irrespective of their factual circumstances," end quote. That's at the *Pashby* case 279 F3d 347 at 353.

That is clearly not what we're talking about here, Your Honor. We are not talking about a single law, making a single change to the provision of services to a specific population.

Similarly, in *Oster v. Lightborn* [phonetic], Northern District of California case, again referred to a specific change in California law regarding mandatory reductions in the state's, quote, "in-home support services," or IHSS services, "for the elderly and disabled." Again, the class was limited to -- actually, there wasn't a single class. There were multiple subclasses in that case and the classes were limited to the recipients or those eligible for IHSS services whose services would be limited or terminated under this new law. And, again, the plaintiffs sought an injunction preventing the enforcement of this change, very specific relief on a narrow issue that was clearly common across the class: whether or not this specific law violated the ADA.

THE COURT: And that case again was Oster --

MR. GIBSON: That's *Oster v. Lightborn*, 2012 Westlaw, 685808.

THE COURT: Okay.

MR. GIBSON: Those cases are totally different than the type of super-claim, as the Fifth Circuit called the foster care case, that we're talking about here. A claim that attacks, as plaintiffs themselves say, the "funding, administration, operation and" -- one other word -- "of the entire provision of Medicaid services to the developmentally disabled in nursing facilities." The entire program from start to finish is being, is being attacked. From the time that they step foot in that door and they're screened to the time that they get to a community placement.

In fact, the class isn't even limited to that. It allegedly would include everyone who's in community placement including Mr. Holmes because there's maybe a potential risk that they may at some day be back in a nursing facility.

Your Honor, to close, this case as asserted by the plaintiffs is a across-the-board challenge to this entire program for every single person who is currently in the program and those who may at some point be in the future and who may come back into the program for a litany of different reasons under a variety of different statutes and regulations, none of which is common across every member of this class. The class lacks commonality, is not cohesive under 23(b)(2), and has the other problems identified.

The class should not be certified, Your Honor. Thank

you.

THE COURT: Counselor, do you wish to respond to any or all -- well, not all.

MR. SCHWARTZ: Not all.

THE COURT: You'll miss your plane.

MR. SCHWARTZ: I promise not all.

THE COURT: First of all, how does the class have the -- the purported class have an *Olmstead* claim?

MR. SCHWARTZ: Defense counsel dramatically misrepresents what we have said in our complaint and the evidence that we have supported the motion.

THE COURT: Well, in any event, how does the purported class have an *Olmstead* claim?

MR. SCHWARTZ: Well, they all are -- because of the way the defendants have deny -- have operated their community service system and have -- the result of which is segregation in nursing facilities, everyone is subject to the same common practice. We recognize, as we said, precisely the reasons why the Court is not involved in individualized relief, which is that after those corrections are -- let's fast forward.

If we prove at trial that the defendants' eligibility criteria for certain of its programs, that its funding and administration, that its notices and information that they give to people, all significantly contribute to, independently contribute to people's unnecessary segregations, we would

ask the Court would issue an injunction saying you change those things. As a result of the change to that community services are made available to people in nursing homes. There then would be -- so all of those individuals suffer a common wrong. They are subject to the way the defendants have denied them access, through their eligibility criteria have denied them access to community services.

The defendants right now operate, as I think the Department of Justice mentioned, they operate a community service system. They provide services to a bunch of people, including, by the way, people with intellectual and developmental disabilities who happen to be in those other institutions, ICMFR's. They just don't do it for people in the nursing homes. So that's the common contention.

What is critical is that -- so all of the individuals in nursing homes are injured in that way. Now as we acknowledged in an earlier part of our argument, if that deficiency is corrected, there will then be the use of the State's own treatment planning process to look at what each person needs and who wants to go and things like that. All right.

If it were true, if the defendants' proposition was true, one of two things would have to happen. Either, for the reasons they say of what constitutes an *Olmstead* claim and a Medicaid claim, and they went down the reasonable promptness

and so on like that, either it would be absolutely impossible for any federal judge to ever certify a case under the ADA again. It would be impossible -- or the Medicaid Act. It would be impossible because, as they say it, the only people who have a Medicaid claim to specialized services are people who have -- for whom that would be necessary, for whom that would be appropriate, who has an assessment.

So then every person -- there could never be a single challenge under the Medicaid Act. There could never be a single challenge under the ADA. The defendants' theory would obviate all 40 decisions which we gave you. It says that *Walmart* is not just a change in law but it vacates, it effectively repudiates all prior decisions because the only people they would say who have a claim are the people who have stepped forward and say, "Today, today, Judge, I want to leave, I'm able to leave, I'm qualified to leave. I might not be tomorrow, by the way, because I could get sicker. I might not be yesterday because I didn't have an opportunity to even think about this, but today."

So the second part of their position is that it's not only impossible to ever certify an *Olmstead* case but that because of the very nature of all of us, we change our minds, we get sick and we get better --

THE COURT: Okay, how is the purported class ascertainable?

MR. SCHWARTZ: It's ascertainable because -- there's really two branches to the answer to that question. All people who are in nursing homes, that is, once someone -- ones with intellectual disabilities, we're only talking about people, I think that's clear, people with intellectual and developmental disabilities -- as soon as they enter the nursing home or are required to be given a PASRR, because sometimes a PASRR, if it's done properly, will actually create a diversion. A person will go and be assessed and find that they do better in a community program, that's if it's done right. So any person who is subject to a PASRR, that's the ascertainable condition.

It is true that the condition that the Department of Justice and the *Olmstead* court says people who are at serious risk of institutionalization is vaguer. It's harder to identify. And so the Ninth Circuit in M.D. -- excuse me -- in *M.R.* recently made clear, adopted the Department of Justice's guidance and rules and said that people who are at risk of institutionalization are also covered by the ADA. As did the Tenth Circuit in *Fisher*, as did the Ninth Circuit in *Arc v. Braddock*, as has the Third Circuit in *Frederick L.* All of those circuits have said that the ADA covers people who are institutionalized. So that's easy to ascertain. It's all the people in the nursing homes with intellectual and developmental disabilities. It also includes the people at

risk of institutionalization.

The defendants' repeated mischaracterization that we keep -- that we're admitting that only 10 percent of all those people want to leave is plainly wrong. We say first at Paragraph -- in our complaint at Paragraph 82 that:

"National experience when PASRR programs are properly implemented have identified" -- that at least 80 percent of all the people in a properly adequate or appropriately operating PASRR program are identified as leaving -- as needing to leave, they shouldn't be in there.

THE COURT: Identified as what?

MR. SCHWARTZ: I'm sorry. Have been -- let me say it better. When a PASRR program is operating properly, that program will identify 80 percent -- at least 80 percent of the people will be described as those who do not need to be in a nursing home. In Massachusetts, for instance, where the court is about to -- in *Rolland*. The PASRR program currently identifies 93 percent of all the people who are referred to nursing homes as not needing to be there. That's the current statistic that was provided to the federal court by the defendants and the court monitor.

So that's another way of saying, of course, and we acknowledge not every single person who's admitted to a nursing home are inappropriate. There's some people who do have to be in a nursing home. But 93 percent are identified

in that program.

We further say at Paragraph 83 that:

"Of the approximately 4500 people with developmental disabilities, the vast majority could be diverted or are qualified for community living."

One of the difficulties, Your Honor, is -- and that's why I used that number just a moment ago, appropriately constituted an operating PASRR program. If a PASRR program mis-identifies, meaning they don't think a person's developmentally disabled when his school, his father, his doctor and everybody who's ever seen that person say they are developmentally disabled, how can you get an accurate count? The fact is the defendants, because of their program, don't have any idea exactly how many people are in nursing homes.

So all we have to go on is some data that the defendants have generated from a program that we feel, and to some extent they acknowledge, needs to be fixed.

So from that data, there's another piece of data that the federal government collects. It asks each person, not -- it doesn't break it down to people with developmental disabilities. But every elderly person, every person who comes into a nursing home, "Do you want to leave? Do you want to leave right now?" Shortly after they're admitted, "Do you want to leave?" That's the number that the defendants'

counsel is talking about. Right?

It's about Medicare clients and non-Medicare clients, not broken down by disability, not broken down by people giving information, not reflecting people who've given a realistic opportunity. We have never conceded, we have never presented evidence to the Court and we will never state that only 10 percent of the purported class are qualified. All right?

So what we're saying is that the class is ascertainable because of two factors. It talks about the people who are in facilities and, and in at least a minimally-adequate PASRR program, the defendants should be able to tell you, Your Honor, "These are the number of people and these are the -- the people by name who have intellectual disabilities who are in the nursing homes we're paying for. We are paying for their care. We're spending tens of thousands of dollars to have them in nursing homes. We are operating a PASRR program that should identify who has a disability." You should be able to ask them what are their names and they should be able to tell you. That's how ascertainable it should be.

THE COURT: Well, how does the law in *Walmart* not apply, or applicable in this case for your purported class?

MR. SCHWARTZ: Let me say that defense counsel started by saying we believe *Walmart* is irrelevant, or

whatever exactly he said, "We don't think it makes a change."

THE COURT: I don't think they said that, but, in any event, just answer my question.

MR. SCHWARTZ: *Walmart* does make a change. *Walmart* applies by saying, and this is the quote that was read to you in part. *Walmart* says that -- and this is quoted, actually, by the Fifth Circuit is quoting *Walmart*.

THE COURT: Right, he read --

MR. SCHWARTZ: It says:

> "Rule 23(a)(2) requires that all class members' claims depend on a common issue of law, or fact, whose resolution will resolve an issue that is central to the validity of each one."

It doesn't say, and *Walmart* doesn't mean, and the Fifth Circuit didn't hold, as was previously argued, that every single deficiency must affect every single class member in precisely the same way. That's not the law. That's not what *M.D.* is saying. And that's not what the quote from *Walmart* is.

What *Walmart* requires you to do now is first ask us for evidence. We've given that to you. Second, you've always been asked, the federal court, federal district judges have always been asked to conduct a rigorous analysis. That's been the law for 30 years.

But what *Walmart* newly does, and this is I think a new requirement, is to say that in order for a purported class to meet commonality, there must be a showing that there are common questions that are susceptible to common answers. All right? In *Walmart*, if you remember, you had 3-1/2 million people who were supervised by thousands of different supervisors across the United States. Each supervisor was making promotion or paid decisions based on his or her own criteria.

In fact, what was really problematic in *Walmart* was that not only couldn't they prove a common policy for the corporation Walmart, but their basic allegation was that there wasn't anything common. They were trying to prove that there was no common situation that binds it together. Every supervisor operated on his or her own. And Justice Scalia says, "Wait a minute. We need some common glue that holds this together and you haven't suggested anything; in fact, what you are alleging," in *Walmart*, "is that there is no common glue. You say that's really the problem. You say Walmart should tell every one of its supervisors, 'When you make promotion decisions, use these explicit criteria and do it in this way.'" Walmart failed to do it.

In fact, what they did was to allow there to be a lack of commonality. That's what Walmart -- and so the plaintiffs had a pretty high burden and didn't convince the

Supreme Court that the lack of a common anything, even common instructions, even a memo to the supervisors, they couldn't point to anything.

Here, we can point to any number of things. We can point to -- and so what *Walmart* requires us to do, and ultimately the district court to do, is to closely tie a claim to a common contention and demonstrate there's a common answer. What the defendants want us to do is to tell you today the answer to the question. They want to essentially leap frog over the trial.

The trial is going to be a time which after discovery, after we find out exactly how many people in nursing homes do they think there are, exactly how many people have gotten a PASRR, exactly how many people they believe, in whatever way they determine it, are qualified to live in the community, and then we'll have experts do assessments and we'll give you reports and information. So we'll answer the question at the trial how many people. But Justice Scalia, nor the Fifth Circuit, said that you have to answer the common question today. The common question has to be presented with clarity. It has to be tied to a claim.

And so here we can go down each of the claims, but the two main ones that you've heard kind of over and over is there's an ADA unnecessary segregation claim that Texas fails to provide its public entity disability services in the most

integrated settings possible. That common question, which is -- flip it around: Does Texas fail to provide its community service -- its disability services in the most integrated setting possible? Right? That's the common question. There will be a common answer.

We can't answer exactly how many people. We can demonstrate by evidence of even the experts and the data and the Inspector General that there is an answer. It is capable of a resolution. And as *Walmart* says, we just have to have a common issue of law or fact; that is, whose resolution will resolve? It doesn't say, it doesn't say that the deficiency has to be common.

So I think I've talked about why the defendants have either misunderstood or misrepresented, I'm not sure, this 10-percent number. But we were not claiming that. Our evidence does not say that.

Similarly, there's not a super claim. We've made, I think -- the Court has sat through patiently the entire morning hearing about all the individual claims. All right? There are two constellations: people who are unnecessarily segregated, people who are not getting services while they're there. All right? That is what PASRR -- right? And that's what the PASRR claim was.

As I've said a couple of times so I'm not going to keep on repeating this, we are not asking for individualized

relief. The prayers in our claim don't seek that. We are not like the *M.D.* or *Jamie S.* things where courts should set up an independent expert so every one of the people could be evaluated by the expert. We rely on the defendants. And, frankly, we framed our prayers in a way that we're not trying to dictate to the State of Texas how it should fix its PASRR program.

The PASRR program says accurately screen people, accurately identify them. All right. In part, until we conduct the discovery we're not sure of all the reasons that contribute to it, but, more importantly, you know, both out of deference to the State and respectful of the Supreme Court's admonition to federal courts, it is up to the defendants in the first instance to be able to identify how they want to correct their program or how they want to comply with the ADA.

If we wrote ten pages of prescriptive requirements, train people like this, make sure that these are the qualifications of PASRR reviewers, make sure that the waiver provides this service and that service with these many hours, the defendants would be complaining to you today that the plaintiffs were trying to dictate how Texas should run its community service program or its nursing program.

So there has to be a balance. The balance is that we have an obligation to come forward in our complaint to identify both what the wrongs are and to give you some

guidance in terms of the injunctive relief we want. At the same time, we are neither respectful of the prerogatives of the State nor -- or of the deference the Court is supposed to give to the State of Texas if we try to write you, you know, the precise road map of how the State should comply.

Significantly just at the end when the cases were being described post-ADA, the defense counsel neglected to mention both *Lane*, the case that we provided you as supplemental authority, as well as *Gray*, which is discussed in our brief in detail. In both of those cases what was being challenged was a common practice. In Oregon it was that the state segregates individuals in its employment programs. In fact, the district court judge noted that the one policy that they do have says, "We shall not segregate." It's just they don't listen to that policy.

So we weren't challenging a policy in Oregon, we were challenging the failure to insure that the system of employment services were provided in the most integrated setting possible. Similarly, in *Gray* it was not a single policy or rule but, instead, California was running some of its public parks without accommodating the needs of wheelchair users.

I want to stress at the end, Your Honor, that the combination of the -- the defendants have essentially made sort of two core arguments. One is that the individualized

nature of the claims in this case and the individualized nature of the relief sought precludes class certification. And the second argument that they make is that -- it's really a version of that which is that the wrongs that are happening to people in nursing homes are not happening to every single person. But they are --

THE COURT: How do you get around those two arguments?

MR. SCHWARTZ: As to the first one, I think we've tried to say two things back to you. One is that if taken literally, if taken on their face value, it would be impossible to ever certify an ADA or Medicaid class. And *Walmart* doesn't mean that, no court has ever held that. The second, the second point that individuals, not all 4500 people, are being subject to all of the --

THE COURT: The same wrong?

MR. SCHWARTZ: No, all of the same -- the reasons for the wrong. They are being suffered the same wrong. They are being denied access to services in the most integrated setting and they're being denied access to a proper PASRR program. It doesn't affect every individual in exactly the same way. And our answer to that is *Walmart* does not require that. It requires the resolution -- it requires us to state, and we have stated, a common contention, a common problem, a common injury. And it doesn't require -- which is susceptible to a

common solution in a single stroke.

You could enter -- and here's the kind of easy answer to that. You could enter an injunction that says that the defendants will make reasonable -- essentially the injunction the Supreme Court ordered in Georgia, and that the Fifth Circuit and the district court on remand entered was that the State of Georgia, or the State of Texas, will make reasonable modifications to its community-service system so that all individuals who are qualified for community services are provided the opportunity to live in the most integrated setting. That's the single injunction in one stroke.

And you could say, "I'll enter a second injunction, the State of Texas will make improvements -- will revise its PASRR program to insure that individuals are accurately identified, professionally assessed, and provided the same specialized services that people in their ICMFR institutions are provided so that they all can receive active treatment."

THE COURT: Okay.

MR. SCHWARTZ: Thank you.

THE COURT: You want to say anything?

MR. GIBSON: Just a few things, Your Honor.

THE COURT: Sure, of course.

MR. GIBSON: I just want to respond to a couple of the points. Plaintiffs claim that defendants' position results in this parade of horribles that means that no

Olmstead ADA claim can ever be certified. That is clearly not what we're saying.

What we are saying is that this class cannot be certified on these claims --

THE COURT: Because?

MR. GIBSON: Because there is no common question of fact or law that allows for the class-wide resolution of any of these claims to address a common injury. That is required both under the commonality provision and the (b)(2) provision.

They claim that --

THE COURT: Well, aren't they talking that the common injury is the lack of a process?

MR. GIBSON: No, I think they say that -- the question is they -- he stated this. The common question is: Does Texas provide disability services in the most integrated way possible? It is not: Does Texas provide a process that meets PASRR? Does Texas provide a process that meets Medicaid requirements?

THE COURT: Okay.

MR. GIBSON: The question proposed and being relied upon by the plaintiffs is: Does Texas provide disability services in the most integrated way possible?

THE COURT: Okay.

MR. GIBSON: That is not sufficient. The same could be said for Walmart: Does Walmart discriminate against women?

That is not a sufficient common question. All he has done is merely restated the *Olmstead* Integration Mandate on a very vague level. That is not a common question capable of class-wide resolution in this case.

The same thing in terms of his purported single injunction would -- an injunction that would require Texas to provide disability services in the most integrated way possible. Again, that is such a vague, un-specific injunction that there's no way that that can meet the requirement of *M.D.* and the requirement for a specific injunction that resolves the claim on a class-wide basis.

I would like to point out that the two cases that were referenced, the *Lane* case and the *Gray* case, both of those cases relied on a reading of *Walmart* that has been specifically rejected by the Fifth Circuit.

THE COURT: That's the *Lane* and *Gray* case?

MR. GIBSON: Yes, Your Honor, and those cites are -- the *Lane* is 2012 Westlaw 3322680. And *Gray* is 279 Frd 501.

THE COURT: Okay.

MR. GIBSON: Very, very briefly, Your Honor. In both *Lane* and *Gray* the courts distinguished the holding in *Walmart* to say that it was limited to Title VII discrimination claims, and essentially said that the old law regarding civil rights cases still applies and we're going to continue to allow certification so long as there's some vague allegation of a

common violation suffered by the whole class.

I would suggest that the Court compare the discussion of *Walmart* in *Lane* at Page 10, Star 10, to the discussion in *M.D.* at Page 840. You will see a very different understanding of the impact of *Walmart* on cases outside of Title VII and in cases such as this that *M.D. v. Perry* found these programmatic challenge -- across the board challenges to entire state programs.

The same is in *Gray*. It relied on a limited reading of *Walmart* as applied only to Title -- which applied only to Title VII cases, which, again, has been rejected by *M.D. v. Perry*.

I think those are the only points I wanted to make, Your Honor. We are not saying that no ADA case can ever be certified again. You know, *Pashby and Otis*, they address the commonality concern by having a specific class to address a specific change in the law, a specific issue that was applied to everyone the same. Thank you, Your Honor.

THE COURT: Okay, thank you.

MS. JUREN: Your Honor?

THE COURT: Yes.

MS. JUREN: If I might address some of the --

THE COURT: Okay.

MS. JUREN: I'd like to address some of the factual statements that Mr. Schwartz made and I think he did it in

response to class and maybe a couple of other times today also. That is that I believe he said just a few minutes ago that, that Texas has a variety of community-based programs, and that is true, I'm not taking issue with that, that certainly is true. But I believe he indicated to the Court that they are not available to persons in nursing facilities and that is absolutely not true.

I wanted to make that clear to the Court that there are a number of programs that are available, community-based programs that are available to the named plaintiffs and to other members of the purported, would-be class who are living in nursing facilities. And the plaintiffs in their response to the motion to dismiss basically admit, they say that they are able now to bypass the interest lists for the class waiver, that's c-l-a-s-s, the CBA waiver, which is a nursing facility waiver, and the Star Plus waivers and access community-based services and supports through a program called Money Follows the Person.

Those are available now, Your Honor. I just don't want to leave you with the impression that the State is doing nothing and that there are no programs available to these people. In fact, all the named plaintiffs are now being evaluated for placement into the HCS waiver and, in fact, have been offered other waivers that they've turned down. But those facts are not yet before the Court.

The other thing that I wanted to say is that a number of times Mr. Schwartz has commented on what the State has not asserted in terms of the motion to dismiss. We have not -- the State has not claimed that they are doing such and such. And I would just say that the time for that has not yet come. No, we have not even filed an answer where we will refute many of the things that they have said, of course, in their complaint. I mean the Court knows that, but the time has not yet come for the defendants to put forward their side of the story on much of this.

The final thing is just a housekeeping matter, Your Honor. We do also have notebooks for the Court on the motion to dismiss that has all of the relevant pleadings in one place and we have them, also, for the motion for class certification if the Court is interested in having a notebook.

THE COURT: Yes, yes, of course. Now have those been provided to the plaintiffs?

MS. JUREN: They have all the materials. I do have a notebook for the United States and for the plaintiffs as well.

THE COURT: All right. And you have them here today?

MS. JUREN: I have them here today.

THE COURT: Okay. Let's do this. I know our court reporter -- you don't need to -- this doesn't need to be in the record.

(Discussion off the record re: transcript.)

THE COURT: Once we get that transcript, we'll review it and get a ruling out on the motion to intervene. Now I know the Government requested in their pleading that they be afforded ten minutes on the motion to dismiss and the class certification motion. If they are permitted to intervene, they'll have 30 days to -- if you need to further supplement your arguments or whatever, or submit a brief on the motion to dismiss or motion for certification, you'll have those 30 days. Which is a lot longer than ten minutes.

Then once you get the transcript, if any party wishes to supplement their brief, additional briefing, you'll have 30 days after that, the same period as the DOJ would have; that is, to respond -- that is to submit a brief on the motion to dismiss. And then if you want to -- is it likely, do you know at this point, whether you would like to supplement your brief or pleadings on either the certification motion or the motion to dismiss, or you can reserve that judgment? Or you can make that judgment later.

MS. JUREN: We probably will reserve --

THE COURT: To make that determination later.

MS. JUREN: -- to make that determination later.

THE COURT: And I'm certain you'll likewise, the plaintiffs, would like to supplement --

MR. CORBETT: Well, we have briefed these, especially the motion to dismiss to the hilt.

THE COURT: Oh, okay.

(Discussion re: submission of supplemental briefings.)

THE COURT: You'll get a copy of the transcript perhaps. After then you can decide whether you want to supplement your briefing. And if you do, if you'll let the Court know that you're going to be doing this so that we'll give you 30 days. Okay? So if you'll provide those notebooks, Counselor, to --

MS. JUREN: Yes, sir.

THE COURT: -- our courtroom deputy, Jessica. She'll make sure we get it. If there's anything in those notebooks that you need to respond to, you can do it within that 30-day period after you get the transcript.

Okay, so we'll be in recess. That will permit you, Counselor, to get to the airport.

MR. SCHWARTZ: Thank you.

(Discussion re: trip to airport.)

MR. SCHWARTZ: Your Honor, right now we haven't had a Rule 16 conference yet.

THE COURT: We will do that after the rulings on these other matters.

MS. JUREN: Your Honor?

THE COURT: Yes.

MS. JUREN: I did want just a final word. Thank you for your indulgence today. I really appreciate the time

you've given to all of us to --

THE COURT: Sure. Well, this is my way of staying here and not having to deal with redistricting. All right, thank you.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, MAURICE D. WEST, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

12 October 2012

/s/Maurice D. West
MAURICE D. WEST
Official Court Reporter
United States District Court
Western District of Texas
210-472-6574

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