10-235-cv(L)

10-251-cv(CON); 10-767-cv(CON); 10-1190-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DISABILITY ADVOCATES, INC. and UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC. and EMPIRE STATE ASSOCIATION OF ASSISTED LIVING,

Movants-Appellants,

and

DAVID A. PATERSON, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Department of Mental Health, NEW YORK STATE DEPARTMENT OF HEALTH, and NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, CYNTHIA CATHLEEN CALORI, TONI TURNER, DR. NELBA CHAVEZ, CHARLES CURIE, NATALIE REATIG AND DR. PATRICIA MORRISSEY AS *AMICI CURIAE* IN SUPPORT OF APPELLEE DISABILITY ADVOCATES, INC.

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October 13, 2010

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae National Disability Rights Network certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

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INTEREST OF AMICI

This brief is submitted on behalf of *amici curiae* the National Disability Rights Network, Cynthia Cathleen Calori, Toni Turner, Dr. Nelba Chavez, Charles Curie, Natalie Reatig and Dr. Patricia Morrissey.[1]

The National Disability Rights Network ("NDRN") is the membership association of federally sanctioned protection and advocacy systems ("P&As"). In the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI" or "the Act"), Congress tasked P&As with protecting the rights of individuals with mental illness. There are P&As in all 50 States, the District of Columbia, Puerto Rico, and the territories. Through their efforts, P&As aim to prevent mistreatment of individuals and to achieve systemic reform for thousands of people. *See generally* Nat'l Disability Rights Network, 2008 Annual Report: Protection and Advocacy for Individuals with Mental Illness (July 2009), *available at* http://www.ndrn.org/pub/AnnRpt/2008/2008PAIMIAnnualReport.pdf. It is critical to the mission of P&As to pursue legal remedies on behalf of individuals with mental illness.

Cynthia Cathleen Calori has served as the Chairwoman of New York's PAIMI Advisory Council since 2007. Toni Turner served as

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[1] The parties have consented to this filing. Counsel to the parties did not author this brief in whole or in part and did not contribute money to fund the preparation or submission of this brief.

Chairwoman of the PAIMI Advisory Council from 1998 to 2006. PAIMI requires each P&A to have an advisory council to "advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness". By law, at least sixty percent of advisory council members, including the chairperson, must be individuals who have received or are receiving mental health services, or who have a family member who receives such services. Additional members include professionals in the mental health services fields and individuals knowledgeable about mental illnesses. The New York PAIMI Advisory Council advises New York's P&As, including DAI.

Dr. Nelba Chavez is the Senior Executive Advisor to Moving Organizations Ahead, a consulting company for non-profit organizations. From 1994 until 2001, she was Administrator of the Substance Abuse and Mental Health Services Administration ("SAMHSA") of the federal Department of Health and Human Services ("HHS"), the agency that administers federal funding for the P&A program. Charles Curie is founder of the Curie Group, LLC, a healthcare consulting company specializing in mental health services. Mr. Curie served as Administrator of SAMHSA from 2001 to 2006. Natalie Reatig, who is currently retired, served as Director of the PAIMI Program at SAMHSA from 1985 to 1996. Dr. Patricia Morrissey is CEO of Employment Diversity Network, an organization aimed at securing jobs for people with disabilities in the Washington, D.C. area.

Dr. Morrissey was Commissioner of the Administration on Developmental Disabilities from 2001 until 2009 and assisted in drafting the Developmental Disabilities Act Amendments of 1996 and 2000.

SUMMARY OF ARGUMENT

Protection and advocacy ("P&A") organizations provide an array of vital services to individuals with mental illness. From their experiences in varied capacities with DAI and other P&A organizations around the country, Amici know that this lawsuit enforcing the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, providing the opportunity for residents of adult homes in New York to live in a more integrated setting, is one of many successful results that P&A organizations achieve for persons with mental illness.

Along with other services P&As provide, P&A litigation is an important means to protect the rights of persons with mental illness. Amici submit this brief in support of DAI because they believe that standing for P&A organizations to bring suit is critical to ensuring that there are effective remedies for State violations of the ADA and other rights of individuals with mental illness.

This brief demonstrates first that Congress has authorized P&As to bring litigation in a representative capacity to ensure the protection of individuals with mental illness. This authorization is made clear in the language of the statute

and the accompanying legislative history, and is confirmed by subsequently enacted HHS regulations. *See infra* Part I.

Through their investigative work, P&As such as DAI are intimately familiar with conditions in institutions such as the adult homes at issue here. Notably, P&As are guided by advisory councils, which ensure that P&As are responsive to their constituents' interests. *See infra* Part II.

Accordingly, Amici respectfully submit that DAI has standing in this case based on the Article III injury in fact suffered by DAI's constituents. Congress has conferred representative standing on DAI by statute and, based on DAI's responsiveness to the needs of individuals with mental illness, DAI also meets the Supreme Court's test in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), for associational standing for nonmembership organizations. *See infra* Part III.

ARGUMENT

I. THE PAIMI STATUTE WAS ENACTED TO AUTHORIZE P&A ORGANIZATIONS TO INVESTIGATE ABUSE AND NEGLECT OF PERSONS WITH MENTAL ILLNESS AND TO PURSUE LITIGATION ON THEIR BEHALF.

Congress passed the PAIMI Act in response to congressional findings that individuals with mental illness receiving care and treatment were too often being abused and neglected. *See* S. Rep. No. 109, 99th Cong., 1st Sess. 2-3 (1985). Congress determined that "abusive" conditions created "a need for an

advocacy system independent of any service provider". *Id*. at 2. The "limited authority of advocates" and the fact that existing protective systems were "not . . . sufficient for protecting the mentally ill" required legislation to "affirm and enforce the rights of the mentally ill". *Id*. at 2-3.

PAIMI grew out of legislation concerning individuals with developmental disabilities. In 1975, Congress established the first of several programs providing states funding to create P&A systems. The law was enacted in response to reports of severe abuse and neglect at the Willowbrook School for the Mentally Retarded, in New York. *See* Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. § 6012 (1976); S. Rep. No. 1297, 93d Cong., 2d Sess. 59 (1974). The DD Act had two goals: to improve care in residential facilities and to minimize inappropriate and involuntary confinement in such facilities. *See* S. Rep. No. 1169, 93d Cong., 2d Sess. 1-2 (1974). Under the DD Act, to receive federal funding a state must create and maintain a P&A system to "protect and advocate the rights of individuals with developmental disabilities". 42 U.S.C. § 15043(a).

Similar concerns about abuse, neglect and the disregard of the civil rights of institutionalized individuals with mental illness led to PAIMI's enactment in 1986. PAIMI authorized additional funding for P&A systems, expanding their mission to encompass the protection of individuals with mental illness. 42 U.S.C.

§§ 10802(2), 10803, 10827. Congress enacted PAIMI to "prevent further instances of abuse and neglect". *See* H.R. Rep. No. 401, 99th Cong., 2d Sess. 3 (1985).

Two PAIMI requirements particularly empower P&As to protect and advocate for their constituents.

First, P&As can monitor facilities and have access to patient records and individual residents in covered facilities. Under PAIMI and the DD Act, P&A organizations "shall have the authority to investigate incidents of abuse and neglect". 42 U.S.C. § 10805(a)(1)(A); *see also id.* § 15043(a)(2)(B). To ensure that such investigations are effective, the statutes provide that P&A systems "shall . . . have" a broad right of access to "all records" that are relevant to an investigation in enumerated circumstances. 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I) and (J). These powers of oversight and access allow P&As to monitor conditions in covered facilities, *see* 42 C.F.R. § 51.42(c)(2), interact in an investigative capacity with individuals receiving mental health treatment in residential facilities, *see* 42 C.F.R. § 51.42(b), review incident reports from facilities, *see Ariz. Ctr. for Disability Law v. Allen*, 197 F.R.D. 689 (D. Ariz. 2000), examine peer-review evaluations of mental health professionals, *Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.), and investigate reports from affected individuals or the public about abusive or otherwise unacceptable conditions in

facilities, *see Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) (Sotomayor, J.); *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 894 F. Supp. 424 (M.D. Ala. 1995), *aff'd*, 97 F.3d 492 (11th Cir. 1996); *Disability Rights Wisc., Inc. v. Wisc. Dep't of Public Instruction*, 463 F.3d 719 (7th Cir. 2006) (tips from friends and family of residents); *Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 365 (M.D. La. 1999) (tips from facility residents).

Second, Congress gave P&As the power to pursue legal and other remedies to protect and advocate on behalf of individuals with mental illness. The plain language of PAIMI confers on P&As the ability to act in a representative capacity and bring legal actions on behalf of their constituents. P&A organizations "shall have the authority to pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of individuals with mental illness". 42 U.S.C. § 10805(a)(1)(B); *see also id.* § 15043(a)(2)(A)(i) (same requirement under the DD Act).

In giving P&A organizations this authority, Congress conceived of more than the usual attorney-client relationship. Indeed, Congress drew a distinction in PAIMI between "individuals" and "clients". While a P&A is broadly authorized to "pursue . . . legal . . . remedies to ensure the protection of *individuals* with mental illness", *id.* § 10805(a)(1)(B) (emphasis added), in specific types of

cases involving access to medical records the P&A may obtain records only for an "individual *who is a client* of the system", *id*. § 10805(a)(4)(A) (emphasis added). *Cf.* 42 U.S.C. § 10805(a)(4)(B)-(C) (granting P&As access to records of individuals who are not clients of the system). The statute's distinction between "individuals" and "clients" implies that while a P&A may have a traditional attorney-client relationship with certain constituents, the statutory authorization in section 10805(a)(1)(B) is not limited to individual "clients". Rather, PAIMI broadly authorizes P&As to bring lawsuits, not only to obtain individual relief, but in their own right to protect all "individuals with mental illness".

The legislative history of the federal P&A program also shows Congress' intent to authorize P&As to sue on behalf of individuals with mental illness. In amending the DD Act in 1993, the responsible Senate Committee stated that it had reviewed the statute's authorization for P&As to sue[2] and determined that the statute clearly confers standing on P&As to sue in their own right:

> The Committee heard testimony about the *waste of scarce resources that are expended on litigating the issue of whether P&A systems have standing to bring suit.* The Committee wishes to make it clear that we have reviewed this issue and have decided that *no statutory fix is necessary because the current statute is clear that P&A systems have standing to pursue legal remedies* to ensure the protection of and advocacy for the rights of individuals with developmental disabilities within the State.

[2] The DD Act has language identical in relevant aspects to PAIMI, which was modeled after the DD Act. *Compare* 42 U.S.C. § 15043(a)(2)(A)(i) *with* 42 U.S.C. § 10805(a)(1)(B).

S. Rep. No. 120, 103d Cong., 1st Sess. 39-40 (1993), *reprinted in* 1994 U.S.C.C.A.N. 164, 202-03 (emphases added). The Senate report also gave express approval to two district court decisions holding that P&As have standing to sue for injury to their constituents. *Id.* (citing *Goldstein v. Coughlin*, 83 F.R.D. 613 (W.D.N.Y. 1979); *Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396 (N.D.N.Y. 1992); *see also* 132 Cong. Rec. H2642-02, May 13, 1986 (statement of Rep. Waxman) (stating in the enactment of PAIMI that "[i]t is also clear that the conferees do not intend for questions of standing or jurisdiction to limit the effectiveness, range, or forums in which [P&As] can work").

In accordance with Congress' intent, the implementing regulations promulgated by HHS explicitly allow funds allotted under PAIMI to be used by P&As to litigate in their own right to redress instances of abuse, *in addition to* litigating on behalf of individuals. *See* 42 C.F.R. § 51.6(f). The regulations were issued in 1997 at the direction of Amicus Dr. Chavez, then the Administrator of SAMHSA, to realize Congress' intent that P&As have broad authority in bringing lawsuits. The regulations provide: "Allotments may be used to pay the . . . costs incurred by a P&A system [1] in bringing lawsuits *in its own right* to redress incidents of abuse or neglect . . . and other rights violations impacting on individuals with mental illness *and* [2] when it appears *on behalf of* named plaintiffs or a class of plaintiffs for such purposes." *Id.* (emphases added). This

distinction is empty unless Congress intended for P&As to do something other than sue "on behalf of named plaintiffs or a class of plaintiffs", that is, to bring lawsuits in their own right to ensure the protection of individuals with mental illness.

As the agency tasked with administration of PAIMI, HHS's interpretation of PAIMI receives substantial deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). While HHS acknowledged that, of course, standing is ultimately a question for the courts, HHS expressed its view that "without showing injury to itself, a P&A system does have standing to bring suit on behalf of" its constituents. *See* Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness (Final Rule), 62 Fed. Reg. 53,548, 53,553-54 (Oct. 15, 1997). Through their experience in the federal administration of the P&A program, Amici Dr. Chavez, Mr. Curie, Ms. Reatig and Dr. Morrissey know the importance of P&A litigation as a supplement to federal action to protect the rights of individuals with mental illness.

II. INDIVIDUALS WITH MENTAL ILLNESS PROVIDE MEANINGFUL GUIDANCE TO P&A ORGANIZATIONS THROUGH PAIMI ADVISORY COUNCILS.

Under PAIMI and the DD Act, each state establishes its own P&A organization. *See* 42 U.S.C. §§ 10802(2) & 15044(a).[3] PAIMI requires the P&A's

[3] New York has designated the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQCAPD) as New York's P&A. *See* Mental Hygiene Law § 45.07(p). Under the provisions of 42 U.S.C. § 10804 and Mental Hygiene Law § 45.07(i), CQCAPD entered into

service priorities be set by an Advisory Council, at least 60% of whose members are "individuals who have received or are receiving mental health services or who are family members of such individuals". *Id.* § 10805(a)(6)(B); *see also infra* Part III.C.

New York's PAIMI Advisory Council, currently chaired by Amicus Ms. Calori and previously by Amicus Ms. Turner, advises DAI in its protection and advocacy activities. The Council holds an annual public meeting to discuss the PAIMI program's goals and objectives for the upcoming year. For 2011, these goals include, among other things,

- Protecting "PAIMI-eligible individuals from harm in residential care or treatment facilities"; [and]
- Assist[ing] "PAIMI-eligible individuals in obtaining access to . . . care and treatment . . . in the least restrictive environment available".

See Protection and Advocacy for Individuals with Mental Illness Goals/Objectives for FY2011, *available at* http://cqc.ny.gov/advocacy/protection-advocacy-programs/paimi#bottom. Amici Ms. Calori and Ms. Turner are convinced that this lawsuit furthers those goals.

The PAIMI Advisory Council also meets on a quarterly basis with representatives of DAI and the other New York P&As. At these meetings, the

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a contract with DAI in 1988 designating DAI as an authorized New York P&A. (Zucker Aff. ¶¶ 4-6, Dkt. No. 205.) The contract between CQCAPD and DAI has been periodically renewed ever since. (*Id.* at ¶ 6.)

Council is regularly briefed on major litigation, including this lawsuit, and advises DAI on its protection and advocacy services for persons with mental illness.

In fulfilling its duties as a designated New York P&A organization, DAI's mission is "to protect and advance the rights of adults and children who have disabilities so that they can freely exercise their own life choices, enforce their rights, and fully participate in their community life". (*See* DAI's website, included as Murray Decl. Ex. 52, Dkt. No. 214-27.) In pursuit of these goals, DAI provides a variety of services, in addition to litigation on behalf of its constituents, aimed at improving the position of New York State residents with mental illness. These services and activities include "advice and professional assistance, administrative remedies, technical assistance, negotiation [and] mediation, legal assistance, [providing] information [and] referral[s], [and] training". (*Id.*) Thus, together with litigation on behalf of its constituents, DAI provides both direct services to its constituents and uses its investigative and legal powers to obtain systemic relief to benefit larger numbers of constituents. Both types of activities are necessary to fulfill the mandate of an organization created to "ensure that the rights of individuals with mental illness are protected", 42 U.S.C. § 10801(b)(1), and "prevent further instances of abuse and neglect", H.R. Rep. No. 401, 99th Cong., 1st Sess. 3 (1985).

III. DAI HAS STANDING TO PURSUE LITIGATION ON BEHALF OF ITS INJURED CONSTITUENTS.

DAI's standing to bring this suit is based on injury to adult home residents. DAI showed at trial that its constituents suffered judicially redressible injury caused by the State defendants. *See infra* Part III.A. By enacting PAIMI, Congress explicitly designated P&As to bring representative suits to protect the rights of persons with mental illness, thereby abrogating by statute the prudential bar to one party suing to redress another's injury. *See infra* Part III.B. Moreover, DAI has associational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), to bring this action. *See infra* Part III.C. Consistent with the overwhelming majority of courts that have addressed the issue, *see infra* Part III.D., this Court should therefore affirm the district court's holding that DAI has standing to bring this suit to protect the legal rights of its constituents.

A. DAI's Constituents Have Article III Standing in Their Own Right.

DAI demonstrated at trial that its constituents easily satisfy Article III standing and could sue in their own right. Article III requires that the plaintiff show "injury in fact"; a "causal connection between the injury and the conduct complained of"; and that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision". *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, qualified individuals with a disability have the right under the ADA to receive care and treatment in the most integrated setting. *See Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). DAI demonstrated at trial that its constituents were injured by New York's denial of their *Olmstead* rights. Testimony showed that many adult home residents have an interest in supported housing. (*See* JA142:390:6-16 (S.K.); JA506:1846:3-JA507:1849:19 (Dorfman); JA565:2081:1-2082:8 (Burstein); JA780:2979:13-JA781:2980:16 (Zucker); JA723:2751:18-25 (I.K.) (testifying that for adult home residents, supported housing is "freedom. It's being able actually to live like a human being again").) Adult home residents also testified that they want to leave the adult homes where they live because these homes isolate them, foster learned helplessness, and push residents into a state of hopeless dependence. (*See* JA141:389:22-JA142:390:2 (S.K.); JA157:451:20-JA158:454:22, JA162:471:4-21 (G.L.); JA707:2685:22-2686:15, JA717:2724:25-2726:6 (I.K.).) Evidence at trial also demonstrated that many individuals discharged to adult homes from psychiatric hospitals are eligible for supported housing. (*See* JA497:1810:22-JA500:1819:23, JA512:1869:10-1870:24 (Dorfman).) Residents further testified that it is very difficult for adult home residents to obtain information regarding supported housing. (*See* JA141:389:22-JA142:390:2 (S.K.); JA158:453:11-454:22 (G.L.); JA717:2724:25-2726:6 (I.K.).)

These facts demonstrate "concrete" and "particularized" injury to adult home residents.

Second, standing also requires a causal connection between the injury and the defendants' conduct. *Lujan*, 405 U.S. at 560-61. DAI has shown that the denial of the right to placement in the most integrated setting, required under the ADA and by *Olmstead*, is caused by the defendants' systematic and pervasive isolation of DAI's constituents in adult homes and disregard for the rights of individuals who qualify for placement in a more integrated setting, such as supported housing. (*See* JA205:644:16-JA206:646:22; JA217:691:25-JA218:694:8; JA221:708:20-JA222:710:4 (Rosenberg).)

Finally, to show standing, a favorable decision must be likely to redress the injury. *Lujan*, 405 U.S. at 561. This requirement is easily met in this case. The district court's decision and order requiring the State to provide supported housing opportunities for qualified adult home residents will redress the injury inflicted on DAI's constituents by being warehoused indefinitely in adult homes. (*See* JA208:655:3-24; JA212:669:5-18; JA217:691:25-JA218:694:8; JA222:709:13-710:12 (Rosenberg).)

B. Congress Has Granted P&As Representative Standing to Vindicate the Rights of Individuals with Mental Illness.

PAIMI is a statutory grant of representative standing for P&As to vindicate the rights of individuals with mental illness receiving care and treatment.

See 42 U.S.C. § 10805(a)(1)(B) (granting P&As the authority to "pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of individuals with mental illness"). PAIMI therefore gives DAI the authority to sue as the representative of adult home residents.

There is no constitutional standing barrier to suits by a representative based on injury in fact suffered by those whom the plaintiff represents. The presumption against standing to raise the rights of a third party is a rule of prudential, not Article III standing. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). The presumption against third-party standing is overcome "[w]here practical obstacles prevent a party from asserting rights on behalf of itself" and where the litigant "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal". *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *see* 1 Laurence H. Tribe, Constitutional Law § 3-19, at 435 (3d ed. 2000). Thus, in numerous cases the Supreme Court has granted standing for one party to assert the rights of another, *despite the absence of legislation*, where the general prudential considerations against third-party standing do not apply. *See, e.g.*, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Craig v. Boren*, 429 U.S. 190 (1976); *Griswold v. Conn.*, 381 U.S. 479, 481 (1965).

Likewise, this Court has found representative standing where plaintiffs "represent the rights and interests of" those suffering the underlying Article III injury in fact. *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1347-48 (2d Cir. 1989).

DAI overcomes the general presumption against third-party standing. Isolated in adult homes, with the culture of dependency these institutions foster, residents are often unaware of their rights and reasonably fear retribution from adult home administrators if they bring suit in their own name. With its long experience and deep knowledge of its constituency, and the participation of individuals with mental illness, *see supra* Part II, DAI can properly frame the issues and present them with the necessary adversary zeal. That is why Congress created P&As. *See supra* Part I. DAI therefore "represent[s] the rights and interests of" adult home residents. *Terry*, 886 F.2d at 1348.

PAIMI makes DAI's standing clear. PAIMI makes DAI a representative of its constituents for purposes of protecting their rights as individuals with mental illness. This is no different from how the law may designate someone to be a guardian, trustee or other representative of another, and authorize the representative to bring suit on the other person's behalf. *See* Fed. R. Civ. P. 17(c)(1) (listing those who may sue in a representative capacity). PAIMI is an express congressional designation that the relationship between DAI and its

constituents is such that DAI can pursue legal remedies to protect the rights of its constituents.[4]

Congress has the power to grant standing to plaintiffs to represent the rights of persons who have suffered Article III injury in fact. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Thus, in *Financial Institutions Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147 (2d Cir. 1992), the Court held that a statute "enumerating persons empowered to bring" suit overrode any prudential limits on the plaintiffs' standing. *Accord United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1153-54 (2d Cir. 1993). Congress' express grant to P&As of the right to sue on behalf of persons with mental illness therefore confers standing on DAI.

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[4] The cause of action in this case is under Title II of the ADA and the Rehabilitation Act. This is therefore not a case in which a P&A asserts a right of action directly under PAIMI. *See Ind. Prot. & Advocacy Servs. v. Ind. Family & Social Servs. Admin.*, 603 F.3d 365, 375 (7th Cir. 2010) (holding that PAIMI grants P&As a right of action for access to patient records). Rather, PAIMI creates the legal relationship between P&As and their constituents that grants DAI standing to assert adult homes residents' ADA claims.

C. P&As Also Meet *Hunt*'s Requirements for Associational Standing.

DAI also has associational standing. In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court set out the requirements for an organization to sue on behalf of its constituency. For the organization to have standing, 1) its members must "have standing to sue in their own right", 2) "the interests it seeks to protect [must be] germane to [its] purpose", and 3) "neither the claim asserted nor the relief requested [can require] the participation of individual members" of the organization. *See* 432 U.S. at 343. The third requirement is a prudential one, and Congress may abrogate it by statute. *See United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 552-53 (1996). DAI meets all three of these requirements. Moreover, the third *Hunt* requirement does not apply because PAIMI is a clear congressional abrogation of this prudential standing requirement. *See United Food*, 517 U.S. at 553.

Under PAIMI, DAI protects and advocates the rights of "individuals with mental illness who are receiving care or treatment in" New York. 42 U.S.C. § 10805(a)(1)(B). In *Hunt*, the Supreme Court applied a test of "functional equivalence", *see Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003), to determine whether the plaintiff's status as a state commission, "rather than a traditional voluntary membership organization, [would] preclude[] it from asserting . . . claims" on behalf of Washington apple growers. *Hunt*, 432 U.S. at

344. The Court reasoned that it was necessary to look at the "substance" of the organization, and not its mere "form", to determine whether it was capable of properly representing the interests of its purported constituency. *Id*. at 344-45. The Court concluded that the Commission's

> purpose is the protection and promotion of the Washington apple industry . . . . It thus serves a specialized segment of the . . . community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation. . . . Under the circumstances presented here, it would exalt form over substance to differentiate between the . . . Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency.

Id.

Hunt does not require an organization to have members in the traditional sense. Indeed, the state commission at issue in *Hunt* did not. Instead, *Hunt* analyzes an organization to determine whether there are "indicia of membership" indicating the organization "[i]n a very real sense . . . represents [its constituents] and provides the means by which they express their collective views and protect their collective interests". *Id*. at 345. Voting control of an organization is merely one indicator that the organization represents its constituents. *See id*. at 345. Contrary to the State's arguments (Br. at 76-77), voting control is not dispositive.

The structure of P&As established by PAIMI confers the indicia of membership that *Hunt* requires. A PAIMI advisory council guides P&A activities.

The New York PAIMI Advisory Council performs that role for DAI. As required by PAIMI, 60% of the Council's members are individuals "who have received or are receiving mental health services" or their family members. 42 U.S.C. § 10805(a)(6)(B). The Council is chaired by Amicus Ms. Calori, who, as required by PAIMI, was a consumer of mental health services within the state. *Id.* § 10805(a)(6)(C). DAI is intimately familiar with the concerns of individuals with mental illness through the investigations it conducts and its unique statutory access to facilities and their residents. *Id.* § 10805(a)(4); 42 C.F.R. § 51.42. Through the Council and its annual public meetings, DAI's constituency guides DAI's protection and advocacy services. *See supra* Part II.

Congress, moreover, expressly designated P&As to sue on behalf of individuals with mental illness. This congressional designation makes this a much easier case than *Hunt*, where the Court was left to grapple with a situation where it was unclear whether, despite clear injury to apple growers, the state commission should be allowed standing to sue on their behalf. In *Hunt*, there was no express designation of the organization's right to sue. Like the organization in *Hunt*, P&As are creatures of statute. But unlike in *Hunt*, P&As are specifically authorized by Congress to sue on behalf of their injured constituents. NYCQAL's characterization of DAI as a mere "concerned bystander" (NYCQAL Br. at 33, 35) is therefore directly refuted by PAIMI itself. DAI is not a bystander. DAI is the

organization designated by Congress and New York State to protect the rights of individuals with mental illness.

Hunt's first prong is satisfied because DAI's constituents have Article III standing to bring this suit in their own right. *See supra* Part III.A. Nor is there any question under *Hunt*'s second prong as to whether the interests DAI seeks to protect "are germane to [its] purpose". *Hunt*, 432 U.S. at 343. The State does not dispute this because it cannot. DAI's statutory mandate is to "protect and advocate the rights of individuals with mental illness". 42 U.S.C. § 10803(2)(A). DAI's advocacy of adult home residents' rights under the ADA is "central to [DAI's] purpose of protecting and" advocating the rights of individuals with mental illness. 432 U.S. at 344.

The hypothetical conflicts among DAI's constituents raised by NYCQAL do nothing to alter this analysis. (*See* NYCQAL Br. at 36-39.) *First*, the record at trial shows no evidence of such intra-constituency conflict. Tellingly, NYCQAL itself presents the Court with statistics suggesting that between 66% and 92% of adult home residents would like to leave their adult home. (*Id*. at 37.) *Second*, access to supported housing is the right of every qualified adult home resident under the ADA and *Olmstead*. While those who wish to move out of adult homes will have more options with the district court's injunction, those residents who do not qualify for such housing or who do not wish to leave an adult home

setting will not be forced into supported housing. There is no basis in the record (or in common sense) for NYCQAL's unsupported assertion that the injunction will injure any of DAI's constituents.

Hunt's third requirement is that neither the claim asserted nor the relief requested necessitates the participation of an organization's individual constituents. 432 U.S. at 343. This prudential requirement was abrogated by Congress in PAIMI's authorization of DAI to sue on behalf of its constituents. *United Food*, 517 U.S. at 552-53. DAI therefore need not satisfy the third *Hunt* prong.

But in any event, this action does not require individual constituent participation. Even if individualized assessments are required to determine the services and supports that will be necessary in light of the district court's injunction, DAI can litigate a case to obtain such a remedy for the benefit of its constituents. *See UAW v. Brock*, 477 U.S. 274, 288 (1986). A plaintiff organization satisfies the third *Hunt* requirement so long as "[t]he claims asserted by plaintiffs may be resolved by [the court] answering common questions of law without individualized proof". *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 308 (E.D.N.Y. 2008). The record demonstrates this—the District Court remedied the State's ADA violations without the individual participation of adult home residents.

NYCQAL argues that, if the third *Hunt* requirement applied—which it does not—DAI would lack standing to bring this suit because a treatment team must determine whether individual adult home residents qualify for supported housing. (NYCQAL Br. at 41.) This argument misunderstands the nature of this lawsuit, which is for injunctive relief. In *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004), NYCQAL's sole authority for their argument on this point, this Court made clear that where, as here, an "organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied".[5] The only question of a remotely individualized nature in this action is the assessment—in enforcing the injunction—of what services a person will need in supported housing. That determination requires neither participation of individuals during the course of the litigation, nor individual determinations by the court afterwards.

[5] *Bano* involved organizations bringing claims for money damages on behalf of their members, which would require a court to use "individualized proof" to determine "the fact and extent" of injury. 361 F.3d at 714. Here, by contrast, DAI sought and obtained injunctive relief.

D. The Overwhelming Majority of Courts Have Rightly Held That P&As Have Standing To Sue on Behalf of Individuals with Mental Illness.

Courts that have addressed the issue agree that P&As have standing to sue on behalf of their constituents.[6] These courts hold that PAIMI grants P&As the representative authority to sue to protect the rights of individuals with mental illness and that P&As satisfy *Hunt*'s requirements for associational standing.

The leading cases concerning P&As' standing to sue on behalf of their constituents are *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), and *Oregon Advocacy Center v. Mink*, 322 F.3d 1101. In *Doe v. Stincer*, Florida's P&A brought suit alleging violations of the ADA in a Florida statute's restriction of access to records of treatment for mental illness. *See Stincer*, 175 F.3d at 881. The Eleventh Circuit held that the plaintiff P&A could satisfy *Hunt*'s requirements for organizational standing. *Id*. at 886. The court reasoned that, as in *Hunt*, P&As "serve[ ] a specialized segment of the . . . community which is the primary beneficiary of its activities, including prosecution of this kind of litigation". *Id*. Further, the court found that "under [PAIMI], Congress authorized protection and advocacy organizations . . . to protect and enforce the rights of individuals with

[6] Commentators also agree on this point. *See* Gary P. Gross, *Protection and Advocacy System Standing–To Vindicate the Rights of Persons with Disabilities*, 22 Mental & Physical Disability L. Rep. 674, 674 (1998); Kelsey McCowan Heilman, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. Pa. L. Rev. 237, 241 (2008).

mental illness, perform[ing] the functions of a traditional . . . association representing [individuals with mental illness]". *Id*. After detailing the numerous ways in which a P&A's constituents have a meaningful voice in the direction and agenda of the organization, the court concluded that "[i]n a very real sense . . . as in *Hunt*, the [P&A] represents the State's individuals with mental illness and provides the means by which they express their collective views and protect their collective interests". *Id*. (quotations omitted).[7]

Similarly, in *Mink*, the Ninth Circuit held that a P&A's constituents are the "functional equivalent of members for purposes of associational standing" because the P&A is "sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy". *Mink*, 322 F.3d at 1110-11 (quotations omitted). The Ninth and Eleventh Circuits agreed that by enacting PAIMI, Congress clearly abrogated prudential standing requirements (such as the third *Hunt* requirement) and conferred upon P&As representative status to pursue litigation on behalf of individuals with mental illness. *See Stincer*, 175 F.3d at 884 ("[T]he very purpose of [PAIMI] was to confer standing on protection and advocacy systems . . . as

[7] The Eleventh Circuit in *Stincer* ultimately held that the P&A had not demonstrated standing because, although the requirements of *Hunt* were met, the organization had failed to sufficiently show that any of its constituents had suffered injury-in-fact. 175 F.3d at 888. Here, by contrast, DAI proved at trial that its constituents have suffered injury-in-fact. *See infra* pp. 13-15.

representative bodies charged with the authority to protect and litigate the rights of individuals with mental illness."); *accord Mink*, 322 F.3d at 1110.

Courts within this circuit agree with the sound reasoning in *Stincer* and *Mink*, uniformly holding that P&As have standing to sue in their own name on behalf of their constituents. *See State of Conn. Office of Prot. & Advocacy for Persons with Mental Illness v. State of Conn.*, 706 F. Supp. 2d 266, 279-84 (D. Conn. 2010); *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 396-97 (D. Conn. 2009); *Joseph S.*, 561 F. Supp. 2d at 308; *Aiken v. Nixon*, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002). Courts in this circuit have also held that PAIMI grants P&As standing to sue in a representative capacity. *Brown v. Stone*, 66 F. Supp. 2d 412, 423-25 (E.D.N.Y. 1999), *aff'd sub nom. Mental Disability Law Clinic, Touro Law Ctr. v. Carpinello*, 189 F. Appx 5, 7 (2d Cir. 2006); *Trautz v. Weisman*, 846 F. Supp. 1160, 1163 (S.D.N.Y. 1994); *Rubenstein v. Benedictine Hosp.*, 790 F. Supp. at 408-09; *Goldstein*, 83 F.R.D. at 614-15. The Senate Committee responsible for PAIMI and the DD Act has endorsed the reasoning of two of these cases as properly reflecting congressional intent. *See* S. Rep. No. 120, 103d Cong., 1st Sess. 40 (1993) (citing *Goldstein* and *Rubenstein*).

Furthermore, this Court has twice held that similar organizations have associational standing to sue on behalf of their constituents. In *Bernstein v. Pataki*, 233 Fed. Appx. 21 (2d Cir. 2007), New York's Mental Hygiene Legal Service, an

organization "mandated by New York law to initiate and take any legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment", sued various state agencies claiming constitutional violations. *Id*. at 23, 24 (quotations omitted). This Court held that the plaintiff organization had standing to sue on behalf of its constituents because it "serves a specialized segment of the State's . . . community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation." *Id*. at 24 (citing *Hunt*, 432 U.S. at 344) (quotations omitted). Likewise, in *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002), this Court held that RECAP, a not-for-profit corporation providing educational and housing services to low-income families, had associational standing to sue on behalf of recovering alcoholics. *Id*. at 46. The Court concluded that "RECAP serves a class of individuals with discrimination claims; the interests at issue are germane to RECAP's purpose; and no individual participation is required under these circumstances". *Id*. at 46 n.2. RECAP "therefore . . . meets the organizational standing requirements of *Hunt*". *Id*. The same is true with respect to DAI here.

Contrary authority from other courts is based on misreading *Hunt* and ignoring PAIMI. In *Association for Retarded Citizens v. Dallas County Mental Health & Retardation Center. Board of Trustees*, 19 F.3d 241 (5th Cir. 1994), the

court held that the Texas P&A lacked standing to sue on behalf of a disabled minor under the Fair Housing Act. To support its conclusion that the P&A lacked associational standing, the court stated that the P&A failed to establish "the first prong of [the *Hunt*] inquiry because [the individual named in the suit] is not a 'member' of [the P&A]. The organization bears no relationship to traditional membership groups because most of its 'clients' . . . are unable to participate in and guide the organization's efforts." *Id*. at 244. This reasoning, however, is contrary to *Hunt*. *Hunt* holds that an association need not be a membership organization for standing purposes. 432 U.S. at 346-47. The *Hunt* test is a functional one, examining the specific characteristics of an organization to determine if there are sufficient "indicia of membership". *Id*. at 344. The Fifth Circuit never considered the statutorily mandated elements of P&As—the same organizational characteristics that led the courts in *Stincer* and *Mink* to the opposite conclusion. *See Mink*, 322 F.3d at 1110 (describing the analysis of *Dallas* as "overly formalistic" in light of *Hunt*). *Dallas* is also distinguishable because it involved a P&A under the DD Act, without PAIMI's structural protections. *See Advocacy Ctr. for the Elderly & Disabled v. La. Dept. of Health and Hosps.*, No. 10-1088, 2010 WL 3170072, at *6-7 (E.D. La. Aug. 9, 2010).

The Eighth Circuit's decision in *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007), is even less persuasive.

The Eighth Circuit held that the Missouri P&A did not meet the first *Hunt* requirement for want of actual "members". *Id*. at 810. The Eighth Circuit went on to hold that despite 42 U.S.C. § 10807, which "expressly authoriz[ed] this type of global challenge to state programs absent the participation of individuals seeking redress of specific injuries", the P&A also failed *Hunt*'s third prong because there would be a need for individualized proof. 499 F.3d at 810 & n.7. That analysis is contrary to the Supreme Court's decision in *United Foods*, holding that Congress can abrogate the prudential third prong of *Hunt*. *United Foods*, 517 U.S. at 546. In sum, the cases upon which Defendants and their amici rely are unpersuasive and contrary to controlling Supreme Court precedent.

CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's judgment and remedial order in their entirety.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

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