No. 09-529

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
BY ITS OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL,

Respondents.

On Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Disability Rights Network (NDRN) is the membership association of federally-sanctioned protection and advocacy systems (P&As). In landmark legislation, Congress tasked P&As with protecting the rights of people with disabilities. P&As are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. Eight of NDRN's members are independent state agencies, including the petitioner in this case, the Virginia Office for Protection and Advocacy (VOPA), an independent state agency established by the Commonwealth of Virginia.

Through their efforts, P&As are frequently able to prevent mistreatment of particular individuals and also to achieve systemic reforms that impact 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.

In states such as Virginia where P&As are public entities, the Fourth Circuit's decision will eviscerate the ability of P&As to carry out the mission Congress intended – protecting individuals with developmental disabilities and mental illnesses

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

against abuse, neglect, and other deprivations of their rights. It will have the same effect in any other states that elect to designate the P&As as public entities, rather than as private non-profits. Because the ability to challenge state entities in court is critical to a P&A's ability to protect the legal rights of persons with disabilities, NDRN and its members have an interest in this case and believe that their views may assist the Court in resolving the issues before it.

SUMMARY OF ARGUMENT

Conferring Eleventh Amendment immunity on states from suits by public agency P&As for access to information would prevent those P&As from doing their job. In 1975, Congress created independent Protection and Advocacy organizations after making explicit findings that individuals with developmental disabilities were subject to widespread abuse in state-operated facilities. With the passage of the Developmentally Disabled Assistance and Bill of Rights Act (the "DD Act"), Pub. L. No. 94-103, 89 Stat. 486 (1975), originally codified at 42 U.S.C. § 6041 - 6043 and currently at 42 U.S.C. §§ 15041 - 15045, some of the country's most vulnerable citizens gained, for the first time, a nationwide network of advocates empowered to act on their behalf.

A decade later, Congress broadened the scope of those whom P&As protect. Having investigated conditions in psychiatric institutions and found that the abuse of individuals with mental illness was shockingly widespread, Congress enacted what is

now the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"),[2] Pub. L. No. 99-319, 100 stat. 478 (1986) codified at 42 U.S.C § 10801, *et seq.*, which expanded the P&As' role to include not just those with developmental disabilities, but also those with mental illness.

To ensure that each P&A has the power to uncover abuse and neglect and effectively advocate to end that abuse and neglect, federal law requires that all P&As have three critical features. First, every P&A must be independent of any state agency that provides treatment, services, or habilitation to persons with developmental disabilities or mental illnesses. Second, every P&A has a federal right of access to records, facilities, and individuals to allow for unimpeded investigations of suspected instances of abuse and neglect. And third, every P&A is authorized to pursue legal, administrative, and other appropriate remedies to protect the rights of individuals with disabilities and mental illnesses.

Because these powers are critical to the ability of P&As to carry out their federal mandate, Congress required *all* P&As to have them. However, because Congress did *not* require that all P&As take the same form, in some states the P&A is a private, non-profit organization, and in others it is an independent state agency. Yet that distinction should not have any effect on the federal powers of

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[2] This act was originally titled the Protection and Advocacy for Mentally Ill Individuals Act and was referred to as the "PAMII" act.

the P&As. The Fourth Circuit's flawed interpretation of this Court's Eleventh Amendment jurisprudence would severely curtail the ability of P&As to support the rights of those with disabilities in those states that elected to designate a state entity P&A rather than a private non-profit.

ARGUMENT

I. ABUSE AND NEGLECT OF INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES AND MENTAL ILLNESS

Congress created the P&As in response to a long history of mistreatment of individuals with disabilities. The facts in this case illustrate the types of suspected abuse and neglect to which these individuals have often been subject and that P&As now investigate. This case involves investigations into suspected abuse of three individuals in institutions owned and operated by the state of Virginia:

- In 2006, a man with mental illness and intellectual disabilities died while a resident at the Central Virginia Training Center. He had a history of ingesting non-edible items. When he began to show symptoms of bowel obstruction, he was transported to the hospital. Surgeons conducted exploratory surgery and removed two latex gloves from his intestines. He later died.

- In 2007, a man with intellectual disabilities, who resided at the same training center, was

assaulted by another resident. Staff saw the assaulted resident running from his room covered in blood. When staff went to the room, they discovered several pieces of human ear on the floor and a large amount of blood.

- Also in 2007, a man with mental illness died while a resident at the Central State Hospital. He had been held in some form of mechanical restraint for thirty-three hours before finally being released. About thirty minutes after he was released, staff entered his bedroom to again restrain him. He complained he couldn't breathe. Staff attempted to revive him, but he was later pronounced dead.

Complaint ¶¶ 13, 19, 25, *Virginia v. Reinhard*, No. 07 Civ. 00734 (E.D. Va. Dec. 3, 2007).

VOPA, the agency designated by Virginia to fulfill the Congressional mandate to investigate abuse and neglect of individuals with disabilities in Virginia, opened investigations into each case to find out whether these events were a result of abuse or neglect and, if so, how to prevent other residents from being similarly abused and neglected. Unfortunately, those investigations have been stymied by the obstinacy of the relevant state institutions to provide the necessary information.

The incidents that occurred at the Virginia facilities are not isolated. Indeed, they are a stark reminder of this country's long, tragic history of failing to protect the rights of citizens with

disabilities. *See e.g.*, Maurianne, Adams et. al., *Teaching for Diversity and Social Justice*, Perspectives on the Historical Treatment of People with Disabilities, Appendix 14C (2d ed. 2007).

For decades, many individuals with disabilities were warehoused in institutions, primarily run by the states. The abuse and neglect they lived with eventually led to reform. In 1972, an investigative reporter in New York visited Willowbrook, a state-run institution for children and adults with developmental disabilities. The reporter described walking into the institution and encountering children, twisted and deformed from untreated medical conditions, lying, nearly naked, in their own feces. S. Rep. No. 94-160, at 29 (1975).

In response to the public outrage generated by the mistreatment at Willowbrook, Congress began to investigate the conditions in American institutions for individuals with developmental disabilities and discovered that the conditions in Willowbrook were not unique. The Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard from doctors who described conditions in many institutions as "hazardous to psychological integrity, to health and in some cases even to life." S. Rep. No. 93-1169, at 33. Other witnesses before the Senate Subcommittee described this horrific state of affairs with bone-chilling detail. In one institution, two hundred children were packed into a single room with only three or four staff members to supervise them. *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973:*

Hearing on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Public Welfare, 93d Cong. 562 (1973). In another, fifty-four young men were forced to share nine plates and spoons at every meal. S. Rep. 94-160, at 30.

The Senate Staff Report concluded that the testimony "exposed overwhelmingly that totally unacceptable conditions still prevail in many public and other facilities for the developmentally disabled." S. Rep. 93-1169, at 29. The Committee further found that:

> Many institutions can best be described as "hopeless places" dedicated to custodial care of lifelong residents. All too often these institutions are far removed from urban areas and represent an effort of society to forget its obligations to their residents. Frequently they have little or no outreach and are quite unconnected with the existing community facilities. They generally lack any commitment to change . . . All these circumstances tend to generate environments in which residents can be neglected and even abused, and which unfortunately often lead to deterioration of the residents' physical and mental condition.

Id. at 29-30.

II. THE CREATION OF THE P&A SYSTEM

In response to this national problem, Congress enacted the DD Act with two goals: to improve care

in residential facilities and to minimize inappropriate, involuntary confinement in those facilities. S. Rep. 93-1169, at 1-2. In setting these goals, Congress drafted a "Bill of Rights" for those with developmental disabilities living in residential facilities. These included (1) appropriate treatment; (2) the provision of nourishment; (3) appropriate medical and dental care; (4) prohibition on the use of physical restraint unless medically necessary; (5) permission for relatives to visit at reasonable hours without prior notice; and (6) compliance with applicable fire and safety standards. DD Act, Pub. Law No. 94-103 17, currently codified at 42 U.S.C. § 15041, *et seq.*

To ensure these rights were secured, Congress created the Protection and Advocacy system. Each state that wished to take advantage of any federal funding related to the DD Act was required to designate an independent P&A. Each P&A was required to "(A) have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, and (B) be independent of any State agency which provides treatment, services, or habilitation to persons with developmental disabilities." 42 U.S.C. § 6042 (1975) (current version at 42 U.S.C. § 15043(a)(2)).

For the first time in our nation's history, the welfare of our most vulnerable citizens was no longer purely a state concern.

Over the next decade, it became increasingly apparent that the DD Act was not sufficient. Although federal law gave P&As some tools to investigate and address many of the abuses occurring in institutions for those with developmental disabilities, P&As lacked a guaranteed right of access to people, records, and institutions. In order to conduct a proper investigation into alleged abuse or neglect, a P&A needed the ability to read investigation reports, to see facilities from the inside, and, most importantly, to talk to the people whose rights were being violated. Accordingly, when Congress reauthorized the DD Act in 1984, it added a guaranteed federal right for P&As to access medical reports for individuals with disabilities, 42 U.S.C. § 15043(a)(2)(I), (J), and the individuals themselves, *id.* § 15043(a)(2)(H).

Many of the same abusive environments that had existed in institutions for those individuals with developmental disabilities also existed in institutions for people living with mental illness. In 1985, Congress held hearings related to reports of abuse in state psychiatric hospitals. In connection with the hearings, Senate staff investigated 31 facilities in 12 states and conducted approximately 600 interviews over a period of nine months. The Senate staff report concluded that as a result of the DD Act, individuals with developmental disabilities living in residential facilities held "a clear advantage" over those living with mental illness. *Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped*

of the S. Comm. on Labor & Human Resources and Subcomm. on Labor, Health & Human Services, Education & Related Agencies of the S. Comm. on Appropriations, 99th Cong. 710 (1985) (statement of Harold Cockerham).

Every psychiatric institution responding to the Senate's request for information replied with documented incidents of abuse at the institution within the last year that resulted in disciplinary action against staff. *Id.* at 736. Not only did the Senate staff find widespread abuse of individuals with mental illness, but it found that, although the Justice Department had the authority to investigate and sue to prevent abusive situations, that authority was rarely used. *Id.* at 711.

During the hearings, the Senate also heard story after story describing the horrible neglect and mistreatment experienced by those with mental illness in institutions. These stories included:

- A twelve-year old boy who had been beaten and cut by a staff member so badly that he lost his hearing. The individual responsible for abusing the boy was originally allowed to continue working and later put on leave with pay. "There was a joke going around the State facility that you could beat up a child and get a year off with pay." *Id.* at 13-18.

- Non-ambulatory children with severe disabilities "punished" by having their wheel chairs forced into a corner, with furniture

wedged up against them, forcing them to stare at the wall. *Id.* at 32.

- A four-year-old boy left unattended and improperly restrained in a wheelchair only to die by choking to death in his straps. *Id.* at 42-43.

- A 49-year-old woman taken off a respirator and left to die after only five days in a coma, despite doctors admitting that they "did not know what was wrong with her." *Id.* at 27.

Beyond the specific examples, the Congressional record contained a plethora of evidence of other forms of abuse. The unnecessary use of restraints, seclusion, and forcible sedation was common. *Id.* at 87. In one hospital, the escape of a single resident caused the hospital to confine all other residents to their rooms involuntarily. *Id.* at 88. For eight months, other institutionalized individuals were denied any access to fresh air or exercise. *Id.*

In response to these hearings and the Senate staff report, Congress enacted the PAIMI Act. In addition to expanding the DD Act to cover individuals living with mental illness, Congress also increased the P&As' powers. For example, P&As were given authority to bring actions in the name of particular individuals, and given access to records of individuals with mental illness, as well as to individuals themselves. *Id.* § 10805(a)(3)-(4). Later, through the Children's Health Act of 2000, Congress expanded the PAIMI Act to cover individuals with

mental illness living in the community, including in their own homes. Pub. L. No. 106-310, codified at 42 U.S.C. § 10802(4)(B)(ii).

III. THE P&AS' FEDERAL RIGHT OF ACCESS TO INFORMATION IS CRITICAL TO THEIR MISSION

Today, every state and territory has a P&A, which is empowered to act pursuant to the DD and PAIMI Acts. *See* S. Rep. No. 100-454, at 3 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3217, 3219. Congress expressly allowed states to set up P&As as private, non-profit entities or state entities but directed that each P&A be independently governed. 42 U.S.C. § 10805(c). The majority of P&As are non-profit organizations. Eight state and two territorial P&As are independent state agencies.[3] Regardless of their structure, however, the funding and the decision-making of the P&A remain independent. In particular, each P&A is required to be "independent of any agency in the State which provides treatment or services." 42 U.S.C. §§ 10805(a)(2), 15043(a)(2).

In fulfilling their legislative mandate to represent individuals with disabilities, P&As carry out a multitude of functions, for which they have been praised as having "a whistleblower, ombudsman, watchdog, advocacy, and 'private attorney general' role." *Ind. Prot. & Advocacy Servs. Admin. v. Ind. Family & Soc. Servs.*, 603 F.3d 365, 383 (7th Cir. 2010) (Posner, J., concurring) *petition*

[3] The states and territories with state agency P&As are Alabama, American Samoa, Connecticut, Indiana, Kentucky, New York, North Dakota, Ohio, Puerto Rico, and Virginia.

for cert. filed, 73 U.S.L.W. 3063 (U.S. July 21, 2010)(No. 10-131). Thus, P&As are comprised of a small staff of specially trained and highly dedicated lawyers, social workers, and advocates.

Under the DD Act and the PAIMI Act, one principal function of P&As is to "investigate incidents of abuse and neglect…if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 15043(a)(2)(B); *see also* 42 U.S.C. § 10805(a)(1)(A). Thus, a P&A's first task is to be aware of any abuse or neglect that is occurring at facilities for individuals with mental illnesses and developmental disabilities. A P&A might discover such abuse or neglect of the safety or rights of residents from monitoring facilities for compliance, 45 C.F.R. § 1386.22(g)(2); 42 C.F.R. § 51.42(c)(2), from its review of regular incident reports from facilities, *see, e.g.*, *Arizona Center for Disability Law v. Allen*, 197 F.R.D. 689 (D. Ariz. 2000), from an anonymous or identified tip, *see, e.g.*, *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 894 F. Supp. 424 (M.D. Ala. 1995), *aff'd,* 97 F.3d 492 (11th Cir. 1996), from friends or family of individuals in facilities, *see, e.g.*, *Disability Rights Wisconsin, Inc. v. Wisconsin Department of Public Instruction*, 463 F.3d 719 (7th Cir. 2006), directly from clients themselves, *see, e.g.*, *Advocacy Center v. Stalder*, 128 F. Supp. 2d 358, 365 (M.D. La. 1999), or even from newspaper articles or press reports, *see, e.g., Office of Protection and Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303 (D. Conn. 2003). After receiving reports of abuse or

neglect, a P&A must determine whether there is probable cause for a more thorough investigation. *See, e.g.*, 42 U.S.C. §§ 10805(a)(1)(A), 15043(a)(2)(B); Conduct of Protection and Advocacy Activities, 42 C.F.R. § 51.31; Access to Records, Facilities and Individuals with Developmental Disabilities, 45 C.F.R. § 1386.22.

Investigations by P&As could not be effective without access to the information and individuals that are under the control of the facilities where any such abuse and neglect occurs. There is often no alternative source of information. As a result, if the P&A determines that there is probable cause to believe that abuse or neglect has occurred, it "shall" have a broad right of access to "all records," 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I), (J), individuals with developmental disabilities, *see id.* § 15043(a)(2)(H), and facilities, *id.* § 10805(a)(3), that are relevant to an investigation. As the Eleventh Circuit has explained, access to the records and to the individuals at the facility is essential to conducting an investigation. *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497 (11th Cir. 1996) (P&As require "broad access to records, facilities, and residents to ensure that [their] mandates can be effectively pursued."); *see also Protection and Advocacy for Mentally Ill Individuals Act, (P.L. 99-319): Hearing Before the Subcomm. on the Handicapped Comm. of the S. Comm. on Labor & Human Resources*, 100th Cong. 90 (1988) (statement of Eleanor S. Kohn, Vice President, National Mental Health Association) ("Access to facilities, residents, and their records is

essential if the P&As are to fully serve the needs of their clients.").

The information to which P&As need access includes medical records, which are critical for a P&A to perform its investigative function. Court after court has endorsed the proposition that without sufficient access to records, a P&A is incapable of fulfilling its statutory obligations. *See Ala. Disabilities Advocacy Program,* 894 F. Supp. at 429, ("The authority to investigate would mean nothing and advocacy in the form of investigation would be ineffective without access to records."); *Robbins v. Budke*, 739 F. Supp. 1479, 1488 (D.N.M. 1990) (mem.) ("Access to patient records is necessary for P & A to serve its clients, evaluate its clients' concerns, and determine whether a client has a legal claim."). Indeed, courts have found that the deprivation of such records by itself is enough to constitute irreparable harm to the P&A, such that the P&A is entitled to preliminary or permanent injunctive relief against state policies that deny access to records. *See, e.g.*, *Wis. Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1051-52 (E.D. Wis. 2001); *Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs, L.L.C.*, 152 F. Supp. 2d 1150, 1173 (N.D. Iowa 2001); *Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 364, 365 (M.D. La. 1999); *Robbins*, 739 F. Supp. at 1488.[4]

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[4] Several circuit courts have also defined "records" broadly to encompass "peer review records," in addition to the more common "incident reports." *E.g.*, *Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d

P&As also require access to individuals with disabilities or mental illness and the locations where they receive services, regardless of whether they live in institutions or community settings. One court has described that "central to the concept of authority to investigate is the ability to interview witnesses." *Miss. Prot. & Advocacy Sys., Inc. v. Cotten*, Civ. A. J87-0503(L), 1989 WL 224953, at *9 (S.D. Miss. Aug. 7, 1989), *aff'd*, 929 F.2d 1054 (5th Cir. 1991). It explained that "[o]nly by frequent personal contacts with residents, out of the presence of . . . staff, can [a P&A] effectively carry out its mission of pursuing remedies to protect the rights of [clients] and of providing the necessary information to them." *Id.* (footnote omitted). Another court concluded that a P&A's need for unmediated access to patients trumped the right of a patient's "legal representative . . . to prevent, be present during, or to terminate an interview." *Iowa Prot. & Advocacy Servs., Inc.*, 152 F. Supp. 2d at 1171. Thus, federal regulations give P&As broad access to residents and facilities:

> The P & A system shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority shall include the opportunity to interview any facility service recipient, employee, or other person, including the person thought to be the victim of such abuse, who might be reasonably

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119 (2d Cir. 2006); *Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000).

> believed by the system to have knowledge of the incident under investigation.

42 C.F.R. § 51.42(b); *see also Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 240-42 (2d Cir. 2006) (Sotomayor, J.) (finding that DD Act and PAIMI Act required access to state-run schools as well as residential institutions).

Moreover, in order to fulfill their statutory obligations, P&As must not only have access to records, individuals with disabilities, and the locations where they receive services, but they must also receive *prompt* access. *See* Melissa Bowman, Note, *Open Debate Over Closed Doors The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 Ky. L.J. 955, 965 (1997) ("When P&As are denied timely access to information, their ability to promptly investigate suspected abuse and neglect is greatly diminished. This interference with the investigative process allows 'facilities the time to conceal evidence, change medical records, coordinate stories among witnesses and/or impose a code of silence upon staff.'")(citation omitted). Under a 2000 amendment to the DD Act, Congress expressed its clear intent that P&As should be able to act quickly by requiring institutions to produce requested records within three business days of a P&A system's request, and to provide "immediate access" to records in cases involving the death of, or immediate danger to, an individual with developmental disabilities. 42 U.S.C. § 10543(a)(2)(J).

As a result, courts have recognized that mere delays in access constitute irreparable harm to the agency. *See Advocacy Ctr.*, 128 F. Supp. 2d at 364 ("Prompt access to records is necessary . . . . [T]he defendants maintain that, under state law and departmental policy, the Advocacy Center needs a court order. However, it cannot be disputed that the delay in getting a court order frustrates the goal of the PAMII Act."); *Robbins*, 739 F. Supp. at 1488 (holding that "[t]imely access to records is essential for effective communication" and that delays may "preclude[] P&A from evaluating and acting on a patient's concerns in a timely manner" and "prevent P&A from acting within prescribed deadlines or may cause a violation of rights to go unaddressed until it is too late to remedy").

P&As have used their access to information in a myriad of innovative ways to benefit individuals with disabilities. P&As have compiled information into databases, allowing them to identify facilities that show a pattern of abuse or neglect. They have sent reports to facilities, drawing attention to unacceptable practices and policies and making recommendations as to changes the facilities should make. They have issued public reports to expose abuse and neglect to the general public and policy makers. And as a last resort, when absolutely necessary, they also can use the information as the basis for litigation on behalf of their clients.[5] Or, alternatively, they can share information with other

[5] P&As are encouraged to engage in alternative dispute resolution before filing any litigation. 42 C.F.R. § 51.32.

agencies, like the Department of Justice, which may have an interest in litigation in support of individuals with disabilities. Here again, the threat of litigation has often been enough to prompt facilities to adopt P&A recommendations, such that actual litigation was unnecessary.

These strategies have dramatically improved conditions in facilities for individuals with disabilities throughout the country. To list just a few recent examples in states with public agency P&As:

- In Indiana, the P&A recently used its access authority to investigate the use of restraints that physically injured a resident of a child care institution serving children with disabilities. Records obtained by the P&A using that authority included client clinical records, facility policies and the facility's internal investigatory report. As a result of the P&A's advocacy, the provider changed its practice concerning the use of restraints, adopted a non-physical intervention approach that focuses on behavioral management and problem solving, enhanced its current video recording equipment for better monitoring of common areas and when restraint and seclusion was used, and increased its documentation requirements.

- Also in Indiana, the P&A investigated the death of an individual who had resided in a facility for individuals with disabilities and determined that the death had been caused by

neglect. The P&A used its access authority to get access to the client's medical records, staffing schedules, bed-check records, the facility's internal investigation report, and to get access to the facility, where a witness had observed the night staff sleeping. As a result of that advocacy, the state social services agency developed a mortality review committee, increased Medicaid waiver rates based on individual client needs, developed a written plan to follow when closing institutions, required inspections of all homes before individuals with disabilities moved in, and hired nineteen field workers to assess the quality of life in community homes and to respond to complaints.

- In Kentucky, the P&A has repeatedly used access authority in investigating the deaths of individuals in state institutions, including an individual with a severe seizure disorder who drowned after being left unattended for ninety minutes in a bathtub and another who died after being placed in mechanical restraints because he insisted on watching television after hours.

- In Connecticut, the P&A used access authority won in *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education*, 464 F.3d 229, 240-42 (2d Cir. 2006) to gain access to state schools for students with diagnosed emotional disturbances who were being regularly

> restrained. Using that access authority, the P&A gained entrance to the school and the right to speak with the students. A report issued which resulted in the closing of the school. In 2010, the P&A issued a second, follow-up report, again using its access authority. As a result of this report the district has decided to send the children to different schools that are better suited for them.

IV. IN ORDER TO GAIN ACCESS TO INFORMATION, P&AS OFTEN REQUIRE JUDICIAL EQUITABLE RELIEF

Unfortunately, requests made by both non-profit and independent state entity P&As for access to information and witnesses are often delayed or outright denied by state-operated facilities. *Miss. Prot. & Advocacy Sys., Inc.*, 1989 WL 224953; *Mich. Prot. & Advocacy Servs., Inc. v. Miller*, 849 F. Supp. 1202 (W.D. Mich. 1994); *Alabama Disabilities Advocacy Program,* 894 F. Supp. 424; *Office of Prot. & Advocacy for Persons with Disabilities*, 266 F. Supp. 2d 303. For a P&A facing a recalcitrant facility, often the only effective recourse is to invoke the threat of future litigation, buttressed by past court victories in similar access disputes. P&As have found that this threat is frequently both necessary and sufficient to prompt facilities to respond to requests expeditiously.

For example, in *Alabama Disabilities Advocacy Program*, a P&A sought medical records for two people who had died of respiratory failure in a state institution. The P&A sought the medical information after an anonymous tip, but the agency tried to

forestall investigation. The court required release of the records, explaining that even if federal law did not explicitly authorize P&As to have broad access to records, which it did, "a strong argument could be made that the Advocacy Program would be entitled to all information necessary to investigate incidents of abuse and neglect . . . ." 894 F. Supp. at 429.

Similarly, in *Advocacy Center,* the state P&A brought an action to compel the release of mental health records of an inmate of a state correctional center who claimed that his new physician had taken him off his medication, and his condition was deteriorating. The P&A requested the records on multiple occasions, but the facility refused to release the records except after an in-camera inspection by a court. 128 F. Supp. 2d at 361. The court concluded that forcing the P&A to go to court every time it needed to see medical records would "impede its ability to investigate a claim." *Id.* at 367. Thus, it compelled the disclosure of the requested records and granted a permanent injunction, invalidating the prison's policy of requiring in-camera review prior to record delivery. *Id.* at 368.

Finally, in *Mississippi Protection & Advocacy System,* the state P&A brought a legal challenge to a state hospital's policy that restricted the P&A's access to residents with whom it did not have a signed retainer agreement. 1989 WL 224953, at *9. A P&A attorney had been visiting the facility to investigate allegations of abuse. Rather than cooperating with the investigation, the facility chose to restrict the representative's access and to

encourage residents not to meet with him. The district court granted the P&A's requested injunction against the policy. In affirming the injunction, the Fifth Circuit explained that the DD Act

> [N]ot only described the range of services to be provided by the protection and advocacy systems, it also states that the systems "must have the authority" to perform these services. The state cannot satisfy the requirements . . . by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority. Defendants' restrictive practices have reduced [the P&As] authority to the point that it can offer [its clients] only a fraction of the services to which they are entitled.

Miss. Prot. & Advocacy Sys., Inc. v. Cotten, 929 F.2d 1054, 1059 (5th Cir. 1991).

Thus, case after case shows that court orders will sometimes be necessary to ensure that state-run institutions comply with federal law and to provide the oversight that Congress correctly determined was critical to ensuring basic protection for individuals living with disabilities.

V. All Protection and Advocacy Organizations Must Be Able To Seek Equitable Remedies Against State Agencies in Court.

In determining that sovereign immunity precluded the suit by the Virginia Office of

Protection and Advocacy, the Fourth Circuit failed to appreciate the extent to which state-agency P&As are independent, and therefore that a court battle between a P&A and a state-run institution is not an "intramural" dispute. It also created a two-tier P&A system under which private non-profit P&As will have powers that state agency P&As lack. In doing so, the decision threatens to undo years of progress by P&As across the country.

A. P&As Are Independent of State Influence.

Congress specifically designed the P&A system to be independent of state influence because it knew that disputes between the P&As and state agencies were not only inevitable – due to state ownership and operation of many of the facilities where there were allegations of abuse and neglect – but also were necessary to ensure that P&As would offer adequate protection, without any conflict of interest, to persons with mental illnesses and developmental disabilities.

Ever since the DD Act, federal law has required that a state's P&A system must be independent from any other state agency that "provides treatment, services or habilitation to individuals with developmental disabilities." 42 U.S.C. § 15043(a)(2)(G); *see also id.* § 10805(a)(2) (requiring independence from agencies providing services for individuals with mental illnesses). Congress viewed this separation as necessary due to the fact that

> [T]here is an inherent conflict in the role a state must play in delivering services and administering programs for persons with

> developmental disabilities and in protecting the human and legal rights of such persons. The Committee also believes that it is most important to distinguish between these two roles in light of the nature and the problems confronting such persons who are not able to adequately protect their own rights.

S. Rep. 94-160, at 37. Indeed, a contemporary commentator described that in the first DD Act, with respect to P&A systems, "the only concrete requirement set out in the legislative history was the need for the P&A system to be independent . . . ." *See* James Stearns, *An Overview of the Genesis of Section 113 Advocacy Agencies*, *in*, *Protection and Advocacy Systems for the Developmentally Disabled* 2, 2-3 (Gary Clarke & James Stearns, eds., 1977).

In 1976, the Developmental Disabilities Office published interim guidelines to assist the states in implementing the Act. The guidelines reiterated Congress's requirement that the "designated P&A . . . must be independent . . . ." The Guidelines explained that in this regard "all possibility of conflict of interest must be avoided, and freedom of access to all remedies must be assured." Developmental Disabilities Office, DHEW, *Interim Guidelines for Development and Implementation of a System for Protection of the Individual Rights of and Advocacy for Persons with Developmental Disabilities* 2(b) (1976), *reprinted in* Stearns, *supra*, app. B, at 35.

The issue of P&A independence was revisited in 1981, when amendments to the DD Act were first

considered. Based on the early experience of the state P&As, one expert emphasized the critical importance of independence:

> Finally, I would like to mention a provision which I would not like to see substantially revised. I refer to the requirement for independent protection and advocacy systems in each participating state (Section 113). It is clear that such systems cannot survive without the required independence in both funding and authority.
>
> . . .
>
> The fact that some state agencies may be uncomfortable when challenged by one of these Protection and Advocacy Systems should not be a surprise to you. It was this Committee's dismay and dissatisfaction with the inability of state agencies to police themselves that brought about your mandate that Protection and Advocacy Systems be created.

Bill of Rights Act, 1981: Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources, 97th Cong. 38-39 (1981) (statement of Elizabeth Boggs, Member of New Jersey Council on Developmental Disabilities and the National Council of the Handicapped).

Accordingly, even after multiple amendments and reauthorizations, the DD and PAIMI Acts still require that all P&As act independently. *See Ind. Prot. & Advocacy Servs.,* 603 F.3d at 373 (describing

state P&A system as "independent of the governor to a degree that is unusual and perhaps unique"). The federal government provides substantial funding for P&As. A governor may appoint "not more than 1/3 of the members of the governing board" of a P&A system. 42 U.S.C. § 15044(a)(2). States are prohibited from imposing "hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system . . . or would prevent the system from carrying out the functions of the system . . . ." *Id.* § 15043(a)(2)(K). Finally, state P&A systems must report to the federal government. *Id.* § 10805(a)(7); § 15044(e). These features led the Seventh Circuit to describe P&A systems as "closer to being . . . specialized agent[s] of the federal government . . . than [they are] to being … ordinary state agenc[ies]." *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373; *see also id.* at 387 (Posner, J. concurring) (describing P&As as "state entit[ies] in name only" and as "agent[s] of the *federal* government" when in suits against states).

By guaranteeing that P&As would be independent of state influence, Congress ensured that a lawsuit brought by a public P&A against a state-operated facility would not be an "intramural" state dispute. The concern that federal courts should not intervene in such disputes, which motivated the Fourth Circuit's holding below, *Virginia v. Reinhard*, 568 F.3d 110, 119-20, 123 (4th Cir. 2009), is therefore misplaced.

B. Private P&As Do Not Have Different Powers than State Agency P&As.

Although Congress permitted states to designate either a public or a private entity for its P&A system, 42 U.S.C. §§ 10805(c)(1)(B), 15044(a), nothing in the statutory text or in the legislative or administrative history of the P&A system indicates that Congress intended that decision also to give states the choice between amenability to and immunity from suits. To the contrary, the history shows that the choice was structural, not substantive.

The legislative histories of the DD Act and the PAIMI Act do not expressly state why states might choose to establish P&As as either non-profit agencies or independent state entities. *See Ind. Prot. & Advocacy Servs.*, 603 F.3d at 387 (Posner, J. concurring). It seems likely, however, especially given the relatively small budgets provided to the first P&As, that in providing a choice Congress wanted to create a system of innovation in which states could experiment with systems that best met their needs. Stearns, *supra*, at 3. The early regulations implementing the system emphasized the need for preserving "flexibility." Developmental Disabilities Programs, 42 Fed. Reg. 5272, 5276 (Jan. 27, 1977) ("[U]ntil more experience is available in this program, it is best to allow the States as much flexibility as possible in implementing their protection and advocacy systems."). At least initially, that result was achieved. U.S. Gen. Accounting Office, GAO-03-1044, Protection and

Advocacy Agencies: Involvement in Deinstitutionalization Lawsuits on Behalf of Individuals with Developmental Disabilities, at 6-7 (2003) (discussing diversity of P&A structures). Neither at the time, however, nor in subsequent evaluations of the competing models, did anyone suggest that one advantage or disadvantage of public P&As was that they might be barred from seeking records from state agencies on sovereign immunity grounds. *See e.g.*, Bowman, *supra*, 85 Ky. L.J. at 990. Ironically, the assumption in the literature appears to be that one of the primary benefits of adopting a public P&A system is that they are *more* effective at obtaining information than private P&As. *Id.*

That Congress did not intend to permit states to immunize themselves from suit is apparent from the statutory mandate that P&As be independent. It is also apparent from the fact that Congress provided indistinguishable litigation capacities to public and private P&As even though its emphasis on flexibility ensured that P&As in individual states might adopt different enforcement strategies. A structural reading of the statutes compels this conclusion. Neither the DD Act nor the PAIMI Act differentiates between public and private P&As in terms of their abilities to pursue administrative or legal actions. *See, e.g.*, 42 U.S.C. §§ 10805(c)(1)(B), 15044(a). But all P&As "shall" have access to the records of individuals with disabilities, *id.* §§ 10805(a)(4), 15043(a)(2)(I), and facilities, *id.* § 10805(a)(3); authority to investigate potential abuse or neglect, *id.* §§ 10805(a)(1)(A), 15043(a)(2)(B); and the ability

to pursue administrative and legal remedies, *id.* §§ 10805(a)(1)(B), 15043(a)(2)(A)(i). It is forced and unnatural to construe the statutes as imposing uniform obligations on P&As while at the same time giving states the ability to imbue them with vastly different structural capacities to fulfill those obligations. The Seventh Circuit, sitting *en banc*, referred to such a reading of the statute as "unfair" and "strange." *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373; *see also id.* at 387 (Posner, J. concurring).

Moreover, the Seventh Circuit's holding that the DD and PAIMI Acts preclude state-by-state variation is hardly novel. Several circuit courts have been presented with the question of whether a P&A's right to access "records" includes "peer review records" as well as individual records in instances when a state legislature had enacted a law prohibiting the use of peer review records in discovery or civil litigation.[6] As then-Judge Alito found,

> PAMII requires that groups such as PP&A be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language.

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[6] These cases are discussed at greater length, *infra*.

Pa. Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423, 428 (3d Cir. 2000).

The provisions governing how and when a state may redesignate its P&A (change its structure from a state entity to a nonprofit or vice versa) underscore this conclusion. A state may not redesignate its P&A system absent "good cause." 42 U.S.C. § 15043(a)(4)(A). The state must give notice of the proposed redesignation, allow the P&A system to respond, provide for a period of public comment, and permit the P&A to appeal to the federal government. *Id.* § 15043(a)(4)(B)-(D). In discussing this "good cause" limitation, the Senate Committee explained that the aggressiveness of a P&A in pursing actions against a state or local government does not constitute good cause for the state to alter the form of the P&A: "good cause does not, in the Committee's view, mean aggressiveness—specifically litigation against any agency of state or local government—in pursuit of the designee's mandate to protect persons with developmental disabilities." S. Rep. No. 98-493, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4334, 4362. This admonition demonstrates the Committee's desire to protect the ability of P&As to sue. If a state cannot alter the form of a P&A based on its aggressiveness, it surely cannot avoid suit altogether simply by choosing a public P&A in the first place.

VI. THE ABILITY OF STATES TO ASSERT SOVEREIGN IMMUNITY WOULD ERADICATE THE ABILITY OF STATE AGENCY P&AS TO CARRY OUT THEIR MANDATE

To allow states like Virginia to take federal funds under the DD and PAIMI Acts while essentially "opting-out" of the requirements on which Congress made those funds contingent would completely undermine the essential purposes of the P&A program—protection and advocacy for individuals with disabilities. Yet this is exactly what will happen if states are entitled to assert sovereign immunity against suits by public entity P&As for injunctive relief.

Rather than being independent, as Congress intended, public agency P&As would be entirely dependent on the whims of the states in obtaining access to both information and individuals with disabilities, as is required for them to fulfill their mandate. This Court has held that the Eleventh Amendment is equally applicable to suits in state courts and in federal courts. *See Alden v. Maine*, 527 U.S. 706 (1999). Accordingly, if the Eleventh Amendment bars public P&As from suing in federal court, a similar bar would apply in state courts. *See Ind. Prot. & Advocacy Servs.*, 603 F.3d at 374 ("[I]f the Eleventh Amendment prohibited IPAS from suing the defendants under the PAIMI Act in federal court, it would also prohibit IPAS from suing defendants under the PAIMI Act in state court."). Absent waiver, public agency P&As will be entirely unable to enforce federal law against state agencies.

Based on the assertion of counsel for Virginia, the Fourth Circuit suggested that VOPA may seek a mandamus in the Virginia Supreme Court. This is predicated on a provision in the Virginia Constitution permitting mandamus actions in the Virginia Supreme Court and an apparent interpretation of that provision as waiving sovereign immunity for such suits. Although counsel for Virginia may be correct that Virginia's Constitution waives sovereign immunity for mandamus actions, other states do not offer a similar alternative. *See, e.g., Ind. Prot. & Advocacy Servs.* 603 F.3d at 374 n.7 (noting that because a mandamus action would seek to enforce federal law, "the *Alden v. Maine* problem would remain."). Indeed, the state constitutions of other states with state P&As, such as Kentucky and Alabama, contain no similar waiver of sovereign immunity for mandamus actions. *See* Ky. Const. § 231 ("The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."); Ala. Const., Art. I § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."); *see also Patterson v. Gladwin Corp.*, 835 So. 2d 137, 142 (Ala. 2002) ("The wall of immunity erected by § 14 is nearly impregnable."). As a result, P&As in those states may be completely barred from enforcing federal law against state agencies.

Even in states that waive sovereign immunity for a mandamus action, that option would be far less effective than a suit in federal court. First, even in Virginia, a writ of mandamus is an "extraordinary remedy" contingent on "judicial discretion."

Umstattd v. Centex Homes, G.P., 650 S.E.2d 527, 530 (Va. 2007). Second, a mandamus action in a state supreme court cannot address ongoing violations of federal law with anywhere near the alacrity with which a federal court can issue a preliminary injunction. Under the DD Act, Congress expressed its clear intent that P&As should be able to act quickly by requiring institutions to produce requested records within three business days of a P&A's request, and to provide "immediate access" to records in cases involving the death of, or immediate danger to, an individual with developmental disabilities or mental illness. 42 U.S.C. § 10543(a)(2)(J); *see also Ind. Prot. & Advocacy Servs.*, 603 F.3d at 374 n.7 ("Congress clearly intended the protection and advocacy systems – all of them – to be able to respond quickly to threats of imminent harm to their constituents."). Yet a mandamus action does not provide for temporary injunctive relief. As the Seventh Circuit recognized, there is no such thing as a "preliminary mandamus action." 603 F.3d at 374, n.7.

And even if states waive sovereign immunity for suits in state court, they may do so in a manner that significantly limits the enforcement power of the P&As. In some states, P&As may face a number of procedural hurdles that compromise their ability to enforce federal law. In New York, for example, a state agency obtains an automatic stay of an injunction simply by filing a notice of appeal. *See* N.Y. C.P.L.R. § 5519(a)(1). That home-field advantage simply cannot be reconciled with

Congress's intent that P&As be able to respond to problems quickly.

Moreover, federal courts have a broader geographic jurisdiction than state trial courts. Thus, a single suit brought by a P&A in federal court could resolve a number of statewide violations, while in state court it would have to file multiple suits across the State. Similarly, decisions of the federal courts of appeals establish precedent across a far broader geographic territory than decisions by state appellate courts. P&As forced to sue only in state courts will need to file more lawsuits, and therefore will require greater legal resources, simply to obtain the relief that federal law requires.

Lastly, as noted by the Seventh Circuit, it would be both "unfair" and "strange" to give any weight to a state's choice to set up a P&A as an independent state agency rather than a private not-for-profit entity. *Ind. Prot. & Advocacy Servs.,* 603 F.3d at 373. To do so would enable a state to "use its own choice…as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens." *Id.* Congress did not intend that only private P&As have the power to sue, nor could Congress possibly have intended that states could avoid difficult investigations or inconvenient lawsuits simply by designating – or re-designating with good cause – their P&A as a state agency. The ruling below would potentially permit states to flout federal law and render P&As completely powerless to investigate and

address the sort of appalling conditions at state-run facilities that necessitated federal government intervention in the first place.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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