
COMMENT

THE RIGHTS OF OTHERS: PROTECTION AND ADVOCACY ORGANIZATIONS' ASSOCIATIONAL STANDING TO SUE

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INTRODUCTION

Popular discussion of the standing doctrine has reached a fever pitch. A search for “standing to sue” in the *New York Times* archives for the last two years connects this phrase to a smorgasbord of hot political issues: global warming,¹ warrantless wiretapping,² torture,³ and

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¹ See Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, at A1 (discussing the Supreme Court’s decision to grant standing to a “broad coalition of states, cities and environmental groups” that challenged the EPA’s refusal to regulate greenhouse gases).

² See Adam Liptak, *Spying Program May Be Tested by Terror Case*, N.Y. TIMES, Aug. 26, 2007, at A1 (noting that the standing requirement in civil cases had made challenging the legality of an NSA surveillance program difficult).

³ See Paul von Zielbauer, *Former Detainees Argue for Right to Sue Rumsfeld over Torture*, N.Y. TIMES, Dec. 9, 2006, at A9 (reporting on a federal court hearing that concerned “whether noncitizens confined in prisons outside the United States had legal standing to sue American military officials for constitutional violations”).

the separation of church and state.⁴ For a relatively young doctrine,⁵ standing is incredibly pervasive in popular as well as judicial discourse.

This Comment explores the implications of the standing analysis for a particular group of plaintiffs: Protection and Advocacy Organizations (P&As)—a group of federally funded nonprofit corporations or state entities⁶ statutorily charged with protecting and advocating on behalf of individuals with disabilities. P&As exist in all fifty states, Puerto Rico, the District of Columbia, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.⁷ According to the National Disability Rights Network's website, P&As

have the authority to provide legal representation and other advocacy services, under all federal and state laws, to all people with disabilities (based on a system of priorities for services). All P&As maintain a presence in facilities that care for people with disabilities, where they monitor, investigate and attempt to remedy adverse conditions. These agencies also devote considerable resources to ensuring full access to inclusive educational programs, financial entitlements, healthcare, accessible housing and productive employment opportunities.⁸

P&As engage in a variety of advocacy activities, though their priorities differ across the country as they respond to local and state-specific problems. For example, in October 2008, Pennsylvania's P&A, the Disability Rights Network of Pennsylvania (DRN), focused on combating the bullying and harassment of children with disabili-

⁴ See Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. TIMES, June 26, 2007, at A18 (explaining a Supreme Court decision holding that taxpayers do not have standing to challenge the constitutionality, under the Establishment Clause, of White House expenditures).

⁵ See *infra* note 59 (discussing the "constitutionalization" of the standing doctrine as a recent doctrinal development).

⁶ For a discussion of possible implications of a state's decision to charter its P&A as an independent government agency, rather than to contract out to a nonprofit, see *infra* note 152.

⁷ See Letter from Curtis L. Decker, Executive Dir., Nat'l Disability Rights Network, to Patricia A. Morrissey, Comm'r, Admin. on Developmental Disabilities, Admin. for Children and Families 1 (June 9, 2008), available at <http://www.ndrn.org/regs/NDRN-comments-on-proposed-DD-reg6-9-08.pdf>.

⁸ Nat'l Disability Rights Network, The P&A/CAP System, http://www.ndrn.org/aboutus/PA_CAP.htm (last visited Oct. 1, 2008). The National Disability Rights Network (NDRN) is the nonprofit membership organization of protection and advocacy systems and client assistance programs (CAPs) in the United States. CAPs provide complimentary services to individuals with disabilities who are seeking vocational rehabilitation under the Rehabilitation Act. *Id.* CAPs are beyond the scope of this Comment.

ties in public schools.⁹ DRN's website provided a variety of "Know Your Rights" publications and resources for parents and offered the opportunity to participate in a survey on the topic. The Hawaii Disability Rights Center provides an example of a different type of advocacy through its recently launched community television series on disability rights.¹⁰ The series features programming on emergency preparedness and other issues for individuals with disabilities and their families. Disability Rights Oregon is currently investigating complaints of maltreatment faced by individuals with mental disabilities in emergency rooms through an online questionnaire.¹¹

These examples represent a very small slice of the advocacy in which P&As engage each day. P&As also regularly meet with local, state, and national government officials, comment on proposed regulations, and visit local facilities for individuals with disabilities. Occasionally, a P&A determines that litigation is the best way to advocate on behalf of state residents with disabilities. However, courts of appeals disagree over whether P&As have associational standing to sue on behalf of their constituents.¹² This question is particularly important for anyone concerned about disability rights, given that individuals with disabilities—especially those in institutions—face cognitive and social barriers to self-advocacy.

The resolution of the associational standing issue for P&As has ramifications for other organizations as well. Certain organizations—such as unions and trade associations—clearly have associational standing, provided that they can demonstrate harm to one of their members and an issue central to their purposes as an organization.¹³ However, for other types of organizations, such as environmental groups, which may not have a dues-paying or voting membership in the traditional sense, standing poses a series of unanswered questions. To qualify for associational standing, does the organization have to be

⁹ See Disability Rights Network of Pa., *Bullying and Harassment in Pennsylvania Schools*, <http://www.drnpa.org/news/id/13> (last visited Oct. 1, 2008) (noting that the organization is in "the beginning stages of advocacy on the issue" and is seeking input from concerned individuals).

¹⁰ See Haw. Disability Rights Ctr., *HDRC Launches New Olelo Community Television Series* (July 23, 2007), http://www.hawaiidisabilityrights.org/General_NewsDetail.aspx?nid=1035.

¹¹ See Disability Rights Or., *OAC News and Reports*, <http://www.oradvocacy.org/news/> (last visited Oct. 1, 2008) (soliciting accounts from emergency room visitors).

¹² See *infra* Part III.

¹³ See *infra* text accompanying note 75.

long established, or can it be newly formed?¹⁴ Must the members vote or pay dues?¹⁵ Does membership have to be voluntary?¹⁶ A careful analysis of P&As' associational standing is important beyond the disabilities world; it also has the potential to inform decisions that other organizations make when constructing legal arguments for associational standing—and even when deciding how to structure their organizations in the first instance.¹⁷

When it comes to associational standing, the judicial inquiry is composed of two parts. First, courts ask the constitutional question: whether the ties between the member or members and the association are tight enough to satisfy Article III's core standing requirements of injury, causation, and redressability.¹⁸ Since individuals themselves cannot bring suit in federal court without meeting these three requirements, associations must demonstrate a sufficiently close relationship to the members and their interests to gain standing by proxy. Second, courts are faced with the prudential inquiry: whether an association that is constitutionally qualified to sue on behalf of its members should be granted an exception to the usual prudential limitation that one person cannot sue on behalf of another.¹⁹ The doctrinal approach to associational standing, articulated in *Hunt v. Washington State Apple Advertising Commission*, requires an organization to satisfy a

¹⁴ Compare *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 690 (1973) (granting standing to “SCRAP[,] . . . ‘an unincorporated association formed by five law students . . . in September 1971’”), with *Sierra Club v. Morton*, 405 U.S. 727, 739-41 (1972) (noting that plaintiff Sierra Club was “a large and long-established organization, with a historic commitment to the cause of protecting our Nation’s natural heritage from man’s depredations,” but denying standing on other grounds).

¹⁵ See Karl S. Coplan, *Is Voting Necessary? Organizational Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 SE. ENVTL. L.J. 47, 75-77, 80-81 (2005) (analyzing the extent to which members’ voting rights and financial contributions tie organizations’ decisions to litigate to these members’ interests).

¹⁶ See *id.* at 78-79 (analyzing the extent to which voluntary membership ties organizations’ decisions to litigate to their members’ interests).

¹⁷ Cf. *id.* at 81-87 (discussing “some of the . . . measures an organization may take to improve a claim for standing, while minimizing exposure to hostile takeover”); *id.* at 70-75 (assessing environmental groups’ prospects for associational standing by drawing from federal court decisions about P&A associational standing).

¹⁸ See *infra* text accompanying notes 56-61.

¹⁹ See *infra* text accompanying notes 65-70 (outlining the prudential standing requirements that courts apply on top of the Constitution’s minimum standing requirements).

three-prong test to establish standing.²⁰ The test encompasses both the constitutional and prudential requirements.²¹

In Parts I and II of this Comment, I trace the history of P&As' enabling statutes and the Supreme Court's standing and associational standing doctrines, paying particular attention to the goals underlying the standing test. Part III introduces the approaches of the four courts of appeals that have ruled on the issue of associational standing for P&As. Finally, Part IV applies the *Hunt* analysis, informed by the goals discussed in Part III, to P&As. I argue that the procedural safeguards in place under P&A enabling statutes ensure a connection between P&As and their constituents, affirming the tight relationship between the claim and the organization necessary to provide zealous litigation and protect the separation of powers. Therefore, Article III should not be construed to bar associational standing for P&As because these organizations will be litigating true Article III "controversies." Furthermore, the P&A enabling statutes should be read as an abrogation by Congress of all prudential barriers to granting P&As associational standing. Finally, the real-world risk of unaddressed rights violations if P&As are denied standing further supports an extension of the prudential doctrine of associational standing to include P&As.

I. THE HISTORY AND STATUTORY AUTHORITY OF PROTECTION AND ADVOCACY ORGANIZATIONS

In 1974, an advocacy group for children with disabilities successfully sued Willowbrook State School, a New York institution for people with developmental disabilities, for inhumane treatment of thousands of patients.²² In finding that the school had violated the patients'

²⁰ 432 U.S. 333, 343 (1977); *see also infra* text accompanying note 75 (discussing *Hunt*'s three-part test).

²¹ I discuss which of the *Hunt* requirements are constitutional, and thus immovable, and which are prudential, and thus able to be eliminated by Congress or the Court, *infra* Part IV.A-B.

²² *See* N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); *see also* 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, 959-60 (1997) (citing Willowbrook's watershed role in the history of the protection and advocacy system). Willowbrook became notorious, largely due to Geraldo Rivera's Peabody Award-winning exposé, *Willowbrook: The Last Great Disgrace* (WABC television broadcast Jan. 6, 1972). This exposé is available on the DVD of UNFORGOTTEN: TWENTY-FIVE YEARS AFTER WILLOWBROOK (City Lights International 1996). Willowbrook was not, however, the only institution with such inhumane conditions. Rather, it was symptomatic of a nationwide problem. *See, e.g., The Big News with John Facenda: Suffer the Little Children* (NBC television broadcast 1968), available at

“right to reasonable protection from harm,”²³ the court noted “[t]he loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds were typical of the [residents’] testimony.”²⁴ The true horrors of Willowbrook are only hinted at in the court’s opinion; witnesses at the trial reported beatings, inappropriate use of restraints, untreated wounds, and even deliberate exposure to disease for the purpose of medical experimentation.²⁵ In response to the situation at Willowbrook, Congress passed the Developmental Disabilities Assistance and Bill of Rights Act (the DD Act) of 1975.²⁶ The DD Act offered federal funding to assist states in providing services to individuals with developmental disabilities. To be eligible for this funding, states were required to establish a system to “protect the legal and human rights of individuals with developmental disabilities.”²⁷

In 2000, the DD Act was repealed and replaced with the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (PADD).²⁸ Between 1975 and 2000, the responsibility and authority of P&As had

<http://www.nbc10.com/video/vault/4294108/detail.html> (last visited Oct. 1, 2008) (exposing, in a five-part news series, the shocking conditions at Pennhurst State School and Hospital in Spring City, Pennsylvania, which housed individuals with cognitive impairments and mental illnesses).

²³ *Rockefeller*, 357 F. Supp. at 758.

²⁴ *Id.* at 756.

²⁵ Bowman, *supra* note 22, at 959.

²⁶ Pub. L. No. 94-103, 89 Stat. 486; *see also* Bowman, *supra* note 22, at 959.

²⁷ 42 U.S.C. § 15001(b)(2) (2000).

²⁸ Pub. L. No. 106-402, 114 Stat. 1677 (codified at 42 U.S.C. §§ 15001–15115 (2000)). This replacement is often also referred to as the “DD Act,” but the portion that authorizes the protection and advocacy system, 42 U.S.C. §§ 15041–15045, is known as PADD. In his signing statement, President Clinton discussed the evolution of the law from 1974 to 2000:

When [the DD Act] was first conceived . . . , the primary emphasis was on the advancement of scientific understanding, professional education, and ensuring access to, and safety of, institutional facilities Today, the programs emphasize fundamental system change, including legal services and advocacy and capacity-building at the State and local levels. The focus is on listening to people with developmental disabilities as self-advocates, and helping people with developmental disabilities and their families obtain the information, assistive technology, and supports they need to make more informed choices about how and where to live. An important aspect of today’s work is to ensure self-determination and access to supports for historically unserved and underserved populations across the Nation. To ensure continued progress in these areas, [PADD] now includes performance-based accountability requirements.

Statement on Signing the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 3 PUB. PAPERS 2382, 2383 (Oct. 30, 2000).

been expanded by two major pieces of federal legislation: the Protection and Advocacy of Mentally Ill Individuals Act of 1986 (PAIMI)²⁹ brought people with mental illness under the protection of P&As, while the Protection and Advocacy of Individual Rights Act of 1992 (PAIR)³⁰ filled in the gaps and inclusively covered all individuals with disabilities not yet covered by PADD or PAIMI. Collectively, these three statutes grant a state's P&A the powers to investigate allegations of abuse and neglect, respond to rights violations, and provide general advocacy services on behalf of state residents with disabilities or mental illness.³¹

²⁹ Pub. L. No. 99-319, 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 10801–10851 (2000)). What was then referred to as the PAMII program has since been renamed the Protection and Advocacy of Individuals with Mental Illness program, with the new acronym PAIMI. See Children's Health Act of 2000, Pub. L. No. 106-310, § 3206, 114 Stat. 1101, 1193-94 (codified at 42 U.S.C. § 10801 note). This change reflects a preference in the disability community for "people-first" language that conceives of disabilities as attributional rather than definitional. See National Service Inclusion Project, Glossary of Disability and National Service Related Terms, <http://www.serviceandinclusion.org/index.php?page=glossary#language> (last visited Oct. 1, 2008).

³⁰ Pub. L. No. 102-569, 106 Stat. 4430 (codified as amended at 29 U.S.C. § 794e (2000)). Throughout this Comment, PADD and PAIMI are cited along with the regulations promulgated under them, which are codified at 45 C.F.R. pts. 1385–1387 (2007) and 42 C.F.R. pt. 51 (2007), respectively. PAIR is not cited because it was drafted to fill in the gaps left by PADD and PAIMI:

The purpose of this section is to . . . protect the legal and human rights of individuals with disabilities who . . . are ineligible for protection and advocacy programs under [PADD] because the individuals do not have a developmental disability, as defined in . . . [the] Act; and are ineligible for services under [PAIMI] because the individuals are not individuals with mental illness, as defined in . . . [the] Act.

29 U.S.C. § 794e(a)(1). PAIR grants the "same general authorities, including access to records and program income, as are set forth in [PADD]; [and] the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals described in subsection (a)(1) of this section." *Id.* § 794e(f)(2)–(3). As such, a discussion of authority under PADD amounts to a discussion of authority under PAIR.

³¹ As a result of these three programs' superior funding, the vast bulk of P&A work is done under the authority of PADD, PAIMI, and PAIR. There are, however, actually eight total P&A programs. Those not discussed in this Comment are the Client Assistance Program, 29 U.S.C. § 732 (2000) (granting P&A services to individuals receiving or seeking state rehabilitative services); Protection and Advocacy for Assistive Technology, 29 U.S.C. § 3004 (Supp. IV 2004) (extending P&A funding to allow assistance for individuals with disabilities seeking assistive technology); Protection and Advocacy for Beneficiaries of Social Security, 42 U.S.C. § 1320b-21 (Supp. IV 2004) (providing employment assistance to recipients of Social Security); Protection and Advocacy for Individuals with Traumatic Brain Injury, 42 U.S.C. § 300d-53 (2000) (including individuals who suffer traumatic brain injury in the group that P&As are authorized to serve); and

Under these governing statutes, P&As are granted certain rights and responsibilities. They are broadly given the authority to “pursue legal, administrative, and other appropriate remedies” on behalf of individuals with disabilities.³² Pursuant to this broad grant, P&As specifically have access to these individuals in any facility where “services, supports, and other assistance are provided.”³³ P&As also have the authority to view the records of individuals with disabilities³⁴—in certain situations, without consent of either the individual or her legal guardian.³⁵ This access to individuals and records is available at any time for the purposes of investigating a suspected specific “incident of abuse or neglect.”³⁶ Where a P&A is not investigating a specific incident, it is entitled to access facilities “at reasonable times” for the purposes of general advocacy (for example, the distribution of information or routine health and safety monitoring).³⁷

Structurally, the federal statutes allow states to choose how to implement their protection and advocacy systems.³⁸ As a result, some states, such as Connecticut and Kentucky, choose to create independent state agencies, while others, such as Pennsylvania and Texas, contract out to private nonprofit corporations for P&A services.³⁹ In ei-

Protection & Advocacy for Voting Accessibility, 42 U.S.C. § 15461 (Supp. II 2002) (attempting to ensure that individuals with disabilities participate in the electoral process). For an overview of the history, structure, and authority of P&As, as well as an explanation of the way that the eight statutes work together, see Nat'l Disability Rights Network, The P&A/CAP System, http://www.napas.org/aboutus/PA_CAP.htm (last visited Oct. 1, 2008).

³² 42 U.S.C. § 15043(a)(2)(A)(i) (2000); *see also id.* § 10805(a)(1)(B) (giving P&As the authority to “pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State”).

³³ *Id.* § 15043(a)(2)(H); *see also id.* § 10805(a)(3) (granting P&As “access to facilities in the State providing care or treatment” to individuals with mental illness).

³⁴ *Id.* §§ 10805(a)(4), 15043(a)(2)(I)–(J).

³⁵ *Id.* §§ 10805(a)(4), 15043(a)(2)(I).

³⁶ 42 C.F.R. § 51.42(b) (2007); 45 C.F.R. § 1386.22(f) (2007).

³⁷ 42 C.F.R. § 51.42(c); 45 C.F.R. § 1386.22(g).

³⁸ *See, e.g.*, 42 U.S.C. § 10805(c)(1)(B) (recognizing that states have the option of authorizing P&As as “private non-profit entit[ies]” or as “public system[s]”).

³⁹ *See* Bowman, *supra* note 22, at 989-93 & n.180 (discussing different structural choices faced by states, primarily Kentucky, in implementing their protection and advocacy systems); *see also* Office of Prot. & Advocacy for Persons with Disabilities, <http://www.state.ct.us/opapd> (last visited Oct. 1, 2008) (Connecticut); Ky. Prot. & Advocacy, <http://www.kypa.net> (last visited Oct. 1, 2008); Disability Rights Network of Pa., <http://www.drnpa.org> (last visited Oct. 1, 2008); Advocacy, Inc.—About Us, <http://www.advocacyinc.org/about.cfm> (last visited Oct. 1, 2008) (Texas). There is some debate among disability-rights advocates as to which option is preferable. *See*

ther case, the P&A is statutorily required to implement procedures that facilitate the participation of individuals with disabilities in setting priorities.⁴⁰ PADD requires that a majority of the members of a P&A's governing board (for nonprofits, or for state agencies with governing boards) or advisory council (for state agencies without governing boards) be either individuals with disabilities who are eligible for or receiving services (or have received them in the past); or family members, advocates, guardians, or authorized representatives of such individuals.⁴¹ The regulations clarifying these requirements are in place "to provide a voice for individuals with developmental disabilities."⁴² Under PAIMI, the chair and sixty percent of the members of the advisory council must be "individuals who have received or are receiving mental health services or who are family members of such individuals."⁴³ Both PADD and PAIMI regulations require that the public be given the opportunity to review and comment on the decisions made by a P&A's governing authority and council.⁴⁴ To that end, all procedures for public comment must provide notice "in a format accessible to individuals with mental illness"⁴⁵ or developmental disabilities.⁴⁶ P&As must also "establish a grievance procedure . . . to ensure that in-

Bowman, *supra* note 22, at 989-93 & nn.179-198; *see also infra* note 151 (discussing the disparities between public and private funding received by P&As).

⁴⁰ The structure of a P&A is an important consideration in this analysis because courts look to structure to determine whether an organization is sufficiently accountable to its membership to qualify for associational standing under *Hunt*. For a discussion about how this examination of structure plays out in doctrinal analysis, see *infra* Part IV.A.

⁴¹ 42 U.S.C. § 15044(a)(1)(B)(i)-(ii), (5)(B)(i)-(ii). For example, Disability Rights Oregon, Oregon's P&A, has a board of directors that "includes individuals with disabilities, family members of people with disabilities, [and] attorneys and other professionals knowledgeable about disability issues." DISABILITY RIGHTS OREGON, *available at* <http://www.oradvocacy.org/DRObrochure.pdf>. The Chair of the Board is an "[a]dvocate for persons with disabilities." *Id.* Other board members include the President of People First of Oregon, an organization that is a "pioneer in the People First and self-advocacy movement," a movement led entirely by individuals with developmental disabilities, People First of Or.: Chapters and Officers, http://www.people1.org/about_us_oregon.htm (last visited Oct. 1, 2008), and the founder of SAFE, Inc., the only mental health drop-in center in the state that is "designed, owned, and operated entirely by mental health system clients, ex-patients, and survivors," Safe/Wonderland Project, What Is SAFE?, <http://www.wonderland-safe.org/safe.htm> (last visited Oct. 1, 2008).

⁴² 45 C.F.R. § 1386.21(g) (2007).

⁴³ 42 U.S.C. § 10805(a)(6)(B)-(C).

⁴⁴ 42 C.F.R. § 51.24(a)-(b) (2007); 45 C.F.R. § 1386.31(a).

⁴⁵ 42 C.F.R. § 51.24(b).

⁴⁶ 45 C.F.R. § 1386.31(a).

dividuals with developmental disabilities have full access to services of the system.”⁴⁷

The text of the statutes and accompanying regulations also explicitly mentions P&As’ power to sue on behalf of individuals with disabilities. Both PADD and PAIMI contain language generally authorizing the pursuit of legal remedies.⁴⁸ More specifically, PADD states that, where available administrative procedures fail to adequately remedy a violation, a P&A may pursue alternative remedies—including the initiation of a legal action.⁴⁹ Both PADD and PAIMI regulations allow for costs incurred by a P&A “in bringing lawsuits *in its own right* to redress incidents of abuse or neglect, discrimination and other rights violations impacting on individuals with developmental disabilities”⁵⁰ or mental illness.⁵¹ The PAIMI regulations further provide that “a P&A system may use any appropriate technique and pursue administrative, legal, or other appropriate remedies to protect and advocate *on behalf of* individuals with mental illness.”⁵² Statutory authority does not, however, allow an organization to bypass constitutional or other requirements.⁵³ Federal courts have consistently held that Article III standing is a threshold matter that must be satisfied before an action can proceed;⁵⁴ the question of standing must therefore be addressed in each suit brought by a P&A.

⁴⁷ 42 U.S.C. § 15043(a)(2)(E) (2000); *see also* 42 C.F.R. § 51.25(a)(1) (“The P&A system shall establish procedures to address grievances from [c]lients or prospective clients of the P&A system to assure that individuals with mental illness have full access to the services of the program . . .”).

⁴⁸ *See* 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i).

⁴⁹ *See id.* § 10807(a) (granting P&As the ability to initiate legal action where administrative actions “will not be resolved within a reasonable time” or where administrative remedies have been exhausted).

⁵⁰ 45 C.F.R. § 1386.25 (emphasis added).

⁵¹ 42 C.F.R. § 51.6(f) (2007).

⁵² *Id.* § 51.31(a) (emphasis added).

⁵³ For example, P&As have clear statutory authority to access client records with the client’s permission, 42 U.S.C. §§ 10805(a)(4)(A), 15043(a)(2)(I)(i), but the Supreme Court of West Virginia has imposed an additional requirement in the form of a competency hearing. *See* *W. Va. Advocates, Inc. v. Appalachian Cmty. Health Ctr., Inc.*, 447 S.E.2d 606, 612 (W. Va. 1994) (requiring a P&A to obtain a state court declaration of a client’s mental capability to grant the P&A access to her records); *Bowman, supra* note 22, at 969-70 (discussing *West Virginia Advocates*).

⁵⁴ *See, e.g., Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (rejecting, on the ground that a statute “cannot override constitutional standing requirements,” a P&A’s attempt to use statutory authority to “short-circuit” the Oregon State Hospital’s argument that the P&A lacked standing”); *see also* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-102 (1998) (rejecting the contention of the dissent and several courts of appeals that a court may assume hypothetical jurisdiction and pro-

II. THE DOCTRINES OF STANDING AND ASSOCIATIONAL STANDING⁵⁵

Article III of the United States Constitution limits the jurisdiction of federal courts to “cases” and “controversies.”⁵⁶ The development of

ceed to the merits of the case without resolving the issue of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992) (Scalia, J., majority opinion, with Rehnquist, C.J., and White and Thomas, JJ., joining the plurality opinion as to this section) (referring to the standing inquiry as a “threshold” issue); *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (characterizing jurisdictional inquiries as “the first and fundamental question” in all federal appeals); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

⁵⁵ This Part provides a brief survey of standing law and focuses largely on *Hunt*. For a more thorough history of standing, see generally Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168-97 (1992). See also PETER L. STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 1126-28 (rev. 10th ed. 2003) (citing the increased availability of remedies for constitutional violations and “the emergence of the administrative state” as the two factors that led to the development of the modern standing doctrine); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 225-28 (1989) (tracing the Court’s late-twentieth-century standing jurisprudence and its relationship to the public-interest representation movement).

⁵⁶ The constitutional provision actually lists nine separate categories of cases and controversies where the federal courts may constitutionally exercise jurisdiction:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2. There is considerable disagreement as to whether this language confers mandatory jurisdiction on federal courts to any extent. Compare Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1506-15 (1990) (using textual, structural, and historical evidence to support a “two-tiered thesis,” which proposes that federal jurisdiction is mandatory in the three categories for which the Constitution extends jurisdiction to “all Cases”), with Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1260-61 (2007) (remarks of John Yoo) (critiquing Amar’s two-tiered thesis based on, among other historical inconsistencies, the absence of congressionally conferred general federal question jurisdiction for the first one hundred years of the United States’ nationhood). The U.S. Supreme Court has long made clear, however, that Article III’s “case” or “controversy” language defines the outer limits of federal court jurisdiction. See, e.g., *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1810) (holding that a “statute cannot extend the jurisdiction beyond the limits of the Constitution”). As the question of P&A associational standing

a concrete judicial test for standing, however, has been relatively recent.⁵⁷ In *Lujan v. Defenders of Wildlife*, the Supreme Court synthesized the standing doctrine of the previous three decades by articulating a three-part test:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁵⁸

Article III's sparse "case" or "controversy" language does not lead inexorably to the modern judicial test for standing. The connection between the three-prong test and the actual constitutional language would seem murky, at best, in the absence of further explanation. Fortunately, the Supreme Court has occasionally delineated its logic in the course of developing the standing doctrine. The requirements of injury in fact, causation, and redressability are designed to ensure that all disputes adjudicated by the federal courts are cases or controversies within the meaning of Article III.⁵⁹ According to the Court,

involves an exploration of the outer limits of federal jurisdiction, an analysis of the debate described above is beyond the scope of this Comment.

⁵⁷ See Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 318 (2001) ("[P]rior to the 1970s, the Court . . . analyzed standing on a case-by-case basis, applying flexible and decidedly sub-constitutional standards."); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) ("For most of the nation's history, there was no distinctive body of standing doctrine. Whether there was standing depended on whether positive law created a cause of action.").

⁵⁸ 504 U.S. at 560-61 (internal citations and punctuation omitted).

⁵⁹ The constitutionalization of the standing doctrine happened under the Burger Court and has been characterized at least in part as an attempt to unburden packed federal dockets and to bar judicial interference with progressive legislation. See John E. Bonine, *Broadening "Standing to Sue" for Citizen Enforcement*, in 2 FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 249, 257 (Jo Gerardu & Cheryl Wasserman eds., 1999) ("Remarkable developments in recent years position the United States as one of a handful, at most, of countries where the Supreme Court is starting to assert the power to reject efforts by the democratically elected legislative branch of government to specify who may bring lawsuits to court . . ."); Gilles, *supra* note 57, at 322-26 (arguing that the Burger Court both replaced the Warren Court's liberal prudential standing inquiry with a more constitutionally based inquiry and articulated the standing doctrine's connection to separation-of-powers principles); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L.

this language requires that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”⁶⁰ A “personal stake” in the dispute ensures the “concrete adverseness which sharpens the presentation of issues upon which the court[s] so largely depend[] for illumination of difficult constitutional questions.”⁶¹ The standing doctrine, then, can be viewed as playing a gatekeeper function, admitting only true cases or controversies that will be vigorously litigated in a manner that presents the strongest arguments on each side, thus promoting the correct legal outcome.

Beyond the Article III case-or-controversy requirement, however, the standing test also serves a separation-of-powers function.⁶² The standing test functions to admit controversies that courts ought to decide while rejecting disputes that are better resolved by the political branches, to which citizens have access via the right to vote.⁶³ Justice Scalia has been prolific on this topic:

There is, I think, a functional relationship [between the doctrine of standing and the role of the courts in the separation-of-powers system], which can best be described by saying that the law of standing roughly

REV. 1371, 1452-57 (1988) (listing five reasons for the convergence of the “metaphor” of standing and the “private rights model,” including a dramatic increase in the workload of federal courts and liberal Justices’ interest in “protecting the legislative sphere from judicial interference”). For an argument that the standing test as constructed misses the point of Article III, see generally Sunstein, *supra* note 57, at 1461-80, which contends that the standing test is underinclusive and frequently bars justiciable cases and controversies from being heard, and Winter, *supra*, at 1460-63, 1470, which argues that the focus on standing as a “threshold” issue artificially separates the standing criteria from the merits. See also Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246-49 (1999) (demonstrating that the injury-in-fact requirement of Article III is “nonsense” by using the hypothetical case of a public defender moving for dismissal in a criminal prosecution on the ground that the government lacks a “personal, concrete, and particularized injury in fact”). But see Michael S. Greve, Friends of the Earth, *Foes of Federalism*, 12 DUKE ENVTL. L. & POL’YF. 167 (2001) (criticizing the Court’s deviation from the strict standing doctrine as a violation of the principles underlying the Court’s then-recent federalism decisions).

⁶⁰ *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

⁶¹ *Baker v. Carr*, 369 U.S. 186, 204 (1962); see also *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 341 (1977).

⁶² See *Lujan*, 504 U.S. at 559-60 (describing the standing doctrine as a “landmark” that helps to define the judiciary’s proper constitutional function).

⁶³ The Supreme Court recently affirmed the importance of separation-of-powers concerns to the standing analysis. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2569 (2007) (plurality opinion) (criticizing *Flast* for depicting the standing inquiry as solely about adverseness and failing to acknowledge the separation-of-powers values that it serves).

restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*.⁶⁴

The constitutional portions of the standing inquiry, as expressed in the three-part test, cannot be waived.⁶⁵ If a federal court finds one of the three pieces lacking, it must dismiss the case for lack of jurisdiction.⁶⁶

In addition to the constitutional three-part test, the Supreme Court has also imposed “prudential” limitations on standing to sue in federal court. These limitations, unlike the constitutional requirements, can be removed at the discretion of the court. Generally, a plaintiff must assert her own interests rather than the interests of third parties;⁶⁷ the injury alleged must not be so “pervasively shared” that it amounts to a “generalized grievance”;⁶⁸ and the complaint must “fall within the ‘zone of interests to be protected or regulated by the statute or constitutional guarantee under which the plaintiff seeks relief.’”⁶⁹ These requirements, while “closely related to Art[icle] III concerns, are not constitutional and are essentially matters of judicial self-

⁶⁴ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983). Justice Scalia argues that it is the proper realm of the judiciary to vindicate individual rights and the proper realm of the legislature to make decisions about advancing the general public interest. Because the issue here is whether P&As are proper representatives of their constituents under *Hunt*—and not whether the injury-in-fact requirement is a proper component of the standing test—this Comment does not explore the separation-of-powers argument in depth. For a further discussion of the importance of the injury-in-fact requirement, see Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL’Y F. 39, 59 (2001), which argues that weakening injury-in-fact requirements would both “shift the incentives faced by those individuals that would consider” filing environmental citizen suits and “increase[] the potential for rent-seeking and the pursuit of other agendas.”

⁶⁵ *Lujan*, 504 U.S. at 560 (describing the three-part test as an “irreducible constitutional minimum”).

⁶⁶ See *supra* note 54 (listing examples where the Court has made clear that standing is a threshold jurisdictional question).

⁶⁷ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 474 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

⁶⁸ *Id.* at 474-75 (internal quotation marks omitted) (citing *Warth*, 422 U.S. at 499). This prudential requirement is closely tied to separation-of-powers concerns, as “pervasively shared” injuries presumably can be resolved through the legislative process.

⁶⁹ *Valley Forge*, 454 U.S. at 475 (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

governance.”⁷⁰ Their existence outside of the constitutional “irreducible minimum” means courts can decide to allow exceptions.⁷¹

One such exception is the doctrine of associational standing. While individuals generally must assert their own rights, the Court has long recognized that there are some benefits to allowing organizations to litigate claims on behalf of their members. The Court has held that various types of organizations, including trade associations,⁷² unions,⁷³ and nonprofit corporations,⁷⁴ fall within this exception. To ensure that an association has sufficient ties to the controversy it is litigating on behalf of its members, federal courts apply a three-part test: “[A]n association has standing to [sue] when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁷⁵ This test leaves unclear, however, the important question of what exactly “membership” in an organization means for these purposes.

An organization seeking to assert associational standing must demonstrate that its ties both to its members and to the controversy are tight enough to ensure vigorous litigation and proper respect for the appropriate sphere of the judicial branch. But that is not the *only* issue. The doctrines of associational and third-party standing⁷⁶ demonstrate that the Court is not solely concerned with containing its authority within the proper constitutional bounds.⁷⁷ As a secondary mat-

⁷⁰ *Warth*, 422 U.S. at 500.

⁷¹ See Gilles, *supra* note 57, at 318 n.17 (“[P]rudential limitations on standing tend to be flexible standards based on policy and fairness rather than rigid rules of constitutional construction based on separation of powers.”).

⁷² See, e.g., *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246, 247 (1963) (per curiam) (granting the appellant, an association of motor carriers, standing to challenge an administrative order on the ground that “appellants are proper representatives of the interests of their members”).

⁷³ See, e.g., *UAW v. Brock*, 477 U.S. 274, 281-88 (1986).

⁷⁴ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1957) (upholding the NAACP’s ability to assert its members’ constitutional rights to resist an Alabama court order requiring the organization to turn over its membership lists).

⁷⁵ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

⁷⁶ See Tacy F. Flint, Comment, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1037 (2003) (“[T]hird-party standing allows a litigant to bring suit on behalf of a third party if the litigant and third party share a ‘close relationship,’ the litigant is also injured, and the third party is hindered from bringing the suit on her own behalf.” (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991))).

⁷⁷ See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) (“[T]he entire doctrine of ‘representational standing’ . . .

ter, the Court has created exceptions to the prudential limitations. The exceptions are designed to ensure that, within the constitutionally allowable limits, parties that experience actual injury are realistically able to bring their claims in court. The Court was not required to continue upholding associational standing; as it developed a stricter standing doctrine, the Court could have struck down the relationships between the associations and their members as too attenuated. There is no constitutional requirement that federal courts hear every justiciable case or controversy. Still, the Court opted to retain associational standing, and, in *Hunt*, it indicated that its interpretation of the doctrine would not always be the narrowest possible reading of precedent.⁷⁸

As this decision makes clear, the Court recognizes that individuals sometimes need advocates to sue on their behalf.⁷⁹ Organizations have resources and expertise that their members lack. Where a member of the organization has an actual injury *and* the expert organization has an interest in litigating the claim, the quality of the organization's case presentation will potentially exceed that of the individual plaintiff. In addition, individuals often face significant economic and other barriers to bringing suit in the adversarial system, especially when those individuals have limited resources or claims for only small damages. If the court system is supposed to both provide redress for unjustly injured individuals and also deter injurious behavior in the future, it should create incentives for wronged individuals, or others suing on their behalf, to bring their claims. Granting associational standing to an organization whose members might otherwise be deterred from bringing suit is one way to provide such an incentive.

Hunt provided an important elaboration on the Court's associational standing doctrine. In *Hunt*, the Washington State Apple Advertising Commission—a state agency composed of thirteen elected offi-

rests on the premise that in certain circumstances, particular relationships . . . are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties.”); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights . . .”).

⁷⁸ *Hunt*, 432 U.S. at 344-45 (recognizing the state agency’s associational standing despite the fact that it did not fit the mold of a “traditional trade association,” which typically has voluntary “members”).

⁷⁹ Any exception to the general rule barring an individual from suing on behalf of another implicates questions about autonomy. For a discussion about autonomy concerns in the context of P&As’ associational standing, see *infra* Part IV.B.

cial—challenged the constitutionality of a North Carolina statute.⁸⁰ The statute, which restricted packaging and publication of certain inspection grades on apples shipped in interstate commerce, worked to the disadvantage of the Washington apple industry, and the Commission argued that it impermissibly interfered with interstate commerce.⁸¹ North Carolina challenged the Commission’s standing to bring suit, arguing that its connection to the controversy was tenuous and that it lacked a “personal stake” in the litigation, which, at the time, was cited as the primary inquiry underlying the standing doctrine.⁸² North Carolina contended that the Commission could not meet the requirements of associational standing because it did not have “members” in the same sense as the trade associations, unions, and nonprofit corporations previously granted standing.⁸³

The Court rejected North Carolina’s argument as an overly formalistic application of its previous associational standing jurisprudence,⁸⁴ adopting instead the “functional equivalence test”⁸⁵ quoted above.⁸⁶ The Court said that the Commission “for all practical purposes perform[ed] the functions of a traditional trade association.”⁸⁷ In addition,

while the apple growers and dealers [were] not “members” of the Commission in the traditional trade association sense, they possess[ed] all of the indicia of membership. . . . They alone elect[ed] the members of the Commission; they alone [could] serve on the Commission; they alone finance[d] its activities, including the costs of this lawsuit⁸⁸

In dismissing North Carolina’s argument that lack of voluntary membership meant that the Commission lacked standing, the Court drew an analogy to union membership by noting that unions, like the Commission, frequently feature compulsory membership.⁸⁹ Finally, the

⁸⁰ *Hunt*, 432 U.S. at 337-39.

⁸¹ *Id.*

⁸² *See id.* at 341 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962) (describing the “personal stake” requirement as “the gist of the question of standing”)).

⁸³ *See id.* at 342.

⁸⁴ *See id.* at 345 (“Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency.”)

⁸⁵ Coplan, *supra* note 15, at 53.

⁸⁶ *See supra* text accompanying note 75.

⁸⁷ *Hunt*, 432 U.S. at 344.

⁸⁸ *Id.*

⁸⁹ *Id.* at 345.

Court noted that the fact that the Commission's own interests were threatened (because its funding was tied to industry profit margins) created a "financial nexus" that "coalesce[d] with the other factors noted above to 'assure . . . concrete adverseness.'"⁹⁰

Hunt made clear that an organization does not need voluntary "members" to have associational standing, but it did little to elucidate its reasoning.⁹¹ In 1986, the Court was faced with a request to overturn *Hunt*.⁹² It declined to do so, and in the process finally shed light on the reasoning underlying *Hunt*.⁹³ In *UAW v. Brock*, the Court said that organizations have "special features" that are "advantageous both to the individuals represented and to the judicial system as a whole"—namely, that an "association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital."⁹⁴ Quoting an opinion from the Southern District of New York, the Court reasoned that "[t]he interest and expertise of this plaintiff, when asserted on behalf of its directly affected members, assure . . . concrete adverseness."⁹⁵

Under *Hunt* and its progeny, several characteristics clearly support a conclusion that an organization has "members," or the functional equivalent thereof, and therefore can satisfy the membership requirement of associational standing: members (formal or otherwise) serve on the governing board, vote to elect the board's membership, and finance the group's activities.⁹⁶ It is unclear, however, whether other combinations of "indicia of membership" might satisfy this in-

⁹⁰ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁹¹ See Coplan, *supra* note 15, at 53 ("Although *Hunt* adopts a functional equivalence test . . . , the Court did not explicate the Article III interests served by these functions.").

⁹² See *UAW v. Brock*, 477 U.S. 274, 288-90 (1986).

⁹³ See *id.*

⁹⁴ *Id.* at 289.

⁹⁵ *Id.* at 289 (internal quotation marks omitted) (quoting *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973)). Interest, expertise, and funds are frequently cited as reasons that organizations can, at least sometimes, represent their members' interests better than the members themselves. See, e.g., Flint, *supra* note 76, at 1046 (stating that the Supreme Court has recognized that organizational resources ensure a "high standard of aggressive advocacy"); Dale Gronemeier, Comment, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L.F. 663, 668-69 (noting that organizations' "financial strength," "specialized expertise and research resources," and "purification of individual interests" result in more effective litigation).

⁹⁶ See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344-45 (1977).

quiry.⁹⁷ Lower-court decisions applying *Hunt* have reached conflicting results.⁹⁸ For groups, like P&As, that are neither traditional membership organizations nor exact replicas of the Commission in *Hunt*, associational standing remains an open question.

III. THE SPLIT ON ASSOCIATIONAL STANDING FOR P&AS

PAIMI and PADD make clear that P&As can represent protected individuals who are named plaintiffs in litigation.⁹⁹ It is equally clear that P&As are authorized to sue on their own behalf by alleging injury to themselves.¹⁰⁰ But for a P&A to sue on behalf of the individuals it protects when those individuals are not themselves plaintiffs, it must meet the test for associational standing.¹⁰¹ The federal courts of appeals that have ruled on the issue are divided as to whether P&As are sufficiently like traditional membership organizations to meet the requirements for standing under *Hunt*. The Ninth and Eleventh Circuits have held that P&As have associational standing to sue on behalf of individuals with disabilities, while the Fifth and Eighth Circuits have held that they do not.¹⁰²

⁹⁷ See Coplan, *supra* note 15, at 55 (noting that the *Hunt* Court “failed to spell out . . . the irreducible minimum of” the traditional indicia of membership).

⁹⁸ See *infra* Part III; see also Coplan, *supra* note 15, at 61-65 (listing cases denying and granting standing to environmental organizations that do not extend voting rights to their members); *id.* at 70-75 (outlining varying interpretations of *Hunt*’s applicability to P&A standing).

⁹⁹ See *supra* note 32 and accompanying text.

¹⁰⁰ For example, P&As can claim that their First Amendment rights have been violated when they are denied access to records. See, e.g., *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 287 (1st Cir. 1982) (stating that certain “legal advocacy organizations have first amendment rights which, in appropriate circumstances, may permit them to seek out clients and initiate litigation”) (citing *NAACP v. Button*, 371 U.S. 415, 428 (1963)).

¹⁰¹ It is important to note that P&As can often use organizational standing to advocate on behalf of their constituents. Any time a P&A has spent time, money, and resources on nonlitigation activities, it can assert organizational standing under *Button*. This strategy applies not only in cases where a P&A seeks access to records, but in other institutional cases as well. This Comment’s focus is on associational standing, but strategically, P&As often find that asserting organizational standing is useful either in lieu of or as a complement to asserting associational standing. See, e.g., *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F. Supp. 2d 353, 361-64 (E.D. Pa. 2001) (holding that a P&A that had spent “time, money, and resources” on advocacy against a particular policy and on counseling families harmed by that policy had organizational standing to sue on its own behalf).

¹⁰² The Seventh Circuit also recently decided a case involving a claim for P&A associational standing. See *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796 (7th Cir. 2008). The court specifically noted, however, that the

The Fifth Circuit was the first to address the issue. In *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees*,¹⁰³ a P&A called Advocacy, Inc.¹⁰⁴ brought suit on behalf of itself and a minor with developmental disabilities, Matt W., alleging violations of, among other statutes, the Fair Housing Act (FHA).¹⁰⁵ In a brief opinion, the Fifth Circuit dismissed the case for lack of standing. After rejecting Advocacy, Inc.'s standing based on allegations of injury to the organization itself,¹⁰⁶ the court addressed the issue of associational standing. Advocacy, Inc. argued that application of the *Hunt* fact pattern as the exclusive formula for finding sufficient indicia of membership is inappropriate where an organization's constituency is "not capable of functioning as typical and traditional members of an organization."¹⁰⁷ The court rejected this reasoning and affirmed the judgment of the district court, holding that individuals with disabilities are not "members" of P&As because "[t]he organization bears no relationship to traditional membership groups because most of its 'clients'—handicapped and disabled people—are unable to participate in and guide the organization's efforts."¹⁰⁸

Five years later, in *Doe v. Stincer*, the Eleventh Circuit explicitly declined to follow the Fifth Circuit's reasoning from *Dallas County* and held that P&As have associational standing because their constituents possess sufficient indicia of membership.¹⁰⁹ In *Stincer*, Advocacy

question whether P&As are membership organizations for the purposes of the associational standing analysis had been conceded by the county. *Id.* at 803. The court based its denial of associational standing on its conclusion that none of the plaintiff's members had suffered a cognizable injury. *Id.* at 802-04.

¹⁰³ 19 F.3d 241 (5th Cir. 1994).

¹⁰⁴ Advocacy, Inc. is the P&A for the state of Texas. It is an independent nonprofit and is not located within the state government. See Advocacy, Inc.—About Us, *supra* note 39.

¹⁰⁵ 42 U.S.C. §§ 3601–3631 (2000). Matt W.'s transfer to a permanent home was significantly delayed because of a neighborhood association's opposition to the construction of the home. The P&A claimed that the delay had caused irreparable harm to Matt W. and five other children, and that the neighborhood association's obstruction of the home would inhibit development of group homes for the disabled in the future. *Dallas County*, 19 F.3d at 243.

¹⁰⁶ *Dallas County*, 19 F.3d at 243-44.

¹⁰⁷ Brief of Appellant Advocacy, Inc. at 14, *Dallas County*, 19 F.3d 241 (No. 93-1573), 1993 WL 13104421.

¹⁰⁸ *Dallas County*, 19 F.3d at 244.

¹⁰⁹ *Doe v. Stincer*, 175 F.3d 879, 885-86 (11th Cir. 1999).

Center,¹¹⁰ the Florida P&A, challenged a Florida statute denying patients the right of access to their medical records concerning treatment for mental or emotional conditions.¹¹¹ Advocacy Center alleged that the statute violated the Americans with Disabilities Act.¹¹² Florida challenged Advocacy Center's participation in the suit, arguing that under *Hunt* and according to *Dallas County*, Advocacy Center lacked standing to sue because it did not have members.¹¹³ In addressing this argument, the Florida court pointed out that the Supreme Court in *Hunt* had "specifically reject[ed] the argument that the Apple Advertising Commission lacked standing because it did not have any members."¹¹⁴ The court reasoned that Congress's statutory authorization for P&As "to act as agencies to protect and enforce the rights of [disabled individuals]" made the P&As significantly similar to the Advertising Commission in *Hunt*, which "serve[d] a specialized segment of the . . . community which [was] the primary beneficiary of its activities, including prosecution of this kind of litigation."¹¹⁵ While P&As might not have "members" in the same sense that unions or trade organizations do, the Eleventh Circuit held that individuals with disabilities have enough memberlike characteristics to be considered "members" for the purposes of the *Hunt* associational standing test.¹¹⁶

The Ninth Circuit subsequently addressed P&As' associational standing in 2003 in *Oregon Advocacy Center v. Mink*.¹¹⁷ *Mink* provides the most comprehensive consideration of the arguments for and against associational standing for P&As by any of the courts of appeals. In *Mink*, the Oregon Advocacy Center¹¹⁸ sued state officials on the grounds that delays in evaluating and treating criminal defendants with mental illness violated the defendants' constitutional rights to

¹¹⁰ Like Advocacy, Inc. in *Dallas County*, Advocacy Center is a nongovernmental nonprofit organization. See Advocacy Ctr. for Persons with Disabilities, Inc., About the Advocacy Center, <http://www.advocacycenter.org/about.html> (last visited Oct. 1, 2008).

¹¹¹ See *Stincer*, 175 F.3d at 881.

¹¹² *Id.*

¹¹³ See *id.* at 885.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 886 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977)).

¹¹⁶ *Id.*

¹¹⁷ 322 F.3d 1101 (9th Cir. 2003).

¹¹⁸ The Oregon Advocacy Center has since changed its name to Disability Rights Oregon. Disability Rights Oregon is an independent nonprofit organization. See Disability Rights Or., <http://www.disabilityrightsoregon.org> (last visited Oct. 1, 2008).

substantive and procedural due process.¹¹⁹ The Ninth Circuit recognized that the facts could be distinguished in some ways from *Hunt* but advanced arguments supporting the applicability of associational standing to P&As based on salient similarities, concluding that the Center was the “functional equivalent of a voluntary membership organization.”¹²⁰ The court highlighted the fact that protected individuals had access to formal grievance procedures and that P&As are statutorily required under PAIMI to establish an advisory council composed of people who receive or have received mental health services and their family members, arguing that these facts made protected individuals substantially similar to “members” of the Commission in *Hunt*.¹²¹

Most recently, in *Missouri Protection & Advocacy Services, Inc. v. Carnahan*,¹²² the Eighth Circuit joined the Fifth Circuit in denying associational standing to a P&A. Missouri Protection & Advocacy Services, Inc. (MOPAS)¹²³ brought an equal protection challenge to a Missouri constitutional provision and its accompanying election laws denying “incapacitated” persons (defined as persons under guardianship orders) the right to vote.¹²⁴ Relying on the “indicia-of-membership” portion of the *Hunt* opinion and the holding in *Dallas County*, the court concluded that MOPAS failed to meet the first prong of the associational standing test because individuals with disabilities neither had the power to elect the leadership of MOPAS nor financed MOPAS’s activities.¹²⁵

In circuits that have not yet ruled on the issue, the federal district courts are divided on the question of standing for P&As under *Hunt*. Most, but not all, district courts have followed the Eleventh and Ninth Circuits in holding that P&As qualify for associational standing.¹²⁶ It is

¹¹⁹ See *Mink*, 322 F.3d at 1105.

¹²⁰ *Id.* at 1111.

¹²¹ See *id.* at 1112.

¹²² 499 F.3d 803 (8th Cir. 2007).

¹²³ MOPAS is an independent, nongovernmental organization. See Mo. Prot. & Advocacy Servs., <http://www.moadvocacy.org/> (last visited Oct. 1, 2008).

¹²⁴ *Carnahan*, 499 F.3d at 806, 808.

¹²⁵ *Id.* at 810. The Eighth Circuit went on to conclude that even if MOPAS had satisfied the first associational standing requirement, it would have failed to satisfy the third because the participation of individual constituents with specific claims was required. *Id.* I argue that the third prong of the associational standing test is not at issue because it is prudential and has been abrogated by Congress. See *infra* Part IV.B.

¹²⁶ See, e.g., N.J. Prot. & Advocacy, Inc. v. Davy, No. 05-1784, 2005 WL 2416962, at *2-3 (D.N.J. Sept. 30, 2005) (rejecting the Fifth Circuit’s approach to P&A associational

important to note that even when courts uphold the ability of P&As to sue on behalf of their constituents under *Hunt*, P&As have often been denied standing for failing to assert actual harm to a particular individual. In *Stincer*, for example, the Eleventh Circuit held that allegations that “many” people who wanted to examine their own mental health records had been denied access did not establish that a P&A-protected individual had suffered a “concrete injury” traceable to the policy in question.¹²⁷ The court held that the complaint failed to allege harm to a protected individual under PAIMI, which requires a person either to be currently receiving treatment or to have been discharged within the past ninety days in order to be a “member” of the P&A who can allow the P&A to satisfy the first prong of the associational standing test.¹²⁸

The approach of the Fifth and Eighth Circuits turns on the word “member” as it relates to the *Hunt* indicia-of-membership criteria.¹²⁹ While appealing in its simplicity, this approach fails to recognize that *Hunt* itself was a repudiation of the overly formalistic application of this word in associational standing cases. In *Hunt*, the Court rejected arguments based on the *status* of the organization and instead asked what *function* the Commission performed, concluding that it was “for

standing as “excessively rigid and formalistic”); *Univ. Legal Servs., Inc. v. Saint Elizabeths Hosp.*, No. 05-0585, 2005 WL 3275915, at *4-5 (D.D.C. July 22, 2005) (finding that *Hunt*’s first prong was satisfied because University Legal Services had a “constituency” and also that PAIMI had abrogated *Hunt*’s third prong); *Aiken v. Nixon*, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002) (finding that Disability Advocates, Inc., an authorized P&A, satisfied *Hunt*’s first prong by bringing claims on behalf of its constituents). P&As generally seem to have more success asserting associational standing when the injured individuals with disabilities join in the litigation as named plaintiffs or exemplars. Compare *Mental Disability Law Clinic, Touro Law Ctr. v. Carpinello*, 189 F. App’x 5, 7 (2d Cir. 2006) (affirming a district court’s conclusion that a P&A had associational standing under PAIMI in a suit with two individual named plaintiffs in addition to the P&A), and *Procurador de Personas con Impedimentos v. Municipality of San Juan*, 541 F. Supp. 2d 468, 470, 472 (D.P.R. 2008) (concluding that a P&A had satisfied the three-prong test for associational standing in a case with three individual named plaintiffs in addition to the P&A), with *Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F. Supp. 2d 808, 816 (M.D. Tenn. 1998) (denying associational standing in a case where a P&A failed to sue “on behalf of specific, named, injured individuals”).

¹²⁷ *Doe v. Stincer*, 175 F.3d 879, 887 (11th Cir. 1999).

¹²⁸ *Id.* In *Stincer*, the court held that the general allegations regarding “many” individuals, without more to establish that those individuals were protected under the governing statute, were insufficient to establish that any PAIMI “members” could have sued in their own right. The P&A therefore did not meet the first requirement for associational standing. *Id.*

¹²⁹ See *Camahan*, 499 F.3d at 810; *Ass’n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994).

all practical purposes” the same as a traditional trade association.¹³⁰ The Court investigated the relationship between the Commission and the apple growers on the theory that an organization’s responsiveness to its members’ needs served as a measure of how zealously it would litigate a conflict if one of those members were injured.¹³¹ The Fifth and Eighth Circuits declined to engage in any such substantive inquiry, limiting their analyses to whether the P&As met each of the indicia laid out in *Hunt*: financial support, voting power, and opportunity for leadership. This latter approach exalts form over substance, precisely what the *Hunt* Court sought to avoid.¹³²

The Eleventh and Ninth Circuits’ opinions go further in moving beyond a formalistic inquiry but fail to explore fully all the important considerations in the P&A associational standing analysis. They reject the idea that an organization must possess all of the *Hunt* indicia of membership, yet they frame their holdings by linking P&As as closely as possible to the indicia of the Advertising Commission in *Hunt*. In *Stincer*, the Eleventh Circuit held that the Advocacy Center was sufficiently analogous to the Commission in *Hunt* to make its constituents “members” for the purposes of associational standing.¹³³ The court highlighted the role of individuals and family members of individuals with mental illness in serving on the P&A governing board and the procedures for public comment.¹³⁴ The Ninth Circuit’s *Mink* analysis closely paralleled that of the Eleventh Circuit in *Stincer*, focusing again on the governing board and advisory council and noting that the Oregon Advocacy Center served a “specialized segment of [the] community.”¹³⁵ These analyses address the first part of the inquiry—whether the *Hunt* indicia of membership as an expression of Article III *permit* P&A standing. However, they fail to take into account the secondary question—whether granting associational standing to P&As is consistent with the reason that courts allow a prudential exception for associational standing in the first place.

¹³⁰ *Hunt*, 432 U.S. at 344.

¹³¹ See Coplan, *supra* note 15, at 54 (“[F]or an organization to bring [the] necessary ‘concrete adverseness’ to litigation, it must be sufficiently responsive to those of its constituents who have suffered an ‘injury in fact’ and bring the same full and zealous representation as the individuals would themselves.”).

¹³² See *supra* notes 84-85 and accompanying text (citing *Hunt*’s use of a “functional equivalent test”).

¹³³ *Stincer*, 175 F.3d at 886.

¹³⁴ *Id.*

¹³⁵ *Mink*, 322 F.3d at 1111-12.

While the board-membership, grievance-procedure, and public-comment requirements in PADD and PAIMI are certainly important considerations, merely filling in pieces of the *Hunt* indicia-of-membership test misses the broader point of the standing inquiry. The Court itself called *Hunt* a rejection of form-over-substance inquiries and pointed out various attributes of the Advertising Commission that ensured its tight connection to its membership. It thus indicated that the Commission was a legitimate representative of its members' interests—granting the Commission standing was not only constitutionally permissible but would serve other judicial values, such as providing for the thorough litigation of the issues (because of the Commission's expertise and resources). Under *Hunt*, then, the central questions in analyzing P&As' eligibility for associational standing are (1) whether the information about P&As, taken as a whole, indicates a relationship between P&As and individuals with disabilities such that a P&A can *constitutionally* represent the interests of those individuals in the courtroom, and (2) whether, as a secondary matter, P&As are the *type* of organization for which federal courts ought to make an exception to the general prohibition against suing on behalf of another.

IV. P&AS UNDER *HUNT*

Granting P&As associational standing is both within the limits of Article III and consonant with the values underlying associational standing. P&As are statutorily constructed to be tightly tied to the individuals with disabilities whom they represent. They must consult with individuals with disabilities and their family members in deciding agency priorities, both by reserving space on their boards and advisory councils for those individuals, and by providing formal grievance procedures and opportunities for public comment. Fidelity to the statutory goal of protecting and advocating on behalf of individuals with disabilities has the power to impact both government funding and public donations. These procedural protections demonstrate that P&As are closely connected to the interests of those whom they serve, thereby satisfying the requirements of Article III. Further, Congress has recognized the stark reality of the world for individuals with disabilities absent publicly funded, independent advocates. Willowbrook's lessons of disease, injury, and death inspired Congress to establish a government-funded check on state influence on the lives of

individuals with disabilities.¹³⁶ In enacting the P&As' enabling legislation, Congress carefully considered issues of autonomy and consent and determined that P&As should have the power to access facilities, view records, and litigate on behalf of individuals with disabilities in the state. As with housing and employment discrimination, Congress recognized a need and has designated P&As as organizations for which the courts ought to impose no barrier to standing other than the constitutional one.

In *Hunt*, the Supreme Court refined and articulated a three-part test for associational standing.¹³⁷ For purposes of this Comment, I assume that the second portion of the test, requiring germaneness to the organization's purpose, is not at issue. No challenger to P&A associational standing has attempted to argue that the issue at the center of the litigation is not sufficiently germane to the association's purpose. I also assume that the P&A in question is able to identify a disabled individual within the state who would have standing to sue if not represented by the P&A. Thus, my inquiry is, first, whether individuals with disabilities are *members*, or sufficiently similar to members, of P&As for purposes of constitutional standing, and second, whether Congress has effectively abrogated prudential barriers to granting associational standing. This inquiry splits into constitutional and prudential components. First, the question is whether P&As have sufficient ties to individuals with disabilities such that a lawsuit brought on behalf of one of those individuals will satisfy Article III. If so, a second question emerges: whether persuasive reasons exist for federal courts to create an exception to the prudential rule that no one may sue on behalf of another individual.

A. *The Irreducible Minimum: P&As as Zealous
Litigants of Their Constituents' Claims*

The Supreme Court has recognized that, at least in some cases, organizations are better positioned to fight for their members' rights than the members themselves:

While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. . . . “[T]he interest and expertise of [an organization], when exerted on behalf of its directly affected members,

¹³⁶ See *supra* text accompanying notes 22-26.

¹³⁷ See *supra* text accompanying note 75.

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”¹³⁸

Numerous commentators have agreed with this characterization of the advantages of organizational litigation.¹³⁹ Some have even suggested that organizations perform the function of weeding out frivolous lawsuits by requiring the support of multiple actors.¹⁴⁰

So are individuals with disabilities constitutional “members” of P&As? Here, the focus of the Eleventh and Ninth Circuits in *Stincer* and *Mink* becomes relevant. The placement of individuals with disabilities on governing boards and advisory councils, the opportunity for public comment, and the availability of complaint and appeal processes all indicate that P&As are statutorily designed to respond to the needs of individuals with disabilities. There are clear differences between the structure of P&As and the structure of organizations previously granted associational standing under *Hunt*. Some courts have signaled their awareness of these differences by designating individuals with disabilities as “constituents” or “clients” of P&As rather than “members.”¹⁴¹ It would be disingenuous to argue that there are not differences between the Commission in *Hunt* and P&As. The direct power to elect a governing board¹⁴² and the financial nexus between members and an organization¹⁴³ have been highlighted as strong indicators that a group is sufficiently under the control of its members to “stand[] in their shoes in the courtroom.”¹⁴⁴ Despite these differences

¹³⁸ *UAW v. Brock*, 477 U.S. 274, 289 (1986) (quoting *Harlem Valley Transp. Ass’n v. Stafford*, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973) (internal quotation marks omitted)).

¹³⁹ *See, e.g., Gronemeier, supra* note 95, at 669 (“Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack.”); Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723, 734 (1976) (“[O]rganizations with specialized purposes and experience in a given and frequently unfamiliar subject area would seem to meet the need for the sharp presentation of issues which the Court has said is the ‘gist’ of standing.”).

¹⁴⁰ *See, e.g., Orren, supra* note 139, at 734 (“[O]rganizational plaintiffs perform a valuable judicial function. If judges must distinguish genuine concern . . . from a bad faith or spurious suit, membership in a recognized organization is one indicator.”).

¹⁴¹ *See, e.g., Ass’n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994) (finding that Advocacy, Inc. did not satisfy the first prong of the associational standing test because the individual on whose behalf the organization sued was not a “member,” but rather a “client,” of the organization).

¹⁴² *See Hunt*, 432 U.S. at 344.

¹⁴³ *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958).

¹⁴⁴ *See Gronemeier, supra* note 95, at 663.

between the Commission and P&As, P&As are sufficiently structurally responsive to individuals with disabilities to meet the minimum constitutional requirements, and their “constituents” or “clients” are constitutional “members” for purposes of the associational standing analysis.

As discussed in Part II, P&As are statutorily constructed to be responsive to the population that they are charged with serving. Whether operating within or without the state government’s structure, P&As must have a governing board or advisory council where a majority (under PADD) or sixty percent (under PAIMI) of the members are individuals with current or former disabilities or mental illness, or family members, guardians, advocates, or authorized representatives of those individuals.¹⁴⁵ In addition, the public must be given the opportunity to comment on all decisions made by the governing authority and council, and procedures for public comment must be provided “in a format accessible” to individuals with disabilities or mental illness.¹⁴⁶ P&As must also establish formal grievance procedures to ensure full access to the system.¹⁴⁷ While some individuals with disabilities could participate fully in a traditionally structured membership organization by voting or contributing money, many of the people whom P&As are charged with serving are “not capable of functioning as typical and traditional members of an organization.”¹⁴⁸ In drafting PADD and PAIMI, Congress sought to structure P&As in a way that would make them responsive to the particular needs of the disability community. The presence of individuals with disabilities, along with their family members, on boards and advisory councils, combined with mechanisms for public comment and the airing of grievances, provides a set of safeguards designed to keep P&As’ fingers on the pulse of the needs of a community composed of often difficult-to-reach individuals.

Analyzing the structure of an organization is only one part of a broader inquiry designed to evaluate the “pressures on an organization to pursue its members’ interests. Those pressures include the advantages to the organization of successful representation [and] the threat to the organization’s survival from inadequate or unsuccessful representation”¹⁴⁹ In addition to membership pressures, organi-

¹⁴⁵ 42 U.S.C. § 15044(a)(1)(B), 5(B) (2000); *id.* § 10805(a)(6)(B).

¹⁴⁶ 42 C.F.R. § 51.24(a)–(b) (2007); *see also* 45 C.F.R. § 1386.31(a) (2007).

¹⁴⁷ 42 U.S.C. § 15043(a)(2)(E); 42 C.F.R. § 51.25.

¹⁴⁸ Brief of Appellant Advocacy, Inc., *supra* note 107, at 14.

¹⁴⁹ Gronemeier, *supra* note 95, at 668-69.

zations are also subject to external pressures that will affect future funding (by either donation or legislative appropriation) and other forms of support.¹⁵⁰ Granting associational standing to organizations like the NAACP, the ACLU, and the Sierra Club is premised partly on the idea that members can vote with their wallets. There is no reason to believe financial pressures do not apply to P&As, if to a lesser degree. A P&A's failure to represent effectively the interests of individuals with disabilities could result in a reduction in private donations¹⁵¹ or, more dramatically, in a state's decision to contract with another nonprofit or in a reduction in federal funding.¹⁵²

¹⁵⁰ See *id.* at 669 (noting the strong "publicity value" inherent in an organization's participation in a lawsuit as the named plaintiff).

¹⁵¹ The amount of private donations, or "direct public support," that P&As receive varies widely, but it is consistently small when compared to the government funding that a P&A receives. For instance, Disability Rights Oregon (at the time, the Oregon Advocacy Center) received \$140,744 in direct public support in 2005, compared to \$1,571,498 in government funding. See Or. Advocacy Ctr., Return of Organization Exempt from Income Tax (Form 990), at 1 (May 3, 2007). By contrast, Advocacy, Inc., of Texas, received \$124,834 in direct public support in 2005, compared to \$8,403,696 in government funding. See Advocacy, Inc., Return of Organization Exempt from Income Tax (Form 990), at 1 (Feb. 21, 2007).

¹⁵² While the majority of P&As are nonprofits that contract with states, some are independent administrative state agencies. An interesting line of argument for those P&As that remain part of the state government emerges from the Supreme Court's recent opinion in *Massachusetts v. EPA*, which holds that states are entitled to "special solicitude" when asserting claims in defense of their sovereign interests. 127 S. Ct. 1438, 1454-55 (2007). While a full exploration of this possibility is outside the scope of this Comment, it is important to note that conceiving of P&As as state entities quickly creates constitutional problems with the statutory grants of authority under PADD, PAIMI, and PAIR. At least one defendant has unsuccessfully raised Fourth Amendment search-and-seizure arguments to block a P&A from using its statutory grant of power to access psychiatric medical institution residents. See *Iowa Prot. & Advocacy Servs., Inc. v. Tanager Place*, No. 04-0069, 2004 WL 2270002, at *14-16 (N.D. Iowa Sept. 30, 2004) (rejecting the defendant's argument by reasoning that the Fourth Amendment was not applicable because the P&A was not an instrument or agent of the government). On appeal, the Eighth Circuit never reached the issue because the case became moot. *Iowa Prot. & Advocacy Servs. v. Tanager, Inc.*, 427 F.3d 541, 543 (8th Cir. 2005). Because presumptive access rights are so central to the P&A statutory scheme, courts have interpreted the statutory scheme as creating P&As that are not state actors—and therefore not restricted by the Fourth Amendment—regardless of their location inside or outside state government, thus avoiding a constitutionally problematic reading of the P&As' enabling statutes. See Brief of Nat'l Ass'n of Prot. & Advocacy Sys., Inc. et al. as Amici Curiae in Support of Plaintiff-Appellee Urging Affirmance at 15-17, *Tanager, Inc.*, 427 F.3d 541 (No. 04-4074), 2005 WL 5628194 (listing the numerous situations in which courts have upheld P&As' access authority without requiring warrants, implicitly drawing a distinction between P&As and government authorities, which are subject to Fourth Amendment prohibitions). This is consistent with the longstanding interpretive canon of avoidance. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question,

The status of P&As as statutorily created entities is also relevant under *Hunt*. The Advertising Commission was statutorily charged with promoting the Washington apple industry.¹⁵³ While technically a state agency, the Commission “serve[d] a specialized segment of the State’s economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.”¹⁵⁴ Similarly, P&As are created by statute to serve a “specialized segment” of the population—individuals with disabilities—and that segment is the “primary beneficiary” of their activities.¹⁵⁵ Individuals with disabilities do not choose to join P&As, but neither did apple growers in Washington choose to join the Advertising Commission; in both cases, a statute created an organization that automatically represented the group’s interests. It is absolutely clear under *Hunt* that the fact that individuals with disabilities do not *choose* to join the P&A, but rather are “automatic” constituents, is not dispositive.

In *Hunt*, the Court rejected a formalistic application of the definition of “membership organization,” opting instead to analyze the structure of the Advertising Commission. Each of the “indicia” that the Court highlighted demonstrated that the entire structure of the Commission was designed to tie it to the apple growers. Many of these indicia could not be realistically applied to individuals with disabilities. Requiring individuals with disabilities to pay dues, like the members of the Commission, makes little sense when the organized population is not an economic entity. Similarly, tying all membership changes to a vote by the disability community would be administratively difficult given the size of the constituency and a challenge given the cognitive barriers faced by many of its members. Nevertheless, while P&As do not have the exact same indicia of membership as the Commission, they are statutorily structured to respond to the needs of individuals

and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

¹⁵³ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 336-37 (1977).

¹⁵⁴ *Id.* at 344.

¹⁵⁵ See 42 U.S.C. § 10801(b) (2000) (“The purposes of [PAIMI] are—(1) to ensure that the rights of individuals with mental illness are protected; and (2) to assist states to establish and operate a protection and advocacy system for individuals with mental illness which will—(A) protect and advocate for the rights of such individuals . . . and (B) investigate incidents of abuse and neglect . . .”); *id.* § 15041 (“The purpose of [PADD] is to provide for allotments to support a protection and advocacy system . . . in each State to protect the legal and human rights of individuals with developmental disabilities . . .”).

with disabilities, and they possess their own indicia of membership appropriate to the constituency they serve. Like the Commission, P&As exist only because the legislature (in this case, federal rather than state) perceived a need for an entity that would advocate on behalf of a certain group,¹⁵⁶ and, as was true of the Commission, there are procedural safeguards and social pressures in place that ensure P&As are tightly connected to their members' needs.

The connection between P&As and the interests of individuals with disabilities is sufficient to satisfy the portion of the associational standing test that constitutes an "irreducible minimum" Article III requirement. Congress has structurally provided individuals with disabilities a means of voicing their grievances: they have a right to an appeals process, and P&As are politically and financially affected by the level of representation that they provide to those for whom they litigate. P&As will still have to identify specific individuals who have been harmed and also demonstrate causation and redressability; those individuals will just be relieved of the obligation to join the lawsuit as plaintiffs. Relief from that obligation is often vital to zealous litigation, as the pressures on individuals with disabilities not to speak out against rights violations can be significant. As discussed in the next Section, Congress wisely recognized these pressures and took them into consideration in abrogating all prudential barriers to associational standing for P&As.

B. *The Abrogation of Prudential Barriers: The Role of Congress*

Congress clearly cannot abrogate the limitations of Article III. However, its judgment that a certain segment of the population needs special protection and advocacy should certainly be taken into consideration when courts decide how to apply the prudential¹⁵⁷ portions of

¹⁵⁶ See *id.* § 10801(a) ("The Congress finds that—(1) individuals with mental illness are vulnerable to abuse and serious injury; . . . (3) individuals with mental illness are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and (4) State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate."). In the case of P&As, this statutorily approved advocacy explicitly includes the power to litigate. See *supra* notes 48-52 and accompanying text.

¹⁵⁷ The term "prudential" is typically used in this context to describe the circumscription of the standing doctrine in a judicial attempt to bar the number of cases brought before the federal courts. See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) (holding that the third prong of the associational standing test is prudential in that it is "best seen as focusing on . . .

the standing doctrine. The Supreme Court has clearly stated that where the part of the standing inquiry at issue is *prudential* rather than *constitutional* (that is, where the Article III minimum has been satisfied), Congress can abrogate these prudential barriers to standing.¹⁵⁸ In *Oregon Advocacy Center v. Mink*, the Ninth Circuit cited *United Food & Commercial Workers Union v. Brown Group* for the principle that while “the Constitution constrains Congress’ ability to confer standing, Congress can confer standing where the only obstacles are ‘judicially fashioned and prudentially imposed.’”¹⁵⁹ The court went on to hold that the third prong of the *Hunt* associational standing test—the requirement that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit”¹⁶⁰—is a prudential, not a constitutional, requirement, and as such could be abrogated by Congress.¹⁶¹ The Ninth Circuit then concluded that

matters of administrative convenience and efficiency”). Consequently, the term “prudential” typically is tied to judicial efforts to avoid “flood-of-litigation” concerns. While I use “prudential” in this narrow sense, some have argued that “prudential” ought to be understood as describing a concern for guarding against all “losses that qualify as disastrous.” See Edward F. McClennen, *Prudence and Constitutional Rights*, 63 AM. J. ECON. & SOC. 213, 214-16 (2004) (arguing that preventing future losses is as much a part of prudential decision making as saving current costs or shoring up gains). Understood this way, prudential decisions must take into account all relevant costs and benefits; certainly the risk of a flood of litigation will be part of the calculus, but so will the risk of societal harm if access to the courts is denied.

¹⁵⁸ See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (“Congress may, by legislation, expand standing to the full extent permitted by Art[icle] III, thus permitting litigation by one who otherwise would be barred by prudential standing rules.” (internal quotation marks omitted)); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (holding that the language of the Fair Housing Act, 42 U.S.C. § 3610(a), manifests Congress’s intent to “define standing as broadly as is permitted by Article III”); see also Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 AKRON L. REV. 613, 615 (2001) (noting that the Supreme Court in *Trafficante* recognized Congress’s power to eliminate all prudential barriers to standing, leaving only the Article III minimum); Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 556-61 (1995) (discussing *Gladstone*, *Trafficante*, and the elimination of prudential standing requirements).

¹⁵⁹ *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003) (citing *United Food & Commercial Workers Union*, 517 U.S. at 551, 558).

¹⁶⁰ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

¹⁶¹ *Mink*, 322 F.3d at 1113; see also, e.g., *Joseph S. v. Hogan*, No. 06-1042, 2008 WL 2403698, at *21 (E.D.N.Y. May 23, 2008) (holding that the organizations in question had associational standing “without regard to whether they meet *Hunt*’s third prong”); *Haw. Disability Rights Ctr. v. Cheung*, 513 F. Supp. 2d 1185, 1193 (D. Haw. 2007) (“Congress’s intent to permit a private right of action under a statute . . . could trump a court’s standing determination if made according to the prudential standing rule”); *Access 4 All, Inc. v. Trump Int’l Hotel & Tower Condominium*, 458 F. Supp. 2d 160, 171-72 (S.D.N.Y. 2006) (“The third prong of the *Hunt* test is not a con-

“Congress clearly intended to confer standing” on P&As under PAIMI, and analogized the language of PAIMI to that of the statute at issue in *United Food*, finding that the similarities between the two laws supported the conclusion that Congress had effectively abrogated all prudential barriers to associational standing for P&As in enacting PAIMI.¹⁶²

The protection and advocacy system is not the only place where Congress has responded to a need for special advocate status. Under the Fair Housing Act, Congress has made federal funds available for nonprofits designated “fair housing organizations” through the Fair Housing Initiatives program.¹⁶³ The governing statute authorizes fair housing organizations to “obtain enforcement of the rights granted by title VIII [of the Civil Rights Act] . . . through such appropriate judicial or administrative proceedings . . . as are available.”¹⁶⁴ In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, the Northern District of Ohio upheld a fair housing organization’s standing in a “representative capacity.”¹⁶⁵ In *Buckeye*, two mothers of young children challenged the City of Cuyahoga’s decision to block construction of

stitutional requirement, but a matter for prudential consideration.”). Over the course of several decades, the Court has disentangled the three pieces of the associational standing test, indicating which are constitutional and which are prudential. The first requirement of associational standing—that at least one of the organization’s members would have standing to sue in her own right—was the first to be clearly defined as a constitutional requirement. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The Court noted in *United Food & Commercial Workers Union* that, aside from the *Warth* holding regarding the first prong of the *Hunt* test, standing jurisprudence had not “clearly disentangled the constitutional from the prudential strands of the associational standing test.” 517 U.S. 544, 555 (1996). The Court went on to conclude that “[r]esort to general principles . . . leads us to say that the associational standing test’s third prong is a prudential one.” *Id.* This left as uncategorized the second associational standing requirement: that the claim be germane to the organization’s purpose. The court noted that this requirement is,

at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member’s claim raises an assurance that the association’s litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant’s natural adversary.

Id. at 555-56. Thus, the Court has indicated that while the first and second prongs of the associational standing test form part of the Article III minimum requirements—serving to ensure a tight connection between an organization and its members—the third prong can be eliminated through congressional action.

¹⁶² *Mink*, 322 F.3d at 1113.

¹⁶³ The Fair Housing Initiatives Program is codified at 42 U.S.C. § 3616a (2000); its accompanying regulations are codified at 24 C.F.R. pt. 125 (2008).

¹⁶⁴ 42 U.S.C. § 3616a(a)(1).

¹⁶⁵ 970 F. Supp. 1289, 1305-06 (N.D. Ohio 1997).

an apartment complex in which they likely would have been eligible for subsidized housing.¹⁶⁶ The local fair housing organization, Fair Housing Contract Service, sued on behalf of the women for injunctive relief.¹⁶⁷ Despite the relatively loose connection between the women and Fair Housing Contract Service,¹⁶⁸ the court determined the women were proper “members” of the organization for the purposes of associational standing.¹⁶⁹ While the Supreme Court has not ruled directly on the associational standing of fair housing organizations under the FHA, in 1982, the Court found that such an agency had organizational standing in *Havens Realty Corp. v. Coleman*.¹⁷⁰ The agency in question, Housing Opportunities Made Equal (HOME), had suggested in its brief that the Court did not need to rule on the question of associational standing and could instead decide only that HOME had standing to sue in its own right based on diversion of organizational funds.¹⁷¹ The Court agreed,¹⁷² and perhaps for this reason, no circuit courts of appeals have ruled on the question of whether fair housing organizations have associational standing to sue; the organizations instead bring claims via organizational standing. Still, strong parallels exist between the creation of fair housing organizations under the FHA and the creation of P&As under PADD and PAIMI, and the reasoning employed by the court in *Buckeye* supports the conclusions of the Eleventh and Ninth Circuits.

Similarly, the Equal Employment Opportunity Commission (EEOC) has standing to intervene in any qualifying civil action brought by an aggrieved party against a nongovernmental employer.¹⁷³ In *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, the Supreme Court referred to Con-

¹⁶⁶ *Id.* at 1305.

¹⁶⁷ *Id.* at 1304-05.

¹⁶⁸ Both had voluntarily become members, but one testified that she “did not have to pay any dues [and did] not receive any of the newsletters,” and characterized her contact with the organization as “not a lot.” *Id.* at 1305.

¹⁶⁹ *Id.*

¹⁷⁰ 455 U.S. 363, 378 (1982).

¹⁷¹ *Id.* at 379.

¹⁷² *Id.* at 378-79.

¹⁷³ 42 U.S.C. § 2000e-4(g)(6) (2000). Admittedly, this is an imperfect analogy. The EEOC is a federal agency with standing to bring lawsuits directly on behalf of the federal government. It does, however, provide another example of a congressional response to a situation where the typical citizen-as-plaintiff model would provide insufficient enforcement of individual rights.

gress's explicit grant of standing to the EEOC.¹⁷⁴ In *Newport News*, the Court mentioned the EEOC in a list of government agencies that have standing to intervene in certain civil actions based on clear statutory language.¹⁷⁵ While agencies "normally do not have standing," the Court affirmed Congress's ability to grant that standing by "say[ing] so."¹⁷⁶ While there are clear differences between the EEOC and P&As—and between standing to sue and standing to intervene—both are statutorily created organizations with the power to advocate on behalf of aggrieved individuals. Congress has clearly "said so" when it comes to P&A associational standing.

Both housing and employment discrimination are particularly sticky issues for individual plaintiffs to tackle. Victims are frequently poor, with little knowledge of the law, and the resources of an organization are often required to ascertain the existence of sufficient evidentiary patterns. Like the EEOC and the fair housing organizations, P&As are provided with federal funding to address the particular plight of a vulnerable group faced with an unwieldy and pervasive problem. While Congress cannot statutorily circumvent the requirements of Article III, its judgment that a certain group needs an organized advocate with access to the courts ought to be respected so long as that advocating organization is structured and actually functions in a way that ensures the responsiveness and stake in the controversy prized by the *Hunt* indicia-of-membership test.

P&As clearly can provide legal assistance to individuals with disabilities who wish to become plaintiffs in suits to remedy rights violations. The fact that this route to relief is available does not, however, eliminate the real need for P&A associational standing. P&As, like other organizations, have the "pre-existing reservoir of expertise and capital" that the Supreme Court has referred to in upholding associational standing.¹⁷⁷ In this way, P&As are like unions, trade associations, and nonprofit membership corporations—they provide the benefits of combined resources and prior experience, while allowing the injured individual to escape the burden of being the named plaintiff in the litigation. But in the case of P&As, there is another reason to grant associational standing: individuals with disabilities, especially those in residential facilities, are especially unlikely to challenge viola-

¹⁷⁴ 514 U.S. 122, 130 (1995).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 129.

¹⁷⁷ *UAW v. Brock*, 477 U.S. 274, 289 (1986).

tions of their rights. They are in the uncomfortable position of deciding whether to sue the organization that cares for them each day. Understandably, even when serious rights violations have taken place, victims and their families may be reluctant to go on the offensive against such an organization. Adding to this pressure, individuals with disabilities may have difficulty understanding that their rights have been violated in the first place. A P&A with associational standing can carry the would-be plaintiff's burden by representing the interests of the individual in court without requiring her to stand up and personally accuse her caretakers. Even when an individual with disabilities or that person's family opposes litigation outright, P&As' special access rights to records, facilities, and individuals may, under many circumstances, allow them to demonstrate concrete injury to individuals with disabilities. Such a demonstration may occur even where the injured individuals are reluctant to join affirmatively in the litigation or authorize its progress.

This is the thorniest piece of the normative debate about allowing a prudential exception for P&A associational standing. It is always controversial to say that an organization can represent an individual's interests better than she can represent her own. In the United States, there is a strong resistance to paternalism.¹⁷⁸ For this reason, notwithstanding the Supreme Court's clear grant of associational standing to compulsory-membership organizations such as unions, some have suggested that *voluntary* membership is the key to associational standing.¹⁷⁹ Yet under *Hunt*, voluntary membership is not at the heart of associational standing. In the case of individuals with disabilities, there are particularly compelling reasons not to require consent to litigation. Both sides of the consent controversy are persuasive.¹⁸⁰

¹⁷⁸ Public health and safety issues provide evidence of this resistance. See, e.g., David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 372 (2007) ("Republicans' apparent resistance to government action on this issue illustrates a broader aversion to the paternalistic tendencies of the public-health community."); cf. Elizabeth Cooper, *Social Risk and the Transformation of Public Health Law: Lessons from the Plague Years*, 86 IOWA L. REV. 869, 890 n.90, (2001) (noting the difficulties that governments have encountered in attempting to require individuals to wear motorcycle helmets or cut back on smoking).

¹⁷⁹ See generally Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310-15 (1979) (presenting a self-determination approach to standing that argues that "persons should not be able to assert the rights of others *even assuming* they are good representatives").

¹⁸⁰ For a contemporary illustration, consider *Ricci v. Okin*, currently before the federal district court in Massachusetts. No. 72-0469 (D. Mass.). In 1993, a court ter-

Those who argue that P&As should not be able to sue “on behalf of” individuals with disabilities without the consent of those individuals or their families correctly note that, for years, the states’ power to make decisions on behalf of individuals with disabilities landed them in the squalor of places like Willowbrook. However, to require affirmative consent in all situations, either from individuals or from their parents or guardians, also represents a value choice—one that may ignore the complex power dynamics in a given situation.¹⁸¹ Congress’s passage of PADD, PAIMI, and PAIR reflects the reality that individuals with disabilities are a unique population. These individuals face major cognitive and social barriers to effective self-advocacy. As one court noted in striking down limitations on P&A access to individuals with disabilities, the mentally ill are a uniquely vulnerable population:

minated twenty-one years of federal court oversight of mental health institutions in the state. *Ricci v. Okin*, 823 F. Supp. 984, 985 (D. Mass. 1993). The order terminating oversight stipulated that the state would not approve “a transfer of any class member . . . into the community” without “certifi[cation] that the individual . . . will receive *equal or better services* to meet their needs in the new location.” *Id.* at 987 (emphasis added). In 2003, the Commonwealth of Massachusetts attempted to close six mental health facilities and transition the residents of those facilities into the community. *Cf.* Amicus Brief in Response to Report of Court-Appointed Monitor at 2, *Ricci v. Okin*, 499 F. Supp. 2d 89 (D. Mass. 2007) (No. 72-0469) (showing the support of amici disability-rights groups for transitioning residents into “community-based settings”). The push to close the facilities set off a storm of controversy in the disabilities world, pitting families against national disability-rights groups. Families argued that consent should be required before transfer—consent that often comes via family members because the individual in question cannot speak or write. *See, e.g.*, Emily Sweeney, *Test of Wills at Fernald: Families Refusing to Let Patients Move*, BOSTON GLOBE, Jan. 12, 2006, at A1. A coalition of national disability-rights groups responded that individuals with disabilities, in the end, gain more autonomy when the state is allowed to override consent and close down outdated, large facilities in favor of community integration. *See* Amicus Brief in Response to Report of Court-Appointed Monitor, *supra*, at 19 (arguing that the shift “from institutional settings to community-based settings . . . has had a profoundly positive impact on the lives of . . . people with intellectual disabilities”).

¹⁸¹ The complexity of the dilemma is highlighted by the Administration on Developmental Disabilities’ recent proposed amendments to PADD regulations. Developmental Disabilities Program, 73 Fed. Reg. 19,708 (proposed Apr. 10, 2008) (to be codified at 45 C.F.R. pts. 1385–1388). The proposed amendments included an invitation for public comment on whether P&As must obtain consent of the parent or guardian where an individual P&A constituent wishes to participate in a class action. *Id.* at 19,709. In their comments to the regulations, the National Disability Rights Network opposed any consent requirement, arguing that the proposal of such a requirement fundamentally misunderstands the nature and purpose of class actions. *See* Letter from Curtis L. Decker, Executive Dir., Nat’l Disability Rights Network, to Patricia A. Morrissey, Comm’r, Admin. on Developmental Disabilities, Admin. for Children and Families, *supra* note 7, at 38-39 (contesting the Administration on Developmental Disabilities’ statement that informed consent is a “cornerstone” of class action suits).

The mentally ill are vulnerable to abuse and neglect because many mentally ill individuals have difficulty recognizing the concept that they have rights and will not necessarily identify even the most egregious abuse as a violation of their rights

. . . .

Furthermore, residents who are willing to initiate such a call are apt to be deterred if facilities for making a private call are not available or if the nature of the call must be revealed to the institution's staff in order to gain access to a private phone. Many institutionalized residents are reluctant or afraid to take actions that might incur the displeasure of staff who control nearly every aspect of their daily life.¹⁸²

Any analysis of the "big picture" importance of P&As' rights and responsibilities must be undertaken with the knowledge that the DD Act was passed in the shadow of Willowbrook.¹⁸³ People with disabilities have been the victims of pervasive and systemic discrimination resulting in horrific treatment.¹⁸⁴ For decades, this country's policy for dealing with disability and mental illness was segregation or institutionalization far from the public eye.¹⁸⁵ Inside these institutions, human beings were abused, neglected, and experimented upon.¹⁸⁶ This isolation was exacerbated by the courts' unwillingness to respond to the harms to those affected:

In 1927, the U.S. Supreme Court upheld the forced sterilization of a woman whose mother and daughter were both mentally retarded. People with mental disabilities were, the Court said, a "menace" who "sap the strength of the state." Society would be wise to "prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough."¹⁸⁷

¹⁸² Robbins v. Budke, 739 F. Supp. 1479, 1486 (D.N.M. 1990).

¹⁸³ See Nat'l Disabilities Rights Network—History, <http://www.ndrn.org/aboutus/history.htm> (last visited Oct. 1, 2008) ("The Protection and Advocacy concept was initially triggered by . . . investigative reporting [that] exposed abuse, neglect and lack of programming at Willowbrook"); *supra* text accompanying notes 22-26.

¹⁸⁴ See generally ACLU, Disability Rights—ACLU Position/Briefing Paper (Jan. 1, 1999), <http://www.aclu.org/disability/gen/10648pub19990101.html>. Recognition of this tragic history is not new. See RICHARD C. ALLEN, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED 2-3 (1969) (recognizing the "catalog of horrors" that is characteristic of the mistreatment of individuals with disabilities).

¹⁸⁵ For example, Hawaii's leper colonies were maintained into the 1950s. See ACLU, *supra* note 184.

¹⁸⁶ See Bowman, *supra* note 22, at 959 (describing witness accounts of residents at Willowbrook being beaten and purposely exposed to hepatitis).

¹⁸⁷ ACLU, *supra* note 184 (quoting Buck v. Bell, 274 U.S. 200, 206-07 (1927)).

Responding to this history, PAIMI begins with congressional findings that “individuals with mental illness are vulnerable to abuse and serious injury . . . [and] are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning.”¹⁸⁸ These conditions may be particularly difficult to discover if residents feel pressure not to speak out.

It is difficult to gauge the effect of institutional pressures on individuals in residential situations because the more effective the pressure, the fewer complaints will be heard. Scientific studies in a variety of settings demonstrate, however, that residential settings often systematically discourage dissent and that reluctance to challenge a practice does not necessarily indicate acquiescence.¹⁸⁹ One such study also indicates that “the longer [individuals have been] in a care home, the less likely they [are] to complain.”¹⁹⁰

The autonomy-consent problem has been hotly debated in the disability world, where advocates must balance the development of programs that act on behalf of individuals with disabilities against the dangers of paternalism.¹⁹¹ This is an important issue, and I do not wish to imply otherwise. In this case, however, the risk of harm in the form of unaddressed rights violations if consent is required outweighs the risk of paternalistic abuse by P&As. At the very least, there is strong evidence that the failure of individuals with disabilities willingly to become plaintiffs in a lawsuit does not mean that rights violations are not taking place. Whatever else the standing requirement is de-

¹⁸⁸ 42 U.S.C. § 10801(a)(1), (3) (2000).

¹⁸⁹ See, e.g., Stephen Abbott et al., *Social and Democratic Participation in Residential Settings for Older People: Realities and Aspirations*, 20 *AGEING & SOC'Y* 327, 335-36 (2000) (documenting the general feeling of elderly residents of a nursing home that they could not complain to staff about conditions); Mordecai Arieli, *Knowledge and Educational Contexts: Some Intercultural and Intergenerational Notes*, 29 *CHILD & YOUTH CARE F.* 153, 154 (2000) (reporting that a previous study found that in residential school settings, students who avoid challenging what they are taught are more likely to be academically successful); Michael Preston-Shoot, *A Triumph of Hope over Experience? Modernizing Accountability: The Case of Complaints Procedures in Community Care*, 35 *SOC. POL'Y & ADMIN.* 701, 701-02 (2001) (acknowledging that while complaint procedures are a key part of fighting abuse in homes for children, the elderly, and individuals with disabilities, such procedures are often unsatisfactory in uncovering problems because they fail to shift the fundamental organizational-individual balance of power in a significant way).

¹⁹⁰ Preston-Shoot, *supra* note 189, at 703.

¹⁹¹ See, e.g., D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 *SANTA CLARA L. REV.* 55, 56-57 (2003) (criticizing legislation, ostensibly for the protection of individuals with disabilities, allowing employers to fire those individuals from dangerous jobs for their own safety).

signed to do, it should not prevent legitimate rights violations from being remedied in court. The pressure not to speak up in residential settings is well documented and understandably powerful. Procedural safeguards designed to give individuals with disabilities a voice in P&As' activities are vital, but hinging all litigation on a consenting individual plaintiff may lead us back down the path to Willowbrook. Individuals with disabilities need advocates. P&As were created to serve as those advocates, and it is important that they be allowed to speak for their constituents in court.

The fact that Congress has squarely faced this difficult issue in creating statutorily authorized, federally funded advocates connects to the separation-of-powers values that the standing doctrine is designed to protect.¹⁹² Congress, not the courts, is the expert on making policy determinations by weighing evidence.¹⁹³ So long as the minimum constitutional requirements are met, Congress's decision to vest P&As with the authority to sue on behalf of members with disabilities is entitled to deference.

The statutory language granting P&As the right to sue on behalf of their members is very specific. PADD and PAIMI explicitly authorize P&As to pursue legal remedies on behalf of their members.¹⁹⁴ In *Trafficante v. Metropolitan Life Insurance Co.*, the Court found "broad and inclusive" language in the Fair Housing Act to be sufficient to abrogate prudential standing requirements and noted that the Act granted standing to sue to anyone in an apartment complex where a person had been the object of discriminatory housing practices.¹⁹⁵ Congressional intent to grant P&As the ability to sue on behalf of individuals with disabilities under PADD and PAIMI is just as clear as the intent to allow any resident of an apartment complex where housing discrimination is a problem to sue. Under the plain language of

¹⁹² See *supra* Part II.

¹⁹³ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (noting that certain policy issues are best resolved by Congress and are not amenable to judicial resolution); *cf. Turner Broad. Sys., Inc. v. FCC.*, 520 U.S. 180, 199 (1997) ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference . . . to Congress' findings . . .").

¹⁹⁴ 42 U.S.C. §§ 10805(a)(1), 15043(a)(2)(A)(i) (2000).

¹⁹⁵ See 409 U.S. 205, 208-09 (1972) ("The definition of 'person aggrieved' contained in [the statute] is in terms broad, as it is defined as '(a)ny person who claims to have been injured by a discriminatory housing practice.'" (quoting Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(a), 82 Stat. 73, 85 (codified at 42 U.S.C. § 3602(i) (2000)))).

PADD and PAIMI, the third prong of the associational standing test has been eliminated for P&As.

CONCLUSION

Hunt rejected a formalistic application of the test for associational standing in favor of a substantive inquiry into both the relationship between the organization and its members and the individual and societal values served by granting that organization standing. Overly formalistic application can yield unjust results, as the Court reminded us in *Hunt*.¹⁹⁶ Formalistic application of rules should always be followed by consideration of the meaning underlying constitutional provisions.

The four courts of appeals to address the issue each undertook the first and most important piece of the associational standing analysis, asking whether the connection between individuals with disabilities and P&As is sufficient to ensure the kind of zealous litigation constitutionally required by Article III's "case" or "controversy" language. The Ninth Circuit in particular explored the procedural safeguards in place to hold P&As accountable to individuals with disabilities in the state. But when the inquiry is limited to plugging new pieces of information into the *Hunt* fact pattern, it is difficult to know how the analysis ought to come out. A cursory analysis of the problem under *Hunt*'s indicia-of-membership test yields inconsistent results because *Hunt* does not tell us which indicia are mandatory or how to weigh the indicia against one another.

The *Hunt* test should be viewed as part of an analysis designed to get at the twin underlying goals of standing: first, that disputes before the federal courts will be between parties with real interests at stake and so will be genuine Article III cases or controversies, and second, that associational standing is granted where the application of typical prudential limitations runs the risk that true rights violations will go unaddressed. The Supreme Court has recognized that organizations ought to be able to sue on behalf of their members. Numerous politi-

¹⁹⁶ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343-44 (1977); *see also* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (contending that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"). *See generally* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1713 (2005) (arguing that the Court itself sometimes confuses "decision rules" with the actual meaning of the Constitution).

cal and procedural safeguards ensure P&As will zealously represent the interests of their constituents. Congress has affirmatively stepped in to abrogate all prudential barriers to P&A standing. In addition, denying P&As the right to litigate on behalf of these constituents creates a very real danger that rights violations will persist unchecked. P&As are precisely the sort of organization that ought to qualify for associational standing.