
Oral Argument Scheduled for February 24, 2010

No. 08-3183

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

INDIANA PROTECTION AND ADVOCACY SERVICES

Plaintiff - Appellee

v.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, in her official capacity as Secretary of the Family and Social Services Administration; GINA ECKART, in her official capacity as Director of the Division of Mental Health and Addiction; LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital

Defendants - Appellants

On Appeal From The United States District Court
For The Southern District of Indiana (Indianapolis Division)
In Civil Action 1:06-cv-01816

EN BANC BRIEF OF PLAINTIFF-APPELLEE

Debra J. Dial
Karen Davis
Indiana Protection and Advocacy Services
4701 N. Keystone Avenue, Suite 222
Indianapolis, IN 46205
(317) 722-5555

Seth M. Galanter
Brian R. Matsui
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington DC 20006
(202) 887-6947

January 14, 2010

CORPORATE DISCLOSURE STATEMENT

1. Indiana Protection and Advocacy Services is a governmental entity and thus does not need to comply with the disclosure requirements of Federal Rule of Appellate Procedure 26.1.

2. The private law firm of Morrison & Foerster LLP is appearing for the first time at the *en banc* stage of the Seventh Circuit proceedings for plaintiff Indiana Protection and Advocacy Services.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	4
A. Statutory Framework	4
1. Federal Statutes.	4
a. Establishment of Protection and Advocacy Systems.	4
b. Right of access to records.	7
2. Federal Regulations.....	10
3. Indiana Law.....	12
a. Establishment of Protection and Advocacy System.	12
b. Peer review records.....	15
B. Factual Background	16
1. Mortality Review Committee And Root Cause Analysis Reports.	16
2. Medical Records/Complete Chart.....	17
3. Investigation Report.....	18
4. Incident Report.....	19
SUMMARY OF ARGUMENT	20

ARGUMENT24

I. The Eleventh Amendment Is No Bar To This Action.....24

 A. The Defendants Forfeited Or Waived Any Eleventh Amendment Defense By Failing To Raise It In The District Court And Instead Litigating The Case On The Merits24

 B. This Action Against The State Officials Falls Squarely Within The Scope Of *Ex parte Young*, Which Permits Suits Against State Officials For Prospective Relief To Remedy An Ongoing Violation Of Federal Law28

 1. The relief sought by IPAS is only prospective relief to remedy an ongoing violation of law30

 2. The relief is sought from state officials and IFSSA may be dismissed32

 3. The Supremacy Clause is involved because federal law is at issue33

 C. The Fact That The Plaintiff Is An Independent State Agency Does Not Negate The *Ex parte Young* Doctrine.....33

 1. Suits between state officials within the same States have been heard by federal courts in other contexts34

 2. Defendants provide no rationale for distinguishing *Ex parte Young* suits brought by a state-created public agency and a state-created private corporation36

 3. The so-called “special sovereignty interests” exception has no application to this suit, which does not involve real property40

 4. Even if the status of the plaintiff were relevant to the *Ex parte Young* analysis, IPAS is affected with a federal interest so that it may sue state officials to vindicate the federal rights it derives from federal law.....42

II.	IPAS Has A Federal Right Of Action To Enforce Federal Law Against These State Officials.....	43
A.	Congress Intended Entities Such As IPAS To Have A Federal Cause Of Action To Enforce Their Federal Access Rights.....	43
B.	Alternatively, Enforcement Of The Statutory Right Of Access Can Be Brought Through Section 1983, And The Case Should Be Remanded To Permit The Complaint To Be Amended To Add An IPAS Official In His Official Capacity As A Plaintiff	50
III.	The District Court Correctly Held That Federal Law Requires Defendants To Give IPAS Access To The Records.....	52
	CONCLUSION	59
	Certificate Of Compliance	
	Statutory And Administrative Materials Appendix	
	Supplemental Appendix	
	Certificate Of Service	

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Alabama v. Pugh</i> , 438 U.S. 781 (1978)	29
<i>Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.</i> , 97 F.3d 492 (11th Cir. 1996)	47
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	46
<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2008)	53
<i>Allegheny County Sanitary Authority v. EPA</i> , 732 F.2d 1167 (3d Cir. 1984).....	36
<i>Ameritech Corp. v. McCann</i> , 297 F.3d 582 (7th Cir. 2002)	41
<i>Barnes v. Black</i> , 544 F.3d 807 (7th Cir. 2008)	31
<i>Blessing v. Freestone</i> , 520 U.S. 329 (1997)	24
<i>Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen</i> , 392 U.S. 236 (1968)	35
<i>Board of Levee Comm’rs v. Huls</i> , 852 F.2d 140 (5th Cir. 1988)	36
<i>Branson Sch. Dist. RE-82 v. Romer</i> , 161 F.3d 619 (10th Cir. 1998), <i>cert. denied</i> , 526 U.S. 1068 (1999).....	36
<i>Center for Legal Advocacy v. Hammons</i> , 323 F.3d 1262 (10th Cir. 2003).....	47, 54
<i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	56
<i>City of Chicago v. Lindley</i> , 66 F.3d 819 (7th Cir. 1995)	21, 42, 52
<i>Clark v. Barnard</i> , 108 U.S. 436 (1883)	24
<i>Common Cause, Inc. v. State</i> , 691 N.E.2d 1358 (Ind. Ct. App. 1998).....	38
<i>Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.</i> , 464 F.3d 229 (2d Cir. 2006)	47
<i>Crosetto v. State Bar of Wisconsin</i> , 12 F.3d 1396 (7th Cir. 1993), <i>cert. denied</i> , 511 U.S. 1129 (1994).....	27

<i>Disabilities Rights Center, Inc. v. Commissioner</i> , 732 A.2d 1021 (N.H. 1999)	57
<i>Disability Rights Wisconsin, Inc. v. Wisconsin Dep’t of Pub. Instruction</i> , 463 F.3d 719 (7th Cir. 2006)	47
<i>Doe v. Chao</i> , 540 U.S. 614 (2004).....	57
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	29, 42
<i>Elliott v. Hinds</i> , 786 F.2d 298 (7th Cir. 1986)	31
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	<i>passim</i>
<i>FGS Enters., Inc. v. Shimala</i> , 625 N.E.2d 1226 (Ind. 1993)	37
<i>Florida Department of State v. Treasure Salvors, Inc.</i> , 458 U.S. 670 (1982).....	30
<i>Frew v. Hawkins</i> , 540 U.S. 431 (2004)	20, 26
<i>Golden State Transit Corp. v. City of Los Angeles</i> , 493 U.S. 103 (1989).....	49
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002)	50
<i>Hawaii Disability Rights Center v. Cheung</i> , 513 F. Supp. 2d 1185 (D. Haw. 2007)	46
<i>Hawaii v. Office of Hawaiian Affairs</i> , 129 S. Ct. 1436 (2009)	34
<i>Heartwood, Inc. v. United States Forest Service</i> , 230 F.3d 947 (7th Cir. 2000)	35
<i>Hill v. Blind Indus. & Servs. of Md.</i> , 179 F.3d 754 (9th Cir. 1999), amended by 201 F.3d 1186 (9th Cir. 2000)	25
<i>Idaho v. Coeur d’Alene Tribe</i> , 521 U.S. 261 (1997).....	21, 40, 41, 42
<i>Illinois Association of Mortgage Brokers v. Office of Banks & Real Estate</i> , 308 F.3d 762 (7th Cir. 2002)	48, 49
<i>Illinois v. General Electric Co.</i> , 683 F.2d 206 (1982), cert. denied, 461 U.S. 913 (1983).....	48
<i>In re Bliemeister</i> , 296 F.3d 858 (9th Cir. 2002)	25

<i>Independent Living Ctr. of S. Cal., Inc. v. Shewry</i> , 543 F.3d 1050 (9th Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 2828 (2009)	49
<i>IPAS v. Commissioner, Indiana Dep’t of Corr.</i> , 642 F. Supp. 2d 872 (S.D. Ind. 2009)	38, 39
<i>Kendall v. United States</i> , 37 U.S. 524 (1838).....	24
<i>Ku v. Tennessee</i> , 322 F.3d 431 (6th Cir.), <i>cert. denied</i> , 540 U.S. 880 (2003)	26
<i>Lapides v. Board of Regents</i> , 535 U.S. 613 (2002)	20, 26, 27
<i>Lassen v. Arizona ex rel. Arizona Highway Dep’t.</i> , 385 U.S. 458 (1967).....	34
<i>Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1</i> , 469 U.S. 256 (1985)	35
<i>Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n</i> , 453 U.S. 1 (1981).....	24
<i>Mississippi Prot. & Advocacy Sys., Inc. v. Cotten</i> , 929 F.2d 1054 (5th Cir. 1991)	47
<i>Missouri Prot. & Advocacy Servs. v. Missouri Dep’t of Mental Health</i> , 447 F.3d 1021 (8th Cir. 2006)	47, 54
<i>New Hampshire v. Ramsey</i> , 366 F.3d 1 (1st Cir. 2004).....	25
<i>Office of the Governor v. Department of Health & Human Servs.</i> , 997 F.2d 1290 (9th Cir. 1993)	6
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	29, 30, 33
<i>Pennsylvania Prot. & Advocacy, Inc. v. Houstoun</i> , 228 F.3d 423 (3d Cir. 2000)	47, 54, 56
<i>Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.</i> , 448 F.3d 119 (2d Cir. 2006)	47, 54, 56, 57
<i>Public Citizen v. Department of Justice</i> , 491 U.S. 440 (1989).....	35
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	56

<i>Rogers v. Brockette</i> , 588 F.2d 1057 (5th Cir.), <i>cert. denied</i> , 444 U.S. 827 (1979).....	36
<i>State v. Marion County Superior Court</i> , 373 N.E.2d 145 (Ind. 1978)	14, 28
<i>Swaim v. Moltan Co.</i> , 73 F.3d 711 (7th Cir.), <i>cert. denied</i> , 517 U.S. 1244 (1996).....	25
<i>Tarrant Reg’l Water Dist. v. Sevenoaks</i> , 545 F.3d 906 (10th Cir. 2008)	41
<i>United States v. ICC</i> , 337 U.S. 426 (1949).....	39
<i>United States v. Monsanto</i> , 491 U.S. 600 (1989)	56
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	39
<i>Verizon Maryland Inc. v. Public Serv. Comm’n</i> , 535 U.S. 635 (2002) .	21, 33, 40, 41
<i>Virginia v. Reinhard</i> , 568 F.3d 110 (4th Cir. 2009), <i>petition for cert. filed</i> (Oct. 28, 2009) (No. 09-529).....	34
<i>Washington v. Seattle Sch. Dist. No. 1</i> , 458 U.S. 457 (1982).....	35, 51
<i>Will v. Michigan Department of State Police</i> , 491 U.S. 58 (1989)	50, 51
<i>Wisconsin Dep’t of Corr. v. Schacht</i> , 524 U.S. 381 (1998).....	24
FEDERAL CONSITUTION, STATUTES, REGULATIONS AND RULES:	
U.S. Const. art. VI, cl. 2 (Supremacy Clause)	<i>passim</i>
U.S. Const., amend. XI	<i>passim</i>
28 U.S.C. § 1331	48
28 U.S.C. § 2201	48
42 U.S.C.	
§ 1320c-9(b)(1)(A)	55
§ 1320c-9(b)(1)(B)(i)	55
§ 1983.....	<i>passim</i>
Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C.	
§ 10801 <i>et seq.</i>	4

§ 10801(a)(1)	5
§ 10801(a)(4)	5
§ 10801(b)(2)(A).....	5
§ 10802(2).....	6, 44
§ 10803(1).....	44
§ 10805(a)(1)(B)	46
§ 10805(a)(1)(C)	46
§ 10805(a)(2)	5
§ 10805(a)(4)	<i>passim</i>
§ 10805(a)(7)	6
§ 10805(c)(1)(B)	5
§ 10806(a)	45, 53, 55
§ 10806(b).....	45
§ 10806(b)(2)(C).....	9, 45
§ 10806(b)(3)	53
§ 10806(b)(3)(A).....	9
§ 10806(b)(3)(B).....	45
§ 10807(a)	46

Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.

§ 15001 <i>et seq.</i>	4
§ 15042(b).....	15
§ 15043(a)(1)	44
§ 15043(a)(2)(G).....	5
§ 15043(a)(2)(I)	7
§ 15043(a)(2)(K).....	6, 38
§ 15043(a)(4)	44
§ 15043(a)(4)(A).....	6
§ 15043(a)(4)(D).....	6
§ 15044(a)	5
§ 15044(a)(2)	6
§ 15044(d).....	6
§ 15044(e).....	6

Developmental Disabilities Assistance & Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975).....	4
--	---

Developmental Disabilities Act of 1984, Pub. L. No. 98-527, 98 Stat. 2662 (1984).....	8
---	---

Developmental Disabilities Assistance & Bill of Rights Act of 1990, Pub. L. No. 101-496, 104 Stat. 1191 (1990)	9
Protection & Advocacy for Individuals with Mental Illness Act, Pub. L. No. 99-319, 100 Stat. 478 (1986)	4, 8
Protection & Advocacy for Mentally Ill Individuals Amendments Act of 1988, Pub. L. No. 100-509, 102 Stat. 2543 (1988)	9, 10
42 C.F.R.	
§ 51.41.....	57
§ 51.41(c)(1)	11
§ 51.41(c)(2))	11
§ 51.41(c)(4)	11
§ 51.41(e)	16, 30
45 Fed. Reg. 31,006 (May 9, 1980)	7
49 Fed. Reg. 11,772 (Mar. 27, 1984).....	7
62 Fed. Reg. 53,548 (Oct. 15, 1997).....	12
73 Fed. Reg. 19,708 (Apr. 10, 2008)	58
Fed. R. Civ. P.	
9(a)(1)(A).....	25
9(a)(2)	25
12(h).....	25
34(a)(1)	31
45(a)(1)(D).....	31
STATE CONSTITUTION, STATUTES AND REGULATIONS:	
Ind. Const. art. VI.....	14
Conn. Gen. Stat. § 46a-7 <i>et seq.</i>	5
Ind. Code	
§ 2-7-1.6-1(b).....	38
§ 2-7-1.6-2.....	38
§ 4-6-2-1.....	14
§§ 5-8-1-1 to 5-8-1-18	14
§ 5-8-1-38.....	14

§ 12-28-1-6(a)	13
§ 12-28-1-6(c)	13
§ 12-28-1-7(a)	13
§ 12-28-1-10.....	14
§ 12-28-1-1(b).....	12
§ 12-28-1-12(2).....	14
§ 12-28-1-12(4).....	14
§ 12-28-1-12(5).....	14
§ 23-1-17-2.....	37
§ 25-6.1-2-1.....	38
§ 25-26-13-3.....	38
§ 25-34.1-2-1.....	38
§ 34-6-2-99(a)	15
§ 34-6-2-117.....	15
§ 34-30-15-1(f).....	54
§ 34-30-15-1(f)(2).....	15
§ 34-30-15-3(a).....	15
§ 34-30-15-8.....	15
Ky. Rev. Stat. Ann. § 31.010 <i>et seq.</i>	5
N.D. Cent. Code § 25-01.03-01 <i>et seq.</i>	5
N.Y. Mental Hyg. Law § 45.01 <i>et seq.</i>	5
Ohio Rev. Code § 5123.60 <i>et seq.</i>	5
Va. Code § 51.5-39.2A <i>et seq.</i>	5
Ind. Pub. L. No. 193-1977	13
OTHER AUTHORITIES:	
Lawrence M. Friedman, <i>A History of American Law</i> (2d ed. 1985)	37
Indiana Protection & Advocacy Services, <i>2008 Annual Report</i> (Spring 2009)	15
National Inst. of Mental Health, <i>NIMH P&A Program Evolving Policy Guidelines</i> (Dec. 14, 1990)	10
Official Op. No. 40, 1954 Ind. Op. Att’y Gen. 146 (1954).....	13

S. Rep. No. 102-114 (1991)12

STATEMENT OF JURISDICTION

1. Defendants-appellants' jurisdictional statement regarding the district court's jurisdiction is complete and correct.

2. Defendants-appellants' jurisdictional statement regarding this Court's jurisdiction is incomplete in the following respects, neither of which ultimately affects this Court's jurisdiction.

First, all the defendants, not simply defendant Indiana Family and Social Services Administration, joined the notice of appeal filed August 25, 2008.

Second, the district court's order may not have been final as required by 28 U.S.C. § 1291, as the district court did not formally act on plaintiff's request for a declaratory judgment but only entered an injunction. This Court nonetheless has jurisdiction over this appeal from an injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the Eleventh Amendment bars this action when the defendants did not invoke the Eleventh Amendment below and litigated the case on the merits and when the action is brought against state officials seeking prospective relief to remedy a violation of federal law.

2. Whether plaintiff, an entity designated by the State of Indiana as its Protection and Advocacy System, has a federal cause of action to enforce its federal right under the Protection and Advocacy for Individuals with Mental Illness Act to access “all records” of individuals with mental illness.

3. Whether the phrase “all records” in the Protection and Advocacy for Individuals with Mental Illness Act excludes peer review records as defined by state law.

STATEMENT OF THE CASE

Plaintiff, the Indiana Protection and Advocacy Services (IPAS), initiated this action in the District Court for the Southern District Court of Indiana for injunctive and declaratory relief against the Secretary of the Indiana Family and Social Services Administration, the Director of its Division of Mental Health and Addiction, and the Superintendent of its Larue Carter Memorial Hospital. App. 22. Also named as a defendant in the caption of the complaint was the Indiana Family and Social Services Administration. App. 21.

IPAS claimed that the state official defendants, in violation of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), were denying access to records of two persons with mental illness (one dead, one injured) who resided at the state-operated Larue hospital. App. 23-27. The Attorney General of Indiana initially appeared to represent the defendants, but later withdrew in favor of private counsel. Dt. Ct. Dkts. 10, 20. Defendants then filed an answer, in which they raised no affirmative defenses. Dt. Ct. Dkt. 25.

After the parties filed a stipulation of facts, App. 28-30, IPAS and defendants filed cross-motions for summary judgment. The district court granted IPAS's motion for summary judgment and denied defendants' motion for summary judgment. App. 3-19. The court entered an injunction ordering defendants to provide "reasonable access to the records of two clients at Larue Memorial

Hospital” within 10 days. App. 1-2. Defendants’ timely appeal followed. Dt. Ct. Dkt. 62. The district court stayed its injunction pending the disposition of the appeal. Dt. Ct. Dkt. 71.

STATEMENT OF THE FACTS

A. Statutory Framework

1. Federal Statutes.

a. Establishment of Protection and Advocacy Systems. Congress enacted legislation, effective in 1978, creating a federal grant program that paid States to designate a public or private entity to serve as a Protection and Advocacy System that would be dedicated to protecting individuals with disabilities from abuse and neglect. *See* Developmental Disabilities Assistance and Bill of Rights Act (DD Act), Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 *et seq.*).

In 1986, Congress enacted a similar statute that allocated federal funds to entities designated as Protection and Advocacy Systems to expand their focus to include protecting individuals with mental illness. *See* Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 *et seq.*).

In express statutory findings, Congress determined that “individuals with mental illness are vulnerable to abuse and serious injury” and that existing “State systems for monitoring compliance with respect to the rights of individuals with

mental illness vary widely and are frequently inadequate.” 42 U.S.C. § 10801(a)(1), (a)(4). Congress made clear that it intended the federal funds to assist States in designating entities to serve as Protection and Advocacy Systems that could engage in “activities to ensure the enforcement of the Constitution and Federal and State statutes.” *Id.* § 10801(b)(2)(A).

A State is free to designate a “private non-profit entity” or a state entity as its Protection and Advocacy System, *id.* §§ 15044(a), 10805(c)(1)(B). Indiana and seven other States have designated independent state agencies as their Protection and Advocacy Systems,¹ while the remaining forty-two States have opted to designate not-for-profit corporations.

Under both federal statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that the Systems “shall * * * be independent of” any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2). Most of the other details regarding the required structure of the entity designated the Protection and Advocacy System are described in the DD Act, and (as defendants acknowledge, Def. EB Br. 5) incorporated by reference into the

¹ See Conn. Gen. Stat. § 46a-7 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq.*; Va. Code § 51.5-39.2A *et seq.* Alabama’s system is established by unpublished Governor’s directive.

PAIMI Act, which provides that the term “eligible system” under the PAIMI Act “means the system established in a State to protect and advocate the rights of persons with developmental disabilities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act.” *Id.* § 10802(2).

Under the DD Act, the Governor may appoint no more than one-third of any governing board of a System. *Id.* § 15044(a)(2). Once a State designates an entity as the State’s System, it cannot designate another entity as the System absent “good cause,” *id.* § 15043(a)(4)(A), and any such redesignation can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v. Department of Health & Human Servs.*, 997 F.2d 1290, 1292 (9th Cir. 1993).

Congress provided additional federal protections for, and oversight of, Protection and Advocacy Systems designated by the State. States are prohibited from imposing “hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system.” 42 U.S.C. § 15043(a)(2)(K). Protection and Advocacy Systems are subject to federal onsite review, *id.* § 15044(d), and are required to submit annual reports to the federal government, *id.* §§ 10805(a)(7), 15044(e).

b. Right of access to records. In addition to authorizing advocacy on behalf of individuals, both the DD Act and the PAIMI Act currently expressly authorize that an entity designated as a State’s Protection and Advocacy System “shall * * * have access” to “all records” of certain patients. 42 U.S.C. §§ 15043(a)(2)(I), 10805(a)(4).

The DD Act, as originally enacted in 1975, did not expressly address access to records. In 1980, the Department of Health, Education and Welfare (the predecessor to the Department of Health and Human Services) stated in a notice of proposed rulemaking that, based on its experience with the DD Act, access to records and facilities was “essential and will provide the protection and advocacy systems with the necessary mechanisms to adequately protect the rights of institutionalized developmentally disabled persons.” 45 Fed. Reg. 31,006, 31,009 (May 9, 1980). HEW’s proposed regulation would have required the Protection and Advocacy system to “have appropriate access to the personal, medical, and other records pertaining to the care of institutionalized developmentally disabled persons.” *Id.* at 31,017. In March 1984, however, HEW decided not to issue formal regulations “granting blanket access to records” because of a “potential conflict with the rights of persons who are competent and do not wish their records reviewed.” 49 Fed. Reg. 11,772, 11,775 (Mar. 27, 1984).

Later that year, Congress amended the DD Act to provide that a Protection and Advocacy system must “be able to obtain access to the records of a person with developmental disabilities who resides in a facility for persons with developmental disabilities” if a complaint has been received from or on behalf of such person, and such person does not have a legal guardian or the State is the legal guardian of such person. Developmental Disabilities Act of 1984, Pub. L. No. 98-527, sec. 2 at § 142(a)(2)(D), 98 Stat. 2662, 2679 (1984). The statute did not define the term “records.”

When Congress enacted the PAIMI Act in 1986, it drew from the DD Act to provide the Protection and Advocacy systems a right to access records, but expanded the language to apply to “*all* records.” The statute provided that a Protection and Advocacy System “shall have access to all records of,” *inter alia*, “any individual who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access” if a complaint has been received by the system or “with respect to whom there is probable cause to believe that such individual has been subject to abuse or neglect” and such individual does not have a legal guardian or the State is the legal guardian of such person. PAIMI Act, § 105(a)(4), 100 Stat. at 480 (currently codified at 42 U.S.C. § 10805(a)(4)). Like the DD Act, the PAIMI Act did not define the term “records.”

PAIMI provided a phase-in period for this right of access, stating that “[i]f the laws of a State prohibit an eligible system from obtaining access to the records of mentally ill individuals,” then the access provision “shall not apply to such system” before either “the date such system is no longer subject to such a prohibition” or “the expiration of the 2-year period beginning on the date of the enactment of this Act, whichever occurs first.” *Id.* § 106(b)(2)(C), 100 Stat. at 482 (currently codified at 42 U.S.C. § 10806(b)(2)(C)). PAIMI was enacted on May 23, 1986, so this phase in period ended on May 23, 1988.

It was not until 1988 that Congress provided a partial definition of “records” in PAIMI.² Congress defined the term “records” to include “reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.” Protection & Advocacy for Mentally Ill Individuals Amendments Act of 1988, Pub. L. No. 100-509, § 6(b), 102 Stat. 2543, 2544 (1988) (currently codified at 42 U.S.C. § 10806(b)(3)(A)).

² A similar amendment was made to the DD Act two years later. *See* Developmental Disabilities Assistance and Bill of Rights Act of 1990, Pub. L. No. 101-496, § 15, 104 Stat. 1191, 1200 (1990).

No amendments to PAIMI's statutory provisions concerning records have occurred since 1988.

2. Federal Regulations.

In 1990, HHS issued a document that collected the advice it had previously given Protection and Advocacy Systems, usually in letters, regarding its interpretation of the PAIMI Act. *See* National Inst. of Mental Health, *NIMH P&A Program Evolving Policy Guidelines* (Dec. 14, 1990). Those reprinted letters showed that HHS repeatedly read the provision on records access broadly, to encompass “all records,” without exceptions. *See id.* at 15-25. Thus, HHS found that PAIMI authorized Protection and Advocacy Services to access records of deceased individuals even in those cases where the next of kin did not authorize access, *id.* at 17, financial records prepared by accountants or other facility personnel, *id.* at 20, and investigatory records of a child protective services investigations unit, *id.* at 24. In the latter situation, HHS explained that Protection and Advocacy Services should have all records “which they deem necessary and pertinent to enable them to carry out their own investigation, *or to ensure that a thorough investigation has been performed by others.*” *Ibid.* (emphasis added).

In 1997, HHS issued its first and only set of regulations for the PAIMI Act. In that regulation, it identified the “individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files,

photographs or video or audio tape records, which shall be available to the P&A system under the Act” to include: (1) “Information and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, financial records, and reports prepared or received by a member of the staff of a facility or program rendering care or treatment;” (2) “Reports” prepared “by or for the facility itself, that describe” any “abuse, neglect, or injury occurring at the facility,” the “steps taken to investigate the incidents,” and “[s]upporting information that was relied upon in creating a report, including all information and records used or reviewed in preparing reports of abuse, neglect or injury such as records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings;” and (3) “Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.” 42 C.F.R. § 51.41(c)(1), (c)(2), (c)(4).

In promulgating this rule, HHS confirmed its understanding that the PAIMI Act preempted any contrary state records laws and relied only on legislative

history issued subsequent to 1988, the year the records provision was last amended, to justify its exemption of peer review records:

One commenter was concerned that the regulations appear to allow access to records which in a number of States are confidential by law. This individual argued that system access to records should be granted only when the request is in compliance with the requirements set by State statutes. * * * The Department does not agree. It is clearly the intent of the Act that the system have full access to “all records of an individual” pertaining to a full investigation of a report or complaint. The only exception noted [Senate Report 102-114, 102nd Congress, 1st Sess. 5, 1991] is the Joint Commission on Accreditation of Hospitals Report—peer review/medical review records. In order for the P&A system to carry out its mandate to protect the rights of individuals with mental illness and to investigate allegations of abuse or neglect in public and private facilities, they must be empowered to access information contained in all records relevant to such activities. In all circumstances where there is a direct conflict these regulations will supersede State law unless State law gives greater access. However, the Department does not inten[d] to preempt State statutes that protect from disclosure the records produced by medical care evaluation or peer review committees.

62 Fed. Reg. 53,548, 53,560 (Oct. 15, 1997).

3. Indiana Law.

a. Establishment of Protection and Advocacy System. Indiana originally established plaintiff IPAS and designated it as its Protection and Advocacy System in 1977. IPAS was established to “secure to the state * * * and Indiana citizens maximum benefits under the Developmentally Disabled Assistance and Bill of Rights Act (P.L. 94-103), and to this end this chapter should be liberally construed.” Ind. Code § 12-28-1-1(b).

Defendants describe IPAS as an “independent Indiana state agenc[y].” Def. EB Br. 16. IPAS’s independence is reflected in several statutory provisions.

First, IPAS’s governing commission consists of thirteen voting members, but, since 1993, only four of the voting members are appointed by the Governor. Ind. Code § 12-28-1-6(a). The remaining nine voting members are appointed by a majority of the commission members, *ibid.*, thus making the body self-sustaining. Two non-voting members are appointed by the state legislature from among its elected members. *Id.* § 12-28-1-6(c).

Members of the commission serve fixed terms of 3 years. *See* Ind. Code § 12-28-1-7(a). When the commission was first constituted in 1977, seven of its members were appointed to two-year terms and six members were appointed to three-year terms, *see* Ind. Code § 16-13-19-3 note (1984) (reprinting Ind. Pub. L. No. 193-1977, § 1), so that the appointments are now staggered.

Under Indiana law, the “power to remove an officer as an incident of the power of appointment does not apply in the event a term is fixed by statute.” Official Op. No. 40, 1954 Ind. Op. Att’y Gen. 146, 147 (1954), *available at* <https://scholarworks.iupui.edu/bitstream/handle/1805/1084/1953%20Ind%20Op%20Att%27y%20Gen%20183.pdf?sequence=78>. Instead, state officers appointed to fixed terms are “not subject to being dismissed from service except for cause and then only after a hearing on proper notice.” *Ibid.* Thus, the members of IPAS’s

governing commission may be removed from their positions by impeachment and trial by the state legislature for “crime, incapacity, or negligence,” Ind. Const. art. VI, § 7; *see* Ind. Code §§ 5-8-1-1 to 5-8-1-18; or by conviction for a felony, *see* Ind. Code § 5-8-1-38. IPAS’s executive director is appointed by and serves at the pleasure of the governing commission. *See* Ind. Code § 12-28-1-10.

Second, IPAS may prosecute legal actions in its own name without involvement of the Indiana Attorney General. Section 4-6-2-1 of the Indiana Code provides that the Attorney General of Indiana “shall prosecute and defend all suits that may be instituted by or against the state of Indiana.” As a general rule, “[n]o State agency is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent” so that the Attorney General can “establish a general legal policy for State agencies.” *State v. Marion County Superior Court*, 373 N.E.2d 145, 148 (Ind. 1978). But IPAS’s statute provides that “[n]otwithstanding IC 4-6-2,” IPAS has the power to “sue and be sued in the name of” IPAS. IPAS’s governing commission may thus “appoint” and “prescribe the duties of” its attorneys. Ind. Code § 12-28-1-12(4), -12(2).

Third, IPAS’s finances are independent. IPAS receives no money from the State fisc. It is authorized to apply for grants from “any source that [IPAS] considers best to assist the [IPAS] in performing its purpose.” Ind. Code § 12-28-1-12(5), and the overwhelming majority of its funds comes from the federal

government. *See* Ind. Prot. & Advocacy Servs., *2008 Annual Report* 3 (Spring 2009), *available at* <http://www.in.gov/ipas/files/IPAS-AnnualRepLoRes08.pdf>. Because Indiana has designated IPAS as its Protection and Advocacy System, the federal payments go “directly” to IPAS. 42 U.S.C. § 15042(b).

b. Peer review records. Indiana regulates the disclosure of “communications, proceedings, records, determinations, or deliberations” of a “peer review committee.” Ind. Code § 34-30-15-1(f)(2). Any confidentiality provision may be waived in writing by the professional health care provider. *Id.* § 34-30-15-8. A “peer review committee” is defined as a committee that (1) is organized by a hospital or other medical facility; (2) at least half of whose members are individual professional health care providers or the governing board of a hospital; and (3) has the responsibility of evaluation of patient care rendered by professional health care providers, or evaluation of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint, and the complaint is based on the competence or professional conduct of an individual health care provider. *See id.* § 34-6-2-99(a). A “professional health care provider,” in turn, is defined to mean doctors and nurses and hospitals and other medical professionals and entities. *Id.* § 34-6-2-117.

B. Factual Background

This case is about IPAS's demands for various records under PAIMI of two persons with mental illness who died or were injured while in state custody.

The first individual (described by the parties as Client 1) died in another facility about 40 days after being admitted to Larue Memorial Hospital, a psychiatric hospital operated by the Division of Mental Health and Addiction of the Indiana Family and Social Services Administration. App. 28. IPAS was provided information by a staff person at Larue that led it to open an abuse and neglect investigation. App. 33.

The second individual (Client 2), who also resides at Larue, complained to IPAS that hospital employees and police assaulted, battered, and attempted to murder him. App. 34, 44. Client 2 signed a release of information authorizing IPAS to have access to his records. App. 34, 41.

In furtherance of its investigations, IPAS requested four types of records. To date, defendants have not given IPAS access (*i.e.*, the opportunity to inspect and copy, *see* 42 C.F.R. § 51.41(e)) to any of these records.

1. Mortality Review Committee And Root Cause Analysis Reports. IPAS requested a copy of the Mortality Review Committee and Root Cause Analysis reports that resulted from Larue's internal investigation into the death of Client 1. App. 28, 34, 40. Defendants refused to provide these reports to IPAS because they

were “peer review” records. App. 38. Defendants further expressed concern that IPAS would re-disclose peer review records to its clients, who could in turn disclose the records to their personal injury attorneys. App. 38.

2. *Medical Records/Complete Chart.* IPAS requested a copy of Client 1’s “complete chart,” App. 36, which was also described as her “medical records,” App. 37. Although not described in the record below, the term “chart” and “medical records” generally references records concerning any diagnosis, treatment, or prognosis of the patient, and would include such records as doctor’s orders, master treatment plans and updates, assessments from the various disciplines providing services, progress notes from all disciplines, relevant legal papers (*i.e.*, commitment or guardianship orders), and any medical assessments, treatments or records provided upon admission or created while residing at the facility.

IPAS was permitted to inspect Client 1’s chart at Larue, App. 33, 40, but defendants would not give IPAS a copy of the chart. App. 38-39. Defendants stated that they would not release copies of the records without the consent of Client 1’s parents. App. 38-39. They also refused to ask Client 1’s parents for consent. App. 38. They explained that “Larue’s social worker spent many hours calming down the family and steering them away from litigation,” and that “we

believe our going to them to request their consent will suggest to them that a state agency has found a smoking gun, which we do not believe exists.” App. 38.

3. *Investigation Report.* IPAS requested a copy of the “investigation” Larue conducted in response to Client 2’s grievance. App. 43. Defendants sent an e-mail summarizing the “investigation results,” but did not provide copies of any underlying records, App. 30, 35, 44-45, which they also referred to in their summary judgment motion as “investigative documents,” “the investigator’s notes,” and “document[s] generated as part of the post incident investigation.” Dt. Ct. Dkt. 39 at 11, 13, 15.

Defendants claimed that the written result of an internal investigation is “deliberative in nature” and “analyzes the facts described and reaches certain conclusions.” A32. But they were unclear whether they claimed that the written result was a record of a “peer review committee.”³

³ For the first time in this more than three-year old action, defendants assert that IPAS’s request for investigative reports is “moot” because “no investigative reports were created with respect to Client 2.” Def. EB Br. 4 n.1. This is not a question of mootness, in the technical sense, because defendants rely on the state of facts that existed on the date the lawsuit was filed in 2006.

If defendants wish to have the district court’s judgment altered or vacated, they should move the district court to amend the judgment on remand with affidavits in support of their newly-discovered fact. That would provide the court with the opportunity to inquire, for example, about an e-mail in the record that contains language suggesting that defendants were summarizing some *other* record that reflected conclusions regarding an investigation. That e-mail, responding to IPAS’s request for “a copy of the investigation that you conducted in response to [Client 2’s] consumer grievance,” stated that the “[i]nvestigation results regarding [Client 2] and the response to his grievance have been summarized” and explained that the action of certain employees “is not deemed a violation of organization policy.” App. 44-45.

4. *Incident Report.* IPAS requested the “incident report” created by Larue in response to the events surrounding Client 2. Defendants submitted a copy of a blank incident report form below. Supp. App. 1a-2a. It sets out the raw facts surrounding an incident or injury. The form specifically states that information should be “brief, essential,” and draw “no opinions or conclusions.” Supp. App. 1a, 2a.

Defendants notified IPAS that it would not provide a copy of the incident report “per organization policy.” App. 42; *see also* App. 44 (stating that it was not appropriate to ask for a copy of incident reports).

At every stage of this litigation, however, defendants have conceded that incident reports are “records” for purposes of PAIMI. App. 19; Def. EB Br. 4 n.1. Yet they still have not given IPAS access to that record.

SUMMARY OF ARGUMENT

Congress determined that the right to access records was a vital element of a system designed to protect people with mental illness and to advocate on their behalf. Defendants' decision to withhold access to records in this case impeded the IPAS's mission. And defendants no longer defend on the merits their refusal to provide access to three of the four categories of records at issue. Instead, they claim that this Court cannot adjudicate this dispute. They are wrong.

I.

A. Defendants argue that the Eleventh Amendment bars this action. But the Eleventh Amendment can be waived, and Defendants' litigation conduct constitutes such a waiver. Defendants never raised the Eleventh Amendment below. Instead, they actively litigated the case on the merits and only when they lost did they raise immunity for the first time in their *en banc* opening brief. The Supreme Court both in *Lapides v. Board of Regents*, 535 U.S. 613 (2002), and *Frew v. Hawkins*, 540 U.S. 431 (2004), found waiver through litigation conduct and explained that States should not be permitted to wield the Eleventh Amendment to achieve unfair tactical advantages or to waste judicial resources. And while this Court, of course, may raise the Eleventh Amendment *sua sponte*, it should temper its discretion with respect for the adversarial system.

B. Even if this Court elects to address the Eleventh Amendment, this case primarily concerns a claim against state officials for prospective relief to remedy a violation of federal law and thus is governed by the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). The relief sought by IPAS is prospective relief against state officials to remedy an ongoing violation of federal law. Defendants' suggestion that a federal court cannot require a state official to provide access to documents is contrary to historical practice and makes no sense. Defendants' argument that this suit is also brought against a state agency can easily be remedied by dismissing that agency and letting the suit proceed against the three named state officials.

C. IPAS's independence from the State makes it appropriate to allow it to rely on *Ex parte Young* to enforce its federal rights the same way state-created corporations or political subdivisions may do. The Supreme Court has held that suits between state agencies are not inherently inappropriate for federal courts to resolve, and this Court's opinion in *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995), reaches the same result in a situation analogous to the one before it in this case. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), particularly as limited by *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), does not authorize courts to engage in an ad hoc balancing test to determine whether the nature of the plaintiff makes *Ex parte Young* inappropriate.

II.

A. The text of the PAIMI Act vests authority in an entity designated by the State to serve as its Protection and Advocacy System. That federal statutory authority includes the right to access records and right to seek legal relief. The federal statute itself, then, provides IPAS a cause of action. Recognizing the important role served by a Protection and Advocacy System's ability to force compliance by bringing suit in federal court, this Court and other federal courts of appeals have consistently permitted systems to enforce the provisions of the DD Act and PAIMI Act in federal court without question.

This conclusion is bolstered by the fact that recognizing a cause of action here would plow almost no new ground because it closely tracks a cause of action previously recognized by this Court, apart from 42 U.S.C. § 1983, to enforce the Supremacy Clause. This is precisely what plaintiff seeks: to vindicate its federal claims that the defendants' policy of refusing to provide access to certain records is preempted by seeking declaratory and equitable relief in the federal district courts.

B. In the alternative, Congress intended the PAIMI Act to secure a "right" enforceable through Section 1983. If this Court agrees, then the case should be remanded to permit IPAS to amend its complaint to add its Executive Director in his official capacity as a plaintiff.

III.

Defendants contend that PAIMI's record access requirement does not include "peer review" records protected by Indiana law because Congress did not draft PAIMI to explicitly mention such records when it addressed records generally. That argument, however, cannot be reconciled with the plain language of the statute requiring access to "all records" and the overwhelming weight of authority on this precise issue.

The phrase "all records" is plainly broad in scope, but breadth alone does not create ambiguity. Thus, the regulation of the Department of Health and Human Services carving out peer review records, which itself relies only on legislative history enacted 3 years after the records provision was last amended, is entitled to no deference. In any event, the regulation is unreasonable. Peer review records often supply the most valuable information on a provider's quality of care and whether that care comported with professional standards. These records also provide essential information on possible systemic issues not available from any other source. In addition, access to peer review records enables Protection and Advocacy Systems to evaluate whether a provider is taking appropriate corrective actions, whether there are alternatives to such actions, and the manner and extent to which Protection and Advocacy Systems should monitor those actions in the future.

ARGUMENT

I. The Eleventh Amendment Is No Bar To This Action

A. The Defendants Forfeited Or Waived Any Eleventh Amendment Defense By Failing To Raise It In The District Court And Instead Litigating The Case On The Merits

This Court should not address defendants' Eleventh Amendment argument because it has been waived or forfeited by their litigation conduct below.

Because the Eleventh Amendment does not affect a federal court's subject-matter jurisdiction, it need not be raised by a court *sua sponte*, see *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998), and should not be addressed unless raised before the district court. Indeed, the Supreme Court has declined to address a State's argument that the Eleventh Amendment bars an action when it "w[as] neither raised nor decided below, and w[as] not presented in the petition for certiorari." *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997); see also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 8 n.12 (1981) (same).

Moreover, that Court has described the Eleventh Amendment as a "personal privilege" of the State that can be waived or forfeited. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). And the Court has held that other "personal privileges"—such as jurisdiction and venue, see, e.g., *Kendall v. United States*, 37 U.S. 524, 623 (1838)—are waived if such a defense is not raised in an answer. See *ibid.* (personal jurisdiction "is a personal privilege which may be waived by appearance;

and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause”); Fed. R. Civ. P. 12(h). Cases involving an Eleventh Amendment defense should be treated no differently. *See* Fed. R. Civ. P. 9(a)(1)(A) & (2) (in order “to raise” the issue of a “party’s capacity to sue or be sued,” “a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party’s knowledge”); *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir.) (“[t]he forfeiture rule for capacity parallels the rule embodied in Fed. R. Civ. P. 12(h) regarding personal jurisdiction”), *cert. denied*, 517 U.S. 1244 (1996).

At the very least, when state official defendants actively litigate a case on the merits, such as here, they should not be permitted to invoke such an affirmative defense for the first time on appeal. That is the rule in a number of other courts of appeals. *See New Hampshire v. Ramsey*, 366 F.3d 1, 15-17 (1st Cir. 2004) (waiver found where State moved to dismiss case without relying on Eleventh Amendment immunity and subsequently defended on the merits in a federal administrative forum); *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002) (waiver found where State filed numerous briefs in a case, including a summary judgment motion, before first raising an immunity defense after oral argument in supplemental briefing); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000) (waiver found where State filed

numerous motions to dismiss, answered the complaint, participated in discovery, and fully participated in trial preparation); *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir.) (waiver found where State “engaged in extensive discovery and then invited the district court to enter judgment on the merits” before raising the immunity defense after an adverse decision), *cert. denied*, 540 U.S. 880 (2003).

The Supreme Court’s decisions involving waiver of Eleventh Amendment immunity through litigation conduct effectively compel such a result. In *Lapides v. Board of Regents*, 535 U.S. 613, 619-620 (2002), and *Frew v. Hawkins*, 540 U.S. 431, 439 (2004), the Court held that state officials waived any Eleventh Amendment immunity they had when they engaged in certain conduct (either removing an action to federal court or entering into a consent decree) that indicated their willingness to have a court exercise authority over the case. “[A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment’s presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages.” *Lapides*, 535 U.S. at 620. To hold otherwise, the Court held, would produce undue gamesmanship in which state officials could first see if they could win on the merits and then, if not, raise the Eleventh Amendment as a get-out-of-jail free card, forcing the plaintiffs to start all over again in a

different forum. “To adopt the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others.” *Id.* at 621.⁴

This case, in fact, plainly demonstrates the extraordinary waste of litigant and court resources that could result from a contrary rule. This suit was filed more than 3 years ago and the parties spent 2007 and 2008 compiling a factual record and briefing the legal merits of the claims in the district court; the district court, not apprised of any claim of immunity, expended its resources to resolve the action on the merits. A rule permitting a State to belatedly raise an Eleventh Amendment defense would thus in many cases condone waste that could easily be avoided by requiring States to assert the immunity defense before, or contemporaneously with, broaching the merits.

Nor is there any risk of unintentional waiver. State officials in their official capacities are normally represented by the Attorney General's office, which is well-versed on Eleventh Amendment doctrine and knows when it serves the best interest of the State to raise it. In this case, the Attorney General initially made an appearance on behalf of defendants, Dt. Ct. Dkt. 10, filed three motions (in

⁴ This Court's cases have tended in the same equitable direction, but were impeded by then-existing Supreme Court case law requiring inquiry into state law to determine the Attorney General's authority to waive immunity. *See, e.g., Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1403 n.11 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). *Lapides*, however, overruled earlier cases requiring reference to state law and instructed federal courts to apply federal common law. *See* 535 U.S. at 623.

January, February, and March 2007) for extensions of time to file an answer, Dt. Ct. Dkts. 11, 12, 17, and then sought to withdraw as counsel in April 2007 to be replaced by private counsel, Dt. Ct. Dkts. 20, 21. Defendants could only have retained such outside counsel with the consent of the Attorney General. *See State v. Marion County Superior Court*, 373 N.E.2d 145, 148 (Ind. 1978).

Although this Court can raise the Eleventh Amendment *sua sponte*, it should temper its discretion with respect for the adversarial system. Absent identification of some substantial interest of the State that defendants and their counsel have no incentive to vindicate (such as a suit in which the Attorney General was seeking to aggregate his authority at the expense of the Governor) or some plain error so grievous that it caused an actual miscarriage of justice, this Court should not excuse the state officials' forfeiture or waiver.

B. This Action Against The State Officials Falls Squarely Within The Scope Of *Ex parte Young*, Which Permits Suits Against State Officials For Prospective Relief To Remedy An Ongoing Violation Of Federal Law

Even if this Court elects to address the Eleventh Amendment, this case primarily concerns a claim against state officials for prospective relief to remedy a violation of federal law and thus is governed by the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which defendants correctly describe as a “firmly entrenched exception to sovereign immunity.” Def. EB Br. 22.

In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment did not bar a suit in federal court for injunctive relief claiming that a state official violated federal law. The doctrine of *Ex parte Young* is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160). To that end, the Court has identified three aspects of *Ex parte Young* that address the concerns that undergird the Eleventh Amendment, and the principles of state sovereign immunity that it reflects.

First, because the Eleventh Amendment was animated by a desire to protect state treasuries, *Ex parte Young* does not permit retroactive damage awards and permits only prospective equitable relief. *See Edelman v. Jordan*, 415 U.S. 651, 669 (1974).

Second, to protect the dignity of the State, *Ex parte Young* does not permit suits against the State *in eo nomine* and permits only suits against individual state officials. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). This requirement also comports with the common law rationale that a state official who violates federal law exceeds his authority and is no longer shielded by the State’s immunity.

Finally, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, it requires an allegation that federal law has been violated and is not available to address whether state officials have violated state law. *See Pennhurst*, 465 U.S. at 121.

As discussed below, none of these limits are implicated by this suit.

1. The relief sought by IPAS is only prospective relief to remedy an ongoing violation of law

The state official defendants do not expressly contest that IPAS seeks prospective, *i.e.*, “forward-looking,” relief. Def. EB Br. 25. Citing only a plurality opinion in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), however, defendants make the unprecedented assertion that any order that requires a state official to “turn over” documents is barred by the Eleventh Amendment. *Treasure Salvors*, however, *affirmed* a district court order that seized property in the possession of state officials. In any event, IPAS does not want custody of any documents; it simply wants to be able to access (*i.e.*, inspect and copy, *see* 42 C.F.R. § 51.41(e)) documents so that it can fulfill its purpose of protecting and advocating.

If defendants' assertion were correct that the Eleventh Amendment bars a court from ordering inspection and copying of records in the valid possession of state officials, then all discovery of documents in civil actions brought against state officials (in everything from constitutional discrimination claims, to dormant

commerce clause challenges, to habeas actions) would be prohibited by the Eleventh Amendment. *Compare* Fed. R. Civ. P. 34(a)(1) (requiring a party to “produce and permit the requesting party or its representative to inspect, copy, test, or sample [any designated documents or electronically stored information] in the responding party’s possession, custody, or control”). Likewise, in suits between private parties, defendants’ assertion would mean documents in the hands of a state custodian of records cannot be subpoenaed. *Compare* Fed. R. Civ. P. 45(a)(1)(D).

This Court has previously rejected precisely that argument. Orders “commanding a state official who is not a party to a case between private persons to produce documents in the state’s possession during the discovery phase of the case” do not “violate the Eleventh Amendment” because “they do not compromise state sovereignty to a significant degree.” *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008) (citing, *inter alia*, *Treasure Salvors*).

Further, defendants’ assertion questions a common form of relief—the expungement of state records (usually employment or educational) to eliminate derogatory information—that this Court has already held falls within the scope of *Ex parte Young*. *See, e.g., Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) (“expungement of personnel records, is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment”). If the Eleventh Amendment actually barred a court from ordering inspection and copying of

documents possessed by a state official, then surely it would also bar a court from ordering that a state official destroy or alter documents in his possession.

Finally, taken to its logical conclusion, defendants' assertion suggests that state officials cannot be required to produce persons in their physical custody, thus eliminating the writ of habeas corpus ordering a person brought to federal court and, perhaps ultimately, released. But, of course, *Ex parte Young* itself relied on earlier habeas cases as support for its doctrine. *See* 209 U.S. at 167-168. Defendants' "possession" defense thus has no basis in *Ex parte Young*.

2. The relief is sought from state officials and IFSSA may be dismissed

The suit names three state officials in their official capacities, each of whom, it is alleged, was connected with the withholding of access of the records from IPAS.

The defendants devote a swath of pages to an irrelevant point that state agencies are protected by the Eleventh Amendment. Def. EB Br. 18-21. Admittedly, IPAS also named IFSSA itself as a defendant, in addition to its Secretary, in the caption of the complaint, even though IPAS did not make any allegations concerning IFSSA in the body of the complaint.⁵ If IFSSA had raised

⁵ Defendants also suggest (Def. EB Br. 10, 22, 30) that IPAS sued Larue Carter Memorial Hospital as an entity, but in fact IPAS sued only its superintendent, as the caption and text of the complaint make clear.

the matter in the district court, there is no dispute it could have been dismissed on Eleventh Amendment grounds.

This Court may likewise order that the district court dismiss IFSSA if this Court determines that IFSSA has not waived or forfeited its Eleventh Amendment immunity. Or this Court may, as the Supreme Court has, simply disregard the fact that IFSSA is named. *See Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645, 648 (2002) (declining to decide whether named commission waived its Eleventh Amendment immunity because action could proceed against individual state commissioners under *Ex parte Young*).

3. The Supremacy Clause is involved because federal law is at issue

Unlike *Pennhurst*, this is not a claim that state officials are violating state law. Instead, the complaint alleged that defendants are violating federal law by not providing access to the documents. Whether or not this claim is meritorious (and as we show below, it is) is irrelevant to whether *Ex parte Young* applies. *See Verizon Maryland*, 535 U.S. at 646 (“the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim”).

C. The Fact That The Plaintiff Is An Independent State Agency Does Not Negate The *Ex parte Young* Doctrine

In a mere three pages, the state official defendants address the nub of their Eleventh Amendment argument when they assert (Def. EB Br. 22-24) that

permitting a suit under *Ex parte Young* when the plaintiff is an independent state agency “threaten[s] the integrity of state sovereignty.” Def. EB Br. 22. But other than repeatedly invoking the phrase “special sovereignty interests,” and citing the Fourth Circuit’s decision in *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *petition for cert. filed* (Oct. 28, 2009) (No. 09-529), which did the same thing, defendants do not explain how this suit is different from numerous *Ex parte Young* suits that are routinely brought and heard against state officials in federal court.

1. Suits between state officials within the same States have been heard by federal courts in other contexts

The Supreme Court has already held that suits between state agencies are not inherently inappropriate for federal courts to resolve. *See Lassen v. Arizona ex rel. Arizona Highway Dep’t.*, 385 U.S. 458, 459 n.1 (1967) (“This action is in form and substance a controversy between two agencies of the State of Arizona * * * . We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause.”); *see also Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) (adjudicating suit between State

and state agency); *cf. Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968) (school board officials have standing to sue state officials).⁶

While those cases arose from state court proceedings, the Supreme Court has also adjudicated disputes arising from federal court in which a political subdivision sued its State and permitted the political subdivision to recover attorneys' fees for prevailing. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982) (holding school district was entitled to attorneys' fees for prevailing on federal constitutional claim against state official); *cf. Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259-260 n.6 (1985) (criticizing, in dicta, federal court for dismissing earlier suit between county and school district for lack of federal jurisdiction).

The courts of appeals have likewise permitted suits between political subdivisions and state officials to proceed under *Ex parte Young* to enforce federal

⁶ Defendants acknowledge IPAS's Article III standing to bring this claim. Def. EB Br. 10. The Supreme Court has consistently held that the failure to obtain access to records arguably subject to disclosure under federal law "constitutes a sufficiently distinct injury to provide standing to sue" under Article III. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989). Likewise, this Court in *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947 (7th Cir. 2000), held, as an alternative ground, that plaintiffs had standing to challenge a federal agency's failure to issue an environmental assessment (EA) because federal law "requires agencies to conduct EA's in order to provide stakeholders with information necessary to monitor agency activity. Without an EA, interested parties have no way to comment on or to appeal decisions made by an agency." 230 F.3d at 952 n.5.

The other two elements of standing in addition to injury-in-fact are easily met. Defendants' refusal to provide access to the records is the cause of IPAS's injury, and ordering defendants to provide access to the records will redress that injury.

statutory rights. In *Allegheny County Sanitary Authority v. EPA*, 732 F.2d 1167 (3d Cir. 1984), the Third Circuit held that the suit against state officials by a state-created public agency could proceed under *Ex parte Young*, reasoning that “the Eleventh Amendment is not a bar to all prospective relief against the state officials if violations of federal law are established.” *Id.* at 1174; *see also id.* at 1173 nn.3 & 5. Without expressly addressing *Ex parte Young*, other courts of appeal have held that state-created public entities could sue state officials to enforce federal rights. *See, e.g., Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999). The sole case cited by defendants, *Board of Levee Commissioners v. Huls*, 852 F.2d 140 (5th Cir. 1988), did not rely on the Eleventh Amendment to dismiss the case, but simply held that the state-created board did not have any constitutional rights to enforce against the State’s taking of its property.

2. Defendants provide no rationale for distinguishing *Ex parte Young* suits brought by a state-created public agency and a state-created private corporation

Defendants do not explain why they view this case brought by an independent state agency as “intramural” (Def. EB Br. 13) compared to suits brought by private corporations chartered by Indiana.

Historically, States granted charters to private and municipal corporations through legislation, and identified precisely the powers and duties of that corporation, and the State was free to amend and revoke that charter at its discretion. *See* Lawrence M. Friedman, *A History of American Law* 190-191, 197-198 (2d ed. 1985). Even today, with the more routinized grant of charters of incorporation through general enabling acts, States reserve the right to amend the laws governing private corporate charters. *See, e.g.*, Ind. Code § 23-1-17-2; *FGS Enters., Inc. v. Shimala*, 625 N.E.2d 1226 (Ind. 1993).

Here, IPAS is in the same position as a private corporation, at least vis-à-vis the control the State can exercise over it. IPAS is not subject to the control of the Governor, as defendants admit. Def. EB Br. 16-17. The Governor appoints less than a third of the commission that governs IPAS, and members of that commission can only be removed for cause and only through either impeachment or judicial proceedings. Further, IPAS's litigation is not subject to the control of Indiana's Attorney General. Thus, neither defendants nor any member of the Indiana executive branch can cause IPAS to compromise its federally-established statutory right to access records that are in the hands of defendants or its federally-established statutory duty to protect persons with disabilities and mental illness. "IPAS, then, by both funding and organizational structure, is effectively insulated from direct control by the state's executive. Unlike traditional state agencies, IPAS

is, by Congressional design and mandate, independent from policy dictates of the state government.” *IPAS v. Commissioner, Indiana Dep’t of Corr.*, 642 F. Supp. 2d 872, 880 (S.D. Ind. 2009) (Hamilton, C.J.).⁷

The State can eliminate IPAS by rescinding its authorizing statute, just as it could eliminate a corporation by rescinding its charter. And it has regulated IPAS to some degree in terms of its employment practices by applying its merit-based personnel requirements. *See* Def. EB Br. 14. *But see* 42 U.S.C. § 15043(a)(2)(K) (prohibiting imposition of “hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system”). But

⁷ IPAS appears to be unique in this respect as a matter of Indiana law. Defendants cite four other Indiana commissions that, they claim, are similar to IPAS because the commissioners are not removable by the Governor at will. Def. EB Br. 17. But for three of those commissions, the Governor appoints *all* the commissioners and thus, over time, can impose his policies on the commission. *See* Ind. Code § 25-6.1-2-1 (all 6 members of the Indiana Auctioneer Commission appointed by the Governor for terms of 3 years); *id.* § 25-26-13-3 (all 7 members of the Board of Pharmacy appointed by the Governor for terms of 4 years); *id.* § 25-34.1-2-1 (all 12 members of Real Estate Commission appointed by the Governor for terms of 4 years). And none of those statutes expressly authorizes the commissions to act independently of the Attorney General. Nor do they appear to be designated to play a role in a federal statutory scheme.

The remaining commission cited by defendants, the Lobby Registration Commission, is an “independent agency within the legislative branch,” *id.* § 2-7-1.6-1(b), charged with registering persons who lobby the legislative branch and monitoring their activity. Each of the four commission members is appointed by the majority and minority leader of the house and senate, respectively. *Id.* § 2-7-1.6-2. Even there, it is not clear who would represent that commission in court if the need were to arise. *See Common Cause, Inc. v. State*, 691 N.E.2d 1358, 1362 (Ind. Ct. App. 1998) (rejecting state separation-of-powers challenge in part by noting that the law “clearly dictates that criminal investigation and prosecution of violations shall be made by the appropriate prosecuting attorney or the attorney general through the judiciary”).

other than that authority, which it could equally exercise over private corporations, the State is in essence a minority shareholder of IPAS, with three out of thirteen votes on the board of directors. There is thus no reason why IPAS, like a private state-created corporation, cannot invoke *Ex parte Young* to protect its federal rights.

Defendants spend enormous energy establishing that IPAS is a state agency. Def. EB Br. 13-18. But in doing so, it attacks a straw man of its own making. IPAS admits it is a state agency. Contrary to defendants' understanding (Def. EB Br. 15-16), Judge Hamilton's district court opinion did not reach a different conclusion. It just properly recognized that IPAS was "not a traditional state agency," *IPAS*, 642 F. Supp. 2d at 880, because of its independence from the remainder of state government. The Supreme Court has permitted independent federal agencies to litigate against one another (or against a federal official) in federal court in those situations in which the President cannot dictate the outcome because one of the agencies is structurally "independent." *See United States v. Nixon*, 418 U.S. 683, 693-697 (1974); *United States v. ICC*, 337 U.S. 426, 460-461 (1949). Defendants appear to acknowledge that IPAS is analogous to such an independent federal agency. *See* Def. EB Br. 17. But it fails to explain why federal courts may hear suits between an independent federal agency and a federal official without violating separation of powers, but may not hear suits between an

independent state agency and state officials without violating principles of federalism.

3. The so-called “special sovereignty interests” exception has no application to this suit, which does not involve real property

Defendants rely on *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), and Justice Kennedy’s concurring opinion in *Verizon Maryland* to suggest that federal courts must take into account the “particular impact that applying *Young* would have on sovereign immunity in a particular case.” Def. EB Br. 23.

In *Coeur d'Alene*, five Justices, in opinions reflecting two different rationales, held that, under the “particular and special circumstances” of that case, *Ex parte Young* was not available when “the declaratory and injunctive relief the [Indian] Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe.” 521 U.S. at 287, 282. The lead opinion, authored by Justice Kennedy but joined in whole only by Chief Justice Rehnquist, would have applied a “careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case,” including consideration of whether there was a “prompt and effective remedy in a state forum.” *Id.* at 278, 274. A concurring opinion authored by Justice O’Connor, and joined by Justices Scalia

and Thomas, rejected that approach, *id.* at 291-296, as did the four dissenting Justices.

The Supreme Court rejected the balancing approach urged by the plurality in that case in *Verizon Maryland*, holding that *Ex parte Young* required only a “straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” 535 U.S. at 645 (quoting *Coeur d’Alene*, 521 U.S. at 296 (O’Connor, J., concurring in part and concurring in the judgment)). As this Court recognized in *Ameritech Corp. v. McCann*, 297 F.3d 582 (7th Cir. 2002), “[w]hile the Supreme Court in [*Coeur d’Alene*] seemed to advocate this balancing approach, a majority of the Court in *Verizon* rejected it.” “As a result,” this Court explained, “we need not assess the precise nature of the State’s sovereign interest in law enforcement—so long as [plaintiff’s] complaint seeks prospective injunctive relief to cure an ongoing violation of federal law, the Eleventh Amendment poses no bar.” *Id.* at 588; *see also Tarrant Reg’l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (*Verizon* “limited the reach of *Coeur d’Alene*”).

In any event, *Coeur d’Alene* did not authorize federal courts to engage in ad hoc balancing of federalism interests based on the identity of the plaintiff. *Coeur d’Alene* focused exclusively on the “type of relief” sought to determine whether the suit was “barred by the Eleventh Amendment” or “permitted under *Ex parte*

Young.” 521 U.S. at 281 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)).

And compelling access to records is, as we showed above, permitted under *Ex parte Young*.

4. Even if the status of the plaintiff were relevant to the *Ex parte Young* analysis, IPAS is affected with a federal interest so that it may sue state officials to vindicate the federal rights it derives from federal law

In order for IPAS to prevail in this case, this Court need not go as far as the cases dictate and embrace the ability of an independent state agency always to bring an *Ex parte Young* action in federal court to enforce its federal rights. Even if defendants were correct that, generally, state agencies cannot sue state officials under *Ex parte Young*, they ignore the federal overlay IPAS acquired once the State designated it to be the State’s Protection and Advocacy System. IPAS’s federal role allows this case to fall within this Court’s holding in *City of Chicago v. Lindley*, 66 F.3d 819, 823 n.6 (7th Cir. 1995), which permitted Chicago to sue a state official under Section 1983 in analogous circumstance.

In *Lindley*, as a condition of receiving federal funds under the Older Americans Act, Illinois had designated Chicago as an “area agency on aging” to carry out certain federal programs and to serve as the advocate and focal point for older individuals. *Id.* at 820-821. Chicago contended that the State was not allocating it the appropriate share of funds to which it was entitled based on its designation. This Court held that Chicago could sue the state official for her

alleged failure to comply with federal law in allocating funds. It relied on the fact that Chicago was not bringing an action “in its capacity as a municipal entity created by the State; rather, it [was] suing as the area agency on aging.” *Id.* at 823 n.6. The same is true here. IPAS has not only been created by state law, it was also designated by the Governor, pursuant to federal law, to fulfill certain federal functions pursuant to a federal statute.

II. IPAS Has A Federal Right Of Action To Enforce Federal Law Against These State Officials

Defendants in this case never challenged in the district court IPAS’s right to relief if it could establish a violation of federal law, and thus would normally have waived any challenge. Nonetheless, at this point, the vacated panel’s opinion has raised doubts about the ability of IPAS to enforce its rights, and only resolution of the issue by this Court will put those doubts to rest.⁸

A. Congress Intended Entities Such As IPAS To Have A Federal Cause Of Action To Enforce Their Federal Access Rights

The text and structure of the statute make clear that Congress intended entities designated by the State as a Protection and Advocacy System to have a federal right of action to enforce its federal right of access to records.

⁸ For example, after the panel issued its opinion, a state official relied on that opinion to move to dismiss IPAS’s suit before then-district court Judge Hamilton in the Southern District of Indiana. That motion was placed in abeyance pending disposition of this appeal. *See* Def. EB Br. 16 n.2.

PAIMI is different than other federal funding statutes that provide money to a State that agrees that it will engage in certain conduct in the future. Instead, PAIMI is structured so that, once a State designates an entity as its Protection and Advocacy System, that entity is vested with certain authority as a matter of federal law.

Thus, as the DD Act makes clear, in order to receive funds, all a State must do to “have in effect a system to protect and advocate the rights of individuals with developmental disabilities,” 42 U.S.C. § 15043(a)(1), is to designate or “redesignate” a public or private “agency” that will “implement[] the system,” *id.* § 15043(a)(4). It is that designated system, *i.e.*, “a system established in a State to protect and advocate the rights of persons with developmental disabilities under” the DD Act, *id.* § 10802(2), that the PAIMI Act authorizes HHS to give funds so that that system can “establish and administer [a] system[] * * * which meet[s] the requirements of section 10805.” *Id.* § 10803(1).

Section 10805 provides that the “system established in a State under section 10803 of this title * * * *shall* * * * in accordance with section 10806 of this title have access to all records of” specified individuals with mental illness. *Id.* § 10805(a)(4) (emphasis added). Section 10806, in turn, provides that an “eligible system” shall have access to records “in accordance with the provisions of

subsection (a) of this section and paragraphs (1) and (2) of subsection (b) of this section.” *Id.* § 10806(a), (b)(3)(B).

Subsections (a) and (b) both describe the system having access to records “pursuant to section 10805(a)(4) of this title,” not pursuant to state law. *Id.* § 10806(a), (b). Further, subsection (a) expressly contemplates that a system will not always need to comply with state law. Subsection (a) provides that when the system has access to records that “under Federal or *State law*, are required to be maintained in a confidential manner by a provider of mental health services,” the system shall “maintain the confidentiality of such records to same extent” “except as provided in subsection (b).” *Id.* § 10806(a) (emphasis added). Subsection (b), in turn, authorizes disclosure of records to the individual who is the subject of the information under circumstances when state law would not. Similarly, subsection (b)(2)(C) contemplates that federal, not state, law governs the records access authority of the system by giving States until May 1988 before “section 10805(a)(4) of this title and this section” apply to an “eligible system” even if “the laws of the State prohibit an eligible system from obtaining access to [certain] records.” *Id.* § 10806(b)(2)(C); *see also Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) (holding that the PAIMI Act requires access to records “irrespective of state law”).

Further, Congress provided that an eligible system “shall * * * have the authority to * * * 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.” 42 U.S.C. § 10805(a)(1)(B). This federal authority is distinct from the additional authority to pursue remedies “on behalf of an individual” with mental illness. *Id.* §§ 10805(a)(1)(C), 10807(a).

Plainly, in order to “ensure the protection of individuals with mental illness,” a Protection and Advocacy System must be able to access records. Access to records, such as those at issue in this case, is perhaps the single most important power granted to P&A systems because it permits the systems to independently determine whether individuals with disabilities have been abused or neglected and whether the special needs of people with developmental disabilities are being met by the entities that the system oversees (including the defendants’ institutions). If the federal right to access is denied, then section 10805(a)(1)(B), phrased in terms of the system as the recipient of authority, reflects an intent to create a federal remedy. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see Hawaii Disability Rights Center v. Cheung*, 513 F. Supp. 2d 1185, 1196 (D. Haw. 2007). Moreover, if there were no federal cause of action, defendants do not identify any potential remedy. These Acts have no administrative enforcement mechanism. Cutting off federal funds would deprive the Protection and Advocacy System of *its*

federal funds. It is difficult to perceive how that federal response would influence the State.

Recognizing the important role served by a Protection and Advocacy System's ability to force compliance by bringing suit in federal court, this Court and other federal courts of appeals have consistently permitted systems to enforce the provisions of the DD Act and PAIMI Act in federal court without question. *See, e.g., Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) (Sotomayor, J.); *Disability Rights Wisconsin, Inc. v. Wisconsin Dep't of Pub. Instruction*, 463 F.3d 719 (7th Cir. 2006); *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996); *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, 929 F.2d 1054 (5th Cir. 1991).

Further, in this case at least, in light of the relief sought (an order to bring state officials into compliance prospectively with federal law), recognizing a cause of action here would plow almost no new ground because it closely tracks a cause

of action previously recognized by this Court, apart from 42 U.S.C. § 1983, to enforce the Supremacy Clause. In *Illinois v. General Electric Co.*, 683 F.2d 206 (1982), *cert. denied*, 461 U.S. 913 (1983), companies “brought suit in federal district court under 28 U.S.C. § 2201 (Declaratory Judgment Act) and 28 U.S.C. § 1331 (federal-question jurisdiction) against the state officials responsible for enforcing” a state law, seeking “a declaration that the [state law] violates the supremacy and commerce clauses of the U.S. Constitution.” *Id.* at 207. The Supremacy Clause claim was based on the contention that a federal statute preempted the state law. *Ibid.* The state officials argued that “the companies’ cause of action did not arise under federal law, as required for federal jurisdiction under 28 U.S.C. § 1331, the statutory basis of federal jurisdiction in this case.” *Id.* at 210. This Court rejected that argument, explaining that “the companies are claiming an unconditional right under the Constitution * * * notwithstanding the [state law]. They can vindicate that right in a suit under section 1331. The commerce and supremacy clauses of the Constitution create rights enforceable in equity proceedings in federal court.” *Id.* at 211.

Adhering to *General Electric*, this Court in *Illinois Association of Mortgage Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002), explained that it did not need to decide whether a federal statute secured rights that could be enforced through 42 U.S.C. § 1983 because this Court has “jurisdiction

when the plaintiff seeks declaratory relief against regulation by a state agency and contends that the agency has violated federal law by adopting particular regulations.” *Id.* at 765. It thus permitted the suit to proceed against the state official on the merits. *Id.* at 766.

The other courts of appeals are in accord. They “have universally affirmed the right of private parties to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly preemptive statute confers any federal ‘right’ or cause of action.” *Independent Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1058 (9th Cir. 2008) (citing this Court’s decision in *Illinois Ass’n of Mortgage Brokers* as well as cases from the First, Second, Third, Eighth, and Tenth Circuits), *cert. denied*, 129 S. Ct. 2828 (2009); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (“plaintiffs may vindicate preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes”).

This is precisely what plaintiffs seek: to vindicate its federal claims that the defendants’ policy of refusing to provide access to certain records is preempted by seeking declaratory and equitable relief in the federal district courts.

B. Alternatively, Enforcement Of The Statutory Right Of Access Can Be Brought Through Section 1983, And The Case Should Be Remanded To Permit The Complaint To Be Amended To Add An IPAS Official In His Official Capacity As A Plaintiff

Even if there is not sufficient evidence to show Congress’s intent to create a remedy, there plainly is sufficient evidence that Congress intended the PAIMI Act to secure a “right” enforceable through 42 U.S.C. § 1983 to access to records. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). If this Court agrees, then the case should be remanded to permit IPAS to amend its complaint to add its Executive Director in his official capacity as a plaintiff.

The state official defendants rightly contend that in order to be a plaintiff under Section 1983, one must be a “citizen of the United States or other person.” 42 U.S.C. § 1983.⁹ They then rely on the following syllogism (Def. EB Br. 30) in arguing that IPAS is not a “person”: (1) the term “person” in Section 1983 should be read the same for both potential plaintiffs and potential defendants; (2) when the term “person” in Section 1983 is used to identify the potential defendants, the term does not include States or arms of the State, *see Will v. Michigan Department of*

⁹ Section 1983 reads in part: “Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or *other person* within the jurisdiction thereof to the deprivation of any *rights*, privileges, or immunities *secured* by the Constitution and *laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.” 42 U.S.C. § 1983 (emphasis added).

State Police, 491 U.S. 58, 71 (1989); and therefore (3) a state entity such as IPAS is not a “person” that can bring a Section 1983 action.

Under that rationale, nothing in the statute precludes a state official from suing as a plaintiff because such a state official is a “person” under Section 1983. “Obviously, state officials literally are persons.” 491 U.S. at 71. *Will* distinguished state officials in their official capacities in Section 1983 damage actions—who are shielded by the State’s sovereign immunity because the damages would come from the state treasury and thus, the Court held, are not “persons”—from state officials in their official capacities sued for injunctive relief, who the Court held are “persons” for purposes of Section 1983. “Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983.” *Id.* at 71 n.10. Based on the same symmetry, a state official *suing* for injunctive relief is also a “person” under Section 1983.

The Supreme Court’s decision in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), supports the view that persons who can be sued under Section 1983 may also bring suit under Section 1983. In that case, although not expressly reaching the question, the Court held that a school district who served as a plaintiff was entitled to attorneys’ fees under section 1988 for prevailing on federal constitutional claim under section 1983 against a state official. *Id.* at 487

n.31. Likewise, in *Lindley* this Court held that the City of Chicago could bring a Section 1983 claim to enforce federal statutory rights. *See* 66 F.3d at 823 n.6.

Because defendants did not challenge IPAS's right to bring this action in the district court, it would be unfair to deny plaintiff leave to amend its complaint so that would permit this case to go forward under Section 1983.

III. The District Court Correctly Held That Federal Law Requires Defendants To Give IPAS Access To The Records

There should be no credible dispute that federal law requires defendants to provide IPAS access to all the records in question in this case. Indeed, for many of the records—such as the medical record, incident report and investigative report, defendants offer no reason why those records should not be produced immediately.

Defendants contend that PAIMI's record access requirement does not include "peer review" records protected by Indiana law because Congress did not draft PAIMI to explicitly mention such records when it addressed records generally. Def. EB Br. 37-38. As the district court explained (App. 16), however, that argument cannot be reconciled with the plain language of the statute and the overwhelming weight of authority on this precise issue.

a. Section 10805 of PAIMI expressly mandates that IPAS shall "have access to *all* records of * * * any individual" it has permission or statutory authority to obtain. 42 U.S.C. § 10805(a)(4) (emphasis added). The statute does not apply to "some" records or records of a particular kind; rather, the statutory

text makes clear that IPAS is entitled to “all records.” And nothing in this expansive language excludes by implication or otherwise, as defendants suggest, peer review records from disclosure to a PAIMI system such as IPAS.

To the contrary, Section 10806 makes clear that the record access requirement *applies* to records otherwise required to be maintained as confidential under federal or state law, *id.* § 10806(a), which “includes” any investigative records by the hospital itself—viz., “the term ‘records’ includes reports prepared by *any* staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.” *Id.* § 10806(b)(3) (emphasis added). Thus, Congress’s use of the words “any” and “all” suggest a broad and expansive meaning, “that is, ‘one or some indiscriminately of whatever kind,’” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted), which is reinforced by the open-ended introductory phrase “includes,” and thus provides no basis to exclude peer review records, which by their nature are investigative of injuries, from PAIMI’s record access requirement.

Moreover, as the district court recognized (App. 17), four federal courts of appeals have addressed whether peer review records are records under PAIMI, and

each of those circuits has rejected the precise result that defendants now propose. And no other federal appellate court has reached the contrary result. The Second, Third, Eighth, and Tenth Circuits all have held that Congress’s broad use of the term “records” encompasses peer review records. *See Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep’t of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.). In *Protection and Advocacy for Persons with Disabilities*, for example, then-Judge Sotomayor explained for the Second Circuit that “[t]he term ‘records’ is defined broadly to include reports prepared by any staff of the facility, reports prepared by investigative agencies, and discharge planning records.” 448 F.3d at 125. Likewise, in *Houstoun*, then-Judge Alito wrote for the Third Circuit that “[t]he plain language of [Section 10806] encompasses the peer review reports at issue here, since they are clearly ‘reports prepared by . . . staff or a facility rendering care and treatment.’” 228 F.3d at 426 (citation omitted).

Defendants cannot identify any intervening precedent that might compel a result different from those decisions; rather, defendants contend that those courts of appeals are wrong because they “ignored” the long confidential history behind

peer review records and cite to federal law protecting peer review records in other contexts. Def. EB Br. 34. But, even if this were a basis for this Court to depart from the plain language of the statute and the reasoning of its sister circuits, this argument by defendants overlooks the fact that PAIMI does not undermine the confidentiality of such records and generally requires IPAS to “maintain the confidentiality of such records to the same extent as is required of the provider of such services.” 42 U.S.C. § 10806(a). Indeed, as defendants concede, far from making peer review records strictly confidential, Indiana law permits the hospitals to provide access to peer review records. Def. EB Br. 32 (citing Ind. Code § 34-30-15-1(f)). And the federal statute upon which defendants rely (Def. EB Br. 36) broadly permits agencies to have access to peer review records in circumstances analogous to this dispute—*i.e.*, in order to determine “cases or patterns of fraud or abuse * * * [or] risk[s] to the public health.” 42 U.S.C. § 1320c-9(b)(1)(A), (b)(1)(B)(i).

b. Unable to directly confront the statutory text of PAIMI, defendants instead cite to a Department of Health and Human Services (HHS) regulation and legislative history that was inserted in a committee report five years after the statute first required access to “all records,” and three years after Congress enacted a partial definition of records. Def. EB Br. 31-32, 38. But as the Supreme Court has made clear, an agency may not through rulemaking alter the meaning of a

statute, because “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984); *see also Protection & Advocacy for Persons with Disabilities*, 448 F.3d at 124-125 (rejecting reliance upon the HHS regulation and joining every other federal appellate court to have addressed this issue). The phrase “all records” is plainly broad in scope, but breadth alone does not create ambiguity. *See United States v. Monsanto*, 491 U.S. 600, 609 (1989) (“The fact that the forfeiture provision reaches assets that could be used to pay attorney’s fees, even though it contains no express provisions to this effect, does not demonstrate ambiguity in the statute: It demonstrates breadth.” (internal quotation marks and citation omitted)).

And legislative history (and in particular, subsequent legislative history) cannot create ambiguity. *See Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”). As the Third Circuit recognized, if Congress wanted to alter the scope of PAIMI’s record access requirement in 1991, Congress “needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report.” *Houstoun*, 228 F.3d at 428. Indeed, even in those situation when it might be appropriate to look to legislative history, *subsequent* legislative history of the sort

defendants so heavily rely has limited value. *See Doe v. Chao*, 540 U.S. 614, 626-627 (2004) (“Those of us who look to legislative history have been wary about expecting to find reliable interpretive help outside the record of the statute being construed, and we have said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.” (internal quotation marks and citations omitted)).

It is for that reason that this Court should give the New Hampshire Supreme Court’s ruling in *Disabilities Rights Center, Inc. v. Commissioner*, 732 A.2d 1021 (N.H. 1999), no weight. As the Second Circuit recognized, that state court, like defendants, mistakenly “did not consider whether the statutory language [of PAIMI] is ambiguous. Instead, it relied on 42 C.F.R. § 51.41 without considering whether the regulation is a valid exercise of HHS’s rule-making authority.” *Protection & Advocacy for Persons with Disabilities*, 448 F.3d at 126.

c. In any event, even if Sections 10805 and 10806 were susceptible to more than one construction, any agency interpretation of PAIMI to exclude peer review records would not be reasonable because it would contradict Congress’s mandate that investigative records be disclosed to identify potential abuse and measure effectiveness of the investigation itself.

It makes little sense for Congress to exclude peer review records from PAIMI's record access requirement. Peer review records often supply the most valuable information on a provider's quality of care and whether that care comported with professional standards. These records also provide essential information on possible systemic issues not available from any other source. In addition, access to peer review records enables Protection and Advocacy Systems to evaluate whether a provider is taking appropriate corrective actions, whether there are alternatives to such actions, and the manner and extent to which Protection and Advocacy Systems should monitor those actions in the future.

In fact, in promulgating the regulation, the agency did not rely upon its particularized expertise to exclude peer review records from PAIMI's record access requirement. Instead, the agency cited only to subsequent legislative history, which the Supreme Court has held is of limited utility. And in a notice of proposed rulemaking, the same agency has proposed language that would drop the exclusion for peer review records in the DD Act regulations "in the belief that the proposed provisions are necessary to meet Congress' underlying intent to ensure necessary access to records to promote the System's authority to investigate abuse and neglect and ensure the protection of rights." 73 Fed. Reg. 19,708, 19,715, (Apr. 10, 2008).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Debra J. Dial
Karen Davis
Indiana Protection and Advocacy Services
4701 N. Keystone Avenue, Suite 222
Indianapolis, IN 46205
(317) 722-5555

Seth M. Galanter
Brian R. Matsui
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington DC 20006
(202) 887-6947

January 14, 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that, relying on the word count of the word-processing system used to prepare the brief, this brief is proportionately spaced, has a typeface of 14 points, and contains 13,958 words.

Seth M. Galanter

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing brief on the following counsel of record by UPS Overnight:

Thomas M. Fisher
OFFICE OF THE ATTORNEY GENERAL
302 W. Washington Street
Indiana Government Center South, Fifth Floor
Indianapolis, IN 46204-2770

Alisa B. Klein, Attorney
U.S. DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
Room 7235
950 Pennsylvania Avenue N.W.
Washington, DC 20530

dc-585070