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IN THE

Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; Anne W. Murphy, in her official capacity as Secretary of the Indiana Family and Social Services Administration; Gina Eckhart, in her official capacity as Director of the Division of Mental Health and Addiction; and Larry Lisak, in his official capacity as Superintendent of Larue Carter Memorial Hospital,
Petitioners,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES, *Respondent.*

APPLICATION FOR IMMEDIATE RECALL AND STAY OF MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PENDING CERTIORARI

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

HEATHER L. HAGAN (*Counsel of Record)*
ASHLEY E. TATMAN
Deputy Attorneys General

Office of the Attorney General
Indiana Government Center South,
Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204
(317) 234-4918

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To the Honorable John Paul Stevens, Associate Justice of the United States and Circuit Justice for the Seventh Circuit:

Petitioners Anne W. Murphy, Gina Eckart and Larry Lisak respectfully apply for an order immediately recalling the issuance of the mandate of the United States Court of Appeals for the Seventh Circuit and staying any further action pending final action by this Court on a petition for writ of certiorari seeking review of the Seventh Circuit's judgment in this case.

The petition for writ of certiorari will seek review of the Seventh Circuit's decision in No. 08-3183 (7th Cir. Apr. 22, 2010) (en banc), which affirmed the judgment of the United States District Court for the Southern District of Indiana and held that (1) the Eleventh Amendment does not bar respondent Indiana Protection and Advocacy Services (IPAS) from seeking injunctive and declaratory relief against named state officials; (2) the Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("the PAIMI Act") provides a cause of

action for injunctive and declaratory relief to enforce the Act; and (3) IPAS is entitled to access to peer review records of treatment of covered mentally ill patients. Copies of the Seventh Circuit's majority, concurring, and dissenting opinions, together with the District Court's judgment, are attached.

DECISION BELOW AND JURISDICTION

On July 28, 2008, the district court entered an order granting summary judgment in favor of IPAS. The district court also, however, issued a stay of its injunction pending appeal of this case. FSSA filed a Notice of Appeal on August 25, 2008, and a panel of the Seventh Circuit ruled in favor of FSSA. IPAS petitioned for rehearing *en banc* and, on November 10, 2009, the Court granted IPAS's petition and vacated the panel's opinion and judgment. On April 22, 2010, the United States Court of Appeals for the Seventh Circuit issued its judgment in this case in favor of IPAS. On May 5, 2010, petitioners filed a Motion to Stay the Mandate with the Seventh Circuit. The Seventh Circuit denied petitioners' Motion on May 26, 2010 and issued the mandate on May 27, 2010. Petitioners have exhausted all possibilities of securing a stay of mandate from the Seventh Circuit. Upon receipt of the mandate from the Seventh Circuit, the District Court will have to withdraw its stay and order release of the peer review records.

This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1) and jurisdiction to stay the mandate under 28 U.S.C. § 2101(f) and 28 U.S.C. § 1651 (the All Writs Act). 28 U.S.C. § 2101(f) states:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

Stemming from that statutory provision, this Court's Rule 44.1 states that "[a] stay may be granted by a Justice of this Court as permitted by law."

There are four general criteria that the stay applicant must satisfy if it is "to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). First, the applicant must establish that there is a "reasonable probability" that certiorari will be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203–04 (1972) (Powell, J., in chambers). Second, the applicant must show that there is a "fair prospect" that the Court will reverse the decision below. *Rostker*, 448 U.S. at 1308. Third, the applicant must demonstrate that irreparable harm will result from the denial of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). Fourth, the applicant must show that the equities favor granting a stay. *Rostker*, 448 U.S. at 1308.

REASONS FOR GRANTING THE APPLICATION

The district court has already issued a stay of its injunction pending appeal of this case, and staying the mandate would merely have the effect of keeping the district court's stay in place. Otherwise, if the petitioners are made to turn over the peer-review materials concerning Patient 1, they will suffer the irreparable injury of disclosing information that may later be deemed confidential even as to IPAS. Upon reversal, no court would be able to force anyone who has seen the peer review report to erase from their memories the information they have gleaned from the documents. Accordingly, and because inter-court conflicts justify a grant of certiorari, the equities favor staying the mandate pending resolution of the case by this Court.

I. There is a reasonable probability that certiorari will be granted

The most important factor in evaluating whether this Court will grant certiorari is whether the decision from which certiorari is sought conflicts with a decision from another circuit court of appeals or a decision of a state court of last resort. *See* H. W. Perry Jr., *Deciding to Decide* (1991) at 246 ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 Litig. 25, 29 (1998) ("All agree that conflicts are the most fertile ground for a grant of certiorari."). Such circumstances exist with respect to two of the three issues petitioners will present to the Court.

1. The petitioners have a reasonable probability of persuading this Court to take this case because the Seventh Circuit's decision has created a clear circuit conflict on the sovereign immunity issue, as the Seventh Circuit itself has recognized. *See Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*, No. 08-3183, 2010 WL 1610117, at *28 n.8 (7th Cir. Apr. 22, 2010) ("The Fourth Circuit reached a different conclusion . . . [and for] the reasons explained in the text, we respectfully disagree.").

In *Virginia v. Reinhard*, 568 F.3d 110, 113-14 (4th Cir. 2009), *cert. petition pending*, No. 09-529, Virginia's state-agency P&A system sued three Virginia officials claiming unlawful denial of access to records in violation of the DDA Act and PAIMI. The Fourth Circuit held that the P&A system was barred by the Eleventh Amendment and principles of sovereign immunity from suing officials of the same state—and that it could not invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to circumvent this jurisdictional bar. *Id*. at 124-25. The Seventh Circuit, however, found that "IPAS's lawsuit is a classic application of *Ex parte* Young." *IPAS v. FSSA*, 2010 WL 1610117, at *7.

Moreover, the *Reinhard* case is already pending before this Court on a Petition for Writ of Certiorari, and the Solicitor General of the United States has filed an amicus brief urging this Court to grant the petition in *Reinhard*. The United States's brief only increases the already-high chances of a grant both in that case and this one. *See* Eugene Gressman et al., Supreme Court Practice, 734 n.52 (9th ed. 2007) ("A supportive amicus brief filed by the Solicitor General can carry significant weight with the Court; in most terms, the Solicitor General's success rate as an amicus curiae exceeds 70%.").

If this Court were to grant certiorari in *Reinhard*, it would likely either grant a petition in this case for simultaneous consideration or, at the very least, hold the Petition until it renders a decision in *Reinhard*. Then, if Virginia were to prevail in *Reinhard*, this Court would likely grant the Petitioners' petition in this case, vacate the Seventh Circuit's decision, and remand the case for further consideration in light of its decision in *Reinhard.*

2. Additionally, the Seventh Circuit's ruling on whether the definition of "records" under PAIMI excludes peer review reports and related records made confidential by state law both effectively invalidates a federal regulation and conflicts with a state court of last resort. Peer review reports and records enjoy a special status among all medical records given the critical role of the peer review function in improving patient care. It is for that reason that HHS promulgated a rule interpreting PAIMI's definition of "records" to specifically *exclude* peer review records, the confidentiality of which is otherwise protected by state law. 42 C.F.R. § 51.41(c)(4). Although "a court must give considerable weight to an agency's interpretation of a statute that it is entrusted to administer[,]" *United States v. United Services Automobile Association*, 5 F.3d 204, 209 & n.5 (7th Cir. 1993); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight

should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."), the Seventh Circuit's decision effectively, and erroneously, invalidated the federal regulation. *IPAS v. FSSA*, 2010 WL 1610117, at *15.

Furthermore, the New Hampshire Supreme Court has abided by the HHS directive, concluding that reading PAIMI to preempt State laws protecting the confidentiality of peer review records "would create a result contrary to the basic congressional purpose that underlies PAIMI . . . [which is to] benefit mentally ill individuals by fostering the improvement of services and conditions at medical and psychiatric care facilities." *Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections*, 732 A.2d 1021, 1024 (N.H. 1999) (holding that PAIMI does *not* preempt state peer review privileges).

Supreme Court scholars observe that both the invalidation of federal law and a conflict with a State Supreme Court are persuasive grounds for granting certiorari. *See* Gressman, *supra*, at 260, 267. Accordingly, it is reasonably likely that four Justices will agree to hear the case.

II. There is fair prospect that this Court will reverse the Seventh Circuit decision

In determining whether to grant a stay, the Circuit Justice is charged with determining "the prospect of reversal by this Court as a whole." *Rostker v. Goldberg*, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers). It is not necessary that the prospect "approach[] certainty," it must be merely a "fair prospect" of reversal. *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers) (holding stay warranted pending review on appeal of district court decision declaring New Jersey law reapportioning congressional districts unconstitutional). Petitioners meet this standard with respect to at least two of the three issues they plan to present.

1. On the merits of the sovereign immunity issue, there is at least a reasonable possibility that either the petitioners or their Virginia counterparts in *Reinhard* will persuade this

Court that sovereign immunity precludes this federal court action, in particular because allowing state protection and advocacy services to sue the individual state officials would implicate the "special sovereignty interests" of States. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). This Court has specifically instructed that *Young* cannot be interpreted "to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer" because that "would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Id.* at 270. Indeed, *Young* "requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Verizon Maryland, Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring).

In sum, the sovereign immunity issue presents a clear, acknowledged circuit split, so there is a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of this court. For this reason, this Court should stay the Seventh Circuit's mandate.

2. Furthermore, with respect to the peer review documents, acceptable peer review systems, which states generally protect with confidentiality protections and evidentiary privileges, are necessary for hospitals and other health care institutions to qualify for accreditation, not to mention Medicaid and Medicare eligibility. Congress itself has recognized the critical function that the peer review process plays in the provision of medical care and has extended certain immunities from federal claims to peer-review studies. Not only that, but Congress has, in the Medicare context, created peer review committees to review certain health care decisions as a means to prevent fraud and abuse—and has expressly provided that such

reports are to be kept confidential, subject to exceptions that do not appear to include state P&A systems.

Against this backdrop, one would have expected that, had Congress intended that peer review records be disclosable to P&A systems under PAIMI, it would have been explicit about that decision to contravene the more general national policy against disclosure of peer review records. Congress did not do that, however, and HHS's regulation defining "records" to exclude peer review reports is a reasonable attempt to harmonize federal policy. Given the history behind PAIMI and the Developmental Disabilities Act—and HHS's own extant regulations on the matter—it is at least reasonably possible that this Court will reverse and hold that peer-review reports and related records need not be disclosed when State law renders them confidential.

III. Petitioners will suffer irreparable harm absent a stay

This court has emphasized the importance of irreparable injury in deciding whether to grant a stay of the mandate. *See Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). The possibility of mootness has traditionally satisfied the irreparable harm requirement for a stay from this Court. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., in chambers); *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers); *Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers); *In re Bart*, 82 S.Ct. 675, 675-76 (1962) (Warren, C.J., in chambers). This Court has also recognized that the premature disclosure of confidential information could constitute irreparable harm. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1315-17 (1983) (Blackmun J., in chambers) (recognizing that trade secrets, confidential under Missouri state law, once revealed could not be made secret again).

The petitioners will undoubtedly suffer irreparable harm if the Seventh Circuit issues the mandate. For the pendency of this appeal, the district court has stayed its injunction requiring the petitioners to turn over the documents IPAS is seeking. Docket No. 71, *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*, No. 1:06-cv-01816-LJMTAB (S.D. Ind. Sept. 3, 2008). If the Seventh Circuit were to issue its mandate, however, the district court judgment would go into effect and thereby force petitioners to turn over peer-review reports and related documents to IPAS.

While handing over contested documents might not render the case technically moot because the documents could be returned, *see Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992), that remedy would be insufficient as a practical matter because it would come "too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred" when IPAS obtained the information in the documents. *Id.* Furthermore, *Church of Scientology* notwithstanding, if the petitioners turned over the documents to IPAS there would still be at least some risk that this Court would conclude that the case has become moot.

IV. The equities favor granting a stay

In close cases, the Court may need "to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). As explained above, petitioners will be irreparably harmed if they are forced to disclose the confidential peer review documents. IPAS, however, will not be harmed by the relatively minor delay attendant to this Court's review of the case. The delay occasioned by a stay has not generally been considered to be irreparable harm. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1315-17 (1983) (Blackmun J., in chambers)

(holding delay in registration of pesticides outweighed by interest in maintaining confidentiality of trade secrets); *Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J., in chambers) (finding delay in creating computerized database of patients receiving Schedule II controlled substances outweighed by irreparable harm to private interests of doctor-patient relationship).

IPAS has managed with a stay of the judgment and injunction pending appeal for the past 19 months, so there is no reason to believe that a continued stay would harm it. While the delay is surely frustrating to their investigation, that frustration is far outweighed by the irreparable harm to petitioners that would be caused by disclosure of the confidential peer review documents. Given that disclosure, once made, cannot be undone, the equities weigh in favor of the petitioners.

CONCLUSION

For the foregoing reasons, the Application for Immediate Stay of the Mandate should be granted.

Respectfully submitted,

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GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

HEATHER L. HAGAN (*Counsel of Record)*
ASHLEY E. TATMAN
Deputy Attorneys General

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Fifth Floor
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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2010, true and complete copies of the Application for Recall and Stay were served upon counsel for all parties by mailing same by overnight UPS delivery and electronic mail, to the following:

Debra J. Dial
Gary W. Ricks
David Smith
Karen Davis
INDIANA PROTECTION AND ADVOCACY SERVICES
4701 N. Keystone Ave., Ste. 222
Indianapolis, IN 46205

Jonathan Lave
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
Suite 1300
1615 L Street N.W.
Washington, DC 20036-5694

Alisa B. Klein
DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
Room 7235
950 Pennsylvania Avenue N.W.
Washington, DC 20530-0000

Seth Galanter
Jeremy McLaughlin
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue N.W.
Washington, DC 20006-1888

HEATHER L. HAGAN
Deputy Attorney General (Counsel of Record)

Office of the Attorney General
Indiana Government Center South,
Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204
(317) 234-4918