# No. 14-20

1:13-cv-01559-CM

In the
**United States Court of Appeals**
*for the*
**Second Circuit**

**NEW YORK STATE PSYCHIATRIC ASSOCIATION, INC.,** IN A REPRESENTATIONAL

**On Appeal from the United States District Court**
**for the Southern District of New York**

## BRIEF *AMICUS CURIAE* OF AMERICAN MEDICAL ASSOCIATION AND MEDICAL SOCIETY OF THE STATE OF NEW YORK IN SUPPORT OF NEW YORK STATE PSYCHIATRIC ASSOCIATION AND URGING REVERSAL OF THE DISTRICT COURT JUDGMENT

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*(FOR CONTINUATION OF CAPTION, SEE NEXT PAGE)*

CAPACITY ON BEHALF OF ITS MEMBERS AND THEIR PATIENTS, **MICHAEL A. KAMINS**, ON HIS OWN BEHALF AND ON BEHALF OF HIS BENEFICIARY SON, AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED HEALTH INSURANCE SUBSCRIBERS, **JONATHAN DENBO**, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED HEALTH INSURANCE SUBSCRIBERS, **BRAD SMITH**, ON HIS OWN BEHALF AND ON BEHALF OF HIS BENEFICIARY SON AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED HEALTH INSURANCE SUBSCRIBERS, AND **JULIE ANN ALLENDER**, ED.D., AND **SHELLY MENOLASCINO**, M.D., ON THEIR OWN BEHALF AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THEIR BENEFICIARY PATIENTS AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED PROVIDERS AND THEIR PATIENTS,

*Plaintiffs- Appellants,*

v.

**UNITEDHEALTH GROUP, UHC INSURANCE COMPANY, UNITED HEALTHCARE INSURANCE COMPANY OF NEW YORK** AND **UNITED BEHAVIORAL HEALTH,**

*Defendants-Appellees.*

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## Corporate Disclosure Statement and FED R. APP. P. 29(c)(5) Disclosure

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici*, the American Medical Association ("AMA") and the Medical Society of the State of New York ("MSSNY"), state that they are not-for-profit corporations and no publicly held corporation owns 10% or more of the stock of any *amicus*.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. *Amici* further state that no other person contributed money intended to fund preparing or submitting this brief.

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## Identification and Interest of *Amici* and Source of Authority

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA House of Delegates, substantially all U.S. allopathic physicians, residents and medical students are represented in the AMA policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all states and in all areas of medical specialization.

MSSNY is comprised of physicians and medical students who practice in the State of New York. MSSNY is represented in the AMA House of Delegates and shares the objectives of the AMA to promote the science and art of medicine and the betterment of public health. The primary purpose of MSSNY is to enhance the delivery of medical care of high quality to all people in the most economical manner, and to act to promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public. Together, *amici* represent tens of thousands of physicians in New York and across the country.[2]

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[2] The AMA and MSSNY join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA

*Amici* support the rights of patients who suffer issues of behavioral health and substance abuse to parity of treatment with patients who suffer purely physical disorders. More broadly, *amici* support the right of medical associations to advocate for their members and for their members' patients. Further, *amici*'s members have an affirmative ethical duty to serve as their patients' advocates. AMA *Code of Medical Ethics*, Opinion E-10.01, available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page? This brief is submitted pursuant to that obligation.

The source of authority to file this brief is the consent of all parties.

**Issue Addressed in *Amicus* Brief**

The issue addressed in this brief is whether the New York State Psychiatric Association ("NYSPA") has associational standing to represent its members in this action, both on account of those members' personal rights and on account of the rights of its members' patients.

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and the medical societies of each state, plus the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

## Statement of the Case

### Summary of First Amended Complaint[3]

The first-named plaintiff is NYSPA, a professional medical society of psychiatrists practicing in New York State. JA, p. 28. Additional plaintiffs are (a) Shelly Menolascino, M.D., a member of NYSPA, JA, p. 30, (b) Julie Ann Allender, Ed.D., a psychologist, JA, p. 29, and (c) several subscribers to health insurance plans, JA, pp. 31-37. The defendants are UnitedHealth Group ("UHG"), one of the largest (if not the largest) health insurance companies in the United States, JA, p.38, and three other health insurance companies affiliated with UHG, JA, pp 38-39.[4] UHG administers the health plans of numerous patients served by NYSPA members, JA, pp. 96-101, including Dr. Menolascino. JA, pp. 99-111. UHG also administers the health plans that cover the subscriber plaintiffs and the dependents of those subscribers, JA, pp. 40-96, as well as the health plans of patients of Dr. Allender (the psychologist), JA, pp. 101-109. Both Dr. Menolascino and Dr. Allender are outside UHG's provider network, JA, pp. 29, 114.

Each of Dr. Menolascino's patients signs a standard assignment of benefit form, which states, *inter alia*: I hereby … assign [health insurance] benefits

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[3] The First Amended Complaint is Joint Appendix ("JA") 25-169.

[4] The defendants are hereinafter collectively designated as "UHG."

otherwise payable to me to Shelly Menolascino, M.D. JA, p. 120." In addition, a number of Dr. Menolascino's patients, who are covered under UHG administered policies, have designated her as their "Authorized Representative," pursuant to the following terms:

> I hereby designate, authorize and convey to Shelly Menolascino, M.D. ("Provider"), to the full extent permissible under law and under any applicable insurance policy and/or employee health care benefit plan: (1) the right and ability to act as my Authorized Representative in connection with any claim, right, or cause of action that I may have under such insurance policy and/or benefit plan, including but not limited to with respect to internal appeals or litigation; and (2) the right and ability to act as my Authorized Representative to pursue such claim, right, or cause of action in connection with said insurance policy and/or benefit plan (including but not limited to, the right and ability to act as my Authorized Representative with respect to any claim, right, or cause of action under a benefit plan governed by the provisions of the Employee Retirement Security Act [of] 1974 "ERISA"), as provided in 29 C.F.R. §2560.5031(b)(4). This authorization and designation is deemed to apply to any health care services that I have received from the Provider, or will receive in the future as a result of the services I receive from Provider, and, to the extent permissible under the law, authorizes Provider to claim on my behalf such benefits, claims, or reimbursement to which I am entitled, and any other applicable remedy, including fines or injunctive relief permitted under law. JA, pp. 120-121.

Although only procedural issues are raised in this appeal, the substantive charge is that UHG, as a health insurance plan administrator, has systematically and improperly denied or limited benefits for claims related to behavioral health or substance abuse. The allegedly systematic improper claims policies include the following,

- In determining the medical necessity of behavioral health and substance abuse services, UHG uses internally-developed, unjustifiably restrictive guidelines that do not comport with generally accepted standards within the mental health community, JA pp. 41-32;
- UHG requires "clear and compelling" evidence that psychotherapy services at the proposed frequency are medically necessary to prevent acute deterioration or exacerbation to justify payment, rather than the reasonable probability of medical necessity used to justify payment for medical services not involving mental health treatment, JA p. 32;
- When paying for psychotherapy counseling services, UHG disregards the primary factor that reflects the value of those services – the time spent in the therapeutic session, JA p. 32;
- UHG's utilization review practices (such as pre-authorization and concurrent reviews with prospective limitations) for outpatient mental health services are not comparable to and are more stringent than utilization review procedures applied to medical procedures not involving mental health treatment. Furthermore, UHG delays its treatment pre-authorizations even when the treatment requires continued approvals, thereby leading to lapses in continuity of care, JA p. 32;

- When claim denials for mental health services are appealed, UHG employs biased reviewers on its appeal panels, JA pp. 62-63.

These practices are alleged to cause various types of injuries to the members of NYSPA and their patients, including not only monetary damages arising from underpayment or non-payment for services but also disruptions of the therapeutic relationships between physicians and patients.[5] They have the effect of steering patients away from psychotherapy and toward drug based therapy for mental health problems, a steerage that may be financially desirable for UHG but deleterious to the health of the patients treated by NYSPA members.[6] JA, pp. 96-101. These improper practices of UHG are alleged to violate (i) the Mental Health Parity and Addiction Equity Act of 2008, 29 U.S.C. § 1185a(a)(2) (2014); (ii) the Employee Retirement Income and Security Act (ERISA), 29 U.S.C. § 1132; (iii) the Patient Protection and Affordable Care Act (PPACA), 42 U.S.C. §300gg-19 (2010); and

[5] At least for Dr. Menolascino, UHG applied its improper claim practices to – and then held her responsible for – claims that her patients had submitted on their own behalves. Thus, based on its internal (and unjustifiable) practices, UHG wrongly asserted that it had overpaid benefits to Dr. Menolascino's patients (not to Dr. Menolascino herself), but it nevertheless sought to collect this overpayment from her. JA, p. 113.

[6] Although Dr. Menolascino is the signature NYSPA member plaintiff in this lawsuit, the First Amended Complaint alleged that "NYSPA's members include many psychiatrists who have been confronted with [UHG's] improper and overly restrictive policies applied to deny or reduce coverage for mental health care." JA, p. 96.

(iv) state laws requiring parity of mental health benefits and prohibiting deceptive or otherwise unfair trade practices. JA, pp. 121-145.

NYSPA sought injunctive and declaratory relief only, to remedy UHG's systematic misconduct in its administration of health insurance claims for behavioral health and substance abuse services. JA, pp. 150-160, 162-163.

**Disposition in the Trial Court**

UHG moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On October 10, 2013 the trial court granted that motion. JA, pp. 207-249. Primarily, the trial court found that UHG was not a proper defendant, because UHG was a health plan administrator, rather than a direct underwriter of insurance risk. Thus, according, to the trial court, the plaintiffs were required to base their claims exclusively on ERISA, and under ERISA they should have sued the health plans, rather than UHG.[7] JA, pp. 231-258. As to the question of whether UHG was a proper defendant, *amici* refer to the brief of the plaintiffs themselves.

In addition, the trial court held that, regardless of whether UHG was a proper defendant, NYSPA was not a proper plaintiff, as it lacked standing to bring the claims of its members. It found that the members of NYSPA themselves lacked standing to bring claims under ERISA, JA, pp. 242-24, and, even if they had

[7] There was one exception to this holding – the plaintiff Michael Kamins was a New York State employee, and his health insurance plan was not subject to ERISA. JA, pp. 239-243. This issue is not addressed in this brief.

personal standing the association could not bring suit, as prosecution of the members' claims would require their individual participation, JA, 245-248. It is on these last issues that this brief will demonstrate that the trial court erred.

## Argument

*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), held that an association has standing to litigate claims on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Regarding the first of these requirements, *Hunt* quoted *Warth v. Seldin*, 422 U.S. 490, 515 (1975), to emphasize that associational standing could be found if "any one" of the association members had suffered an injury. *Hunt*, 432 U.S. at 342.

The court below found that NYSPA failed to meet the first and third of the *Hunt* requirements, but in fact those tests were met.

### I. NYSPA Has Associational Standing, not only to Represent the Personal Interests of its Members but also to Represent the Interests of its Members' Patients.

NYSPA passes the first of the *Hunt* requirements for associational standing on not one but two bases: NYSPA members have been personally injured from the

actions of UHG, and NYSPA members have the right to represent the interests of their patients against UHG.

### A. NYSPA Members have a Personal Stake in The Claims Against UHG.

The personal stake of NYSPA members is two-fold. The most straightforward injury to NYSPA members arising from the conduct of UHG has been UHG's underpayment or non-payment for services.

**Dr. Menolascino's Assignment Forms**

As alleged, NYSPA members employ standard assignment of benefit forms, such as Dr. Menolascino's assignment form.[8] Under forms similar to Dr. Menolascino's, UHG was to pay NYSPA members those "benefits otherwise payable" to their patients. These assignments allowed the physicians to assert claims for the benefits which would otherwise have accrued to their patients, including benefits arising under ERISA. *I.V. Servs. of Am., Inc. v. Tr. Of the Am. Consulting Eng'rs Council Ins. Trust*, 136 F.3d 114, n.2 (2d Cir. 1998) (holding that assignments of benefits to health care providers are effective under federal common law to preserve ERISA claims).

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[8] In *Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n,* No. 1:09-cv-05619 (N.D. Ill. March 28, 2014) (Doc. No. 912), the court found that assignments of rights in favor of individually named plaintiff health care providers created an inference that "this is a practice common to other [association] members."

Had UHG paid the proper amounts, NYSPA members would have been fairly compensated for their services. As it was, NYSPA members received lower payments for the mental health services they provided their patients than they would have received if UHG had complied with its legal obligations. And, even if the evidence were to show that Dr. Menolascino was the sole NYSPA member to have received an assignment of benefits, this would still satisfy the first prong of the *Hunt* test for associational standing.

**Injury to Psychiatric Practices**

A second and no less significant aspect of the personal claims of NYSPA members derives from the disruptive effect that UHG's practices has had on the therapeutic relationships between NYSPA members and their patients. This disruption caused an injury personal to NYSPA members. NYSPA members are in the business of fostering therapeutic relationships, in order to provide their professional services. By undercutting these relationships, UHG degraded the value of NYSPA members' services.

The facts at bar are similar to those alleged in *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278 (3d Cir. 2002), and this Court should follow that well-reasoned decision. Just as in the present case, a state psychiatric association there sued several managed health care organizations. The essence of those claims, founded in part on theories of tort and ERISA, was

that the defendants either refused to authorize or imposed obstructions on obtaining necessary psychiatric treatment, thus burdening the reimbursement process and impairing the quality of health care. The psychiatric association claimed that the managed care organizations tortiously interfered with its members' livelihood as well as the psychiatrist-patient relationship.

The trial court dismissed the complaint for lack of standing, but the Third Circuit reversed. The court noted that the first prong of the *Hunt* test for associational standing, the ability of the association members to sue in their own right, was not seriously challenged. "Although the Pennsylvania Psychiatric Society itself has not suffered direct injury, it is uncontested that it properly pleaded that defendants' policies and procedures have economically injured its member psychiatrists and undermined their ability to provide quality health care." *Pa. Psychiatric Soc'y*, 280 F.3d at 289.

Just as in *Pennsylvania Psychiatric Society*, the case at bar alleges violations based on theories of tort (in this case, statutory torts) and ERISA. In addition, of course, the present case raises claims based on violations of the Mental Health Parity and Addiction Equity Act of 2008 and the Affordable Care Act – laws which did not even exist when *Pennsylvania Psychiatric Society* was decided. It can hardly be disputed that physicians have a legally protectable interest in their relationships with their patients. *See, e.g., Baptist Health v. Murphy*, 373 S.W.3d

269, 281-284 (Ark. 2010). Thus, even disregarding the assignments of rights, such as the assignments in favor of Dr. Menolascino, which NYSPA members received from their patients, those members have a personal stake in the mental health care benefit practices of UHG – a stake sufficient to confer personal standing on the individual members.

To support its conclusion that individual NYSPA members lacked standing, the lower court relied heavily on *MainStreet Organization of Realtors v. Calumet City*, 505 F.3d 742 (7th Cir. 2007). This case, however, is far off point. There, a municipality had enacted an ordinance which forbade the sale of a house without an inspection to determine whether it complied with the city's building and zoning codes. If not, the house had to be brought into compliance. An association of real estate brokers contended that the ordinance deprived homeowners of property without due process of law, and they obtained a preliminary injunction to prohibit its enforcement. On appeal, the Seventh Circuit reversed, finding that the association lacked standing.

The court noted that the association did have Article III standing, because the ordinance reduced the salability of city homes and thus lowered brokerage commissions for the association members. However, the association members lacked prudential standing, because their interest in the real estate values was too remote. If the association members had had existing brokerage contracts with

homeowners, the outcome might have been different, but such contracts were not alleged. Without such a present relationship, the members and therefore the association were without standing to challenge the ordinance.

The case at bar is entirely different. The complaint alleges both an assignment of rights and a present, ongoing relationship between NYSPA members and their patients. The alleged mental health practices of UHG are neither remote nor contingent. The members of NYSPA have themselves suffered injury from those practices, and this is another basis under which the first prong of the *Hunt* test for associational standing has been satisfied.

### B. By Virtue of the Identification of Interests between Psychiatrists and Patients, NYSPA Members can Stand in the Shoes of Their Patients to Prosecute the Patients' Claims Against UHG.

Not only do NYSPA members have personal standing to challenge the mental health practices of UHG, but they have standing to represent the rights of their patients. This goes beyond the contractual assignments that NYSPA members, such as Dr. Menolascino, received from their patients, and it goes beyond the injury the physicians suffered to their psychiatric practices. It derives as well from the special relationship between psychiatrists and their patients.

The Supreme Court has long recognized that a physician has third party standing to assert claims on behalf of his or her patients when those patients face a "genuine obstacle to the assertion of their own rights" and the physician is fully, or

very nearly, as effective a proponent of the patients' rights as are the patients themselves. *Singleton v. Wulff,* 428 U.S. 106, 114-116 (1976); *see also Stenberg v. Carhart*, 530 U.S. 914, 922-23 (2000) (accepting standing of doctor to assert rights of his patients); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (recognizing right of criminal defendant to raise a third-party equal protection claim); and *Campbell v. Louisiana*, 523 U.S. 392, 397 (1988) (recognizing, generally, situations in which litigants were allowed to assert the rights of third parties). In addition to physicians, lawyers on behalf of their clients, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), political fundraisers on behalf of their donors, *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984), and beer vendors on behalf of their customers, *Craig v. Boren*, 429 U.S. 190, 193-95 (1976), have had third party standing to sue. As the Third Circuit recognized in *Pennsylvania Psychiatric Society*, "[p]sychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf" because of the "intimate relationship" inherent in mental health treatment. *Pa. Psychiatric Soc'y*, 280 F.3d at 289.

One of the most important functions which the AMA performs is to maintain the *Code of Medical Ethics* which guides physicians in fulfilling their ethical obligations, Chief among the precepts which guide medical ethics is the concept that a physician acts in a fiduciary capacity to his and her patients, and that a

physician is ethically bound to place the interests of the patients ahead of the physician's own interests, including the physician's own pecuniary interests. Physicians are in a unique position to advocate for their patients' interests. Plaintiff in the case at bar, NYSPA, is standing in the shoes of its members in so advocating for their patients.

Opinion 10.015 of the AMA's *Code of Medical Ethics* reads as follows:

> The practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering.
>
> . . . .
>
> The relationship between patient and physician is based on trust and gives rise to physicians' ethical obligations to place patients' welfare above their own self-interest and above obligations to other groups, and to advocate for their patients' welfare.
>
> Within the patient-physician relationship, a physician is ethically required to use sound medical judgment, holding the best interests of the patient as paramount.

Advocacy for patients' interests is precisely what NYSPA is endeavoring to do in the case at bar, which is consistent with the ethical principles upon which the medical profession exists.

The court below found "no hindrance to the primary victims' ability to bring suit themselves," but this finding is simply counter to social reality. Mental health patients face substantial and often overwhelming obstacles to vindicating their own

rights through litigation. They face unfair and significant stigma associated with their condition and treatment. *See Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (noting that "persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.") The public exposure inherent in personally litigating their case represents a substantial deterrent to bringing suit themselves, especially when their employer must be involved in the case as the provider of their group health insurance. *See Singleton*, 428 U.S. at 117 ("[T]he woman's assertion of her own rights [faces] several obstacles," including that "she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit."). Moreover, "[b]esides the stigmatization that may blunt mental health patients' incentive to pursue litigation, their impaired condition may prevent them from being able to assert their claims." *Pa. Psychiatric Soc'y*, 280 F.3d at 290. At minimum, if there is a real question about whether the obstacles mental health and substance abuse patients confront prevent them from enforcing their rights effectively in court, this would be a fact question, to be addressed at trial.

The lower court also interpreted *Hunt* as holding that associations cannot sue if their members are representing the interests of third persons, even if the members have valid assignments from those third persons. This is simply a

distortion of *Hunt*. The point of *Hunt* is that some legal issues may be common to the purposes of an association. In these situations, it would be a waste of resources to require each association member to join in a lawsuit individually (or bring a separate lawsuit) to litigate such interests. Further, it would be anomalous if some members of an association were to secure rectification of a common problem through legal recourse, while others did not. That is the situation at bar. *Hunt* had nothing to do, either way, with whether the association members could derive their interests from third persons, whether through contractual assignments or through a commonality of objectives. For that proposition, *amici* rely on *I.V. Services of America v. Trustees*, on *Singleton v. Wulff*, and on the other cases cited in this section of this brief.

In short, the first prong of the *Hunt* test for associational standing is satisfied in this case.

## II. Neither the Claims Asserted nor the Relief Requested Requires the Participation of Individual NYSPA Members.

The court below also found that NYSPA failed the third of the *Hunt* requirements for association standing. Here, too, it was in error.

The First Amended Complaint alleged systematic, pervasive violations of legal obligations. In essence, the lower court determined that NYSPA will be unable to prove its case, because there might be some instances in which UHG

followed the law and some instances in which it did not.[9] If NYSPA cannot prove its claim of systematic abuse, its case must fail. At this stage, though, its pleadings, which are facially credible, should be accepted.

*Pennsylvania Psychiatric Society*, as noted, faced a virtually identical question and found that the association had passed the third *Hunt* requirement. The court there observed that, while a claim for monetary damages will require participation of individual association members, a request limited to declaratory and injunctive relief will not. The NYSPA claims in this case are so limited. They therefore pass the test.

## Conclusion

The complaint here alleges systematic violations of federal and state laws. These violations have injured the members of NYSPA and their patients. The patients suffer social stigmas and other obstacles preventing their remedying these violations except through the aid of their psychiatrists. Due to the pervasive nature of the violations, an association of psychiatrists can and should lead the legal effort to right those wrongs.

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[9] The trial court also found that NYSPA members "would need to establish each patient's valid assignment in order to have standing." As *amici* demonstrated *supra*, this is an improper legal standard. So long as Dr. Menolascino has alleged an arguably valid assignment, which she has, NYSPA has met the standing requirement – and, in addition, standing would exist even without the written assignments,

For these reasons, *amici*, the American Medical Association and the Medical Society of the State of New York, urge this Court to reverse the judgment entered against NYSPA and remand for further proceedings.

By: / s / Robert J. Conroy
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Dated: April 22, 2014

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## CERTIFICATE OF COMPLIANCE

In conformance with Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure, I certify that:

1) This brief complies with the type-volume limitation of FED. R. APP. P. 29(d) because it contains 4,255 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in Times New Roman 14 point font (a proportionally-spaced typeface) using Microsoft Word 2010.

Dated: April 22, 2014

/ s / Robert J. Conroy
Robert J. Conroy

## CERTIFICATE OF SERVICE

I certify that on April 22, 2014, I filed and served a copy of this document through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

I further certify that I will submit paper copies of the Brief Amicus Curiae in conformance with LOCAL RULE 31.1.

/s/ Robert J/ Conroy
Robert J. Conroy