IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.,	)	
Plaintiff,	)	Civil Action
v.	)	No. 1:08-cv-675-LY
THE TEXAS MEDICAL BOARD (TMB), *et al.*,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' RULE 12(B)(1) MOTION TO DISMISS CLAIMS FOR LACK OF STANDING

TO THE HONORABLE COURT:

Plaintiff Association of American Physicians and Surgeons, Inc. ("AAPS") seeks declaratory and injunctive relief against pervasive, ongoing violations of the U.S. Constitution, including denial of equal protection of the laws, denial of due process, and retaliation for exercising First Amendment rights. The Defendants – the Texas Medical Board and its officers (collectively "TMB") – filed their Answer to the Complaint more than nine months ago. Defendants' Motion to Dismiss is procedurally defective, because its challenge to standing is not jurisdictional; it is substantively baseless, because AAPS seeks declaratory and injunctive relief for its members.

I. DEFENDANTS' MOTION IS PROCEDURALLY DEFECTIVE BECAUSE ITS OBJECTION TO STANDING IS NOT JURISDICTIONAL.

Defendants' objection to associational standing here presents one of the "subconstitutional standing" issues that "do not [present] a question of jurisdiction." *Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Adv. Comm.*, 840 F.2d 258, 261 (5th Cir. 1988) (interior quotations omitted, alteration in original). Defendants cannot properly raise this subconstitutional standing issue as though it were a jurisdictional defect. It is not. As the Fifth Circuit explained in *Allandale Neighborhood Ass'n*:

> the subconstitutional standing and right of action issues are facets of the same inquiry "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." In other words, they ask whether, assuming the claim on the merits is valid, this plaintiff has a right to assert the claim in court. Similarly, the subconstitutional ripeness issue asks whether the plaintiff has a right to assert the claim now or only later. These issues do "not [present] a question of jurisdiction."

Id. (footnotes omitted, alteration in original). This Court plainly has subject matter jurisdiction over claims brought under 42 U.S.C. Section 1983, as asserted here, and an organization of aggrieved individuals may assert claims here under Section 1983 for prospective relief ordering Defendants to stop violating the Constitution. Defendants do not doubt that some association might have standing to sue for equitable relief against future wrongdoing by Defendants, but merely contest whether AAPS itself is in the proper "position" to do so. Accordingly, this is a subconstitutional challenge to standing, which is not jurisdictional under Rule 12(b)(1).

It is worth adding that "[a] motion asserting any of these defenses [including 12(b)(1)] must be made before pleading if a responsive pleading is allowed." FED. R. CIV. P. 12(b). Defendants filed their Motion nine months *after* filing their Answer. While a court may consider subject matter jurisdiction on its own at any time, FED. R. CIV. P. 12(h)(3), it need not allow an untimely Rule 12(b)(1) motion to interfere with ongoing discovery. *See* C.J.S. Fed. Civ. Proc. §827 (courts will generally not consider a repetitive "motion to dismiss unless convinced that the motion is not interposed for delay").

II. PLAINTIFF AAPS, AN ASSOCIATION INCLUDING AGGRIEVED PHYSICIANS, SATISFIED ALL THE REQUIREMENTS OF STANDING.

Plaintiff AAPS has satisfied all the requirements of associational standing because "(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." *Hunt v. Wash.*

State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); *Texas Democratic Party v. Benkiser,* 459 F.3d 582, 587 (5th Cir. 2006) (same). Moreover, "in determining whether an association has standing to bring suit on behalf of its members, neither unusual circumstances, inability of individual members to assert rights nor an explicit statement of representation are requisites." *Church of Scientology of California v. Cazares,* 638 F.2d 1272, 1279 (5th Cir. 1981). AAPS has satisfied all three prongs of the *Hunt* test.[1]

A. AAPS's Members Have Suffered Cognizable Injuries in Fact

Defendants tacitly concede that Plaintiff AAPS has satisfied the first prong of the *Hunt* test, because AAPS's members plainly have standing to bring this litigation. There is no question that this case concerns justiciable injuries and that AAPS has standing to present them.

B. This Litigation is Germane to AAPS's Mission

Plaintiff AAPS has also satisfied the second prong of the *Hunt* test, which simply requires that the lawsuit have some germaneness, no matter how slight, to AAPS's mission.[2] The

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[1] The Complaint's "facts [are] admitted *arguendo* by [the] motion to dismiss the complaint[]." *Cannon v. University of Chicago,* 441 U.S. 677, 680 (1979); *Jenkins v. McKeithen,* 395 U.S. 411, 421-22 (1969) ("[f]or the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted"). Similarly, courts assume the plaintiff's merits views to determine whether they would have jurisdiction if the plaintiff *prevails. Southern Cal. Edison Co. v. F.E.R.C.,* 502 F.3d 176, 180 (D.C. Cir. 2007) ("in reviewing the standing question, the court… must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims"); *Tyler v. Cuomo,* 236 F.3d 1124, 1133 (9th Cir. 2000) ("[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits"). Consequently, TMB does not benefit from its untimely filing of its Rule 12(b)(1) motion after having filed the denial of alleged facts in its Answer.

[2] AAPS did not locate any Fifth Circuit precedent that outlines the scope of the germaneness test, but federal courts have routinely held that it is "undemanding" and requires "mere pertinence between litigation subject and organizational purpose." *Humane Soc'y v. Hodel,* 840 F.2d 45, 58 (D.C.Cir.1988); *Building & Const. Trades Council of Buffalo v. Downtown Development, Inc.,* 448 F.3d 138, 148 (2nd Cir. 2006) (same); *Presidio Golf Club v. National Park Service,* 155

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Complaint expressly states that "[t]he protection of AAPS members from arbitrary and unlawful government action is central to AAPS's mission on behalf of its members." Compl. ¶4. Defendants' own submission about AAPS's mission corroborates that allegation. *See* Exhibits to the Vinson Affidavit. Defendants concede that AAPS's mission is "dedicated to preserving freedom in the one-on-one patient-physician relationship" and that this relationship "must be protected from all forms of third-party intervention." Defs. Vinson Aff. Exh. A-1, p.1. Defendant TMB is a "third party" to the patient-physician relationship; its interference with the practice of medicine in the absence of patient harm is "third-party intervention." Six years ago, in 2002, AAPS's General Counsel testified that AAPS "opposes the intimidation of physicians through deprivation of their rights at [medical board] disciplinary proceedings. This interference destroys the integrity of the patient-physician relationship and the ethical practice of medicine." Declaration of Andrew L. Schlafly ¶ 3, Exh. A, p. 4. AAPS's General Counsel submitted similar testimony regarding the Texas Medical Board, likewise predating this lawsuit. *Id.* ¶ 4, Exh. B.

Count I in Plaintiff's Complaint expressly describes Defendants' "misuse of anonymous complaints against [AAPS members] if they … stand up for the rights of their patients." Compl. ¶ 86. "The physician's first professional obligation is to his patient," AAPS's mission states. Defs. Vinson Aff. Exh. A-2, p.1. It is clearly germane to AAPS's mission to defend the patient-physician relationship to complain about Defendants' retaliation against AAPS members if they

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F.3d 1153, 1159 (9th Cir. 1998) (same). Although TMB attempts to sow an internal conflict between the interests of AAPS's members, Defs. Mot. at 4 n.1, unanimity is not required for germaneness, even if TMB could find AAPS members who oppose this litigation. *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996).

"stand up for the rights of their patients." Compl. ¶ 86.

AAPS's mission statement (as submitted by Defendants' own affidavit) includes the statement that "AAPS has successfully fought in the courts for the rights of patients and physicians." Not even Defendants deny that the claims in this lawsuit concern and advance the rights of physicians with respect to Defendant TMB, which disciplines physicians. On this basis alone AAPS satisfies the germaneness requirement. See *Hunt,* 432 U.S. at 343; *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991) ("the suit is germane to the organization's purpose since Empire is a professional organization which strives to help its members").

Defendants argue that "[t]here is nothing in this lawsuit … about preserving freedom in the physician-patient relationship [or] preserving the doctor-patient relationship from third party intervention." Defs. Mot. at 4. In fact, the Complaint repeatedly alleges that Defendants have acted against physicians in order to advance the interests of insurance companies, who have a financial interest in limiting or denying care to patients, and of TMB officers and agents, who have financial interests against their competitors. Compl. ¶¶ 33-37, 48-49. It is squarely within the mission of AAPS to take legal action to stop Defendants from acting against the interests of AAPS members and their patients on behalf of insurance companies and other third parties.

C. AAPS's Asserted Claims and Requested Relief Do Not Require AAPS's Members to Participate

Plaintiff AAPS's action is for purely declaratory and injunctive relief. Compl. at 20 ("Declaratory and injunctive relief for violation of 42 U.S.C. § 1983"). Plaintiff AAPS seeks no damages, and there is no need for individualized proof of harm beyond what is in Defendants' possession. Participation by the victims of this wrongdoing is not necessary because Plaintiff is not seeking individualized damages, or any damages at all. The allegations of individualized harm in the Complaint simply establish the standing of Plaintiff AAPS to sue under the first

prong of the *Hunt* test, that AAPS members would otherwise have standing to sue in their own right. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (to survive summary judgment, "respondents had to submit affidavits or other evidence showing, through specific facts, … that one or more of respondents' members would thereby be 'directly' affected"). Courts routinely find associational or representative standing for groups like AAPS to litigate the types of injuries that AAPS complains about here. *See, e.g., Eastern Paralyzed Veterans Ass'n, Inc. v. Secretary of Veterans Affairs*, 257 F.3d 1352, 1356 (Fed. Cir. 2001) (denial of procedural due process); *O'Hair v. White*, 675 F.2d 680, 691-92 (5th Cir. 1982) (*en banc*) (due process and equal protection); *Church of Scientology*, 638 F.2d at 1278 (First Amendment); *P.L.S. Partners, Women's Med. Ctr. of R.I., Inc. v. City of Cranston*, 696 F.Supp. 788, 798 (D.R.I. 1988) (procedural due process in the form of anonymous complaints); *Jackson Court Condo., Inc. v. City of New Orleans*, 874 F.2d 1070, 1076-77 (5th Cir. 1989) (procedural due process); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59, 462 (1958) (privacy and First Amendment).

1. Defendants Do Not and Cannot Cite Any Cases Supporting Their Argument that This Action for Injunction Relief is Jurisdictionally Defective.

Defendants do not – and cannot – cite any cases supporting their view that this action for declaratory and injunctive relief is jurisdictionally defective. Defendants depend entirely on one case from the Court of Appeals for the Second Circuit, but that holding relied on plaintiffs' demand for damages. *See Bano v. Union Carbide Corp.*, 361 F.3d 696 (2nd Cir. 2004) (cited at Defs. Mot. at 5). The *Union Carbide* action included an attempt by organizations to recover damages for individual injuries caused by the 1984 Bhopal chemical disaster in India. Thousands died and more than 200,000 were injured in this accident, and the plaintiff association sought relief that included individual medical reimbursements. The Court rejected standing by the association, noting that "[w]e know of no Supreme Court or federal court of appeals ruling

that an association has standing to pursue damages claims on behalf of its members." *Id.* at 714.

In sharp contrast, Plaintiff AAPS seeks no damages "on behalf of its members," so the holding in *Union Carbide* does not support Defendants' Motion. Moreover, the *Union Carbide* Court indicated that it would support standing in this type of lawsuit for injunctive relief: "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." *Id.* The Supreme Court has upheld organizational standing even when future proceedings would award individualized damages to members of the organization. In *Int'l Union, U.A.W. v. Brock*, 477 U.S. 274 (1986), the Supreme Court ruled that a union had standing to seek injunctive relief when the issue "allegedly resulted in the denial of [trade readjustment allowance] benefits to thousands of the Union's members." *Id.* at 281. There, as here, the Complaint did not directly seek recovery of the individual union members' denied benefits. *Id.* at 284. The Supreme Court held that even when the ultimate resolution of an individual member's claim requires an individualized proceeding, nothing precludes using associational standing to address common issues:

> [A]lthough review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court.

Id. at 285; *see also Hunt*, 432 U.S. at 344 (organization had standing where "neither the interstate commerce claim nor the request for declaratory and injunctive relief required individualized proof and both were thus properly resolved in a group context").

Associational standing, like that asserted here, is appropriate for groups seeking only prospective injunctive and declaratory relief on behalf of its members against ongoing violations of federal law. "If the Commission were a voluntary membership organization – a typical trade association – its standing to bring this action as the representative of its constituents would be

clear under prior decisions of this Court." *Hunt*, 432 U.S. at 342; *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 102 (5th Cir.), *cert. denied*, 375 U.S. 829 (1963) (finding associational standing to assert members' constitutional rights notwithstanding that pleadings did not seek relief on behalf of any specific member); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) ("[n]or must the association name the members on whose behalf suit is brought").

Minimal participation by members of an organization does not serve to disqualify associational standing. Rather, the third *Hunt* test asks whether something about the claim asserted or relief requested requires "individualized proof" that includes the "extent of injury." *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).[3] Nothing in the Complaint requires proof of the "extent of injury" of a particular member of AAPS. As then-Judge Alito wrote in *Hospital Council*, the need for discovery to establish the unlawful injury does not negate associational standing:

> This case, unlike many prior associational standing cases, does not involve a challenge to a statute, regulation, or ordinance, but instead involves a challenge to alleged practices that would probably have to be proven by evidence regarding the manner in which the defendants treated individual member hospitals. Adjudication of such claims would likely require that member hospitals provide discovery, and trial testimony by officers and employees of member hospitals might be needed as well. Nevertheless, since participation by "each [allegedly] injured party" would not be necessary, we see no ground for denying associational standing.

Hospital Council, 949 F.2d at 89-90. Then-Judge Alito recognized that that the test is whether "the individual participation of *each injured party [is] indispensable* to proper resolution of the

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[3] While a purely legal question on a statute or regulation is an easier case than a question of law on a pattern or practice, both *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601 (7th Cir. 1993), and *Hospital Council of Western Penn. v. City of Pittsburgh*, 949 F.2d 83, 89-90 (3rd Cir. 1991) (Alito, J.), found associational standing in pattern and practice cases. *See* Compl. ¶¶32, 85 (Count I), ¶¶53 (Count II), ¶¶66, 100, 101 (Count III), ¶¶72, 107 (Count IV), ¶¶77, 81, 113 (Count V) (establishing a pattern and practice of unlawful TMB activity).

cause. *Id.* (quoting *Warth,* 422 U.S. at 511, emphasis added); *accord Retired Chicago Police Ass'n,* 7 F.3d at 601. When viewed to allow evidentiary presentations by individual members (without which no association could prove its standing), the third *Hunt* test is no obstacle here.

2. Defendants Fail to Show that No Relief Is Possible, and Fail To Identify any Individualized Proof Necessary to Prove Plaintiff's Claims.

This Court should not dismiss under the relief-requested prong of the third *Hunt* test unless this Court could grant *no* relief. *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 65-66 (1978) ("a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one"); *Lockhart v. Leeds,* 195 U.S. 427, 436-37 (1904) ("nothing in the intricacy of equity pleading … prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill"). Here, the Court plainly can grant *some* relief. "Although individual relief would remain to be established in individual actions by the members, the declaration would inure to the members' benefit." 13 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, §3531.9; *Rhode Island Broth. of Correctional Officers v. Rhode Island,* 357 F.3d 42, 48 (1st Cir. 2004) (same); *National Ass'n of Life Underwriters v. Clarke,* 761 F. Supp. 1285, 1290-91 (W.D. Tex. 1991) (same). At a minimum, this Court can declare the unlawfulness of TMB's methods, which will protect AAPS's members both generally and in future proceedings. Because this Court can grant *some* relief, this Court should not dismiss under the third *Hunt* test.

Nevertheless, Defendants argue in their Motion that individual participation is "absolutely essential to the prosecution" of Plaintiff's claims. Defs. Mot. at 5-8. But Defendants fail to recognize that the references to individuals in the Complaint are to satisfy the first prong of the *Hunt* test, and are not an impediment to the third prong of that test. Defendants make much of a specific allegation about how a member of AAPS was victimized by the manipulation of ano-

nymous complaints against him with respect to patients who were "very pleased with his treatment," Defs. Mot. at 6, but that member of AAPS is not needed to prove how Defendants abuse anonymous complaints. *See* Count I (¶¶84-92). The proof is in the complaints under the control of Defendants, not Plaintiff. There is often adequate proof of a crime, such as murder, without hearing from the victim himself. In the case of Defendants' wrongdoing in manipulating anonymous complaints, nearly all the evidence of wrongdoing is with Defendants, not the victim.

Defendants' objections to Plaintiff's other causes of action are likewise baseless. Evidence about conflicts of interest, which comprise Count II (¶¶93-98), is with those who had the conflicts, not with the victims (AAPS members). Proof of how Defendants arbitrarily reject administrative rulings, Count III (¶¶99-105), is likewise in the possession of Defendants, not AAPS members. Similarly, evidence for Defendants' breach of privacy and First Amendment infringement is with Defendants, not the victims (Counts IV and V, ¶¶106-111 & ¶¶112-116). It is disingenuous for Defendants to withhold documents that might prove Plaintiff's claims and then insist that the Complaint should be dismissed by arguing that such evidence exists only with Plaintiff's individual members.[4]

III. CONCLUSION

Plaintiff AAPS respectfully requests that this Court deny Defendants' Motion to Dismiss and hold that AAPS has associational standing to assert its members' justiciable injuries.

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[4] If it finds any merit in Defendants' Motion, the Court should allow discovery for the purpose of resolving the jurisdictional issue, and not dismiss the litigation in its entirety. *See, e.g.*, *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) ("In reviewing Saudi Arabia's 12(b)(1) motion to dismiss, the district court devised a procedure allowing additional limited discovery on the issue of jurisdictional immunity under the" Foreign Sovereign Immunities Act.).

Dated: October 24, 2008

Respectfully submitted,

/s/ Andrew L. Schlafly

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2008, I electronically filed the foregoing "Plaintiff's Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss Claims for Lack of Standing" and its accompanying Appendix and Proposed Order with the Clerk of the Court using the Electronic Case Filing system, which I understand to have caused service of Assistant Attorneys General Nancy K. Juren and Eric Vinson of the Office of the Attorney General of the State of Texas, on behalf of all Defendants.

/s/ Karen Tripp
Karen Tripp