

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: August 5, 2008

4 **NO. 27,199**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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Jim M. Martin

5 **PROTECTION AND ADVOCACY**
6 **SYSTEM, JANE DOES 1-3 and**
7 **JOHN DOE 1,**

8 Plaintiffs-Appellees,

9 v.

10 **CITY OF ALBUQUERQUE,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
13 **Valerie A. Huling, District Judge**

14 Protection & Advocacy System
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1
2 **OPINION**

3 **SUTIN, Chief Judge.**

4 {1} In this case, we consider whether City of Albuquerque Ordinance C/S O-06-21,
5 the Assisted Outpatient Treatment Ordinance (the Ordinance), is preempted by state
6 law. First, though, we must consider whether Plaintiffs, Jane Does 1 through 3, John
7 Doe 1, and Protection and Advocacy System (P&A), have standing to challenge the
8 Ordinance. We agree with the district court that Plaintiffs have standing and that the
9 Ordinance is preempted by the State Mental Health and Developmental Disabilities
10 Code (the Code), NMSA 1978, §§ 43-1-1 to -25 (1976, as amended through 2007),
11 and the Mental Health Care Treatment Decisions Act (the Act), NMSA 1978, §§ 24-
12 7B-1 to -16 (2006). Thus, we affirm the district court's declaratory judgment and
13 permanent injunction prohibiting the enforcement of the Ordinance.

14 **BACKGROUND**

15 **I. The Ordinance**

16 {2} The Ordinance became effective on October 6, 2006. It states:

17 The City Council finds that there are mentally ill persons who are
18 capable of living in the community with the help of family, friends and
19 mental health professionals, but who, without routine care and
20 treatment, may relapse and become violent, suicidal or require
21 hospitalization. The City Council further finds that there are
22 mentally[]ill persons who can function well and safely in the community
with supervision and treatment, but who without such assistance, will

1 relapse and require long periods of hospitalization. The City Council
2 further finds that some mentally ill persons, because of their illness,
3 have great difficulty taking responsibility for their own care, and often
4 reject the outpatient treatment offered to them on a voluntary basis.
5 Family members and caregivers often must stand by helplessly and
6 watch their loved ones and patients decompensate.

7 Albuquerque, N.M., Ordinance C/S O-06-21, § 1 (Oct. 6, 2006).

8 {3} The Ordinance further indicates that the City Council believed that “assisted
9 outpatient treatment” would be an “[e]ffective mechanism[]” to prevent the mentally
10 ill from requiring hospitalization. *Id.* The Ordinance defines the following terms:

11 ASSISTED OUTPATIENT TREATMENT. Court ordered
12 services prescribed to treat a person’s mental illness and to assist a
13 person in living and functioning in the community and/or to attempt to
14 prevent a relapse or deterioration that may reasonably be predicted to
15 result in harm to the person or another.

16 ASSISTED OUTPATIENT TREATMENT PROGRAM. A
17 program that arranges and coordinates the provision of assisted
18 outpatient treatment, including monitoring treatment compliance by
19 patients, evaluating and addressing the conditions or needs of assisted
20 outpatients and ensuring compliance with court orders.

21

22 MENTAL ILLNESS. A substantial disorder of thought, mood or
23 behavior that afflicts a person and that impairs that person’s judgment
24 but does not mean developmental disability.

25

1 SUBJECT. A person who is alleged in a petition to the court to
2 meet the criteria for [a]ssisted [o]utpatient [t]reatment.

3 *Id.* § 3.

4 {4} The Ordinance allows certain people to file “[a] petition for an order
5 authorizing assisted outpatient treatment” in the Second Judicial District Court. *Id.*
6 § 5(A). Those people include, but are not limited to, the subject’s parent; the
7 subject’s spouse, adult sibling, or adult child; the director of a hospital where the
8 subject is hospitalized; the director of an organization, agency, or home where the
9 subject resides or from which the subject receives treatment; a qualified psychiatrist;
10 a provider of social services; or the mayor. *Id.* Further:

11 The petition shall be accompanied by an affidavit from a
12 physician, who shall not be the petitioner, and shall state that:

13 (1) The physician has personally examined the subject
14 no more than ten days prior to the filing of the petition, that the
15 physician recommends assisted outpatient treatment for the subject and
16 that the physician is willing and able to testify in person or by telephone
17 at the hearing on the petition; or

18 (2) No more than ten days prior to the filing of the
19 petition, the physician or the physician’s designee has made appropriate
20 attempts to elicit the cooperation of the subject but has not been
21 successful in persuading the subject to submit to an examination, that
22 the physician has reason to suspect that the subject meets the criteria for
23 assisted outpatient treatment and that the physician is willing and able
24 to examine the subject and testify at the hearing on the petition.

1 *Id.* § 5(C).

2 {5} Under the Ordinance, a hearing shall be held on the petition. *See id.* § 6(B).

3 If the subject has refused to be examined by a physician, then at the hearing,

4 the court may request that the [s]subject consent to an examination by a
5 court appointed physician. If the [s]subject does not consent to an
6 examination and the court finds that there are reasonable grounds to
7 believe that the allegations in the petition are true, the court may order
8 that a law enforcement officer take the [s]subject into custody and
9 transport the [s]subject to a provider for examination by a physician. The
10 examination may be performed by the physician whose affidavit
11 accompanied the petition. No [s]subject taken into custody pursuant to
12 this section shall be detained longer than seventy-two hours.

13 *Id.* § 6(E).

14 {6} In order for the court to order assisted outpatient treatment, the court must find
15 by clear and convincing evidence that the subject meets the following criteria.

16 (1) Is eighteen (18) years of age or older;

17 (2) Is suffering from a mental illness;

18 (3) Is unlikely to survive safely in the community
19 without supervision, based on a clinical determination by a qualified
20 mental health care professional;

21 (4) Has a history of lack of compliance with treatment
22 for mental illness that has:

23 (a) prior to the filing of the petition, at least twice
24 within the last thirty-six months[,] been a significant factor in
25 necessitating hospitalization or receipt of services in a forensic or other

1 mental health unit of a state correctional facility or a local jail facility,
2 not including any period during which the person was hospitalized or
3 incarcerated immediately preceding the filing of the petition; or

4 (b) prior to the filing of the petition, resulted in
5 one or more acts of serious violent behavior toward self or others or
6 threats of, or attempts at, serious physical harm to self or others within
7 the last forty-eight months, not including any period during which the
8 person was hospitalized or incarcerated immediately preceding the filing
9 of the petition; and

10 (5) Is unlikely, as a result of mental illness, to voluntarily
11 participate in the recommended treatment pursuant to the treatment plan;
12 and

13 (6) In view of the person's treatment history and current
14 behavior, is in need of assisted outpatient treatment in order to prevent
15 a relapse or deterioration that would be likely to result in serious harm
16 to himself or another person; and

17 (7) Will likely benefit from assisted outpatient treatment;
18 and

19 (8) Is located within the municipal limits of the City.

20 *Id.* § 4(A).

21 {7} The examining physician must provide the court with a proposed written
22 treatment plan. *Id.* § 7(A)(1). In developing the treatment plan, the physician "shall
23 take into account, if existing, an advance directive," as well as allow the subject, the
24 treating physician, and, upon request of the subject, an individual significant to the

1 subject to have an opportunity to actively participate in the development of the plan.

2 *Id.* § 7(B).

3 {8} In making its final disposition based on the petition, the court is:

4 authorized to order the [s]ubject to receive [a]ssisted [o]utpatient
5 [t]reatment for a period not to exceed six months. In its order, the court
6 shall state the [a]ssisted [o]utpatient [t]reatment that the [s]ubject is to
7 receive. A court may order the [s]ubject to self-administer psychotropic
8 drugs or accept the administration of such drugs by an authorized
9 professional as part of an assisted outpatient treatment program. The
10 order may specify the type and dosage range of such psychotropic drugs
11 and shall be effective for the duration of the [s]ubject's assisted
12 outpatient treatment. Assisted outpatient treatment may include one or
13 more of the following categories:

14 (1) medication;

15 (2) periodic blood tests or urinalysis as medically
16 necessary to determine compliance with prescribed medications;

17 (3) individual or group therapy;

18 (4) day or partial day programming activities;

19 (5) educational and vocational training or activities;

20 (6) alcohol or substance abuse treatment and counseling
21 and periodic tests for the presence of alcohol or illegal drugs for persons
22 with a history of alcohol or substance abuse;

23 (7) supervision of living arrangements; or

24 (8) any other services prescribed to treat the person's
25 mental illness and to either assist the person in living and functioning in

1 the community or to help prevent a relapse that may reasonably be
2 predicted to result in suicide or the need for hospitalization; however,
3 electro-convulsive therapy shall never be a form of treatment allowed by
4 this ordinance.

5 *Id.* § 8(B).

6 {9} If an individual refuses to comply with the court-ordered treatment, then that
7 person "may be retained for observation, care, treatment and further examination in
8 the hospital for up to seventy-two hours to permit a physician to determine whether
9 the patient has a mental illness and is in need of continued involuntary retention for
10 care and treatment." *Id.* § 11(A). In order for such a detention to occur, a physician
11 must determine that:

12 (1) the patient has failed or has refused to comply with
13 the treatment ordered by the court;

14 (2) efforts were made to obtain compliance;

15 (3) the patient may be in need of involuntary admission
16 to a hospital for immediate observation, care and treatment; and

17 (4) if the patient refuses to take medications or refuses
18 to take or fails a blood test, urinalysis or alcohol or drug test as required
19 by the court order, the physician may consider such refusal or failure
20 when determining whether the assisted outpatient is in need of an
21 examination to determine whether the patient has a mental illness for
22 which hospitalization is necessary.

1 *Id.* A “provider” may transport the individual meeting the aforementioned criteria to
2 an authorized hospital for observation, care, treatment and further examination, or a
3 physician may “request the aid of a law enforcement officer to take the patient into
4 custody and accompany the physician in transporting the patient to the hospital
5 A law enforcement officer may carry out a provider’s directive pursuant to this
6 section unless otherwise prohibited by law.” *Id.* § 11(B), (C).

7 {10} The Ordinance also addresses the representation of individuals who are the
8 subject of a petition.

9 (A) Notice of a proceeding under this Ordinance shall be served
10 on the [s]ubject of the petition, [P&A], and the Public Defender’s Office
11 Mental Health Unit if applicable.

12 (B) The [s]ubject shall be represented by counsel at all stages
13 of the proceedings. When a subject has not retained his own attorney
14 and is unable to do so, the court shall appoint counsel to represent him.
15 When appointing counsel, the court shall give preference to nonprofit
16 organizations offering representation to mentally ill and
17 developmentally disabled persons.

18 *Id.* § 6.

19 **II. The Proceedings**

20 {11} Before the Ordinance went into effect, Plaintiffs filed a complaint for
21 declaratory and injunctive relief under the Declaratory Judgment Act, NMSA 1978,
22 §§ 44-6-1 to -15 (1975). Plaintiffs requested the district court to declare that the

1 Ordinance is preempted by the Code and the Act, and that, in enacting the Ordinance,
2 the City exceeded the power granted to it under Article X, Section 6 of the New
3 Mexico Constitution. Plaintiffs further requested the court to declare that the
4 Ordinance violated other clauses of the New Mexico Constitution, including the
5 Equal Protection Clause (Article II, Section 18), the substantive component of the
6 Due Process Clause (Article II, Sections 4 and 18), the procedural component of the
7 Due Process Clause (Article II, Section 18), as well as the right to be free from
8 unreasonable searches and seizures (Article II, Section 10). Plaintiffs requested a
9 permanent injunction enjoining the City from enforcing the Ordinance in its entirety.

10 {12} The City moved to dismiss the action arguing that Plaintiffs lacked standing.
11 Plaintiffs filed a response, under seal, with affidavits attached by each of the four
12 individual Plaintiffs. The affidavits stated facts relating to the criteria of the
13 Ordinance. Specifically, each individual Plaintiff averred that he or she is eighteen
14 or older, lives in Albuquerque, has been diagnosed with a mental illness and has a
15 history of being non-compliant with prescribed treatment. Jane Doe 1 stated:
16 "Currently, I sometimes choose not to take my prescribed medications and choose not
17 to comply with other aspects of my recommended treatment plan." Each individual
18 Plaintiff stated that he or she believed that persons specifically authorized by the

1 Ordinance to petition for an order for assisted outpatient treatment may want him or
2 her to comply with treatment with which he or she does not agree. Jane Doe 1 stated
3 that her history of non-compliance with the recommendations of her treatment
4 providers has been a significant factor in necessitating psychiatric hospitalization four
5 times within the past thirty-six months, as well as having resulted in serious self-
6 injurious violent behavior numerous times within the past forty-eight months. Each
7 individual Plaintiff stated that he or she has engaged in at least one act or threat of
8 serious self-injurious behavior in the past forty-eight months. All four individual
9 Plaintiffs averred that based on their history of mental illness, they may be deemed
10 to be unlikely to survive safely in the community without supervision by a qualified
11 mental health care professional, unlikely to voluntarily participate in a recommended
12 treatment plan, in need of assisted outpatient treatment in order to prevent a relapse
13 or deterioration that would be likely to result in serious harm to him- or herself or
14 others, and likely to benefit from assisted outpatient treatment.

15 {13} Each individual Plaintiff also alleged that if the Ordinance were to take effect
16 he or she would suffer irreparable harm. Each stated that he or she believed they
17 would suffer a threat of irreparable injury if he or she became the subject of a petition
18 for assisted outpatient treatment, including being taken into custody, being detained

1 involuntarily, and being subjected to forced medication, blood and urine testing, and
2 other invasive measures without consent. Does 1 through 3 further state that, since
3 the passage of the Ordinance, they experienced an exacerbation of symptoms,
4 including anxiety, depression, sleep difficulties, loss of appetite, stress-related
5 headaches, crying spells, difficulty concentrating, nausea, feelings of shame and
6 stigmatization, difficulty staying organized, and agitation.

7 {14} Additionally, Jane Doe 1 indicated that she completed a psychiatric advance
8 directive in accordance with the Act, which detailed her mental health treatment
9 choices and specified instructions in the event she should experience a future period
10 of incapacity. She further stated that if she were the subject of a petition under the
11 Ordinance she “would face the risk of being court-ordered to comply with a treatment
12 plan that may be contrary to [her] express[] wishes, as set forth in [her] psychiatric
13 advance directive.”

14 {15} The district court addressed both the City’s motion to dismiss and Plaintiffs’
15 request for a permanent injunction on October 10, 2006. The court denied the City’s
16 motion to dismiss and concluded that all Plaintiffs have standing and granted
17 Plaintiffs’ request for a permanent injunction on the ground that the Ordinance is

1 preempted by the Code and the Act. The district court did not address Plaintiffs'
2 other constitutional arguments. The City of Albuquerque appeals.

3 **DISCUSSION**

4 {16} The City argues that (1) neither the individual Plaintiffs nor P&A has standing
5 to sue and (2) the Ordinance is not preempted by the Code or the Act. Applying
6 *ACLU v. City of Albuquerque (ACLU II)*, 2008-NMSC-____, ____ N.M. ____, ____ P.3d
7 ____ (No. 30,415) (June 27, 2008), and *ACLU v. City of Albuquerque (ACLU I)*, 1999-
8 NMSC-044, 128 N.M. 315, 992 P.2d 866, we conclude that the individual Plaintiffs
9 have standing. Applying *ACLU II*, *Forest Guardians v. Powell*, 2001-NMCA-028,
10 130 N.M. 368, 24 P.3d 803, and *New Mexico Right to Choose/NARAL v. Johnson*
11 (*NARAL*), 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, we conclude that P&A has
12 standing. Finally, we conclude that the Ordinance is preempted because it conflicts
13 with two general state laws, the Code and the Act, and because those state laws create
14 a comprehensive scheme governing when a mentally ill individual can be subject to
15 treatment without his or her consent.

16 **I. Standard of Review for Determining Issues of Standing**

17 {17} Whether a party has standing to bring a claim is a question of law which we
18 review de novo. *Forest Guardians*, 2001-NMCA-028, ¶ 5. Here, we are reviewing

1 the denial of a motion to dismiss for lack of standing, under Rule 1-012(B)(1)
2 NMRA, after affidavits have been presented to the court. We have found no New
3 Mexico case stating the light in which we regard the factual allegations of the
4 complaint under these circumstances. However, the United States Supreme Court has
5 stated the standard as follows:

6 For purposes of ruling on a motion to dismiss for want of standing, both
7 the trial and reviewing courts must accept as true all material allegations
8 of the complaint, and must construe the complaint in favor of the
9 complaining party. At the same time, it is within the trial court's power
10 to allow or to require the plaintiff to supply, by amendment to the
11 complaint or by affidavits, further particularized allegations of fact
12 deemed supportive of [the] plaintiff's standing. If, after this
13 opportunity, the plaintiff's standing does not adequately appear from all
14 materials of record, the complaint must be dismissed.

15 *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (citation omitted); *see Gonzalez v.*
16 *United States*, 284 F.3d 281, 288 (1st Cir. 2002) ("The attachment of exhibits to a
17 [Fed. R. Civ. P.] Rule 12(b)(1) motion does not convert it to a Rule 56 motion. While
18 the court generally may not consider materials outside the pleadings on a Rule
19 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion[.]"); 2
20 James Wm. Moore, *Moore's Federal Practice* § 12.30[3], at 12-42 to -43 (3d ed.
21 2008) (indicating the potential procedural postures raised by a motion to dismiss for
22 lack of subject matter jurisdiction); *cf. Doe v. Roman Catholic Diocese of Boise, Inc.*,

1 121 N.M. 738, 742, 918 P.2d 17, 21 (Ct. App. 1996) (stating that when ruling upon
2 a motion to dismiss for lack of personal jurisdiction under Rule 1-012(B)(2), if the
3 court, as a matter of discretion, decides the issue based on affidavits, “then the party
4 asserting jurisdiction need only make a prima facie showing that jurisdiction exists”
5 (internal quotation marks and citation omitted)). Thus, we accept as true all material
6 allegations in the complaint and affidavits and construe them in favor of Plaintiffs.
7 *See Forest Guardians*, 2001-NMCA-028, ¶ 5. To the extent that the City argues that
8 the district court ruled the affidavits inadmissible and would not consider them, our
9 reading of the transcript is that the court so ruled not on the issue of standing, but in
10 the context of deciding the injunction based on the different evidentiary standard in
11 Rule 1-066(A)(2) NMRA, which states that the court may accept “any evidence . . .
12 admissible upon the trial on the merits.”

13 **II. Individual Plaintiffs Have Standing**

14 {18} Standing is a judicially created doctrine designed to “insure that only those
15 with a genuine and legitimate interest can participate in a proceeding.” *De Vargas*
16 *Sav. & Loan Ass’n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1322 (1975)
17 (internal quotation marks and citation omitted); *see also ACLU II*, 2008-NMSC-____,
18 ¶ 10 (stating that a party requesting a declaratory judgment “must have a real interest

1 in the question” (internal quotation marks and citation omitted)). To acquire
2 standing, an individual

3 must demonstrate the existence of (1) an injury in fact, (2) a causal
4 relationship between the injury and the challenged conduct, and (3) a
5 likelihood that the injury will be redressed by a favorable decision. In
6 addition, the interest sought to be protected must be arguably within the
7 zone of interests to be protected or regulated by the statute or
8 constitutional guarantee in question.

9 *Forest Guardians*, 2001-NMCA-028, ¶ 16 (internal quotation marks and citations
10 omitted); *accord ACLU II*, 2008-NMSC-____, ¶ 10; *cf. City of Las Cruces v. El Paso*
11 *Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640, 954 P.2d 72 (explaining the
12 prerequisites of an “actual controversy” in a declaratory judgment action).

13 {19} The real debate between the parties in this case on individual standing is
14 whether the individual Plaintiffs have demonstrated the first element of standing, an
15 injury in fact. We briefly address the second two elements first, and then we turn our
16 attention to the first element. It is clear to us that if the individual Plaintiffs can
17 establish the alleged injury from being subjected to the Ordinance when it is
18 preempted by state law, or that the Ordinance contains provisions which violate any
19 of the individual Plaintiffs’ constitutional rights, then there is a causal relationship
20 between the passage of the Ordinance and the injury. Therefore, if the first element
21 is met, the second element is met in this case. As for the third element, we also

1 believe it is clear that if we affirm the permanent injunction against enforcing the
2 Ordinance, then the alleged injuries will be redressed. We thus now turn to the issue
3 of whether Plaintiffs have established an injury in fact.

4 {20} An injury in fact is “an invasion of a legally protected interest which is (a)
5 concrete and particularized, and (b) actual or imminent, not conjectural or
6 hypothetical.” *Forest Guardians*, 2001-NMCA-028, ¶ 24 (internal quotation marks
7 and citation omitted). This case requires us to consider the imminence of an injury.
8 Federal case law has, on several occasions, considered whether an injury is imminent
9 on the one hand or conjectural or hypothetical on the other. *See, e.g., City of Los*
10 *Angeles v. Lyons*, 461 U.S. 95, 101-10 (1983). New Mexico, however, has only the
11 cases of *ACLU I* and *ACLU II*. We must decide whether the facts of this case are
12 closer to those in *ACLU I* or those in *ACLU II* in order to determine whether the
13 individual plaintiffs have standing. In *ACLU I*, our Supreme Court held that certain
14 plaintiffs, some of whom were minors, had standing to challenge a curfew ordinance
15 even though none of the individual plaintiffs had been “stopped, taken into custody,
16 cited or prosecuted for violation of the [c]urfew,” and the plaintiffs did not allege that
17 one of them would be arrested or charged for violating the curfew. 1999-NMSC-044,
18 ¶¶ 6, 9. The Court stated:

1 When contesting the constitutionality of a criminal statute, it is not
2 necessary that [the plaintiff] first expose himself [or herself] to actual
3 arrest or prosecution to be entitled to challenge [the] statute that he [or
4 she] claims deters the exercise of his [or her] constitutional rights. When
5 the plaintiff has alleged an intention to engage in a course of conduct
6 arguably affected with a constitutional interest, but proscribed by a
7 statute, and there exists a credible threat of prosecution thereunder, he
8 [or she] should not be required to await and undergo a criminal
9 prosecution as the sole means of seeking relief.

10 *Id.* ¶ 9 (alterations in original) (internal quotation marks omitted) (quoting *Babbitt v.*
11 *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The Court held that
12 this credible-threat rationale sufficed to create standing despite the defendant's
13 protests that none of the plaintiffs had been arrested, charged, or otherwise injured.
14 *See id.* ¶¶ 8-9. The curfew ordinance permitted the arrest of a child who was out after
15 curfew in a public place or on the premises of any establishment. *See id.* ¶¶ 2, 14.
16 The majority in *ACLU I* did not focus on a specific constitutional right, although it
17 did refer to Article II, Section 10 of the New Mexico Constitution and to the concern
18 about warrantless arrests. *See id.* ¶¶ 16, 23. As to standing, the Court focused on the
19 existence of a credible threat of prosecution. *See id.* ¶¶ 8-9. *ACLU I* also held that
20 the curfew ordinance was preempted by state law. *See id.* ¶¶ 1, 25.

21 {21} The Court in *ACLU II* continued to indicate that a credible threat of prosecution
22 was a critical consideration. 2008-NMSC-____, ¶ 28. In *ACLU II*, the executive

1 director of the ACLU and the ACLU challenged an ordinance of the City of
2 Albuquerque which would allow the City to seize the vehicle of an individual who
3 has been arrested with no previous offenses, though not yet convicted, of driving
4 while intoxicated (DWI). 2008-NMSC-____, ¶¶ 3-4, 6. The Court in *ACLU II* found
5 no “conduct ‘arguably affected with a constitutional interest.’” 2008-NMSC-____,
6 ¶ 27. The Court also considered that, unlike the situation in *ACLU I*, the vehicle
7 seizure ordinance “[did] not make illegal any particular course of conduct that was
8 previously permitted.” *Id.* Thus, the Court held that the plaintiffs had no injury.

9 {22} Significantly, the *ACLU II* Court also considered the question of imminence
10 in distinguishing *ACLU I*. The Court reaffirmed *ACLU I* and stated the rule that a
11 plaintiff can demonstrate an injury by showing that “he [or she] is imminently
12 threatened with injury, or, put another way, that he [or she] is faced with a real risk
13 of future injury as a result of the challenged action or statute.” *Id.* ¶ 11 (internal
14 quotation marks and citations omitted). The Court stated “[t]he plaintiffs in *ACLU*
15 *I* could demonstrate that they themselves were highly likely to be arrested for
16 violating the curfew if they stayed out past the time specified in the ordinance, simply
17 by virtue of the fact that they were of a certain age.” *ACLU II*, 2008-NMSC-____,
18 ¶ 28. Thus, the *ACLU I* plaintiffs had “establish[ed] an imminent injury or a real risk

1 of injury to the particular plaintiffs.” *ACLU II*, 2008-NMSC-____, ¶ 28. On the other
2 hand, the *ACLU II* plaintiffs had not shown “a high likelihood” that the named
3 plaintiff or any ACLU member would be either arrested for DWI or exposed to the
4 threat of having his or her vehicle forfeited under the ordinance. *Id.* ¶ 29. The Court
5 distinguished the circumstances in *ACLU II* from those in prior cases where “the
6 threat of harm . . . was real and significant and was directly traceable to the individual
7 plaintiffs that were bringing suit[,]” whereas in *ACLU II* the plaintiffs only
8 demonstrated “a general, undifferentiated threat of a hypothetical harm to some
9 unidentifiable person.” *Id.* ¶ 18.

10 {23} After considering *ACLU I* and *ACLU II*, we believe this case is more analogous
11 to *ACLU I*. Here, the named individual Plaintiffs belong to a distinct group of
12 individuals who have been diagnosed with a mental illness and who meet the criteria
13 of Section 4 of the Ordinance. This certainly is as distinct a group as the teenage
14 plaintiffs in *ACLU I*. Additionally, here, as in *ACLU I*, Plaintiffs challenged the
15 Ordinance on the grounds that it is preempted by state law, and that it, among other
16 things, violates their rights to be free from unreasonable searches and seizures. Given
17 the similarities between *ACLU I* and the case at hand, we believe we are bound to
18 apply *ACLU I*.

1 {24} The City argues, however, that there is an important distinction between the
2 case at hand and *ACLU I*. The City argues that the Ordinance at issue in *ACLU I* did
3 not require a “due process hearing before an arrest or detention,” whereas under the
4 Ordinance “no imminent threat of detention arises without the benefit of a hearing,
5 at which time all constitutional and preemption issues can be raised.” The City is
6 correct and, in fact, a hearing is required before application of the Ordinance in any
7 way at all. *See* Albuquerque, N.M., Ordinance C/S O-06-21, § 6. While the City
8 accurately points to a distinction between the circumstances in *ACLU I* and the
9 circumstances here, we are not persuaded that the circumstances to which the City
10 points had any bearing on the reasoning of the Court in *ACLU I*. The concern in
11 *ACLU I* was with subjecting an individual to judicial proceedings when the activity
12 sought to be prohibited by the defendant was protected by state law. 1999-NMSC-
13 044, ¶ 9. The words chosen by our Supreme Court in *ACLU I* were not that an
14 individual should not be required to undergo a seizure before challenging the statute,
15 but that the individual should not be required to undergo a “prosecution as the sole
16 means of seeking relief.” *Id.* (internal quotation marks and citation omitted). Here,
17 the subject of a petition under the Ordinance would be required to undergo court
18 proceedings as a means of seeking relief from application of the Ordinance. Given

1 the language used in *ACLU I*, we do not believe that the City points us to a material
2 distinction between *ACLU I* and the case at hand.

3 {25} Further, while not a criminal ordinance like the curfew ordinance in *ACLU I*,
4 the Ordinance has a provision for taking an individual into custody if the individual
5 has refused to be examined by a physician, as well as a provision for taking an
6 individual into custody for an evaluation if the individual has refused to comply with
7 court-ordered treatment and “may be in need of involuntary admission to a hospital
8 for immediate observation, care and treatment[.]” Albuquerque, N.M., Ordinance C/S
9 O-06-21, §§ 6(E), 11(A)(3). Thus, as in *ACLU I*, this case raises a significant liberty
10 interest involving the constitutional right to be free from an unreasonable seizure.
11 *See id.* § 11(A)(1), (4). Because the Ordinance in this case is capable of curtailing an
12 individual’s constitutional interest in being free from an unreasonable deprivation of
13 liberty just as significantly as the ordinance did in *ACLU I*, we are bound to follow
14 the reasoning therein.

15 {26} Applying *ACLU I* to the case at hand, and accepting the statements in the
16 affidavits as true, each Plaintiff provided sufficient statements to demonstrate that he
17 or she falls within the criteria of the Ordinance and thereby demonstrated a credible
18 threat of application of the Ordinance. *See ACLU I*, 1999-NMSC-044, ¶ 9. Jane Doe

1 1 stated that she had been hospitalized four times in the last thirty-six months in part
2 due to her non-compliance with the recommendations of her treatment providers,
3 thereby meeting the requirements of Section 4(A)(4)(a) of the Ordinance. Three of
4 the individual Plaintiffs alleged an act of serious self-injurious violent behavior in the
5 last forty-eight months, satisfying Section 4(A)(4)(b) of the Ordinance. All of the
6 individual Plaintiffs alleged that based on their history, they may be deemed to be
7 “‘unlikely to survive safely in the community without supervision’ by a qualified
8 mental health care professional.” Section 4(A)(5) of the Ordinance requires that the
9 subject be “unlikely, as a result of mental illness, to voluntarily participate in the
10 recommended treatment pursuant to the treatment plan[.]” Each of the individual
11 Plaintiffs alleged that he or she may be deemed unlikely to voluntarily follow a
12 recommended treatment plan, and Jane Doe 1 alleged that she chooses not to take her
13 prescribed medications and chooses not to comply with other aspects of her
14 recommended treatment plan. This is comparable to the alleged intention to violate
15 the curfew ordinance in *ACLU I*. *Id.* ¶ 9 (“When contesting the constitutionality of
16 [an ordinance], it is not necessary [to] first expose [one]self . . . to actual arrest or
17 prosecution to be entitled to challenge [the ordinance] that [one] . . . claims deters the
18 exercise of [one’s] . . . constitutional rights.” (internal quotation marks and citation

omitted)). Each of the individual Plaintiffs alleged that he or she meets the rest of the criteria of the Ordinance. Therefore, for all of these individual Plaintiffs there is a credible threat that someone will file a petition concerning them under the Ordinance.

{27} Given that the individual Plaintiffs have sufficiently alleged a credible threat, they have thereby alleged an imminent injury or risk of injury stemming from the enactment of the Ordinance, assuming the Ordinance is problematic, to demonstrate standing. In *ACLU I*, the plaintiffs argued that “their previously[]lawful activities during curfew hours [were] curtailed by the [c]urfew [o]rdinance.” *Id.* ¶ 8 (internal quotation marks omitted). Similarly, here, the individual Plaintiffs alleged that an activity which is specifically protected by the Code, Section 43-1-15(A), and by the Act, Section 24-7B-4(A), namely, the right of a person, with capacity, to refuse medication is not protected by the Ordinance, under which a court order can require a person with capacity to take medication. Albuquerque, N.M., Ordinance C/S O-06-21, § 8(B)(1). In other words, Plaintiffs alleged that the previously lawful refusal of treatment is, under a court order requiring medication pursuant to the Ordinance, no longer lawful. Thus, given a credible threat of application of the Ordinance, we conclude that the individual Plaintiffs have sufficiently demonstrated standing to challenge the Ordinance.

1 {28} We note that the individual Plaintiffs also vigorously alleged standing based
2 on mental distress they experienced directly related to the passage of the Ordinance.
3 The individual Plaintiffs asserted that “they are experiencing current harm because
4 the [O]rdinance’s passage has caused exacerbation of the symptoms of their mental
5 illnesses. These symptoms are affecting their lives now, on a day-to-day basis.”
6 (Emphasis omitted.) While we believe these allegations indicate the individual
7 Plaintiffs may be experiencing an injury in some sense, the interest which a plaintiff
8 alleges is violated must be one that is “entitled to some legal protection.” *John Does*
9 *I through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-
10 NMCA-094, ¶ 17, 122 N.M. 307, 924 P.2d 273. We have not yet addressed whether
11 the freedom from emotional distress due to the passage of an ordinance is a “legally
12 protected interest.” *Id.* However, we do not need to address this argument here
13 because we conclude that the individual Plaintiffs have sufficiently demonstrated
14 standing under the credible threat standard set forth in *ACLU I*.

15 **III. Organizational Standing**

16 {29} The organization arguing that it has standing in this case, P&A, is a unique
17 organization. Groups such as P&A are defined and, at least partially, funded by
18 Congress. *See* 42 U.S.C. §§ 10801 to 10851 (1986, as amended through 2000). The

1 groups or "systems" are state-based, can be private or public entities, *see*
2 § 10805(c)(1)(B), and were created "to protect and advocate the rights of individuals
3 with mental illness." § 10805(a). In creating protection and advocacy systems for
4 the advocacy of individuals with mental illness:

5 (a) The Congress finds that—

6 (1) individuals with mental illness are vulnerable to abuse and
7 serious injury;

8 ...

9 (4) State systems for monitoring compliance with respect to the
10 rights of individuals with mental illness vary widely and are
11 frequently inadequate.

12 (b) The purposes of this chapter are—

13 (1) to ensure that the rights of individuals with mental illness
14 are protected; and

15 (2) to assist States to establish and operate a protection and
16 advocacy system for individuals with mental illness which will—

17 (A) protect and advocate the rights of such individuals
18 through activities to ensure the enforcement of the
19 Constitution and Federal and State statutes; and

20 (B) investigate incidents of abuse and neglect of
21 individuals with mental illness if the incidents are reported
22 to the system or if there is probable cause to believe that
23 the incidents occurred.