

4/4/2023

No. 22-986

IN THE
SUPREME COURT OF THE UNITED STATES

Grant Nyhammer as Executive Director of the
Northwestern Illinois Area Agency on Aging,

Petitioner,

v.

Paula Basta, in her capacity as Director of the
Illinois Department on Aging,

Respondent.

On Petition for Writ of Certiorari
to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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2. List of Parties

All parties are listed in the caption.¹

3. Corporate Disclosure Statement

The Northwestern Illinois Area Agency on Aging (NIAAA) is a private Illinois nonprofit with no parent corporation or publicly held stock.

4. Related Proceedings

This case arises from the following proceedings:

- *Nyhamer v. Basta*, 2022 IL 128354 (Ill. 2022) (final judgment entered January 23, 2023).
- *Nyhamer v. Basta*, 2022 IL App (2d) 200460 (Ill. App. 2022) (final judgment entered March 2, 2022).
- *Nyhamer v. Basta*, 2019-MR-1106 (17th Circ. 2020) (final judgment entered July 20, 2020).

¹ NIAAA is part of the nationwide aging network. The number of Americans age 60 and older served by the Aging Network increased by 34% from 55.7 mil to 74.6 mil between 2009 and 2019. ACL, *2020 Profile of Older Americans*, https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf.

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5. Opinions and Orders Below

The Seventeenth Judicial Circuit of Illinois granted Defendant's motion to dismiss with an order on February 28, 2020 that is unpublished. Plaintiff Nyhammer filed a Motion for Reconsideration, which was denied by memorandum order on July 20, 2020. The Appellate Court of Illinois Second District issued an unpublished opinion, *Nyhammer v. Basta*, 2022 IL App (2d) 200460U (Ill. App. 2022), on February 8, 2022 in favor of Plaintiff. Plaintiff moved for a published opinion, and the court issued a final, published opinion on March 2, 2022, *Nyhammer v. Basta*, 2022 IL App (2d) 200460 (Ill. App. 2022). The Illinois Supreme Court issued an Opinion in favor of Defendant and against Plaintiff on November 28, 2022, *Nyhammer v. Basta*, 2022 IL 128354 (Ill. 2022), and denied Plaintiff's Petition for Rehearing on January 23, 2023.

6. Jurisdiction

- A. The Illinois Supreme Court entered judgment on November 28, 2022.
- B. On January 23, 2023, the Illinois Supreme Court denied Plaintiff's Petition for Rehearing.
- C. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

7. Relevant constitutional provisions, statutes, regulations

The following federal constitutional and statutory provisions are involved in this case and reproduced in the appendix: 42 U.S.C. § 3001(8), (10); 42 U.S.C. § 3026(f)(2)(B); 42 U.S.C. § 1983; 42 U.S.C. § 3021(a)(1); 42 U.S.C. § 3025; 42 U.S.C. § 3027; 45 C.F.R. § 1321.7 – 1321.52; 45 C.F.R. 1321.61(a)-(b); 45 C.F.R. § 1321.35; 45 C.F.R. 1321.7(b); 45 C.F.R. 1321.33; *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432 (1982); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 244 (1936); and *Vitek v. Jones*, 445 U.S. 480, n. 6 (1980).

8. Facts

Plaintiff, Northwestern Illinois Area Agency on Aging (NIAAA), is a small non-profit² located in Rockford, Illinois and is one of the nationwide 622³ area agencies on aging (AAAs)⁴ who are a creation of the Older Americans Act (OAA).⁵ The typical AAA is

² NIAAA is a private nonprofit with nine employees.

³ ELDER CARE LOCATOR, https://eldercare.acl.gov/Public/About/Aging_Network/Index.aspx (last visited February 17, 2023).

⁴ 42 U.S.C. § 3002(6).

⁵ 42 U.S.C. § 3001 *et seq.*; 45 C.F.R. 1321 *et seq.*

a private nonprofit⁶ with limited resources who receives nearly half of its funding through the OAA.⁷ The OAA designates AAAs as “public advocates” who are required to “represent the interests of older persons to executive branch officials”, such as the Defendant who is the Director of the Illinois Department on Aging⁸ (Department). The legal definition of a ‘public advocate’ is:

An advocate who intends to represent matters of public concern for the public at large. It is a governmental position similar to an ombudsman. A public advocate can be either an elected or appointed position, depending upon the jurisdiction. The public advocate’s right to bring suit to implement the public advocate’s power, even though not specifically set forth, is implied from the functional responsibility of the public advocate to investigate abuses in government.⁹

⁶ “The structure of AAAs varies. The majority operate as ... [i]ndependent, nonprofit agencies.” National Association of Area Agencies on Aging, *Trends and New Directions: Area Agencies on Aging Survey 2014*, 15, <https://www.usaging.org/files/AAA%202014%20Survey.pdf>.

⁷ “More than half of AAAs have a budget below \$3.9 million ... The average AAA continues to receive about 40 percent of its budget from the OAA.” *Trends and New Directions: Area Agencies on Aging Survey 2014*, 13, <https://www.usaging.org/files/AAA%202014%20Survey.pdf>.

⁸ 45 C.F.R. 1321.61(a)-(b).

⁹ USLEGAL <https://definitions.uslegal.com/p/public-advocate/> (last visited Feb. 17, 2023).

As an AAA, NIAAA is part of the nationwide ‘aging network’ (Aging Network) which is comprised of state agencies on aging (State Agencies) such as the Department, who allocate OAA funding to AAAs¹⁰ who in turn fund AAA provider organizations that deliver direct services to older adults.¹¹ In 2019, nearly 11 million older adults received services¹² nationwide from the Aging Network which includes, for example, about 2.4 million home delivered meals annually.¹³

The Department is a billion dollar¹⁴ Illinois state agency that administers both entitlement and welfare programs such as the license plate discount program¹⁵ and free transportation program.¹⁶ One of the

¹⁰ 42 U.S.C § 3025(a)(2)(C).

¹¹ 42 U.S.C. § 3002(5).

¹² Congressional Research Service, *Older Americans Act Overview and Funding* (2022), <https://crsreports.congress.gov/product/pdf/R/R43414> (last visited Feb. 17, 2023).

¹³ MEALS ON WHEELS AMERICA, <https://www.mealsonwheelsamerica.org/learn-more/what-we-deliver> (last visited Feb. 17, 2023).

¹⁴ Illinois Department on Aging, *Fiscal Year 2020 Enacted Budget*, <https://ilaging.illinois.gov/content/dam/soi/en/web/aging/documents/final-idoa-fy20-revised-w-enacted-0612.pdf>.

¹⁵ 625 ILCS 5/3-806.3.

¹⁶ 70 ILCS 3615/3A.15(b).

declared Congressional objectives of the OAA is that the Department provide open access to programs and services for older adults.¹⁷ Despite the OAA being nearly fifty years' old and being crucial to the well-being of tens millions of older adults and their caregivers, it is believed to have never been addressed by this Court.

*Nyhamer v. Basta*¹⁸ summarizes the background of this litigation as follows [internal citations omitted]:

Plaintiff, Grant Nyhamer, in his capacity as executive director and general counsel of the Northwestern Illinois Area Agency on Aging (NIAAA), filed a “complaint for *mandamus*” in the circuit court of Winnebago County, naming Paula Basta, in her capacity as Director of the Department on Aging (Department), as Defendant. NIAAA is the “area agency on aging (AAA)” that was designated by the Department for “Planning Service Area 1,” which comprises the [Illinois] counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside, and Lee. As the AAA for this planning area, NIAAA is responsible for the planning and development of a “comprehensive and coordinated service delivery system” for older persons. The Department is responsible for overseeing the administration of such services and designates the AAAs to receive funds available under the

¹⁷ 42 U.S.C. § 3001(8), (10).

¹⁸ *Nyhamer v. Basta*, 2022 IL 128354.

Older Americans Act of 1965 (Older Americans Act), as well as other funds made available by the State or the federal government. Prior to the events leading to the dispute that is the subject of this action, the Department also designated NIAAA as a “regional administrative agency (RAA)” for the purposes of administering programs created by the Adult Protective Services Act (Protective Act). The Protective Act tasks the Department with the responsibility to “establish, design, and manage a protective services program for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect.” According to the complaint, NIAAA filed two petitions for administrative hearings with the Department, and the Department rejected both petitions on the basis that neither presented a “contested case” for which an administrative hearing is required under section 1-30 of the Procedure Act. The petitions were appended to the complaint for *mandamus*, and we summarize them here.

A. NIAAA’s First Petition

In its first petition, NIAAA alleges as follows. In July 2013, NIAAA sent an email to the Department, stating that the new Protective Act Program Services Manual (Manual) was invalid and requesting a recall of the Manual. As documented by correspondence appended to the first petition, in October 2013, NIAAA sent an e-mail to the Department stating that NIAAA was considering litigation regarding

the Manual. In December 2013, the Department notified NIAAA that it was terminating its fiscal year 2014 Protective Act grant pursuant to the grant agreement, which provides for termination without cause by either party with 30 days' notice. The notification also provided that NIAAA would no longer serve as RAA under the Protective Act and the Department would assume that role as to Planning Service Area 1 until further notice.

The first petition alleges that five years later, in April 2019, an employee of the Department told NIAAA that she had been given an order in 2014 to withhold funding from NIAAA to retaliate for its advocacy regarding the Manual. Although NIAAA does not know what funding was withheld, it alleges that in 2014-15, the Department awarded \$3.79 million in "other funding" to the other AAAs but that NIAAA received zero "other funding." Despite its efforts to have the Department investigate this past withholding of funding, the Department has not done so.

In its first petition, NIAAA requests the Department to, *inter alia*, adopt administrative rules for "contested case" hearings before the Department and to compensate NIAAA for the lost funding. The Department denied the request for a hearing on the basis that the funding issues did not present a "contested case" under the Procedure Act. The Department invited a discussion of these issues to resolve NIAAA's concerns but stated it could

not issue a “final decision or order,” as defined in the Procedure Act, because that provision is only applicable to “contested cases.”

B. NIAAA’s Second Petition

In its second petition, NIAAA requests a hearing on the Department’s 2019 rejection of NIAAA’s designation of Protective Act providers. The petition alleges that the Department had conflicting standards for the designation of service providers. According to the second petition, although the Department’s stated reason for rejecting the designation was “errors in the instructions and application used for scoring purposes,” the Department had not performed such a review or rejected NIAAA’s designation “in at least ten years.” The second petition requests the Department to adopt administrative rules for

“contested case” hearings, cease using the Manual, and accept NIAAA’s designation of Protective Act provider.

The Department rejected the second petition on the basis that it did not present a “contested case.” The Department explained that the Protective Act defines “Provider Agency” as “any public or nonprofit agency in a planning and service area that is selected by the Department or appointed by the [RAA] with prior approval by the Department.” The Department further explained that the Protective Act provides that an AAA must obtain “prior approval” from the Department as

to its adult protective services provider designation process. Because these decisions are discretionary with the Department, the Department determined they do not present “contested cases” requiring a hearing.

...The circuit court dismissed NIAAA’s complaint for *mandamus*...[and] we [Illinois Supreme Court] find that Count I of NIAAA’s complaint for *mandamus* is moot, and the circuit court properly dismissed counts II and III of the complaint because NIAAA cannot show a clear right to an administrative hearing
....¹⁹

In addition to the above *Nyhamer* summary, the following are other relevant facts. Regarding the First Petition, NIAAA alleged in:

- Count I that the Department not having proper administrative hearing rules is an impediment to NIAAA getting a fair hearing and discourages AAAs from challenging the conduct of the Department;
- Count II that the Department violated the OAA by withholding funding from NIAAA and not affording NIAAA due process;

¹⁹ *Nyhamer v. Basta*, 2022 IL 128354 ¶2-5, 7, 23.

- Count III that the Department withheld funding from NIAAA in retaliation for NIAAA's advocacy for older adults;
- Count IV that the Department withholding funding from NIAAA for a corrupt purpose violates multiple provisions of the OAA (42 U.S.C. § 3021(a)(1); 42 U.S.C § 3025(a)(1)(D); 42 U.S.C § 3025(a)(2)(E); 42 U.S.C § 3027(a)(10) which require the Department to act in the best interests of older adults. *Nyhammer* never mentions 42 U.S.C. § 3021(a)(1), 42 U.S.C § 3025(a)(1)(D), 42 U.S.C § 3025(a)(2)(E), or 42 U.S.C § 3027(a)(10);
- Count V that the Department violated NIAAA's due process rights in violation of 42 U.S.C. § 3026(f)(2)(b);
- Count VI that the Department has failed to take adequate measures to prevent future violations of NIAAA's due process rights;
- Count VII that the Department terminated NIAAA as the RAA in retaliation for NIAAA's advocacy for older adults;
- Count VIII that the Department has improperly interfered with NIAAA's ability to function as the public advocate representing the interests of older adults; and

- Count IX that the Department violated Illinois law by withholding funding from NIAAA for a corrupt purpose.²⁰

The First Petition requested an administrative hearing under multiple provisions, including 42 U.S.C. §3027(a)(5), 42 U.S.C. § 3026(f)(2)(b), and 42 U.S.C. § 1983. *Nyhammer* never mentions 42 U.S.C. §3027(a)(5) and 42 U.S.C. § 1983. *Nyhammer* only mentions 42 U.S.C. § 3026(f)(2)(b) once in a footnote in its factual summary and never discusses if NIAAA is entitled to an administrative hearing under this OAA provision²¹ which states that “[the Department] shall not make a final determination [about] withholding funds...without first affording the area agency...a public hearing concerning the action.”

Regarding the Second Petition, NIAAA alleged that in:

- Paragraph 33 that it is doubtful that any request from an older adult for an administrative hearing reached the Department in the last nine years because the Department moved nine years ago from the mailing address it has published for mailing a hearing request;

²⁰ C 16 – C 19.

²¹ *Nyhammer*, 2022 IL 128354 at ¶ 7.

- Count I and II that the Department unreasonably rejected NIAAA's designation of APS provider organizations;
- Count III that the Department tainted and improperly interfered with NIAAA's selection of APS providers;
- Count IV that the Department is improperly managing the APS program and the APS provider selection process thorough an illegal manual; and
- Count V that the Department does not have proper administrative hearing rules.

Regarding the complaint for mandamus (Complaint), it alleges that it has been at least three years since an older adult received an administrative hearing from the Department.²² The Complaint and supporting documents also allege that the Defendant:

- Does not have proper administrative rules for older adults to access administrative hearings which violates their due process rights;²³

²² C 9.

²³ C 52.

- Has shut down the hearing process to older adults to avoid accountability;²⁴ and
- Failed to provide NIAAA the required administrative hearings on the First and Second Petitions which:
 - Violates NIAAA's Constitutionally protected due process rights; and
 - Inhibits NIAAA's ability to function as the public advocate for older adults.

9. Federal Issues Raised

The first federal issues brought up in this case occurred on June 26, 2019 when NIAAA filed its first Petition for Hearing (First Petition) with the Department.²⁵ In its First Petition, NIAAA requested a hearing from the Department under 42 U.S.C. § 3027(a)(5), 42 U.S.C. § 3026(f)(2)(b), 42 U.S.C. § 3001; 45 C.F.R. § 1321, 42 U.S.C. § 1983, and a number of state laws.²⁶ Also in the First Petition, NIAAA complained that the Department violated NIAAA's due process rights, NIAAA's rights as a public advocate, and the OAA by withholding funding from NIAAA for an improper purpose, i.e. retaliation for

²⁴ C 53.

²⁵ C 21.

²⁶ C 22.

NIAAA's public advocacy, and terminating NIAAA as the Regional Administrative Agency (RAA) under the Adult Protective Service (APS) program without providing due process.²⁷ In a letter from the Department to NIAAA, dated July 29, 2019, the Department refused to offer a hearing or a final administrative decision on the First Petition.²⁸

The second set of federal issues arose when NIAAA filed a second Petition for Hearing (Second Petition) on August 23, 2019²⁹ in which it alleged the violation of two more property interests under due process – the right to designate APS providers³⁰ and the right to participate in the rulemaking process.³¹ On September 24, 2019, the Department refused to offer a hearing on the Second Petition.³²

The third set of federal issues arose when NIAAA filed its Complaint for Mandamus on November 5, 2019 in order to obtain a hearing from the Department

²⁷ C 17 – 19.

²⁸ C 31.

²⁹ C 39.

³⁰ C 36 – 37.

³¹ C 35 (“The rulemaking process requires … there be an opportunity for the public to comment on the proposed rules, there be public hearings …”); C 37 (“The Manual was not adopted under the rulemaking process …”).

³² C 51.

on NIAAA's petitions.³³ NIAAA reiterated its OAA authority as the Public Advocate for older adults³⁴ and requested that the Department provide NIAAA with a hearing for all of the federal law-based reasons stated in the First and Second Petitions, including due process.³⁵ NIAAA reiterated, in its Brief in Support of Complaint for Mandamus, that the Department is denying access to administrative hearings not just to NIAAA but to 2.3 million older adults.³⁶ Also, NIAAA reiterated its right to funding under the OAA Act,³⁷ its right to designate APS providers,³⁸ its right to participate in the rulemaking process,³⁹ and its right to be the RAA.⁴⁰ At the hearing for the Motion to Dismiss, the trial court denied that NIAAA represented any older adults in the Complaint for Mandamus, denying NIAAA authority to act as public advocate for older adults in the Complaint for Mandamus and its petitions.⁴¹ Also, the trial court

³³ C 4.

³⁴ C 5.

³⁵ C 9, C 53 – 55.

³⁶ C 52 – 53.

³⁷ C 53 – 54.

³⁸ C 9.

³⁹ C 8 – C 9.

⁴⁰ C 9.

⁴¹ R 16 – 17.

denied that NIAAA had any property interest in the withheld funding⁴² and ignored all other federal law basis by which NIAAA claimed it had a right to a hearing.⁴³ On March 6, 2020, NIAAA filed a Motion to Vacate the decision of the court, again restating NIAAA's federal rights under due process and the OAA to a hearing, including 42 U.S.C. § 3026(f)(2)(A) and (B); 45 C.F.R. § 1321.63(b); 42 U.S.C. § 1983; and 42 U.S.C. § 3027(a)(5).⁴⁴ Also, NIAAA reaffirmed its role as the public advocate.⁴⁵ The court responded with its Memorandum of Decision as to Plaintiff's "Motion to Vacate" (sic) ie Motion to Reconsider, stating that due process, 42 U.S.C. § 3026(f)(2)(A) and (B), and 45 C.F.R. § 1321.63(b) did not apply because NIAAA did not plead well enough that OAA funding had been withheld.⁴⁶ The court went on to state, without explanation, that the other statutes that NIAAA stated it had a right to a hearing under did not apply.⁴⁷

The fourth set of federal issues arose when NIAAA filed its Brief and Appendix of Plaintiff-Appellant Grant Nyhammer (Appellant Brief) in the Appellate

⁴² R 21 – 22.

⁴³ R 17 – 35.

⁴⁴ C 123 – 126.

⁴⁵ C 126.

⁴⁶ C 158 – 159.

⁴⁷ C 159.

Court of Illinois Second Judicial District on November, 23, 2020. NIAAA, again, reiterated its OAA authority as the Public Advocate for older adults,⁴⁸ its federal rights under due process⁴⁹ and the OAA to a hearing, including 42 U.S.C. § 3026(f); 42 U.S.C. § 1983; and 42 U.S.C. § 3027(a)(5).⁵⁰ All other federal rights as alleged in the First Petition⁵¹ and Second Petition⁵² were again asserted. The Appellate Court issued its published opinion (Appellate Opinion) on March 2, 2022 in favor of NIAAA, holding that:

[T]he Department failed and refused to provide a means for administrative review for the determination of NIAAA's rights, duties, and responsibilities because it failed to grant a hearing where findings of fact and conclusions of law were determined after an opportunity to be heard ... We determine that the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected.⁵³

⁴⁸ Appellant Brief, 8.

⁴⁹ Appellant Brief, 14 – 17.

⁵⁰ Appellant Brief, 2.

⁵¹ Appellant Brief, 9 – 10, 16 – 17.

⁵² Appellant Brief, 11 – 12, 21.

⁵³ A 54; (Appellate Opinion, ¶42 – 43).

The Department appealed the decision, and NIAAA filed its brief⁵⁴ (Answer) in the Illinois Supreme Court, again reaffirming all of its federal rights as the Public Advocate acting on behalf of 2.3 million older adults in Illinois⁵⁵ and its rights to a hearing under federal law, including due process, that were affirmed in the lower courts.⁵⁶ On November, 28 2022, the Illinois Supreme Court issued an Opinion (Supreme Court Opinion) ignoring all of the federal statutes by which NIAAA requested a hearing and never taking into consideration NIAAA's rights as a public advocate.⁵⁷ The Supreme Court discussed due process but never directly cited federal case or statutory law on the matter and instead kept its analysis to Illinois law.⁵⁸ NIAAA filed a Petition for Rehearing (Supreme Court Petition for Rehearing) in the Illinois Supreme Court

⁵⁴ NIAAA let its Answer of Plaintiff-Respondent to Defendant-Petitioner's Petition for Leave to Appeal stand as its reply brief. See Notice of Plaintiff-Appellee's Election to Allow Answer to the Petition for Leave to Appeal to Stand as Brief (filed July 11, 2022).

⁵⁵ Answer 2 – 3.

⁵⁶ Answer 4 – 8.

⁵⁷ *Nyhammer v. Basta*, 2022 IL 128354 (Ill. 2022); A 1 – 24 (Supreme Court Opinion).

⁵⁸ The Illinois Supreme Court mentioned 42 U.S.C. 3026(f)(2)(b) in a footnote but, in doing so, it did not discuss due process nor apply the statute because the court did not believe NIAAA's allegations that OAA funding had been withheld. *Nyhammer v. Basta*, 2022 IL 128354, n. 2 (Ill. 2022). The court did not make any findings of fact in the case. A 20 – 21 (Supreme Court Opinion, ¶ 63 – 67).

on December 15, 2022, stating that the court had ignored all federal law, including binding U.S. Supreme Court precedent that NIAAA cited as a basis for its right to hearings.⁵⁹ On January 23, 2023, the Supreme Court issued a three line denial stating: “Petition for Rehearing Denied. The mandate of this Court will issue to the Appellate Court and/or Circuit Court or other agency on 02/27/2023.”

10. Argument

This Petition for Certiorari (Certiorari) should be granted because *Nyhammer* is a danger to the 11 million vulnerable older adults who receive services from the Aging Network as *Nyhammer* eviscerates the ability of the 622 AAAs nationwide to function as the ‘public advocates’ protecting older adults from actions of State Agencies such as the Department.⁶⁰ As demonstrated by the First and Second Petitions, some State Agencies will abuse their authority to the detriment of older adults and AAAs as public advocates will have no legal recourse under *Nyhammer* to challenge the misconduct. Since it is believed there are no reported federal cases regarding AAAs role as public advocates under the OAA, it is expected that *Nyhammer* will be used by at least some State Agencies nationwide to expand their power to avoid oversight from AAAs who already struggle with the difficult task of trying to protect older adults from billion-dollar State Agencies that provide significant funding to the AAAs.

⁵⁹ Supreme Court Petition for Rehearing, 6 – 12.

⁶⁰ Supreme Court Petition for Rehearing, 2, 10.

Remarkably, *Nyhamer* gives State Agencies this extraordinary and unwarranted authority to refuse to give administrative hearings to public advocates by ignoring both:

- United Supreme Court (Court) precedent; and
- the OAA.

This Certiorari, therefore, should be granted as *Nyhamer* poses a serious threat to a properly functioning Aging Network that provides essential services to millions of vulnerable older adults nationwide.

A. *Nyhamer* ignores *Goldberg v. Kelly*

Nyhamer ignores *Goldberg v. Kelly*⁶¹ in giving the Department the astonishing authority to continue denying 2.3 million older adults in Illinois access to administrative hearings to challenge the termination of welfare benefits.⁶² *Goldberg* requires that before a welfare recipient has their benefits terminated, “a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own

⁶¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁶² Second District Reply Brief, 7; C 116 – 17; C 123; C 125; Supreme Court Answer of Plaintiff-Respondent to Defendant-Petitioner’s Petition for Leave to Appeal, 2 – 3.

arguments and evidence orally.”⁶³ *Nyhammer* offers no explanation for ignoring *Goldberg*.

Nyhammer, instead, effectively overturns *Goldberg* by giving the Department the power to decide for itself who can get an administrative hearing. Under *Nyhammer*, to get an administrative hearing an older adult “must show that the [Department’s termination of a welfare benefit] decision presents a contested case [emphasis added].”⁶⁴ Under *Nyhammer*, the determination of a request that ‘shows’ a contested case is solely within discretion of the Department and that determination is not subject to judicial review.⁶⁵ For example, despite federal law requiring⁶⁶ that NIAAA be given

⁶³ *Goldberg*, 397 U.S. at 268.

⁶⁴ *Nyhammer*, 2022 IL 128354 at ¶ 73.

⁶⁵ *Nyhammer* “declines to address the issue of whether the Department’s decisions [to refuse to give administrative hearings] that are at issue in this case are subject to review.” *Nyhammer*, 2022 IL 128354 at ¶71. The reason *Nyhammer* declined to address the issue is because the appellate court was right when it stated that “the Departments summary dismissal of the NIAAA’s petitions and its conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review.” *Nyhammer*, 2022 IL 128354 at ¶69. Further, even if older adults have the right to challenge the Department’s denial of a hearing request through a writ of certiorari, it is very unlikely they will have the wherewithal to challenge a billion-dollar State Agency in court, so the Illinois administrative hearing process will continue to be effectively closed to older adults.

⁶⁶ The First Petition requested a hearing under 42 U.S.C. §3027(a)(5) which states “[the Department] will ... afford an

an administrative hearing and the First Petition pleading 18 pages of facts and law, the Department's summary conclusion that the First Petition had not 'shown' it is a contested case is beyond judicial review under *Nyhamer*.

Nyhamer giving the Defendant unfettered authority to reject any administrative hearing request, unfortunately, will result in the Department's administrative hearing process continuing to be permanently closed to older adults, as it has been for years, in contradiction to *Goldberg*. *Nyhamer*, consequently, is a dangerous precedent which could create upheaval in the Aging Network, other Illinois welfare programs, and public welfare programs nationwide, so this Petition for Certiorari should be granted to reaffirm that *Goldberg* still applies to welfare benefits in Illinois and elsewhere.

B. *Nyhamer* ignores the Older Americans Act

In addition to ignoring *Goldberg*, *Nyhamer* also ignores the OAA in giving the Department unreviewable power to refuse giving administrative

opportunity for a hearing upon request ... to any area agency on aging submitting a plan under [the OAA]"; 42 U.S.C. § 3026(f)(2)(b) which states "[the Department] shall not make a final determination [about] withholding funds ... without first affording the area agency ... a public hearing concerning the action"; and 42 U.S.C. § 1983 which states that "every person who [acting on behalf of a state agency] ... causes ... [a] deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in ... [a] proper proceeding for redress."

hearings. While *Nyhammer* does acknowledge that the Department is subject to the OAA and that the Complaint is based on the Department's failure to comply with the OAA,⁶⁷ *Nyhammer* inexplicably proceeds to ignore the OAA in stating that "the relevant statutes and regulations grant the Department essentially unbridled discretion in...providing funding for programs for older Americans"⁶⁸ so NIAAA cannot get an administrative hearing. *Nyhammer* giving the Department 'unbridled discretion' in administering the Aging Network is baffling as it directly contradicts the myriad of detailed and explicit OAA limitations⁶⁹ of the Department.

If *Nyhammer* had considered the OAA, as required,⁷⁰ it would have come to the opposite conclusion which is that the Department has virtually no discretion when dealing with AAAs as the OAA severely limits the Department's ability to:

- Cut AAAs' funding;⁷¹

⁶⁷ *Nyhammer*, 2022 IL 128354, ¶ 47.

⁶⁸ *Nyhammer*, 2022 IL 128354, ¶ 67.

⁶⁹ 42 U.S.C. § 3025 *et seq.*; 42 U.S.C. § 3027 *et seq.*, 45 C.F.R. § 1321.7 – 1321.52.

⁷⁰ *Testa v. Katt*, 330 U.S. 386, 391 (1947) ("the constitution and the laws passed pursuant to it are the supreme laws of the land binding alike upon states, courts, and the people...").

⁷¹ 42 U.S.C. § 3026(f)(2)(B).

- Remove AAAs as the area agencies on aging;⁷²
- Change AAAs' service area and the number of older adults that AAAs serve;⁷³
- Take any action regarding any aging program in an AAAs' service area except through and with the approval of the AAA;⁷⁴
- Fund legal assistance services to older adults unless the AAA has made a "finding" approving the legal service provider;⁷⁵
- Determine how funding should be allocated statewide without first consulting the AAAs;⁷⁶
- Dictate AAAs' grievance policy;⁷⁷

⁷² 45 C.F.R. 1321.35.

⁷³ 42 U.S.C. § 3025(b)(5)(C).

⁷⁴ 45 C.F.R. 1321.7(b).

⁷⁵ 42 U.S.C. §3027(a)(11)(B).

⁷⁶ 42 U.S.C. § 3025(a)(2).

⁷⁷ 42 U.S.C. §3027(a)(5)(B).

- Interfere with AAAs independence by making the AAA a branch of the State Agency;⁷⁸
- Designate a replacement for an AAA if someone involved in the designation process at the State Agency has a potential conflict of interest;⁷⁹
- Provide any aging service directly to older adults in place of the AAA's designated service provider;⁸⁰ etc.

The above special protections given to AAAs in the OAA are believed to be unique in federal law and are done because older adults are especially susceptible to being exploited by State Agencies and because AAAs are vulnerable to bureaucratic pressure from State Agencies who fund them. To effectuate these limitations put on the Department, the OAA, therefore, mandates that AAAs, as public advocates, be given administrative hearings on demand from State Agencies.⁸¹

⁷⁸ 45 C.F.R. 1321.33.

⁷⁹ 42 U.S.C. §3027(a)(7)(B).

⁸⁰ 42 U.S.C. §3027(a)(8)(A).

⁸¹ The Department "will ... afford an opportunity for a hearing upon request ... to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. §3027(a)(5). This means the only condition for a AAA to get a hearing is that it has submitted an area plan which all active AAAs do, so all active AAAs have a right to a hearing on demand. See also 42 U.S.C. § 3026(f)(2)(b).

Nyhamer, unfortunately, ignores the AAAs unique role in the Aging Network by treating NIAAA as if it is some ordinary nonprofit who has no statutory protections and no explicit statutory right to challenge the Department's misconduct.⁸² This Certiorari, therefore, should be granted so that this Court can clarify AAAs' unique OAA role as the public advocates protecting the interests of vulnerable older adults from State Agencies such as the Department who decide to abuse their authority to the detriment of older adults and a properly functioning Aging Network.

C. *Nyhamer ignores Mathews v. Eldridge*

In addition to the OAA mandating that NIAAA be given administrative hearings, *Mathews v. Eldridge*⁸³ also requires that NIAAA, as the public advocate, be given administrative hearings to defend its property interests. Under *Mathews* and *Grosjean v. American Press Co., Inc.*,⁸⁴ NIAAA has the right to an administrative hearing to defend its due process protected property interest (Property Interest).⁸⁵ Under *Logan v. Zimmerman*, the State of Illinois creates a Property Interest when it confers a legal

⁸² *Nyhamer*, 2022 IL 128354, ¶ 53 (“we find nothing in these [statutory and regulatory] provisions that requires that ... [NIAAA be given an] opportunity for a hearing”).

⁸³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁸⁴ *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).

⁸⁵ Second District Reply Brief, 7.

right to NIAAA.⁸⁶ Under *Vitek v. Jones*, once Illinois has conferred a Property Interest to NIAAA, that Property Interest cannot be infringed by the Department unless NIAAA is given due process.⁸⁷

Based on these Court precedents, the First Petition requested a hearing to vindicate the following four NIAAA Property Interests:

- a. To be the public advocate representing older adults pursuant to 89 Ill. Admin. Code § 230.150(a)(1)-(3);
- b. To receive funding from the Department pursuant to 20 ILCS 105/3.07;
- c. To participate in the administrative rule making process (e.g. making public comments on proposed regulations as the public advocate, testifying at hearings on proposed regulations as the public advocate) under 5 ILCS 100/5-40; and
- d. To be the regional administrative agency in the APS program pursuant to 5 ILCS 100/5-40.⁸⁸

⁸⁶ *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432 (1982).

⁸⁷ *Vitek v. Jones*, 445 U.S. 480, n. 6 (1980) (quoting *Arnett v. Kennedy*, 416 U.S. at 167). Second District Reply Brief, 7 – 10.

⁸⁸ Second District Reply Brief, 7 – 10.

The Second Petition also added the Property Interest of NIAAA having the right to designate APS provider agencies under then 89 Ill. Admin. Code § 270.215.⁸⁹

Nyhamer, unfortunately, just ignores the above Court precedents in concluding that NIAAA has no Property Interests and no right to an administrative hearing.⁹⁰ *Nyhamer* not allowing NIAAA to protect these five Property Interests through an administrative hearing makes them meaningless proclamations which will continue to be ignored by the Department without consequence. This Certiorari, therefore, should be granted to affirm that NIAAA, and all AAAs, have the constitutional right as public advocates to administrative hearings when the Department infringes on their Property Interests.

D. *Nyhamer* engaged in secret deliberations in violation of NIAAA's due process rights

Finally, the Certiorari should be granted because *Nyhamer* engaged in secret deliberations in determining that Count I of the Complaint is moot.⁹¹ *Nyhamer* engaging in secret deliberations violates NIAAA's due process rights which require that

⁸⁹ Second District Reply Brief, 17 – 19.

⁹⁰ *Nyhamer*, 2022 IL 128354, ¶ 67 (NIAAA has no “legitimate claim of entitlement to funding or service provider designations for which it seeks hearings”).

⁹¹ *Nyhamer*, 2022 IL 128354 at ¶ 34.

NIAAA be given an “opportunity to be heard at a meaningful time and in a meaningful manner”⁹²

Count I of the Complaint alleges that the Defendant does not have proper hearing rules that comply with Article 10 of the Illinois Administrative Procedure Act (Procedure Act) and asks that the Defendant be ordered to adopt hearing regulations that comply with the Procedure Act.⁹³ Two years into this litigation, the Department decided to repeal the hearing regulation challenged in the Complaint by admitting the hearing regulation was “outdated, confusing, duplicative, unnecessary, overlapping, and unnavigable.”⁹⁴

Despite having repealed and replaced the old regulation over a year before the *Nyhammer* decision, the Defendant has never asserted that Count I is moot.⁹⁵ This means that the Defendant has conceded in writing that a mootness defense to Count I was not properly before *Nyhammer*.

⁹² *Mathews*, 424 U.S. at 333 (1976).

⁹³ C 8.

⁹⁴ *Nyhammer*, 2022 IL 128354 at ¶ 60.

⁹⁵ In its June 29, 2022 brief to the *Nyhammer* Supreme court, the Defendant asked the *Nyhammer* Supreme court to “remand this action to the circuit court for further proceedings ... [so that the Defendant] could raise a mootness defense now that the Department has new procedural rules.” Supreme Court Defendant’s Brief, 49 – 50.

Nyhammer, nevertheless, sustained the dismissal of Count I for mootness by claiming that “NIAAA conceded at oral argument that, effective August 10, 2021, the Department enacted regulations that specifically require hearings before the Department to be conducted in accordance with article 10 of the Procedure Act.”⁹⁶ NIAAA made no such concession. Counsel for NIAAA has listened to the oral argument multiple times after *Nyhammer* was released and believes that the best possible explanation for *Nyhammer*’s mistaken claim is that the court mistook Defendant’s counsel for NIAAA’s counsel.

Regardless, *Nyhammer* was apparently secretly considering dismissing Count I for a mootness defense that has never been properly asserted by the Defendant and then, unbeknownst to the parties, was listening for something from the oral argument to justify declaring that Count I is moot. NIAAA obviously was not given a fair opportunity to respond to *Nyhammer*’s secret deliberations about Count I and was denied the opportunity of responding by, for example, asserting the public-interest exception to the mootness doctrine⁹⁷ or asking leave to amend Count I to cite the new hearing regulation, which NIAAA believes is even more non-compliant with the Procedure Act than the repealed regulation cited in the Complaint.⁹⁸ Since the issue of mootness has not

⁹⁶ *Nyhammer*, 2022 IL 128354 at ¶ 34.

⁹⁷ See *Holly v. Montes*, 896 N.E.2d 267, 271 (Ill. 2008).

⁹⁸ *Nyhammer* claiming Count I is moot because it cannot grant NIAAA relief requested is error as *Nyhammer* misunderstands that Count I is just asking that the Defendant be ordered to

been properly before *Nyhammer* and NIAAA was not given a fair opportunity to respond to *Nyhammer*'s secret deliberations, it was a violation of NIAAA's due process rights for *Nyhammer* to *sua sponte* declare that Count I is moot.

E. Conclusion

As discussed above, this Certiorari should be granted because *Nyhammer* ignored relevant Court precedent/federal statutes in denying older adults and NIAAA their federally protected due process rights to administrative hearings. To recap, *Nyhammer* ignored the following in affirming the dismissal of the Complaint:

1. 42 U.S.C. § 3021(a)(1);
2. 42 U.S.C. § 3025(a)(1)(D);
3. 42 U.S.C. § 3025(a)(2)(E);
4. 42 U.S.C. § 3027(a)(10);
5. 42 U.S.C. § 3025 *et seq.*;
6. 42 U.S.C. § 3027 *et seq.*;
7. 45 C.F.R. § 1321.7 – 1321.52;
8. 45 C.F.R. 1321.61(a)-(b);
9. 42 U.S.C. § 3027(a)(5);
10. 42 U.S.C. § 3026(f)(2)(B);
11. 45 C.F.R. 1321.35;
12. 42 U.S.C. § 3025(b)(5)(C);

implement a hearing regulation that complies with the Procedure Act. Since the new hearing regulation also does not comply with the Procedure Act, the remedy for Count I is still viable contrary to the claims of *Nyhammer* that it is "impossible for the court to grant effectual relief." *Nyhammer*, 2022 IL 128354 at ¶34.

13.45 C.F.R. 1321.7(b);
14.42 U.S.C. § 3027(a)(11)(B);
15.42 U.S.C. § 3025(a)(2);
16.42 U.S.C. § 3027(a)(5)(B);
17.45 C.F.R. 1321.33;
18.42 U.S.C. § 3027(a)(7)(B);
19.42 U.S.C. § 3027(a)(8)(A);
20.42 U.S.C. § 1983;
21. *Goldberg*;
22. *Mathews*;
23. *Logan*;
24. *Grosjean*; and
25. *Vitek*.

Nyhammer, consequently, is obviously based on the faulty premise that Illinois courts are not subject to federal law so this Certiorari should be granted to clarify that Illinois courts are obligated to apply relevant federal statutes and Court precedents in litigation.

Respectfully submitted,

/s/ Grant Nyhammer

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NO: _____

IN THE
UNITED STATES SUPREME COURT

**Grant Nyhammer as Executive Director of the
Northwestern Illinois Area Agency on Aging,**

Petitioner,

v.

**Paula Basta, in her capacity as Director of the
Illinois Department on Aging,**

Respondent.

On Petition for Writ of Certiorari
to the Illinois Supreme Court

APPENDIX TO PETITION FOR WRIT OF
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