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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

JANE DOE; CHRISSY MILLER;	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Case No. 24-0503-III**
TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY; JEFF LONG, in his official capacity as the Commissioner of Tennessee's Department of Safety and Homeland Security; and MICHAEL HOGAN, in his official capacity as the Assistant Commissioner of the Driver Services Division for Tennessee's Department of Safety and Homeland Security,	)	**Chancellor Myles**
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Defendants Tennessee Department of Safety and Homeland Security ("Department"), Commissioner Jeff Long, and Assistant Commissioner Michael Hogan submit this Memorandum of Law in support of their Motion to Dismiss.

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INTRODUCTION

Tennessee defines "sex" as "a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex." Tenn. Code Ann. § 1-3-105(c). That is not an extraordinary proposition. *See, e.g.*, 2024 Idaho Laws c. 322 (defining, effective July 1, 2024, "sex" for all Idaho's "laws and rules and policies" as "an individual's biological sex, either male or female"); Utah Code Ann. § 68-3-12.5(34) (defining, for Utah's code, "sex" as "the individual's biological sex, either male or female, at birth, according to distinct reproductive roles as manifested by" anatomy, chromosomes, and endogenous hormone profiles); Kan. Stat. Ann. § 77-207(a)(1) (defining, for "any state law or rules or regulations, "sex" as an "individual's biological sex, either male or female, at birth"); Okla. Exec. Order 2023-20 (August 1, 2023) (defining, for administrative rules, "sex" as a "natural person's biological sex, either male or female at birth") (attached collectively as Exhibit 1).

The Department has followed the General Assembly's clear statutory instruction to interpret "sex" as a person's biological sex. Therefore, the sex designation on a driver license issued by the Department reflects the licensee's biological sex, rather than "gender identity" or anything else. *See* Dep't of Safety & Homeland Security, Proof of Identity (Policy No. DLP-302) at 12 (July 3, 2023) (Amended Complaint, Ex. A.13). There is no discretion exercised by the Department; its policy simply recites state statute and explains what the statute "means." (Amended Complaint, Exhibit A.13.)

Plaintiffs fault the Department for failing to follow the Uniform Administrative Procedure Act's ("UAPA") procedures for notice-and-comment rulemaking when it updated its policy. But *rulemaking* procedures only apply to *rules*. Policy updates, by the express text of the UAPA, are

not subject to rulemaking procedures. And the policy Plaintiffs challenge fits squarely in the UAPA's definition of a "policy." The Department fully satisfied its obligations under the UAPA.

Ironically, it is Plaintiffs who have failed in multiple ways to follow the clear requirements of the UAPA in filing their Amended Complaint challenging the Department's policy. Courts "cannot exercise jurisdictional powers that have not been conferred directly on them expressly or by necessary implication" in constitutional or statutory provisions. *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999). Plaintiffs ask this Court to ignore multiple strict jurisdictional limits placed on it by the General Assembly in the UAPA. First, Plaintiffs improperly ask this Court to act as both a trial court in an original action—by seeking a declaratory judgment—and an appellate court—by seeking review of agency action under the UAPA—at the same time. Binding precedent prohibits that. *Poursaied v. Tennessee Bd. of Nursing*, No. M2020-01235-COA-R3-CV, 2021 WL 4784998, at *5 (Tenn. Ct. App. Oct. 14, 2021). Second, Plaintiffs ask this Court to consider requests for declaratory relief that have not first been exhausted with the Department. Binding precedent and statute prohibit that. *Colonial Pipeline v. Morgan*, 263 S.W.3d 827, 842 (Tenn. 2008). Third, Plaintiffs ask this Court to review the merits of an action by the Department that is not a "contested case," as defined by the UAPA. Binding precedent and statute also prohibit that. *Dishmon*, 15 S.W.3d at 480.

In sum, Plaintiffs have ignored multiple requirements of the UAPA and have failed to ask this Court to do anything it has jurisdiction to do. Moreover, Plaintiffs' rulemaking challenge in Count I fails to state a claim because Plaintiffs challenge what is statutorily a "policy"—not a "rule." And Commissioner Long and Assistant Commissioner Hogan are improper defendants to both counts of the Amended Complaint. The Amended Complaint should be dismissed in its entirety.

BACKGROUND

I. Tennessee's Driver License Policy

The State of Tennessee requires that every application for a driver license "shall state the … sex … of [the] applicant" and must be accompanied by a "birth certificate or other proof of the applicant's date of birth." Tenn. Code Ann. §§ 55-50-321(a), -(c)(1)(A). Each driver license issued by the State contains a marker indicating the license-holder's "sex." *See* Tenn. Comp. R. & Regs. 1340-01-13-.18(2)(c) ("Each driver license … shall contain the following: … A brief physical description of the applicant, including sex …"); *see also* Tenn. Dep't of Safety & Homeland Security, Driver License Card Examples, https://perma.cc/WV4U-VQEU.

Last year, the General Assembly clarified that "sex," as that term is used in the Tennessee Code, "means a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth," as well as "evidence of a person's biological sex," such as "a government-issued identification document that accurately reflects a person's sex listed on the person's original birth certificate." Tenn. Code Ann. § 1-3-105(c). This definition of "sex" applies both to Tennessee's statutory requirements for driver license applications and the sex designation contained on the licenses themselves. *See* Dep't of Safety & Homeland Security, Proof of Identity (Policy No. DLP-302) at 12 (July 3, 2023) (Amended Complaint, Ex. A).

Consistent with Tennessee's statutory definition of "sex," the Department of Safety and Homeland Security updated its policy, effective July 1, 2023, to explain that it "does not accept requests for gender marker changes that are inconsistent with someone's designated sex on their original birth certificate." *Id.* That generally means "amended birth certificates cannot be used" for the purpose of determining the appropriate sex designation on a driver license. *Id.*

Tennessee driver licenses do not in any way reflect a person's gender identity, a concept that can encompass the male-and-female binary, "somewhere in between," somewhere "completely outside these categories," and "limitless" other identities that include "agender, bigender, genderqueer, or gender-fluid." Human Rights Campaign, Glossary of Terms, https://perma.cc/F9J5-YGUZ.

II. Plaintiff Doe's Request for a Driver License that Reflects Gender Identity

Plaintiff Jane Doe is a 33-year-old resident of Monroe County. (Amended Complaint, at ¶¶ 15, 68.) Doe moved to Tennessee eight years ago. *Id*. Doe's Tennessee driver license contains a "male" sex designation, consistent with the sex designation on Doe's Florida birth certificate. *Id*., ¶¶ 68, 76.

Doe now "lives as a woman." *Id*. at ¶ 71. Doe was diagnosed in May 2022 with gender dysphoria and began taking cross-sex hormones. *Id*. at ¶ 69. In February 2024, Doe went to the local driver license service center in Athens, Tennessee, to request that the sex designation on Doe's driver license be changed from male to female. *Id*. at ¶ 73-74. But Doe's request was denied pursuant to the Department's driver license policy because the sex listed on Doe's birth certificate is male. *Id*. at ¶ 76; Policy No. DLP-302, Amended Complaint, Ex. A.

III. Plaintiff Miller's Request for a Driver License that Reflects Gender Identity

Plaintiff Chrissy Miller is a 38-year-old resident of Cocke County. Amended Complaint at ¶ 79. When Miller moved to Tennessee ten years ago, Miller applied for and was issued a Tennessee driver license using Miller's birth certificate from the State of Ohio. *Id*. ¶¶ 80, 95. That Ohio birth certificate listed Miller's name as "Christopher Lee Miller," and it listed Miller's sex as "male." *Id*. at ¶ 95. At the same time, Miller surrendered an Ohio driver license that likewise reflected the name "Christopher Lee Miller" and the sex designation of "male." *Id*.

Miller now "lives as a woman." *Id*. at ¶ 83. Miller was diagnosed with gender dysphoria in 2023 and began taking cross-sex hormones. *Id*. at ¶ 81. In July 2023, Miller went to the local driver license service center in Sevierville, Tennessee, to request that the sex designation on Miller's driver license be changed from male to female. *Id*. at ¶ 84. However, because Miller could not establish that Miller's "biological sex" was female, Tenn. Code Ann. § 1-3-105(c), Miller's request was denied. *Id*. at ¶ 85.

In November 2023, Miller successfully obtained an amended birth certificate from the State of Ohio that listed Miller's sex designation as "female"—consistent with Miller's gender identity. *Id*. at ¶ 86. Two months later, Miller took the amended Ohio birth certificate to the local driver license service center in Knoxville, again requesting to change the sex designation on Miller's license from "male" to "female." *Id*. at ¶88. But, after inspecting Miller's paperwork, that request—like the first—was denied. *Id*. at ¶¶ 89-90.

Undeterred, Miller went the next day to the local driver license service center in Sevierville, again attempting to use the amended Ohio birth certificate to change the sex designation on Miller's Tennessee driver license from "male" to "female." *Id*. at 95. At the time of that transaction, Miller was asked about having another birth certificate, which Miller denied. *Id*. Of course, Miller had in fact presented a different Ohio birth certificate to obtain Miller's original Tennessee license in 2014. *Id*. Relying on Miller's amended Ohio birth certificate, which designated Miller as "female," a clerk in the Sevierville office ultimately agreed to issue a new license designating Miller's sex as "female." *Id*. at ¶ 92. But because Miller had presented a different birth certificate in 2014 designating Miller's sex as "male," Miller's new license was issued in error. *Id*. at ¶ 95.

The Department of Safety and Homeland Security ultimately discovered the clerk's error and has sought to correct it. Assistant Commissioner Hogan sent Miller correspondence dated April 16, 2024, directing Miller to visit a local driver license service center to surrender the noncompliant license and to receive a new one "free of charge." *Id*. Commissioner Hogan warned Miller that the failure to surrender the faulty license within 30 days would result in a cancellation of driving privileges. *Id*.

Instead of surrendering the noncompliant license and obtaining a new one that reflects "sex" consistent with State law, Miller filed suit challenging the validity of the Department's driver license policy under the UAPA.

LEGAL STANDARD

Under Tenn. R. Civ. P. 12.02(1), a suit should be dismissed if a court "lack[s] . . . jurisdiction over the subject matter." "[S]ubject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it." *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). "Whether a court has subject matter jurisdiction to hear a particular controversy depends upon the nature of the cause of action and the relief sought." *State ex. rel. Com'r of Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 602 (Tenn. Ct. App. 2010). "When a court's subject matter jurisdiction is questioned, the first step is to ascertain the nature or gravamen of the case." *Memphis Bonding Co., Inc. v. Crim. Ct. of Tenn. 30th Jud. Dist.*, 490 S.W.3d 458, 462 (Tenn. Ct. App. 2015). The next step is for the court to "determine whether the constitution, the general assembly, or the common law have conferred on it the power to adjudicate cases of that sort." *Id*.

Under Tenn. R. Civ. P. 12.02(6), a pleading should be dismissed with prejudice if it fails to state a claim upon which relief can be granted. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). "A motion to dismiss for failure to state a claim pursuant to Rule 12.02(6) 'admits the truth of all the relevant and material allegations contained in the complaint, but it asserts that the allegations fail to establish a cause of action.'" *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005) (quoting *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004)).

When reviewing a motion to dismiss for failure to state a claim, the court must "presume[e] all factual allegations to be true and giv[e] the plaintiff the benefit of all reasonable inferences." *Trau-Med*, 71 S.W.3d at 696 (quoting *Tigg v. Pirelli Tire Corp*., 232 S.W.3d 28, 31-32 (Tenn. 2007)). However, the complaint must contain sufficient facts to show there is a factual basis on

which the "claim for relief is founded." *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Smith v. Lincoln Brass Works, Inc*., 712 S.W.2d 470, 471 (Tenn. 1986)). And "[t]he facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 104 (Tenn. 2010)). "'Legal arguments or legal conclusions couched as facts' are not taken as true." *Estate of Haire v. Webster*, 570 S.W.3d 683, 690 (Tenn. 2019) (quoting *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017)).

ARGUMENT

I. The Amended Complaint Should Be Dismissed for Lack of Jurisdiction.

The Court does not have subject matter jurisdiction over this case. "Jurisdiction is lawful authority of a court to adjudicate a controversy brought before it." *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977). Jurisdiction over a subject matter must be conferred by constitution or statute. *Id*. Only "the Legislature may determine . . . what shall be the limits of [a court's] jurisdiction." *State ex rel. Ward v. Murrell*, 169 Tenn. 688, 90 S.W.2d 945, 946 (1936). Statutes granting jurisdiction over claims against the State "must be strictly construed." *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

Plaintiffs' Amended Complaint contains two counts. Both purport to be causes of action under a statute: the UAPA. But Plaintiffs have not complied with the strict requirements of that statute that confers jurisdiction on this Court. Accordingly, both counts must be dismissed.

A. This Court lacks jurisdiction to consider Plaintiffs' original declaratory claims and appellate review claims simultaneously.

Plaintiffs have impermissibly joined two counts seeking original declaratory relief with one count seeking judicial review of what Plaintiffs allege is an administrative decision under the UAPA. This Court does not have jurisdiction to act as both a trial and appellate court simultaneously.

Tennessee courts have long refused simultaneous consideration of both an appeal and an original action at the trial level. *Poursaied v. Tennessee Bd. of Nursing*, No. M202001235COAR3CV, 2021 WL 4784998, at *5 (Tenn. Ct. App. Oct. 14, 2021), *perm. app. denied* (Tenn. Feb. 10, 2022); *Groves v. Tennessee Dep't of Safety & Homeland Sec.*, No. M201601448COAR3CV, 2018 WL 6288170, at *6 (Tenn. Ct. App. Nov. 30, 2018), *perm. app. denied* (Tenn. May 16, 2019). As the Court of Appeals has explained about why these two proceedings cannot be combined,

> such procedure is inimical to proper review in the lower certiorari Court and creates even greater difficulties in the Court of Appeals. The necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident . . . Like water and oil, the two will not mix.

Goodwin v. Metro. Bd. of Health, 656 S.W.2d 383, 386 (Tenn. Ct. App. 1983). The "practice of joining appellate jurisdiction and original jurisdiction in one hearing will lead to procedural chaos bogged down in a quagmire of legal conflicts with reasoned law sinking in the quicksands of confusion." *Id*. at 387.

Plaintiffs clearly ask this Court to do two different types of work in this case: "[e]nter judgment[s] declaring" Plaintiffs' rights and "reverse the decision of Defendants . . . and remand to Defendants for further proceedings." (Amended Complaint, at ¶ 28.) Plaintiffs even name the Amended Complaint as one for "Declaratory Judgment and Injunctive Relief" *and* a "Petition for

Judicial Review." (Amended Complaint, at 1.) This Court cannot wear both the original trial court hat and the appellate court hat at the same time. *Poursaied*, 2021 WL 4784998, at *5; *Groves*, 2018 WL 6288170, at *6; *Castro v. Peace Officer Standards and Training Comm'n*, No. M2006-02251-COA-R3-CV, 2008 WL 3343000, at *5 (Tenn. Ct. App. Aug. 11, 2008). "[W]hen presented with both an action for judicial review and an original action, courts typically dismiss the original action." *Poursaied*, 2021 WL 478998, at *5.

Applying these principles, this Court has itself previously dismissed original claims for declaratory judgment that were joined with a petition for judicial review. *See Kaminski v. Tenn. Bureau of Investigation*, No. 23-0087-III (Dav. Ch. Ct. Nov. 14, 2023) (Final Order and Memorandum) (attached as Exhibit 2). Count I of Plaintiffs' Amended Complaint should likewise be dismissed.

B. This Court lacks jurisdiction to consider requests for declaratory relief that have not been exhausted with the Department.

Even if the claims were brought separately, and even if the Court were to assume that the Department's driver license policy constitutes a "rule" under the UAPA,[1] this Court lacks jurisdiction over Count I. Plaintiffs failed to request a declaratory order from the Department, [2] as

[1] As explained further in Section II below, Defendants deny that Department Policy No. DLP-302 constitutes a "rule" subject to UAPA review. The Court need not "take[] as true" Plaintiffs' legal conclusions in that regard. *Moore-Pennoyer*, 515 S.W.3d at 276.

[2] Plaintiffs cannot argue that an email to the Department asking generally if there is any "appeals process" satisfies their obligation to exhaust under the UAPA. (Amended Complaint, ¶ 40.) The request for a declaratory order from an agency must be clear and reflected in the record. *Bonner v. Tenn. Dept. of Correction*, 84 S.W.3d 576, 583 (Tenn. Ct. App. 2001). Nor can Plaintiffs argue that exhaustion is futile, because the futility exception to exhaustion is only available "where exhaustion is not statutorily required." *Pickard v. Tennessee Water Quality Control Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013).

required by Tenn. Code Ann. § 4-5-225(b), before suing for declaratory judgment. Failure to exhaust that administrative remedy under the UAPA deprives this Court of jurisdiction.

In Count I of the Complaint, Plaintiffs seek a declaration under Tenn. Code Ann. § 4-5-225(a) that a supposed "rule" of the Department is "void and of no effect" because it was not adopted in compliance with the UAPA. Amended Complaint, ¶ 106. But a claim for declaratory judgment regarding the validity of a "rule" under Tenn. Code Ann. § 4-5-225(a) is clearly subject to the exhaustion requirement contained in the next subsection of the statute. "A declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." Tenn. Code Ann. § 4-5-225(b). "In no uncertain terms, this statute requires a prospective plaintiff to make a request for a declaratory order with an agency before bringing an action for a declaratory judgment in the Chancery Court." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 842 (Tenn. 2008). While the Supreme Court has excepted challenges to a statute's constitutional validity from this requirement, *id*. 845-46 (Tenn. 2008), Plaintiffs do not challenge the validity of any state statute, (Amended Complaint, at 28 (requesting declaratory relief about the validity of a "rule"). Administrative agencies "have the power" to decide challenges to "rules," *Colonial Pipeline*, 263 S.W.3d at 843, and Plaintiffs failed to ask them to do so.

Plaintiffs cannot escape the exhaustion requirement by claiming that Policy DLP-302 is an improperly promulgated rule. The UAPA contemplates that a chancery court may determine whether a rule "was adopted without compliance with the rulemaking procedures" of the UAPA. Tenn. Code Ann. § 4-5-225(c). But, as noted above, a declaratory judgment regarding the validity of a rule cannot issue unless a plaintiff first petitions the agency regarding the same. Tenn. Code

Ann. § 4-5-225(b). The vehicle for obtaining a declaratory judgment in chancery court only arises if the Department "[r]efuse[s] to issue a declaratory order" when petitioned. Tenn. Code Ann. § 4-5-223(a)(2). If Plaintiffs believe the Department improperly promulgated a "rule," exhaustion of the challenge with the Department is necessary before a declaratory judgment action can be brought in chancery court.

Exhaustion is both statutorily required and serves important interests. Declaratory actions should not be entertained by courts where a statute provides an adequate administrative remedy. *Colonial Pipeline*, 263 S.W.3d at 838. Exhaustion promotes judicial efficiency and protects administrative authority by (1) permitting an agency to correct initial errors and crystallizing important factual and legal issues, (2) developing a complete administrative record for the court to review, and (3) allowing an agency to perform functions within its specialized technical competence. *Id*. at 838-39. Where an agency issues a declaratory order, the chancery court can then review it as an appellate court in the same "manner provided for the review of decisions in contested cases." Tenn. Code Ann. § 4-5-223(a)(1). As explained in Part I(A)(1), *supra*, "there are fundamental differences" between a chancery court's role as an appellate court in judicial review actions and a trial court in original actions. *Taylor v. Reynolds*, No. 93-552-I, 1994 WL 256286, at *2 (Tenn. Ct. App. June 10, 1994). The statutory exhaustion requirement dictates that Plaintiffs must first provide the Department the opportunity to determine the issue before resorting to chancery court. They have not done that.

"In the absence of proof" that a plaintiff sought a declaratory order from an agency, "the Chancery Court lacks jurisdiction over" the declaratory judgment action. *Stewart v. Schofield*, 368 S.W.3d 457, 465 (Tenn. 2012). Conspicuously absent from the Amended Complaint is any allegation that Plaintiffs sought a declaratory order from the Department. "[N]o one is entitled to

judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Colonial Pipeline Co.*, 263 S.W.2d at 838. Count I therefore must be dismissed for lack of subject matter jurisdiction. *Bonner v. Tenn. Dept. of Corr.*, 84 S.W.3d 576, 583 (Tenn. Ct. App. 2001).

C. This Court does not have jurisdiction under the UAPA to review actions of the Department that are not contested cases.

This Court also does not have jurisdiction over Plaintiffs' request in Count II for judicial review of the Department's action under the UAPA (Amended Complaint, ¶ 108), because the remedies provided by Tenn. Code Ann. § 4-5-322 are not available to Plaintiffs.

The UAPA "is inapplicable to proceedings that do not fit within its adjudicatory definitions." *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999). Only "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review" under the UAPA. Tenn. Code Ann. § 4-5-322(a)(1). "Thus, judicial review under Tenn. Code Ann. § 4-5-322 is not available if the proceeding to be reviewed is not a contested case." *Dishmon*, 15 S.W.3d at 481. A contested case is "a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party *are required by any statute or constitutional provision* to be determined by an agency after an opportunity for a hearing." Tenn. Code Ann. § 4-5-102(3). "To determine whether any particular dispute is a contested case . . . [courts] examine the applicable statutes and constitutional provisions to see if any of them provide that a complainant's rights must only be determined after an opportunity for a hearing." *Dishmon*, 15 S.W.3d at 481.

Plaintiffs have identified no statute or constitutional provision providing that the Department must decide requests for sex designator changes only after opportunity for a hearing.

Indeed, Plaintiffs do not assert any constitutional concerns at all. And while statute does provide for hearings with respect to certain driver license decisions, *see e.g.,* Tenn. Code Ann. §§ 55-50-321(e), -505, -509, none of those statutes provide for contested case hearings for requests to change sex designators. Plaintiffs provide no explanation of how the Department's action is a "contested case." Plaintiffs merely assert, with no support, that this Court can "reverse or modify" any action it finds "arbitrary and capricious." Amended Complaint, ¶ 108. Because Plaintiffs do not seek review of a "contested case," Plaintiffs "d[o] not have a right to seek judicial review" of the Department's action. *Dishmon*, 15 S.W.3d at 482.

D. This Court does not have jurisdiction to review the Department's letter to Plaintiff Miller.

The Department letter challenged by Plaintiff Miller in this case is "intermediate" and not a "final" agency action, as required for judicial review under Tenn. Code Ann. § 4-5-322. Miller acknowledges that the Department has already, albeit erroneously, changed the sex designator on Miller's license. (Amended Complaint, ¶ 92.) Miller now seeks review of the Department's letter informing Miller that the new license was issued in error and that, within 30 days, Miller needs to return the license so it can be replaced with one that complies with state law. *Id*. at ¶ 95. The Department's letter also informed Miller that failure to return the erroneous license "*will* result in a cancellation of [Miller's] driving privilege, until [Miller] appl[ies] for the correct driver license." *Id*. (emphasis added).

The Department's letter does not finally resolve Miller's dispute with the Department. The letter simply indicates what the Department will do, conditioned on Miller taking either of two alternative actions. The final action of the Department will not occur until the Department issues

Miller a driver license that complies with state law or cancels Miller's driving privileges. Miller asks this Court to preemptively review the propriety of those two potential courses of action.

Miller cannot justify this request for interlocutory review. To seek review of an intermediate action of an agency, a petitioner must demonstrate that irreparable injury will result from pursuing the normal course of review from a final decision. *Nichopoulos v. Tenn. Bd. of Med. Examiners*, No. 01A01-0411-CH-00534, 1995 WL 145978, at *2 (Tenn. Ct. App. Apr. 5, 1995). Miller does not argue that pursuing judicial review *after* the Department's final action on the matter will cause irreparable injury. Even if the Department's decisions about sex designators are subject to review under Tenn. Code Ann. § 4-5-322, as Miller alleges, then Miller can ask this Court to reverse the cancellation of driving privileges or the issuance of a corrected license *after* any such final action. Miller could even seek a stay at that time. But, as it stands, Miller has prematurely sought judicial review of an intermediate action and has failed to demonstrate the jurisdictional prerequisites for interlocutory review. Without jurisdiction to review the Department's intermediate action, this Court cannot grant Miller's requested extraordinary relief. The Court should dismiss Miller's Count II on this additional ground.

II. Count I Should Be Dismissed for Failure to State a Claim.[3]

Policy DLP-302, which Plaintiffs label the "Redefinition of Sex Rule," is by statutory definition a policy, not a rule. The Department is only required to engage in rulemaking procedures

[3] Defendants are not required to file any responsive pleading to the petition for judicial review brought through Count II. Tenn. Code Ann. § 4-5-322(f). Under Local Rule 25, the parties are required to file briefs of the issues raised for review only after the filing of the administrative record. If Count II survives dismissal on the jurisdictional grounds raised in this Motion, Defendants will ask this Court to set a schedule for filing of the administrative record and briefing.

for rules, not policies. Plaintiffs' attempt to foist notice-and-comment obligations on the Department's policy updates is nothing more than a selective misreading of the UAPA.

The UAPA defines a policy as either of two types of "statement, document, or guideline": (1) those that "merely define[] or explain[] the meaning of a statute or rule and (2) those that "concern[] only the internal management of state government that does not affect private rights." Tenn. Code Ann. § 4-5-102(10). If a statement of an agency fits the definition of a policy, it is not a rule. *Id*. § 4-5-102(12) ("'Rule' means any agency regulation, standard, statement, or document of general applicability that is not a policy as defined in subdivision (10) . . . ."). And only a "rule"—not a policy—must undergo notice-and-comment rulemaking. *Id*. § 4-5-202.

Policy DLP-302 regarding proof of identity is a policy that "merely defines or explains the meaning of a statute or rule." *Id*. § 4-5-102(10). Existing statutes and rules, which Plaintiffs do not challenge, dictate Policy DLP-302. As noted above, Tennessee law provides that "[a]s used in this code, unless the context otherwise requires, 'sex' means a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex." *Id*. § 1-3-105(c). So, "sex" has a specific meaning wherever that term is used in the code.

Then, "sex" is used in the Uniform Classified and Commercial Driver License Act. "Every application [for a driver license] shall state the . . . sex . . .of applicant." *Id*. § 55-50-321(c)(1)(A); Tenn. Comp. R. & Regs. 1340-01-13-.11(2). Every driver license "shall bear thereon . . . a brief description" of the licensee. Tenn. Code Ann. § 55-50-331(b)(1). An existing Department rule, which Plaintiffs do not challenge, also requires that that brief description on each license "includ[e] sex." Tenn. Comp. R. & Regs. 1340-01-13-.18(2).

Policy DLP-302 "merely . . . explains" the meaning of these statutes and rules. Tenn. Code Ann. § 4-5-102(10). Statutes and rules that Plaintiffs have *not* challenged in this case require an applicant to provide, and a driver license to display, an applicant's sex—that is, the person's "immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex." Tenn. Code Ann. § 1-3-105(c). Applicants "[m]ust show proof of their identity." Tenn. Comp. R. & Regs. 1340-01-13-.06(1)(a), -.11(3), -.12(1). And state statute defines "evidence of a person's biological sex" as including "a government-issued identification document that accurately reflects a person's sex listed on the person's original birth certificate." Tenn. Code Ann. § 1-3-105(c). Naturally, that statute means that the Department must reject documents that do not reflect a person's sex listed on an original birth certificate. And that is all that DLP-302 says: it repeats the text of a statute and states that the definition of "sex" in that statute "*means* any amended birth certificates cannot be used for determining" what to put on the applicant's license.[4] DLP-302 is a policy that "merely defines or explains the meaning" of unchallenged statutes and rules.

Because DLP-302 is a policy, and because a "rule" must be something "that is not a policy," Tenn. Code Ann. § 4-5-102(12), DLP-302 cannot be a rule. "[T]he declaratory judgment provisions of the UAPA d[o] not entitle [Plaintiffs] to challenge the applicability or validity of [a] policy." *Mandela v. Campbell*, 1996 WL 730289, at *2 (Tenn. Ct. App. Dec. 20, 1996). Count I should be dismissed because the allegations in the Amended Complaint cannot support the claim that Policy DLP-302 is an improperly promulgated "rule."

[4] Plaintiffs also complain that rule 1340-01-13-.12(6) permits an applicant to submit a doctor's note to change a sex designator on a driver license. (Amended Complaint, ¶¶ 29-30.) To the extent any administrative rule permits a practice that is inconsistent with state statute, the rule is void. *Southern Ry. Co. v. Taylor*, 812 S.W.2d 577, 580 (Tenn. 1991).

III. The Amended Complaint Should Be Dismissed Against Commissioner Long and Assistant Commissioner Hogan.

Neither Commissioner Long nor Assistant Commissioner Hogan are proper defendants to Plaintiffs' claims under the UAPA. For both Plaintiffs' counts, the UAPA instructs that the Department, not its employees, are the proper defendant. Count I purports to be a declaratory judgment action under Tenn. Code Ann. § 4-5-225. In such actions, "[t]he agency shall be made a party to the suit." Tenn. Code Ann. § 4-5-225(a). The UAPA does not authorize actions against an agency's employees. *See Utley v. Rose*, 55 S.W.3d 559, 562 (Tenn. Ct. App. 2001). Likewise, Plaintiffs' petition for judicial review under Count II is "a continuing proceeding in which the parties have been determined and are *of record*." *Jaco v. Department of Health, Bureau of Medicaid*, 950 S.W.2d 350, 352 (Tenn. 1997). The administrative agency—not its officials—is the party to a petition for judicial review. *United Steelworkers of America v. Tennessee Air Pollution Control Bd.*, 3 S.W.3d 468, 472 (Tenn. Ct. App. 1998); Tenn. Code Ann. § 4-5-322(b)(2). And there are no other parties of record. Because the UAPA authorizes a petition for judicial review only against the "agency and all parties of record," only the Department is properly a party to the appellate action in Count II. *But c.f. Gross v. Grunow*, No. 01-A01-9111CH00423, 1992 WL 151439, at *3 (Tenn. Ct. App. July 2, 1992) (affirming dismissal of two employees of Department of Human Services in petition for judicial review as Commissioner was sufficient party to represent the department). Both counts should be dismissed as to Commissioner Long and Assistant Commissioner Hogan.

CONCLUSION

For these reasons, Plaintiffs' Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been filed and served upon the following by operation of the court's electronic filing system, with courtesy copies provided by email, on this the 14th day of May, 2024:

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