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

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| JANE DOE; CHRISSY MILLER, | ) | |
| | ) | |
| Plaintiffs/Petitioners, | ) | 24-0503-III |
| | ) | |
| vs. | ) | Chancellor Myles |
| | ) | |
| 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, | ) | |
| | ) | |
| Defendants/Respondents. | ) | |

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND SUPPLEMENTAL MOTION TO DISMISS**

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## INTRODUCTION

In 2023, for the first time since the founding of Tennessee, the General Assembly passed a law defining the word "sex" throughout Tennessee code. The definition in full states:

> As 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. As used in this subsection (c), "evidence of a person's biological sex" includes, but is not limited to, 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).

Nothing in this code section authorizes agency action. Yet, Defendants Tennessee Department of Safety and Homeland Security, Jeff Long, and Michael Hogan ("the Agency" or "Defendants") took it upon themselves to promulgate a document purportedly binding the citizens of Tennessee and empowering the Agency with the authority to adjudicate cases and controversies—in contravention of the longstanding province of the judiciary. [1]

But Tennessee law prevents this overstepping by the executive branch of government against the legislative and judicial branches. And plainly gives the Court jurisdiction to determine whether the Agency acted within the bounds of its statutory obligations. As such, the Court should deny Defendants' motion to dismiss.

## BACKGROUND

Despite no statutory authorization, the Agency's DLP-302 document mandates that a sex marker on a driver license must match the sex marker as determined on an original certificate of birth. 2nd Am. Compl. ¶¶ 8, 28-30, 33-34. There is no mechanism by which a driver license applicant can appeal a denial of a sex marker change on a driver license. 2nd Am. Compl. ¶ 43. If the Agency perceives the license applicant as transgender, the Agency will not allow them to update their sex marker to correctly identify their sex today. 2nd Am. Compl. ¶¶ 39-42, 44.

Plaintiffs Jane Doe and Chrissy Miller are transgender women. 2nd Am. Compl. ¶¶ 4, 17-18, 71-74, 82-86. This means that they were assigned a male sex at birth but live as members of the female sex today. 2nd Am. Compl. ¶¶ 74, 86. Both women have undergone medical treatment that has changed their physical characteristics and anatomy to reflect their sex as female. 2nd Am. Compl. ¶¶ 72, 84. Yet, Defendants rely on their document DLP-302 to deny

[1] DLP-302(E)(3) was promulgated by the Tennessee Department of Homeland Security in a document labeled "Guidelines to Proof of Identity," *see* 2nd Am. Compl. Ex. A.

any update to Ms. Doe's or Ms. Miller's sex marker to accurately reflect their appearance and identities to the public. 2nd Am. Compl. ¶¶ 77-79, 87-98.

## LEGAL STANDARD

Under Tennessee Rules of Civil Procedure 12.02(1), a court may only entertain those claims over which it has subject matter jurisdiction. A court derives its subject matter jurisdiction, either explicitly or by necessary implication, from the Tennessee Constitution or from legislative acts. *Staats v. McKinnon*, 206 S.W.3d 532, 541-42 (Tenn. 2006). The existence of subject matter jurisdiction depends on the nature of the cause of action and the relief sought. *Id.* at 542. The court presumes the factual allegations of the complaint are true. *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 160 (Tenn. 2017). If these factual allegations establish a basis for the court's exercise of subject matter jurisdiction, then the court must uncritically accept those facts, end its inquiry, and deny the motion to dismiss. *Id.* Thus, when evaluating facial challenges to subject matter jurisdiction, courts are to utilize the familiar analytical framework that applies to motions to dismiss for failure to state a claim [under Tenn. R. Civ. P. 12.02(6)]. *Id.* (citing *McKinnon*, 206 S.W.3d at 543).

## ARGUMENT

### I. Plaintiffs' Factual Allegations Establish a Basis for the Court to Exercise Subject Matter Jurisdiction Over the Petition for Common Law Writ of Certiorari.

Administrative agencies shall have no inherent or common law powers, and shall only exercise the powers conferred on them by statute or by the federal or state constitutions. Tenn. Code Ann. § 4-5-103(a)(2). The common law writ of certiorari is available to review agency action "where an inferior tribunal, board, or officer, exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy." Tennessee Code Annotated § 27-8-101; *and see* TN Const.

Art 6, § 10 ("The Judges or Justices of the Inferior Courts of Law and Equity, shall have power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation"); *and see Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715 (Tenn. 2012). When agencies act outside of the powers conferred on them by statute or the federal or state constitutions, a common-law writ of certiorari is appropriate.

The petition for a writ is addressed to the trial court's discretion. *Biggs v. Memphis Loan & Thrift Co.*, 215 Tenn. 294, 302, 385 S.W.2d 118, 122 (1964); *Gaylor v. Miller*, 166 Tenn. 45, 50, 59 S.W.2d 502, 504 (1933). The judicial review available under a common-law writ of certiorari is limited to determining whether the entity whose decision is being reviewed (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision. *Heyne*, 380 S.W.3d at 729. The Tennessee Supreme Court has "explicitly approved the use of the common-law writ of certiorari to provide judicial relief from (1) fundamentally illegal rulings, (2) proceedings inconsistent with essential legal requirements, (3) proceedings that effectively deny parties their day in court, (4) decisions that are beyond the decision-maker's authority, and (5) decisions that involve plain and palpable abuses of discretion." *Id*.

Defendants enforced their DLP-302 document against Plaintiffs as if it had the force of law. However, DLP-302 was never authorized by statute, and in fact was never publicized by Defendants although it effectively binds the legal rights of the public. The procedures provided by the Tennessee Uniform Administrative Procedures Act ("UAPA") are meant to provide the minimal procedural safeguards against violation of the public's rights to a fair process when an agency is engaged in legislative or judicial functions such as determining rights and responsibilities

and adjudicating controversies. Here, the Agency attempts to circumvent those protections by (i) issuing a document that operates as a rule without undergoing proper notice and comment rulemaking, (ii) demanding that the Court treat it as a rule and require Plaintiffs to first request a declaratory order from the Agency even though the Agency didn't abide by the notice-and-comment requirements, (iii) stating that the document is actually a policy and not a rule and therefore, excepted from the general requirements of agency rulemaking, (iv) declaring that the Agency alone may determine the rights and legal status of Plaintiffs without any internal agency review or appellate process. That is simply unworkable and the type of fundamentally illegal proceeding that the common-law writ of certiorari is meant to protect against that would otherwise escape meaningful judicial review.

Defendants contend that the writ is "unavailable" if DLP-302 is a rule because Plaintiffs "can pursue their challenge through a declaratory action." Defs' 2nd MTD Memo at 7. However, because the Agency did not properly promulgate DLP-302, there is no agency mechanism to request a declaratory order under Tenn. Code Ann. § 4-5-223 for a document they [might] interpret as a "policy" rather than a "rule" under the UAPA. Defs' 2nd MTD Memo at 6. Furthermore, to require Plaintiffs to first request a declaratory order would deprive Plaintiffs of any meaningful review in court. The Agency has sixty (60) days under Tenn. Code Ann. § 4-5-223 to set up a contested case hearing after receipt of the petition. Here, Plaintiffs asked for injunctive relief, and would be deprived of that legal claim if required to first petition the Agency for a declaratory order and potentially wait for sixty (60) days before any possibility of extraordinary relief.

Defendants next argue that the "writ is also unavailable because Plaintiffs challenge a legislative action" because Plaintiffs challenge the action of the agency. Defs' 2nd MTD Memo at 7-8. Legislative functions must be explicitly delegated by statute to an agency. *See Tennessee*

*Cable Television Ass'n v. Tennessee Public Service Com'n*, 844 S.W.2d 151, 158-59 (Tenn. Ct. App. 1992). There was no delegation here. But assuming, arguendo, that Defendants admit that DLP-302 is legislative in nature, then they should have complied with notice-and-comment rulemaking procedures. Defendants' flip-flopping on whether their own agency action constitutes a "rule" or a "policy" under the UAPA deprives Plaintiffs of any meaningful remedy outside this Court's issuance of a common-law writ of certiorari—a situation that the writ was meant to protect against—that is, an agency purposefully circumventing all avenues available for a member of the public to seek review of the agency determination or to seek review of an agency interpretation of a statute that unfairly burdens the petitioner when the agency acts outside of the procedures it is supposed to take when interpreting statutes that affect the public. Defendants do not clearly characterize the Agency action, demanding instead a "heads we win, tails you lose" framework: procedural exhaustion as if it were a "rule" and the lack of judicial review as if it were a "policy." Thus, this Court would be well within its jurisdiction to proceed under a common-law writ of certiorari.

Finally, the Defendants argue that "[t]he Court should not grant the writ because Plaintiffs have other remedies." Defs' 2nd MTD Memo at 8. They assert that if Plaintiffs truly believe the DLP-302 is a "rule" under the UAPA, then "they could bring their UAPA challenge in a declaratory action if they had simply exhausted that challenge with the Department." *Ibid.* However, it is a proceeding inconsistent with essential legal requirements where an agency acts one way and declares to Plaintiffs that they have no remedy available through the agency—then declares that the Plaintiffs must utilize that (unavailable) remedy and essentially give up their day in court—and request the agency make a decision that the Plaintiff alleges is beyond its authority, while at the same time maintaining that the Plaintiffs have no actual meaningful review through

the agency. There is no other remedy. Importantly, Defendants assert that there was no "contested case," Defs' 2nd MTD Memo at 5, and thus the Court has no jurisdiction to review the Agency's denial of any process to change the sex markers on Plaintiffs' driver licenses. Defendants assert Plaintiffs can't pursue administrative exhaustion because they claim DLP-302 is not a rule. Defendants then argue Plaintiffs can't seek a contested case hearing because Defendants say there isn't such a thing for this kind of decision. Then, Defendants argue that Plaintiffs can't go to court because they didn't do either of those two things. Heads we win, tails you lose—here, there is no other remedy outside of a common-law writ of certiorari.

## II. Facts Plead by Plaintiffs Allege a Violation of Section -225 Which Governs Facial Challenges to the Validity or Applicability of a Statute, Rule or Order Within the Primary Jurisdiction of the Agency.

In passing on the legal validity of a rule or order, the court shall declare the rule or order invalid only if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with the rulemaking procedures provided for in [the UAPA] or otherwise violates state or federal law. Tenn. Code Ann. § 4-5-225(c). DLP-302 is a "rule" subject to the rulemaking requirements of the UAPA. 2nd Am. Compl. ¶¶ 112-122. Defendants argue that DLP-302 is a "policy" under the UAPA and thus an exception from the notice-and-comment rulemaking requirements. They select part of the definition: "policies include documents that 'merely define[] or explain[] the meaning of a statute or rule'". Defs' 2nd MTD Memo at 6. But the definition of "policy" also includes "any statement, document, or guideline concerning only the internal management of state government that does not affect private rights, privileges, or procedures available to the public." Tenn. Code Ann. § 4-5-102(10). Document DLP-302 is a "rule" under the UAPA because it affects the private rights, privileges, or procedures available to the public.

To determine whether the DLP-302 document is a "rule" under the UAPA, the Court must determine first whether the statement is "an[ ] agency regulation, standard, statement, or document of general applicability" and second, whether it "concern[s] only the internal management of state government" or "affects private rights, privileges or procedures available to the public." *See Emergency Med. Care Facilities, P.C. v. Div. of Tenncare*, 671 S.W.3d 507, 513 (Tenn. 2023). An agency statement is "of general applicability," when it is capable of being applied or is relevant to an entire class or category. *Id*. at 514. The DLP-302 document clearly is. First, although Ms. Doe and Ms. Miller bring this action to vindicate their rights, the DLP-302 document applies to every member of a class—all transgender people seeking to change the sex designator on their driver license after July 1, 2023. And, that class is open to anyone who becomes a member of that class into the future. Thus, the DLP-302 document is "of general applicability."

Second, this Court must determine whether the DLP-302 document falls into the internal-management exception. An agency statement that is generally applicable is excused from the UAPA's rulemaking requirements if it "concern[s] only the internal management of state government" and does not "affect[ ] private rights, privileges or procedures available to the public." *Emergency Med. Care Facilities*, 671 S.W.3d at 514-515 (citing Tenn. Code Ann. 4-5-102(12)(A)). Both requirements must be met for the exception to apply. *Id*. (citing *Mandela*, 978 S.W.2d at 534). An agency statement "concerns only the internal management of state government," then, when it relates only to the management or control of the State itself rather than to external parties or relationships with external parties. *Emergency Med. Care Facilities*, 671 S.W.3d at 515. The internal management exception does not apply to the DLP-302 document. The DLP-302 document manages the way that the State negotiates a change of sex designator with a private person who is a driver license applicant. The DLP-302 document does not merely concern

the internal management of the Department, it applies a state statute, SB 1440, directly to Ms. Doe and other transgender people without a mandate within the statute to do so. The DLP-302 document does not just concern what Defendants do—it concerns what Defendants do with the Ms. Doe's and Ms. Miller's private information. Ms. Doe's and Ms. Miller's only connection to the State in this relationship is through a driver license to them as private persons. Thus, the internal-management exception does not apply, and the DLP-302 document is a "rule" subject to the notice and comment requirements of the UAPA.

Further, the DLP-302 document revoked the private rights, privileges, and procedures that were available to Ms. Doe and Ms. Miller to change the sex designator on their driver licenses prior to July 1, 2023. Until that time, since at least 1996, the procedures were governed by a previously promulgated rule that allowed a change of sex designator on a Tennessee driver license if an applicant submitted "[a] statement from the attending physician that necessary medical procedures to accomplish the change in gender are complete." 2nd Am. Compl. ¶¶ 31-34; Tenn. Comp. R. & Regs. 1340-01-13-.12(6). The DLP-302 document states that "Starting July 1, 2023, the Department of Safety does not accept requests for gender marker changes that are inconsistent with someone's designated sex on their original birth certificate. This means any amended birth certificates cannot be used for determining the gender on their credential without legal being consulted." 2nd Am. Compl. ¶ 34. In effect, DLP-302 abrogated Rule 1340-01-13-.12(6). Because the DLP-302 document abrogated the private rights of a certain class of the public to change the sex designator on driver licenses, including Ms. Doe and Ms. Miller, it is a "rule" under the UAPA and should have been promulgated under proper notice-and-comment procedures.

**To Require Exhaustion of Administrative Remedies With Defendants Would (i) Cause Undue Prejudice to Plaintiffs' Claims in Court, (ii) Would Be An Inadequate Remedy, (iii) And Would Be Futile.**

Alternatively, Defendants assert the Plaintiffs "could bring their UAPA rulemaking challenge in a declaratory action if they had simply exhausted that challenge with the Department." Defs' 2nd MTD Memo at 8. Tennessee Code Annotated § 4-5-225(b) states that "A declaratory judgment shall not be rendered [by the Chancery Court] 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." But, here, the Court should make an exception as the Plaintiffs have already shown, *supra* at I, that a petition to the agency would (i) cause undue prejudice to Plaintiffs' claims in court, (ii) would be an inadequate remedy, and (iii) would be futile in this situation. 2nd Am. Compl. ¶¶ 112-122.

The exhaustion of administrative remedies doctrine has recognized exceptions based on "equitable considerations of fairness to litigants and institutional competence." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 845 (Tenn. 2008). The Tennessee Supreme Court has outlined "three broad exceptions to the non-statutory exhaustion requirement: (1) when the administrative remedy would cause undue prejudice to subsequent assertion of a claim in court; (2) when the administrative remedy would be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief'; and (3) when the administrative agency has been shown to be biased or has predetermined the issue." *Id*. (citing *McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992)).

First, requiring Ms. Doe and Ms. Miller to obtain a declaratory order or a denial of a declaratory order before bringing this claim would cause undue prejudice to subsequent assertion of a claim in court as they seek preliminary injunctive relief. Were Ms. Doe and Ms. Miller to

petition Defendants for a declaratory order, the agency would have to either (a) convene a contested case hearing within sixty (60) days of being petitioned for the order, or (b) refuse to issue a declaratory order. *See* Tenn. Code Ann. § 4-5-223. Due to the emergent nature of Ms. Doe's and Ms. Miller's legal injuries, administrative exhaustion would cause undue prejudice to their rights to seek injunctive relief from this Court.

Second, a declaratory order would be inadequate because there is serious doubt as to whether Defendants are empowered to grant effective relief. Nothing in Tenn. Code Ann. § 1-3-105(c) authorizes any action by Defendants, including the authority to hold a contested case hearing regarding the legal sex of Ms. Doe or Ms. Miller. Defendants admit that there is no administrative appeal of their determination of Ms. Doe's and Ms. Miller's sex. *See* 2nd Am. Compl. Exhibit B. It is based on their original birth certificates and there is no possibility of any relief. *Id*. "Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that [like here] the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of the plaintiff[s'] lawsuit. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (cleaned up). There is no administrative remedy available to Ms. Doe or Ms. Miller and that issue is identical with the merits of this lawsuit.

Third, Defendants have been shown to be biased or have predetermined the issue. They argue that enforcement of the DLP-302 document is lawful and valid. Defendants' legal interest is aligned with a declaratory order that declares the validity of their action. Defendants have declared that they will not change Ms. Doe's or Ms. Miller's sex designators. Defendants base their decision on a law [Tenn. Code Ann. § 1-3-105(c)] that contains no language authorizing them to act, there is no appeal, and to require administrative review "would be to demand a futile act." *See McCarthy*, 503 U.S. at 148-49; *and see State v. Yoakum*, 201 Tenn. 180, 195 (Tenn. 1956); *and see Cherokee*

*Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466 (Tenn. 2004). This position is supported by Defendants' letter to Ms. Miller demanding she surrender her driver's license. At no time has Defendant issued a letter stating that Ms. Miller can now contest her case prior to surrender. Defendants want to both deprive Ms. Miller and all other transgender member of the class—all transgender people seeking to change the sex designator on their driver license after July 1, 2023—from any level of review of the Agency's actions and from any ability to vindicate their rights with the Agency or the Court—that is simply unlawful and the exceptions to administrative exhaustion exist to protect the rights of Plaintiff and the public against the Agency's attempts to usurp any process whatsoever while mowing over the rights that the UAPA stands to protect.

## III. Facts Plead by Plaintiffs Allege a Violation of Section -322 Which Governs As-Applied Challenges to Decisions That Prejudice the Rights of the Petitioner and Is Subject to Judicial Review by The Court.

Defendants claim this Court lacks jurisdiction over judicial review of the Agency's denial of updated sex markers to Plaintiffs Jane Doe and Chrissy Miller because there was no "contested case" hearing subject to Tenn. Code Ann. § 4-5-322(h). But, the text of the UAPA explicitly gives this Court the power to

> … reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inference, conclusions or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) … unsupported by evidence that is both substantial and material in the light of the entire record *** unsupported by a preponderance of the evidence in light of the entire record …

Tenn. Code Ann. § 4-5-322(h), in this situation. "'Contested case' means 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. Such proceeding may include … suspensions of, revocations of, and refusals to renew licenses … An agency may commence a contested case at any time with respect to a matter within the agency's jurisdiction." Tenn. Code Ann. § 4-5-102(3). If, as Defendants claim, determination of the legal sex of Plaintiffs was within the Agency's jurisdiction, then they had the statutory power to commence a contested case hearing. Otherwise, DLP-302 would provide no opportunity for any meaningful review of Defendants' decision to deny Plaintiffs a legal designation that is so personal, private and important to them as individuals. A legislative rule that would remove the court's discretion in making determinations of legal or logical relevancy would violate the principle of separation of powers and would be void. *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001).

Section -322 makes clear that agency interpretation of statutes that result in as-applied decisions that are arbitrary or capricious, or made in excess of the statutory authority of the agency are not entitled to deference by the Court. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (examining nearly identical section 706 of the federal Administrative Procedures Act). Otherwise, Plaintiffs have no opportunity for any level of review of the Agency's decision applying facts and law to an important personal and private issue that is of importance to the Plaintiffs and the community—a hearing that is due procedures under the UAPA. If there is no way for the Court to meaningfully review Defendants' decision—then a common-law writ of certiorari is appropriate as covered *supra* at I.

## IV. Commissioner Long and Assistant Commissioner Hogan Are Proper Defendants for This Action.

Last, Defendants argue that neither Commissioner Long nor Assistant Commissioner Hogan are proper defendants to Plaintiffs' UAPA claims. Defs' 2nd MTD Memo at 6, First Memo at 18. However, it is the Commissioner who is charged with promulgating rules. Tenn. Code Ann.

§ 4-3-2009 ("The commissioner of safety has the authority to establish and to promulgate such rules and regulations governing the administration and operation of the department as may be deemed necessary by the commissioner and that are not inconsistent with the laws of this state"). Furthermore, "[t]he commissioner is authorized to establish administrative rules and regulations concerning the licensing of persons to operate motor vehicles, in this state, for the purpose of ensuring the safety and welfare of the traveling public …" Tenn. Code Ann. § 55-50-202(a). Here, Assistant Commissioner Hogan signed the letter to Chrissy Miller directing her to surrender her driver license or face cancellation of her driving privileges. 2nd Am. Compl. ¶ 98 and Ex. C. As such, both Commissioner Long and Assistant Commissioner Hogan are proper party Defendants.

**CONCLUSION**

For these reasons, Plaintiffs Jane Doe and Chrissy Miller request the Court deny Defendants' Motion to Dismiss and Supplemental Motion to Dismiss.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent by U.S. Mail, postage pre-paid, or via electronic mail to the following:

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