E-FILED
8/22/2024 3:29 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

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' SUPPLEMENTAL MOTION TO DISMISS SECOND AMENDED COMPLAINT

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 Supplemental Motion to Dismiss Plaintiffs' Second Amended Complaint. Defendants incorporate and rely upon the arguments presented in their original Motion to Dismiss, which the Court has ordered be treated as addressing the Second Amended Complaint.

TABLE OF CONTENTS

Page(s)

Cases

Statutes

Regulations

INTRODUCTION

Tennessee law dictates that the Department of Safety issue driver licenses bearing a sex designation that corresponds to a person's immutable biological sex as determined by anatomy and genetics at birth. *See* Tenn. Code Ann. § 1-3-105(c); Tenn. Code Ann. §§ 55-50-321(c)(1)(A); Tenn. Comp. R. & Regs. 1340-01-13-.18(2)(c). The Department's driver license policy reflects this legal requirement. *See* Dep't of Safety & Homeland Security, Proof of Identity (Policy No. DLP-302) at 12 (July 3, 2023) (Second Am. Compl., Ex. A.13).

Plaintiffs waited nearly a year after implementation of the Department's policy before suing to challenge it. Despite initially calling the policy unconstitutional (and requesting a three-judge panel), multiple amendments to the original complaint leave Plaintiffs bringing only procedural challenges to the policy. The First Amended Complaint challenged the policy exclusively under the Uniform Administrative Procedures Act, and the Department has explained in extensive briefing why those claims should be dismissed. Now, Plaintiffs have filed a Second Amended Complaint that simply adds a claim for writ of certiorari.

The Second Amended Complaint should be dismissed too. None of the defects identified in the Department's prior briefing have been cured. And the claim for the writ of certiorari is just another faulty vehicle for Plaintiffs' challenge. For the reasons outlined in Defendants' first motion to dismiss and in this supplemental motion, the Second Amended Complaint should be dismissed in its entirety.

BACKGROUND

Plaintiffs sued the Department and its officials because they want driver licenses that reflect their gender identity. But Tennessee law requires that driver licenses display the holder's "sex"—their immutable biological sex at birth. Tenn. Code Ann. §§ 1-3-105(c), 55-50-321(a), -(c)(1)(A); Tenn. Comp. R. & Regs. 1340-01-13-.18(2)(c); (*see* First Memorandum, filed May 14, 2024, at 3). Nothing in Tennessee law requires that driver licenses display 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. Following existing Tennessee law, Department policy instructs its employees to only issue licenses displaying the holder's sex, not their gender identity.

As detailed in Defendants' first motion to dismiss, Plaintiffs were born male but now "live as" women. (Second Am. Compl., ¶¶ 74, 86.) Both have lived in Tennessee for years and have held licenses reflecting their sex as male. (*Id*. at ¶¶ 71, 74, 82, 87.) Doe has been unable to obtain a license bearing a "female" sex designation, but the Department mistakenly issued Miller such a license after Miller made multiple visits to driver services centers. (*Id*. at ¶¶ 79, 87-95.) The Court has enjoined the Department from correcting the error on Miller's license. (June 24, 2024 Temporary Injunction).

Plaintiffs' Second Amended Complaint challenges the policy and its application on three procedural grounds. First, Plaintiffs ask this Court to use the common law writ of certiorari to review the Department's action to "enforce and apply" policy because the Department did not undergo notice-and-comment rulemaking to issue the policy. (Second Am. Compl., ¶¶ 99-104.) Second, Plaintiffs seek a judgment under the UAPA declaring that the policy is actually a "rule"

that was improperly promulgated. (*Id*. at ¶¶ 105-06, 108-22.) Third, Plaintiffs seek judicial review under the UAPA regarding both the Department's refusal to issue Doe a license with a "female" sex designator and of its stated intent to correct Miller's license by reinstating the "male" sex designation. (*Id*. at ¶¶ 123-27.)

LEGAL STANDARD

As explained in Defendants' original motion-to-dismiss memorandum, a court must dismiss a suit when the constitution, general assembly, or common law have not "conferred on it the power to adjudicate cases of that sort." *Memphis Bonding Co. v. Crim. Ct. of Tenn. 30th Jud. Dist.*, 490 S.W.3d 458, 462 (Tenn. Ct. App. 2015); (First Memorandum, at 7.) A complaint should also be dismissed if the facts alleged do not show the pleader has a right to relief. (First Memorandum, at 7-8.)

ARGUMENT

I. Both UAPA Claims Should Be Dismissed for Lack of Jurisdiction.

Defendants explained in their original memorandum why this Court lacks jurisdiction over Plaintiffs' UAPA claims. (First Memorandum, at 8-15.) The Second Amended Complaint does nothing to fix the problem.

First, this Court still lacks jurisdiction to consider both an original and an appellate action at the same time. (*See* First Memorandum, at 9-10); *Poursaied v. Tennessee Bd. of Nursing*, No. M2020-01235-COA-R3-CV, 2021 WL 4784998, at *5 (Tenn. Ct. App. Oct. 14, 2021). Plaintiffs ask this Court to simultaneously wear both the trial-court hat and the appellate-court hat—something it cannot do. (*See* Second Am. Compl., at 33-34 (requesting that this Court both "[e]nter a judgment declaring . . ." and "[r]everse the decision of Defendants . . .").) In fact, Plaintiffs have compounded the problem by adding a claim for writ of certiorari, which is also appellate in nature.

A claim "invoking the original jurisdiction of the chancery court" cannot be joined with a claim for common law writ of certiorari. *State v. Farris*, 562 S.W.3d. 432, 448 (Tenn. Ct. App. 2018). Just as it did in *Kaminski v. Tenn. Bureau of Investigation*, this Court should dismiss Plaintiffs' original action for declaratory judgment. No. 23-0087-III (Dav. Ch. Ct. Nov. 14, 2023) (Exhibit 2 to First Memorandum).

Second, Plaintiffs cannot proceed on their declaratory judgment claim under the UAPA because they have not exhausted their administrative remedies for that claim with the Department. (*See* First Memorandum, at 10-13.) Plaintiffs contend that Policy DLP-302 is a "rule" under the UAPA, while Defendants insist it is a policy. If Defendants are right, then they win on the merits. (*See* Part II, *infra*.) But if Plaintiffs are right that Policy DLP-302 is a "rule," Section 4-5-225(b) of the UAPA requires "[i]n no uncertain terms" that Plaintiffs first make a "request for a declaratory order [from the Department] before bringing an action for a declaratory judgment" to challenge that "rule." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 842 (Tenn. 2008). "In the absence of proof" of exhaustion, this Court "lacks jurisdiction over" the declaratory action. *Stewart v. Schofield*, 368 S.W.3d 457, 465 (Tenn. 2012). The Second Amended Complaint indicates that Plaintiffs have never requested a declaratory order from the Department. So, the Court lacks jurisdiction over their UAPA challenge to a "rule."

Plaintiffs confuse the UAPA's clear exhaustion requirement by arguing that (1) they have no statutory obligation to exhaust because Defendants insist that DLP-302 is a policy and not a "rule" subject to the UAPA, and (2) they meet one or more exceptions to the non-statutory exhaustion doctrine. (Second Am. Compl., at ¶¶ 110-15.) Those arguments are inconsistent with Plaintiffs' own position that DLP-302 is a "rule" subject to the UAPA. Of course, if DLP-302 is not a "rule" to which Section 225(b)'s exhaustion requirement applies, then it is also not a "rule"

that can be reviewed under Sections 225(a) and 225(c) or that must undergo rulemaking procedures. But if Plaintiffs believe Section 4-5-225 affords them a vehicle for declaratory relief because DLP-302 is actually a rule, they must take the statute as a whole and satisfy their duty to exhaust. And if the UAPA's *mandatory* statutory exhaustion requirement applies, Plaintiffs' arguments about exceptions to the *discretionary* non-statutory exhaustion doctrine are irrelevant. *See Colonial Pipeline*, 263 S.W.3d at 839. Because Plaintiffs have not exhausted their UAPA challenge to a purported "rule," the Court lacks jurisdiction over any such challenge. Their claim for declaratory judgment should thus be dismissed.

Third, this Court also still does not have jurisdiction to consider the claim for judicial review under the UAPA because it does not involve review of a contested case hearing. (*See* First Memorandum, at 13-14.) UAPA judicial review "is not available if the proceeding to be reviewed is not a contested case." *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 481 (Tenn. Ct. App. 1999). Plaintiffs have still not identified any statute or constitutional provision that requires the Department to hold an adversarial hearing to determine what sex designation to put on a license. *See* Tenn. Code Ann. § 4-5-102(3) (defining "contested case"). Because they do not seek review of a "contested case," Plaintiffs "d[o] not have a right to seek judicial review" under the UAPA. *Dishmon*, 15 S.W.3d at 482.

Fourth, this Court still lacks jurisdiction to review a letter sent by the Department to Miller. (*See* First Memorandum, at 14-15.) Even if a sex designation could somehow be considered a "contested case," that letter is not a "final order" which can be reviewed under the UAPA.

II. The UAPA Claim for Declaratory Judgment Should Be Dismissed for Failure to State a Claim.

Defendants explained in their first memorandum that Policy DLP-302 is not an "improperly promulgated rule" because it is not a rule at all—it is a policy. (First Memorandum, at 15-17.) Nothing in the Second Amended Complaint changes that analysis.

Despite being specifically pointed to the statutory definition of a "policy" in multiple of Defendants' briefs, Plaintiffs continue to selectively quote only part of the definition of a "rule" under the UAPA. (SAC, ¶ 121.) What Plaintiffs deliberately ignore is that the definition of "rule" explicitly excludes anything that is a "policy." Tenn. Code Ann. § 4-5-102(12). Policies include documents that "merely define[] or explain[] the meaning of a statute or rule." Tenn. Code Ann. § 4-5-102(10). Policy DLP-302 does just that: it explains the meaning of pre-existing statutes and rules. (*See* First Memorandum, at 16-17.) And because it is a policy, it is by definition not a rule and not subject to rulemaking requirements. Plaintiffs have failed to engage this argument at all. Their rulemaking claim therefore still fails to state a plausible claim.

III. Commissioner Long and Assistant Commissioner Hogan Should Still Be Dismissed as Defendants to the UAPA Claims.

Neither Commissioner Long nor Assistant Commissioner Hogan are proper defendants to Plaintiffs' UAPA claims. (*See* First Memorandum, at 18.) Plaintiffs' UAPA claims against them should be dismissed.

IV. The New Certiorari Claim Also Fails for Multiple Reasons.

Plaintiffs have added a new claim for certiorari, through which they ask the Court to review the Department's "enforce[ment] and appl[ication] of Policy DLP-302 and find that the Department exceeded its jurisdiction by failing to "undergo[] proper notice-and-comment rulemaking requirements." (Second Am. Compl., ¶ 102.) They allege that Defendants' refusal to

issue licenses bearing Plaintiffs' preferred gender identities constituted "fundamentally illegal, arbitrary, and fraudulent proceedings" because the policy is invalid. (*Id*., ¶ 103.) In short, Plaintiffs attempt to bring the same rulemaking challenge they make in their declaratory judgment claim as a petition for the writ of certiorari.

Once again, Plaintiffs have chosen the wrong vehicle for their challenge. "Common-law writs of certiorari are extraordinary remedies." *Phelps v. Tennessee Bd. of Paroles*, No. 01A01-9603-CH-00103, 1997 WL 718482, at *2 (Tenn. Ct. App. Nov. 19, 1997) (no perm. app. filed). A court "should decline to grant writs of certiorari if there are other plain, adequate, and speedy remedies available to the person seeking the writ." *Id*. (citing *Pack v. Royal-Globe Ins. Co*., 457 S.W.2d 19, 24 (Tenn. 1970)). The writ is "available to review an administrative agency's decision only if the following three requirements are met: '(1) the order of the administrative body of which review is sought is one for which no judicial review is provided; (2) the function performed by the lower tribunal is essentially judicial in nature; [and] (3) the order for which review is sought finally determines the rights of the petitioner.'" *Admin. Res., Inc. v. Tennessee Dep't of Commerce & Ins.*, No. M2010-01199-COA-R3-CV, 2011 WL 2176387, at *5 (Tenn. Ct. App. June 2, 2011) (quoting Ben H. Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee,* 4 Mem. St. U.L.Rev. 19, 27 (1973)) (no perm. app. filed).

If Plaintiffs are right that DLP-302 is a "rule," the writ is unavailable because Plaintiffs can pursue their challenge through a declaratory action. Indeed, they have brought such an action under the UAPA in the same complaint, they have just failed to properly exhaust it. And Doe brought a constitutional challenge in the original complaint before dropping it with little explanation. The writ is also unavailable because Plaintiffs challenge a legislative action, not a

judicial one. Moreover, even if the writ was available, the Department properly issued and applied Policy DLP-302.

A. The Court should not grant the writ because Plaintiffs have other remedies.

A court should only grant a common law writ of certiorari if there are no "other plain, adequate, and speedy remedies available." *Phelps*, 1997 WL 718482, at *2. Plaintiffs assert they have no other "plain, adequate, and complete method" to obtain the relief they seek. (Second Am. Compl., ¶ 110.) But they are plainly wrong.

First, since Plaintiffs believe DLP-302 is a "rule," they could bring their UAPA rulemaking challenge in a declaratory action if they had simply exhausted that challenge with the Department. (*See* Part I, *supra*.) Of course, they should lose on that challenge because Policy DLP-302 is not a rule that must undergo rulemaking. (*See* Part II, *supra*.) But the remedy for challenging an alleged rule's validity because it was improperly promulgated is available under the UAPA.

Second, Plaintiffs could also bring constitutional challenges to the policy or statutes, like Doe did in the original complaint, provided the challenge is in the proper venue against the proper defendants and satisfies other jurisdictional requirements. (Original Complaint, Count II.) But Doe voluntarily dismissed that count with little explanation. (*See generally*, First Am. Compl.) Plaintiffs instead attempt to shoehorn their facts into judicial reviews of administrative agency "decisions." But the writ of certiorari is not a fallback remedy available whenever it is inconvenient for a plaintiff to pursue other remedies. Because Plaintiffs have other plain, adequate, and speedy remedies available, the Court should decline to grant the writ. *Phelps*, 1997 WL 718482, at *2.

B. Implementation of Policy DLP-302 is a legislative function not subject to review under the writ.

The common law writ of certiorari is only available to review quasi-judicial actions of an agency, not legislative actions. *McFarland v. Pemberton*, 530 S.W.3d 76, 103–04 (Tenn. 2017). In this sense, the chancery court acts as an appellate court to review a judicial decision of an agency. "Judicial" determinations "are accompanied by a record of the evidence produced and the proceedings had in a particular case," whereas "legislative" actions have no specific record of a case for the chancery court to review. *Id.*

"The application of pre-defined standards, the requirement of a hearing, and the requirement of a record are earmarks of quasi-judicial proceedings." *Duckworth Pathology Grp., Inc. v. Reg'l Med. Ctr. at Memphis*, No. W2012-02607-COA-R3CV, 2014 WL 1514602, at *8 (Tenn. Ct. App. Apr. 17, 2014) (quoting *Brundage v. Cumberland County,* 357 S.W.3d 361, 370 (Tenn. 2011)) (no perm. app. filed). Judicial proceedings subject to review involve the "discretionary authority" of an agency applied within the bounds of standards and guidelines. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990). When an agency is not applying its discretion to facts and exercising judgment, the action is not "judicial." *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 50 n.2 (summarizing different vehicles and standards of review for actions by administrative entities); *Metro. Nashville Fire Fighters Ass'n v. Metro. Gov't of Nashville*, No. 01A01-9410-CH-00487, 1995 WL 328160, at *3 (Tenn. Ct. App. June 2, 1995) (no perm. app. filed).

Here, neither issuing a policy nor printing a sex designation on a driver license is a judicial function. Defendants did not apply discretion or judge facts—they rewrote their driver license policy to conform to a new statute passed by the General Assembly. (SAC, ¶¶ 24, 33.) Drafting

a policy to govern the change of sex designators on a driver license is akin to drafting qualifications for a municipal position, which the Court of Appeals has held is not a judicial action. *Metro. Nashville Fire Fighters Ass'n*, 1995 WL 328160, at *3. Both involve establishing standards, rather than exercising discretion applied to facts under existing standards. *See also Brown v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2011-01194-COA-R3-CV, 2013 WL 3227568, at *4 (Tenn. Ct. App. June 21, 2013) (where a municipal ordinance required amending an existing zoning ordinance and changes in the official zoning map, those actions were legislative, rather than judicial in character) (no perm. app. filed).

Defendants had no discretion in updating their driver license policy or in applying that policy to Plaintiffs. *McCallen*, 786 S.W.2d at 639. It is axiomatic that Defendants are obligated to comply with state law. Tenn. Code Ann. § 4-3-2009 (stating that the Department cannot act "inconsistent with the laws of this state"). And they have the authority to administer, execute, and perform laws enacted by the General Assembly. Tenn. Code Ann. § 4-3-103. The General Assembly prescribed exactly what "sex" must mean throughout the Code, and Defendants do not have the discretion to depart from that. (*See* First Memorandum, at 16-17.)

Further, the adoption of Policy DLP-302 had no earmarks of a judicial proceeding—no hearing, no evidence presented, no arguments made. And there is no record from a lower tribunal to review regarding the implementation of the policy. Thus, a petition for writ of certiorari is not the proper remedy to review the issuance of Policy DLP-302 or its application to Plaintiffs. *McCallen*, 786 S.W.2d at 639; *Duckworth*, 2014 WL 1514602, at *8. The Court should not grant the writ.

C. Alternatively, Defendants' actions withstand certiorari review.

Regardless, Defendants' implementation of Policy DLP-302 survives narrow certiorari review. As explained in Defendants' first memorandum, Policy DLP-302 is strictly consistent with the Department's obligations under existing law, and the Department has applied that law correctly to Plaintiffs.

"It is well settled that the scope of review under the common law writ of certiorari is very narrow." *Brown v. Majors*, No. W2001-00536-COA-R3-CV, 2001 WL 1683768, at *2 (Tenn. Ct. App. Dec. 19, 2001) (no perm. app. filed). "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 v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 729 (Tenn. 2012). "[I]t is not the correctness of the decision that is subject to judicial review, but the manner in which the decision is reached." *Powell v. Parole Eligibility Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). "Under common law writ of certiorari review, a board's determination is arbitrary and void if it is unsupported by any material evidence." *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 262 (Tenn. 2009).

The Department is required under existing law to print sex designations on licenses that correspond to the holder's immutable biological sex at birth. (*See* First Memorandum, at 16-17.) And there is no dispute that Plaintiffs' sex, as Tennessee law defines it, is male. Both Doe and Miller were "male at birth." (Second Am. Compl., ¶¶ 72, 84.) Doe's and Miller's original birth certificates evidence that their biological sex at birth was male. (*Id.*, ¶¶ 79, 88-89.) Under existing Tennessee law, Doe's and Miller's licenses must bear male sex designations—not their preferred gender identities. The petition for writ of certiorari should be dismissed.

CONCLUSION

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

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ *Cody N. Brandon*
CODY N. BRANDON (BPR# 037504)
Managing Attorney
Senior Assistant Attorney General

STEVEN J. GRIFFIN (BPR# 040708)
Senior Counsel for Strategic Litigation

LIZ EVAN (BPR# 037770)
Assistant Attorney General

Office of the Tennessee
Attorney General and Reporter
P. O. Box 20207
Nashville, TN 37202
(615) 532-7400
Cody.Brandon@ag.tn.gov
Steven.Griffin@ag.tn.gov
Liz.Evan@ag.tn.gov

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 22nd day of August, 2024:

Stella Yarbrough
Lucas Cameron-Vaughn
Jeff Preptit
P.O. Box 120160
Nashville, TN 37212

Maureen Truax Holland
Holland and Associates, PC
1429 Madison Avenue
Memphis, Tennessee 38104

/s/ *Cody N. Brandon*
CODY N. BRANDON
Managing Attorney