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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.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION

Defendants Tennessee Department of Safety and Homeland Security ("Department"), Commissioner Jeff Long, and Assistant Commissioner Michael Hogan submit this Response in Opposition to Plaintiffs' Motion for a Temporary Injunction.

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); *see also* Fla. Dep't of Highway Safety and Motor Vehicles, *Driver License Operation Manual-Issuance Requirements-IR08-Gender Requirements* (Jan. 26, 2024), https://perma.cc/AQY5-Y395 (clarifying that department may not issue replacement license reflecting driver's gender identity and that license must instead reflect "'sex,' which is determined by innate and immutable biological and genetic characteristics").

The Department of Safety and Homeland Security (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 the strict jurisdictional limits placed on it by the General Assembly in the UAPA. First, Plaintiffs improperly ask this Court to simultaneously 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. 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, too. *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. Fourth, and finally, Plaintiffs

ask this Court to stay an agency action without first submitting that request for a stay to the Department. Statute likewise prohibits that. Tenn. Code Ann. § 4-5-322(c).

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. For these reasons alone, Plaintiffs' request for a temporary injunction should be denied.

Aside from Plaintiffs' clear procedural deficiencies, the allegations of the Amended Complaint belie any sense of urgency that would justify the extraordinary relief Plaintiffs request. Miller began a very public social transition over a year ago, yet Miller has not shown any actual or threatened harm attributable to the Department's driver license policy. Moreover, Miller will be able to maintain all driving privileges so long as Miller obtains a driver license that complies with state law—which the Department has readily offered to provide to Miller free of charge. Likewise, Doe began socially transitioning and had a name change in 2022, yet Doe has not experienced any actual or threatened harm attributable to the Department's policy. Plaintiffs cannot demonstrate any "immediate and irreparable injury" as required by Rule 65.03.

Plaintiffs have failed to clear the high bar required to obtain preliminary injunctive relief, and this Court lacks the jurisdiction to grant the request anyway. Plaintiffs' motion should be denied.

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 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*. (emphasis added). 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. Doe had begun "socially transitioning" several months before that. (Doe Decl. ¶ 10.) 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. (Amended Complaint, ¶ 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. Miller Decl. ¶ 3. 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.* ¶ 7; (Amended Complaint, Ex. C.1). That Ohio birth certificate listed Miller's name as "Christopher Lee Miller," and it listed Miller's sex as "male." (Amended Complaint, Ex. C.1.) 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.*

But in March 2023, Miller alleges to have begun "publicly living as a woman." Miller Decl. ¶ 8. Four months later, 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. (Miller Decl. ¶ 24.) However, because Miller could not establish that Miller's sex was female, Tenn. Code Ann. § 1-3-105(c), the request was denied. (Miller Decl. ¶ 26.)

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. (Amended Complaint, ¶ 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." (Amended Complaint Ex. C.1.) 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." (Amended Complaint, ¶ 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. (Amended Complaint, Ex. C.1.)

The Department 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." (Amended Complaint, ¶ 95.) 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

A temporary injunction is an "extraordinary" remedy that should be granted "with great caution." *Hall v. Britton*, 292 S.W.2d 524, 531 (Tenn. Ct. App. 1953). Indeed, "'there is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion or is more dangerous in a doubtful case' than the discretion of granting of an injunction." *Newsom v. Tenn. Republican Party*, 647 S.W.3d 382, 386 (Tenn. 2022) (quotation omitted).

Tennessee courts apply the same standards as federal courts when considering requests for injunctive relief. *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020). To carry the burden for extraordinary injunctive relief, a plaintiff must establish four factors: "(1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on [the] defendant; (3) the probability that [the] plaintiff will succeed on the merits; and (4) the public interest." *Id.* (quotation omitted); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 441 (1974).

ARGUMENT

I. Plaintiffs Are Not Likely To Succeed On The Merits.

Plaintiffs' suit is riddled with infirmities that make showing a likelihood of success on the merits impossible. First, for at least four reasons, this Court cannot even consider the request for extraordinary relief. Second, setting aside jurisdictional and procedural deficiencies, Plaintiffs' claims also fail on the merits. "A plaintiff's failure to show likelihood of success on the merits is usually fatal." *Fisher*, 604 S.W.3d at 394.

A. Plaintiffs cannot obtain extraordinary relief from this Court.

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

Plaintiffs have impermissibly joined a claim for original declaratory relief with another 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.

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*.

The Court does not have jurisdiction to simultaneously review a petition for declaratory judgment and a petition for judicial review. 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: (1) "[e]nter judgment[s] declaring" Plaintiffs' rights in Count I, and (2) "reverse the decision of Defendants . . . and remand to Defendants for further proceedings" in Count II. (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); *Kaminski v. Tenn. Bureau of Investigation*, No. 23-0087-III (Dav. Ch. Ct. Nov. 14, 2023) (Final Order and Memorandum) (attached as Exhibit 2). "[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. Because Count I of the Amended Complaint for which declaratory relief is sought should be dismissed, Plaintiffs have no likelihood of success on the merits of that claim.

2. This Court lacks jurisdiction to consider requests for declaratory relief that were not exhausted with the Department.

Even if the claims were brought separately, this Court lacks jurisdiction to grant Plaintiffs' requested declaratory judgment because Plaintiffs failed to first request a declaratory order from the Department,[1] as required by Tenn. Code Ann. § 4-5-225(b).

The Department maintains that the policy is not a "rule" under the UAPA. But in Count 1 of the Complaint, Plaintiffs seek a declaration under Tenn. Code Ann. § 4-5-225(a) that this supposed rule of the Department is "void and of no effect" because it was not adopted in compliance with the UAPA. (Amended Complaint, ¶ 106.) This 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

[1] Plaintiffs (especially Miller, who sent no email) 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).

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.*, 263 S.W.3d at 842. While the Supreme Court has excepted challenges to a statute's constitutional validity from this requirement, *id*. at 845-46, 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. Because Plaintiffs' claim for declaratory judgment in Count I is barred for failure to exhaust administrative remedies, *Bonner*, 84 S.W.3d at 583, Plaintiffs are unlikely to succeed on the merits of that claim.

3. 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*, 15 S.W.3d at 480. 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.

4. A petition for judicial review under the UAPA cannot support Plaintiffs' request.

Even assuming that Plaintiffs could seek judicial review under the UAPA of the Department's policy regarding requests for a sex designator change, that claim could not support Plaintiffs' request for injunctive relief. (Amended Complaint, ¶¶ 107-10.) Plaintiffs' motion amounts to, at best, a request for a stay of an intermediate agency decision, which this Court does not have jurisdiction to grant given Plaintiffs' failure to satisfy the prerequisites for seeking such a stay.

a. This Court does not have jurisdiction to review the Department's letter advising Miller of the need for a corrected license.

The Department's "decision" Miller brings to this Court is not final, and Miller fails to satisfy the conditions of jurisdiction for interlocutory review of an intermediate agency decision.

"Judicial review under the UAPA is generally limited to final decisions." *Holland v. Tenn. Dept. of Safety and Homeland Security*, No. M2020-01044-COA-R3-CV, 2022 WL 852906, at *2 (Tenn. Ct. App. Mar. 23, 2022). A decision is final when it "resolves all of the parties' claims and leaves the court with nothing to adjudicate." *Ball v. McDowell*, 288 S.W.3d 833, 836-37 (Tenn. 2009). A chancery court has jurisdiction to review an intermediate action of an agency only "if review of the final agency decision would not provide an adequate remedy." Tenn. Code Ann. § 4-5-322(a)(1).

The Department letter challenged by Miller is "intermediate" and not "final." 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 a letter from the Department 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 by one that complies with state law. (Amended Complaint, Exhibit C.) 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." (Amended Complaint, Exhibit C (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 available actions. The final action of the Department, if there is any subject to judicial review under Tenn. Code Ann. § 4-5-322, will occur when the Department issues a driver license without Miller's preferred sex designator or cancels Miller's driving privileges. Miller has asked this Court to preemptively review the propriety of two alternative actions the Department may take in the future dependent on Miller's conduct.

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 issuance of a corrected license *after* the 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.

b. Plaintiffs have not satisfied the jurisdictional prerequisites for seeking a stay.

As explained in Part I(A)(1), *supra*, petitions for judicial review under the UAPA are appellate in nature. *Castro*, 2008 WL 3343000, at *5. Naturally, the UAPA does not talk of chancery courts' enjoining administrative decisions. Rather, like an appellate court, the UAPA grants the chancery court authority to "stay" the agency decision. Tenn. Code Ann. § 4-5-322(c). Plaintiffs have not satisfied the prerequisites for obtaining a stay of the Department's decision.

"The filing of the petition for review does not itself stay enforcement of the agency decision." Tenn. Code Ann. § 4-5-322(c). The chancery court shall not "consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time." Tenn. Code Ann. § 4-5-322(c). A party may submit a request for a stay of any initial or final order within seven days after its entry. Tenn. Code Ann. § 4-5-316.

Here, Plaintiffs have not previously sought a stay from the Department or demonstrated that the Department's ruling on a stay application cannot be obtained within a reasonable time. Plaintiffs' failure to satisfy this prerequisite means that "the reviewing court [shall not] consider a stay." Tenn. Code Ann. § 4-5-322(c). Plaintiffs' petition for judicial review cannot serve as the basis for any injunctive relief against the Department.

B. Plaintiffs' claims lack merit.

1. The Department had no obligation to undergo notice-and-comment rulemaking.

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 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 either definition of a policy, it is not a rule. Tenn. Code Ann. § 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. Tenn. Code Ann. § 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." Existing statutes and rules, which Plaintiffs do not challenge, dictate Policy DLP-302. To begin, a statute provides:

> 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 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). 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." Tenn. Code Ann. § 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 "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 biological sex listed on an original birth certificate. And that is all that Policy 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" the sex designation on the applicant's license.[2] DLP-302 is a policy that "merely defines or explains the meaning" of unchallenged statutes and rules.

[2] Miller also complains 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. (Am. Comp., ¶¶ 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).

Plaintiffs selectively quote only the second definition of a "policy" in the UAPA in an attempt to force the Department to make a rule where none is needed. (Plfs. Mot. Temp. Inj., at 10.) Plaintiffs' entire rulemaking analysis is premised on this omission of the first definition, making the argument a red herring. (Plf.'s Mot. Temp. Inj., at 10-12.) Plaintiffs do not offer any argument that Policy DLP-302 is not a statement explaining the meaning of statutes and rules—a policy. And because a "rule" must be something "that is not a policy," Tenn. Code Ann. § 4-5-102(12), Plaintiffs cannot show that DLP-302 is a rule. "[T]he declaratory judgment provisions of the UAPA d[o] not entitle [Plaintiff] to challenge the applicability or validity of [a] policy." *Mandela v. Campbell*, 1996 WL 730289, at *2 (Tenn. Ct. App. Dec. 20, 1996). Plaintiffs' rulemaking challenge is unlikely to succeed on the merits.

2. The Department correctly determined Plaintiffs' sex.

Under black-letter law, the Department is required to include an "M" sex designation on Miller's and Doe's driver licenses. Nothing about its denials of Plaintiffs' requests to change that designation was arbitrary or capricious.[3]

Judicial review of administrative decisions is "narrow and deferential." *Taylor v. Board of Administration, City of Memphis Retirement System*, 681 S.W.3d 751, 754 (Tenn. 2023). An administrative decision need only be supported by "substantial and material evidence." Tenn. Code Ann. § 4-5-322(h)(5). That is "less than a preponderance . . . but more than a scintilla." *Taylor*, 681 S.W.3d at 754 (internal quotations omitted). "In other words, 'substantial evidence'

[3] As noted in Part I(A)(4), *supra*, a petition for judicial review cannot serve as a vehicle for a temporary injunction. In fact, the Department is not required to file any responsive pleading at all to a petition for judicial review. Tenn. Code Ann. § 4-5-322(f). Nonetheless, Plaintiff is also unlikely to ultimately succeed on the merits of the petition for judicial review.

is such relevant evidence as a reasonable mind might accept to support a rational conclusion and to furnish a reasonably sound factual basis for the decision being reviewed." *Id*.

When an administrative decision is supported by substantial evidence, it cannot be invalidated as "arbitrary and capricious" unless the decision "amounts to a clear error in judgment." *Id*. A "clear error" only exists when the agency decision "is not based on any course of reasoning or exercise of judgment, or disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id*. So long as "there is room for two opinions," a reviewing court may not reverse a decision simply because it would have chosen an opinion different than the agency's. *Id*.; *Starlink Logistics, Inc. v. ACC, LLC*, 494 S.W.3d 659, 670 (Tenn. 2016).

As an initial matter, none of Plaintiffs' declarations supporting their temporary injunction motion can be considered in relation to this claim. Evidence in UAPA petitions for judicial review is confined to the administrative record. Tenn. Code Ann. §§ 4-5-322(d), -(g). If a petitioner desires to present additional evidence, he must apply to the reviewing court for leave before the date set for hearing and show that the "evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." Tenn. Code Ann. § 4-5-322(e). The court then may offer the agency the opportunity to modify its findings and decision by reason of the additional evidence. *Id*. Only the information Plaintiffs presented to the Department is appropriate evidence for this Court to consider.

Based on the evidence presented to it, the Department's letter clears the "narrow and deferential" standard of review. As explained in Part I(B)(1), *supra*, Tennessee law defines "sex" very specifically as "a person's immutable biological sex as determined by anatomy and genetics existing at birth and evidence of a person's biological sex." Tenn. Code Ann. § 1-3-105(c). State

statutes and rules require that an applicant's sex, as defined by Tennessee law, appear on the face of a driver license. Tenn. Code Ann. §§ 55-50-321(c)(1)(A), 331(b)(1); Tenn. Comp. R. & Regs. 1340-01-13-.11(2), -.18(2); *see* Part I(B)(1), *supra*. Evidence of a person's biological sex includes "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).

There is no dispute that the only relevant evidence of Miller's sex —documents reflecting Miller's sex as listed on Miller's original birth certificate—support the Department's finding that the new driver license was issued in error. Miller alleges having been "assigned male at birth." (Amended Complaint, ¶ 81.) That sex was reflected on Miller's original birth certificate, (Amended Complaint, ¶ 86), which lists Miller's sex as "male." (Amended Complaint, ¶ 95). The straightforward conclusion is that Miller's sex, as that term is defined by state law, is male.

Given that fact, it was not arbitrary and capricious for the Department to conclude that Miller's new license reflecting a female sex designation—issued after Miller's three visits to different driver services centers using an amended birth certificate—was "issued in error" and subject to cancellation. (Amended Complaint, Exhibit C.) "The department is authorized to cancel any operator's . . . license upon determining . . . that the licensee failed to give the required or correct information in the application." Tenn. Code Ann. § 55-50-502(b)(1). As already explained, every application must state the "sex" of the applicant. Tenn. Code Ann. § 55-50-321(c)(1)(A). Miller admits to obtaining the new license using an amended birth certificate that did not reflect Miller's sex, as defined by state law, shopping around different centers until ultimately finding a clerk that would make the requested change to the sex designator. (Amended Complaint, ¶¶ 81, 89-91.) Because Miller failed to give the correct information about "sex" required under state law, and because Miller's new license does not reflect Miller's sex, the

Department is authorized to require Miller to obtain a compliant license. Tenn. Code Ann. § 55-50-502(b)(1). Despite Miller's failure to provide the driver services center with documentation comporting with state law, the Department has offered to replace Miller's incorrect license with a correct license "free of charge," thereby avoiding any cancellation. (Amended Complaint, ¶ 95.) The decision set forth in the Department's letter, which was based upon information contained on Miller's original Ohio birth certificate (Amended Complaint, Exhibit C), is supported by substantial and material evidence. The letter's indication that Miller's license would be cancelled if not exchanged for a correct license was entirely in keeping with the Department's statutory authority.

Neither is there any dispute that the only relevant evidence supports the Department's finding that Doe's sex is male. The Amended Complaint states that Doe's sex "was assigned male at birth." (Amended Complaint, ¶ 69.) That sex designation is reflected on Doe's birth certificate. (Doe Decl. ¶ 15.) The straightforward conclusion is that Plaintiff's sex, as that term is defined by state law, is male.

To show that a decision grounded in substantial and material evidence is nonetheless "arbitrary and capricious," Plaintiffs must show that the Department "disregard[ed] the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Taylor*, 681 S.W.3d at 754. But all of the "evidence" Plaintiffs claim the Department disregarded—Plaintiffs' transition status, gender identity, and physical characteristics (Amended Complaint, ¶¶ 109-10)—is irrelevant to the only question for the Department to answer: What is Miller's and Doe's biological sex, as shown on their original birth certificates? There is no dispute that the male sex designation the Department requires for Plaintiffs' respective driver license matches the sex designation on their original birth certificates, which is "evidence of a

person's biological sex." Tenn. Code Ann. § 1-3-105(c). In sum, Plaintiffs do not contest that the Department's position is correct under the applicable law; Plaintiffs simply disagree with the law. But that does not make the Department's decision arbitrary or capricious. This Court cannot substitute Plaintiffs' opinion about the law for the Department's. *Starlink Logistics*, 494 S.W.3d at 670. The decision of the Department should be affirmed.

II. The Other Equitable Factors Favor the State.

Although the failure to demonstrate likelihood of success should be considered fatal to Plaintiffs' request, the other factors for obtaining a temporary injunction also weigh against providing preliminary relief.

A. Plaintiffs have not demonstrated immediate irreparable harm.

To obtain a temporary restraining order, a plaintiff must demonstrate he would suffer irreparable harm. *Fisher*, 604 S.W.3d at 394. Plaintiffs' request for injunctive relief fails to satisfy this high hurdle.

Both Doe and Miller assert that being forced to carry a driver license that reflects biological sex will expose them to a risk of "bodily harm, harassment, and discrimination." (Plfs. Mot. Temp. Inj. at 18.) But speculation about events that may or may not occur cannot support the "extraordinary and unusual remedy" of issuing temporary injunctive relief. *Hines Inv. Mgmt. Holdings Ltd. P'ship v. Good Horse, LLC*, No. 21-0737-BC, 2021 WL 11492986, at *7 (Tenn. Ct. App. Aug. 20, 2021); *see, e.g., State ex rel. Baird v. Wilson County*, 371 S.W.2d 434, 439 (Tenn. 1963) ("The writ will not issue merely to relieve the fears or apprehensions of an applicant."). The only concrete example of "harm" specifically related to presentation of a driver license Doe could conjure up is a single encounter with a liquor store clerk that ended with Doe purchasing the desired liquor. (Doe Decl. ¶ 21.)

Plaintiffs present no facts whatsoever related to actual or threatened physical harm. Instead, they claim they face "generally recognized dangers." (Plfs. Mot. Temp. Inj. at 18.) A Tennessee federal district court recently observed that "available data does not reflect that in any one year—or more to the point, that in any spans of years across a lifetime—the heinous act of anti-transgender crime is statistically at all likely to be visited upon any particular [p]laintiff (or other transgender person)." *Gore v. Lee*, No. 3:19-CV-0328, 2023 WL 4141665, at *26 (M.D. Tenn. June 22, 2023).

Plaintiffs also assert that Tennessee's driver license policy forces disclosure of private medical information. (Plfs. Mot. Temp. Inj. At 17.) This argument is likewise unavailing. The only medical condition mentioned in Plaintiffs' declarations or the Amended Complaint is gender dysphoria. (Miller Decl. ¶ 9; Doe Decl. ¶ 9.) But a driver license that reflects "biological sex" does not force Plaintiffs, or anyone else for that matter, to disclose that diagnosis. WPATH, the transgender advocacy organization cited throughout the Amended Complaint, confirms that "[n]ot all transgender and gender diverse people experience gender dysphoria." Coleman, et al., Standards of Care for the Health of Transgender and Gender Diverse People, Version 8 (Sept. 15, 2022), https://tinyurl.com/yrdjzekf. And Plaintiffs' own complaint acknowledges that simply "[b]eing transgender is not itself a medical condition to be cured." (Amended Complaint, ¶ 53.) Even if the concern were simply disclosure of transgender status, Plaintiffs concede that "gender identity" is a "core sense of belonging to a particular sex." (Amended Complaint, ¶ 45.) A driver license reflecting biological sex does not require anyone to "disclose . . . internal thoughts about themselves . . . whenever they present their [driver licenses]." *Gore*, 2023 WL 4141665, at *29.

Miller first asserts that without court intervention, Miller could lose "access [to] the necessities of daily life." (Plfs. Mot. Temp. Inj. At 20.) But any revocation of Miller's driving privileges would be attributable *solely* to Miller's own refusal to obtain a license that complies with state law—not to mention the deceptive tactics Miller used to obtain that faulty license. The Department has offered to issue Miller a correct license free of charge. Miller can readily avoid any loss of driving privileges simply by surrendering the defective license and obtaining a new one.

For all of these reasons, the Court should "le[ave] the merits … for another day" and "den[y] a preliminary injunction based solely on the lack of an irreparable injury." *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019).

B. The balance of equities favors the State.

The balance of equities weighs in favor of Defendants. The two remaining factors in the temporary-injunction analysis require the Court to "balance" the harm inflicted on Plaintiffs against "the injury that granting the injunction would inflict on defendant," along with the "public interest." *Fisher*, 604 S.W.3d at 394. The public interest and the harm to the defendant merge because the State of Tennessee is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Both weigh against granting a temporary injunction.

Here, the injury to Defendants would be irreparable and thus against the public interest. "[A]ny time a State is enjoined by a court from effectuating [laws] enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotation omitted). So "unless the statute is unconstitutional," enjoining a state from enforcing its duly enacted laws "would seriously and irreparably harm" the state. *Lichtenstein v. Hargett*, No. 3:20-CV-00736, 2021 WL 5826246, at *48 (M.D. Tenn. Dec.

7, 2021), *aff'd*, 83 F.4th 575, 2023 WL 6475984 (6th Cir. 2023) (quotation omitted). And Plaintiffs do not assert that the underlying statute defining "sex" is unconstitutional. (*See generally*, Am. Comp.) Indeed, it is "in the public interest that [courts] give effect to the will of the people by enforcing the laws they and their representatives enact.'' *Hargett*, 2021 WL 5826246, at *48. (quotation omitted).

Conversely, as explained above, the potential harm to Plaintiffs is minimal. Plaintiffs face no individual threat of violence, Miller can maintain driving privileges by obtaining a corrected license free of charge, neither Doe nor Miller has established that Defendants are in any way responsible for any "stigma" Plaintiffs experience, and Plaintiffs will not have any medical information involuntarily disclosed.

The balance of equities weighs heavily in favor of Defendants, who face irreparable harm should the Court restrain them from complying with duly enacted state laws. *King*, 567 U.S. at 1303.

CONCLUSION

For these reasons, Plaintiffs' motion for a temporary injunction should be denied.

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 22nd day of May, 2024:

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