BEFORE THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE IN NASHVILLE

LEAGUE OF WOMEN VOTERS OF TENNESSEE; ALLISON CAVOPOL; CAROL COPPINGER, on her own behalf and as next friend of SAMUEL SHIRLEY; REVEREND JERRY CRISP; TOM JOHN, M.D.; TERRELL McDANIEL, Ph.D.; BRIAN PADDOCK; RANDALL RICE; MERYL RICE; and REVEREND JAMES THOMAS, Plaintiffs vs. JULIE MIX McPEAK, Tennessee Commissioner of Commerce and Insurance; TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE; and ROBERT E. COOPER, JR., Tennessee Attorney General And Reporter, Defendants	)	No. 13-1365 Part IV

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs respectfully submit this memorandum in reply to the defendants' Response in Opposition to Motion for Restraining Order ("State's Response"), filed this morning. Plaintiffs have already argued the merits of their motion in a separate memorandum that was also filed earlier today, and they will not repeat those arguments. The limited purpose of this memorandum is to briefly address three issues raised by the State's Response.

1) **The validity of the Emergency Rules must be determined by the plain language of the Rules themselves.**

The requirement that courts defer to an agency's interpretation of its own rules does not apply where, as here, an agency's construction is plainly erroneous or inconsistent with the regulation at issue *Jackson Express, Inc. v. Tennessee Public Service Com.*, 679 S.W.2d 942, 945 (Tenn. 1984) Likewise, deference to an agency rule interpreting a statute is not applicable where the language of the statute is plain and its meaning is obviously different from the administrative construction. *Covington Pike Toyota, Inc. v. Cardwell,* 829 S.W.2d 132 (Tenn. 1992)

The State attempts to limit the scope of the Emergency Rules by interpreting them in such a fashion that the Rules "do[] not require the registration of persons whose activities do not require the [sic] testing and certification first under the federal law." (State's Response, p. 8.) That is a transparent attempt to save the Rules by reading out of them their constitutionally overbroad language. The State's reading of the Rules is plainly wrong.

As the federal guidance appended to the State's Response makes clear, federal regulations require testing and certification of *only* those organizations that accept federal funding and designation as navigators, or that want to hold themselves out as certified application counselors ("CACs"). Others may assist people and provide such information as they choose, so long as they do not represent that they have federal certification. (See, e.g., State's Response, Tab H at pp. 10-11.)("Designation as a CAC organization is not required to continue to assist people. The program is entirely optional.")

By contrast, the State's Emergency Rules regulate "*any* individual or entity" that, the Rules declare, "should be" certified based, not on their claim of federal certification, but on their engaging in any of the types of constitutionally protected speech enumerated in the Rules. That

critical difference creates a vast gulf between the appropriate regulations issued by the federal government, and the constitutionally defective Emergency Rules promulgated by the State.

The State's effort to close that gap by construing the offending provisions out of the Emergency Rules is to no avail. An agency cannot adopt interpretations that effectively amend or reverse its own rules, as the State is now attempting to do, without going through the rulemaking procedures required by the Tennessee Uniform Administrative Procedures Ac t ("U.A.P.A.). T.C.A. § 4-5-102(10) defines "rule" to include any "agency statement of general applicability that implements or prescribes law or policy," including specifically "the amendment or repeal of a prior rule."T.C.A. § 4-5-216 provides that, "Any agency rule not adopted in compliance with the [UAPA] shall be void and of no effect and shall not be effective against any purpose or party nor shall it be invoked by the agency for any purpose."

2) The Emergency Rules prevent navigators and CACs from performing their federal duties.

Emergency Rule 0780-01-55-.06(1)(b)'s prohibits anyone, other than insurance producers, from

> "discuss[ing] the benefits, term, and features of a particular health plan over any other health plans and offer[ing] advice about which health plan is better or worse or suitable for a particular individual or employer"

The State contends that the Emergency Rule is simply "parroting" a parallel federal prohibition against navigators selling, soliciting or negotiating insurance. (State's Response, p. 10.)

The State's argument is belied by the Emergency Rule itself. The argument treats Emergency Rule 0780-01-55-.06(1)(b) as doing no more than barring the sale, solicitation or negotiation of insurance. But Clause (1)(b) of Rule 0780-01-55-.06 obviously goes much further, as is evident from its broad language encompassing protected speech that does not involve selling, soliciting or negotiating insurance. That point is reinforced by the next clause in the same

rule, which explicitly provides that no one other than an insurance producer may "sell, solicit, or negotiate health insurance." Emergency Rule 0780-01-55-.06(2).

Instead of simply "parroting" the federal requirements, Emergency Rule 0780-01-55-.06(1)(b) prevents federally certified navigators and CACs from meeting those requirements. Their duties, as described in the federal guidance appended to the State's Response, include

> "actually help[ing] an individual compare health plans, benefits, and carrier networks and assist the individual in choosing a health plan. But remember that a CAC cannot actually choose a plan or enroll someone in a plan. A CAC may only assist with plan selection and enrollment, and must provide this assistance in the consumer's best interest."

(State's Response, Tab H, p. 7.)

3) The Emergency Rules are invalid for failure to provide 30 days' advance notice.

The State argues that it was justified in resorting to emergency rulemaking under T.C.A. § 4-5-208(a), because there was insufficient time between the July 1, 2013 effective date of Chapter 377 and the opening of the health insurance exchanges on October 1, 2013. (State's Response, p. 18) The State argues that it could not satisfy the 90 day advance notice required of normal rulemaking.

That argument overlooks the specific requirement of T.C.A. § 56-7-101(b), which provides that:

> **(b)** Except where a different period of notice is provided *by other provisions of the insurance law* relative to particular matters, the commissioner shall give at least thirty (30) days' notice of a hearing to consider the proposed rules and regulations or amendments of the rules and regulations.

(emphasis added). The only exception to the 30 day notice requirement is when a different period is specified "by other provisions of the insurance law," not the Uniform Administrative Procedures Act or other general laws. The importance of this distinction is made all the clearer by the fact that very next section in the insurance law refers to the UAPA's filing and publication

provisions. T.C.A. § 56-1-702. The legislature was clearly mindful of the UAPA and could have included the emergency rulemaking provision among the exceptions to the notice periods prescribed by Section 56-1-701. The legislature did not choose to do so, however. The defendant Commissioner therefore cannot invoke the general rulemaking provisions of Section 4-5-208(a) to excuse her compliance with the specific insurance rulemaking requirements of Section 56-1-701. It is well settled that a specific statute or special provision of a particular statute controls over a general provision in another statute. *Matter of Harris*, 849 S.W.2d 34 (Tenn. 1993)

CONCLUSION

For the foregoing reasons, the Court should enter a temporary restraining order prohibiting the Defendants form enforcing Chapter 377, Public Acts of 2013, and DCI Emergency Rules Chapter 0780-01-55 pending further proceedings, and the entry of declaratory and permanent injunctive relief.

DATED: September 30, 2013.

Respectfully Submitted,

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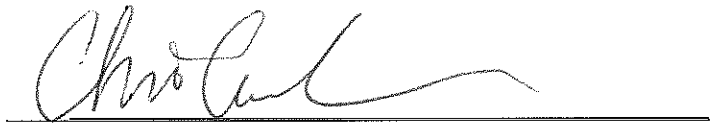
CERTIFICATE OF SERVICE

I hereby certify that I have delivered a copy of this Memorandum by email and by hand to Ms. Sarah Hiestand, Office of Attorney General and Reporter, on this 30th day of September, 2013.



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