To: Secretary Sebelius

From: Jay Angoff

Date: April 16, 2014

Re: HHS's proposed Navigator rule, and its current non-disclosure of rate filing information

I'm writing about (1) the proposed HHS rules governing Navigators and Certified Application Counselors, and (2) HHS's current policy of keeping rate filing information non-public. To the extent that the proposed Navigator/CAC rule permits FFE states to nevertheless regulate FFE CACs it is both difficult to justify legally and invites FFE states to obstruct the operation of the FFE. HHS's current policy of withholding rate filing information from the public is even more difficult to justify legally. Moreover, if it continues, it will cause 2015 rates to be higher than they would otherwise be, and will adversely affect pro-ACA candidates in the 2014 mid-term elections.

1. The proposed Navigator/CAC rule

In my view the manner in which the proposed rule treats specific state law provisions that unduly restrict Navigators and other consumer assisters is exactly right. On the other hand, the rule would expressly allow states to regulate both Navigators and CACs, even when a state has opted to have the federal government run the Exchange. I don't believe that provision should be adopted in the final rule, for three reasons.

First, it is contrary to the language of the current rule and its preamble. The current HHS rule says that "the Exchange" shall regulate CACs. In FFE states the Exchange is the federal government, so the federal government regulates CACs. (The attached brief in St. Louis Effort for AIDS v. Huff, the Missouri Navigator case, at 7-9, explains this in more detail.) Because the language of the rule and its preamble is so clear, Texas-- no friend of the ACA--exempted CACs from its rules restricting Navigators and other consumer assisters. Notably, Navigators are created by statute, but CACs have been created by HHS by regulation. There is no provision of the statute that even arguably authorizes the states to regulate CACs.

Second, allowing the states to regulate CACs in FFE states is contrary to the court's holding in St. Louis Effort for AIDS. The court there held that "Any attempt by Missouri to regulate the conduct of those working on behalf of the FFE is preempted." HHS is certainly not bound by that language. But the court's holding makes sense. As the court explains, the ACA gives the states a choice: they are free to choose either to set up their own Exchange or to have the federal government set one up, but once they opt for the latter they can't then try to impose additional burdens on either the Exchange or those working on its behalf.

I understand the argument that not all state regulation of CACs in FFE states necessarily obstructs the Exchange. But isn't it clear by now that ACA opponents will overreach when

given the least opportunity, particularly when their interests coincide, as is the case here, with those of an influential interest group like insurance agents? Just as anti-ACA legislators used the language in your July 11, 2012 letter to House Members to justify legislation designed to prevent Navigators from doing their jobs, they would use the language "Certified Application Counselors must meet any licensing, certification or other standards prescribed by the State or Exchange" in the proposed amendments to prevent CACs from doing their jobs.

Third, assuming that the Administration's goal is still to have as many states as possible run their own Exchanges, allowing FFE states to impose burdens on CACs working on behalf of the FFE will frustrate rather than further that goal. States are more likely to run their own Exchanges if they know they can regulate Navigators and CACs only if they run their own Exchanges. I recognize the argument that the more flexibility states are given to run their own Exchanges the more likely they are to do so, but hasn't that been disproved by the dearth of states that have set up their own Exchanges, notwithstanding HHS's every effort to make things as easy as possible for them?

A second problem with the proposed rule is that it could be read as a statement by HHS that the doctrine of "obstacle" preemption does not apply to the ACA. State laws are preempted when it is impossible to comply with both the federal and state law at the same time, as the proposed amendments recognize. State laws are also preempted, however, where the state law constitutes an obstacle to the implementation of the goals of the federal law, even if there is no express conflict. By not expressly stating that "obstacle" preemption applies in connection with the ACA, I'm afraid that the amendments invite ACA opponents to argue that HHS intends that obstacle preemption not apply, and thus that the language "prevent the application of" in the ACA be construed to encompass only the "impossibility" theory of preemption.

Notably, the Court in St. Louis Effort for AIDS has issued a strong opinion that is very supportive of HHS's authority to preempt conflicting or obstructing state law. It would be a shame for HHS itself to take a position less protective of the ACA than the court has.

2. HHS's current policy of keeping rate filing information, including the Actuarial Memorandum, non-public

The ACA requires the Secretary to "ensure the public disclosure of information on [unreasonable] increases and justifications for all health insurance issuers," and HHS has stated both in regulation and on its website that most if not all rate filing information is public. In fact, however, it has not made such information public. That is extremely unfortunate, for two reasons.

First, under established legal standards rate filings should be public. Although the law requires that those claiming trade secret protection specifically explain how disclosure of such information would cause competitive harm, no insurer has done this. To the contrary, insurers simply assert, as in their comments to the HHS rate review rule, that rate filing information is proprietary. They neither explain what that information is nor how its release would cause competitive harm.

Second, keeping rate filings non-public will both increase the level of 2015 rates beyond what they would be if rate filings were public, and will adversely affect Democrats in the 2014 midterm elections. To ensure that 2015 rates are as low as possible rate filings must be made public when filed, so that third parties can challenge any unrealistic assumptions on which the increase is based. For example, even though medical trend has been consistently declining, actuaries routinely use a higher trend in rate filings than recent data would justify. In addition, several provisions and effects of the ACA can reasonably be expected to reduce trend, including the ACA health care delivery system reforms, a 2015 risk pool that will be healthier than the 2014 pool, and lower payments by insurers to providers. Several ACA provisions and effects can also reasonably be expected to reduce insurers' administrative expenses, including the Exchange structure, the elimination of insurance company underwriting departments (since the ACA eliminates underwriting), and the enormous amount of taxpayer-funded marketing and advertising from which private insurers are benefitting. Further, the 3R's guarantee that insurers will receive substantial payments for both expected and unexpected losses; they thus enable insurers to substantially reduce their rates. If rate filings--importantly, including the Actuarial Memorandum--are made public, filings that include an unreasonably high trend or that fail to adequately reflect the effect of the ACA's expense-reducing provisions or the 3R's can be challenged. If HHS declines to make rate filings public, they can't be.

The disclosure of rate filing data by HHS would not be particularly well-received by either the industry or non-disclosing states. On the other hand, the issue is not really that important to the industry: its comments on the HHS regulation on this issue were perfunctory, and there have been no adverse effects on the industry in any of the states which already make all rate filing information public (the HHS rule says there are at least twelve). And while the non-disclosing states may oppose disclosure, HHS would have the support of both the press and the public on this issue.

Releasing the information would also, of course, be consistent with HHS's rate review grant program. The statute provides that rate filings will be public; in our FOA announcing the rate review grants we stated that a purpose of those grants was to make such filings public; the states represented in their applications that they would make rate filings public; and we stated on the website--and CCIIO continues to state on its website--that such information is public. Nevertheless, my understanding is that no rate filing data or information of any kind that HHS has received after March 2013 is public.

In short, the law, politics and policy all support making rate filings, including the Actuarial Memorandum, public. And with the companies beginning to file rates in most states in late May, and in some states as early as May 1, time is of the essence.

Congratulations on your successes, and best wishes for the future.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ST. LOUIS EFFORT FOR AIDS, et al. Plaintiffs, vs. JOHN HUFF, in his official capacity as Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration, Defendant.	)	Case No. 2:13-cv-4246

PLAINTIFFS' REPLY SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The public has until March 31, 2014 to obtain health insurance coverage or, thereafter, pay a penalty under the Affordable Care Act (ACA). Events occurring after this case was filed, as well as immediately before its filing, have made enjoining Defendant's enforcement of the Health Insurance Marketplace Innovation Act of 2013 (HIMIA) more essential than ever.

Specifically, on December 19, 2013 the Centers for Medicare & Medicaid Services (CMS) announced that certain individuals who received cancellation notices from their health insurers can apply for a "hardship exemption" from the ACA's coverage requirements and purchase catastrophic insurance coverage in lieu of paying the penalty. CMS, Options Available for Consumers with Cancelled Policies (Dec. 19, 2013).[1] *See also* Letter from CMS, Center for Consumer Information and Insurance Oversight (CCIIO) Director Gary Cohen to Insurance Commissioners (Nov. 14, 2013)[2] (urging state insurance commissioners to permit insurers to renew cancelled policies). Missouri decided to allow such renewals. Missouri Dep't of Insurance, Insurance Bulletin 13-07 (Nov. 21, 2013).[3] Combined, these events give Missourians whose policies were cancelled a number of options:

- They can renew the non-ACA-compliant coverage that had been cancelled;
- They can purchase coverage on the Exchange, where they may qualify for subsidies;
- They can purchase a plan outside the Exchange, where they do not qualify for subsidies;
- They can apply for a hardship exemption and purchase unsubsidized catastrophic coverage.

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[1] *See* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf.
[2] *See* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.
[3] *See* http://insurance.mo.gov/laws/bulletin/documents/InsuranceBulletin 13-0711-21-13.pdf.

Unfortunately, as explained herein and in Plaintiffs' other pleadings in this case, HIMIA establishes distinct, unconstitutional barriers that prevent federally qualified Navigators and consumer assisters, as well as private individuals and entities, from explaining the alternatives.

The ACA seeks to increase the number of Americans with health insurance by, among other things, increasing the number of people and entities available to help people apply for insurance, whereas HIMIA unconstitutionally limits such avenues of assistance. Put another way, the ACA seeks to make it easy for Americans, and Missourians, to find out about their health insurance options and enroll in insurance; HIMIA does the opposite. With less than three months remaining between now and March 31, it is important that HIMIA be enjoined at the earliest possible date if the purposes of the ACA are to be accomplished.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR SUPREMACY CLAUSE CLAIM.

A. Plaintiffs cannot comply with both the ACA and the HIMIA's prohibition on non-insurance-agents providing advice on the benefits, terms and features of health plans.

Defendant argues that Navigators can "distribute fair and impartial information concerning enrollment in qualified health plans" and "provide information...about the full range of [Qualified Health Plan (QHP)] options," as they are required to do by federal law, and at the same time refrain from "provid[ing] advice concerning the benefits, terms and features of" health plans, as they are required to do by § 376.2002.3(3) of HIMIA. Def.'s Sugg. at 9. To credibly make this argument, Defendant must meaningfully differentiate "providing information" from "providing advice." Defendant does not do so, nor could he, since Webster defines "advice" as "information or notice given." Merriam Webster's Dictionary, http://www.merriam-webster.com/dictionary/advice (last visited Jan. 6, 2013).

Materials published by the U.S. Department of Health and Human Services (HHS) illustrate the impracticality of distinguishing "advice" from "information." They also illustrate the irreconcilable conflict between the duties of a Certified Application Counselor (CAC) under the ACA to act in the best interest of the consumer, 45 C.F.R. § 155.225(d)(4), and HIMIA's prohibition on CACs' providing advice about the benefits, terms and features of health plans. For example, HHS instructs CACs that:

> To act in consumers' best interests, you must help them choose health coverage that meets all of their needs, including:
>
> - Their ability to afford paying for health coverage
> - Their health care needs, such as coverage of treatments for any health conditions that they have
> - Their desire to keep a certain doctor or see doctors in a certain location
> - Their families' health coverage needs, if applicable.

U.S. Dep't of Health & Human Servs., *Training Overview Course 1* at 31 (2013) [hereinafter HHS Course 1].[4]

Helping consumers find insurance that covers treatment for their health conditions, which HHS says CACs must do, necessarily means advising them about benefits and terms of plans. Enabling consumers to see their doctor, as required by HHS, inevitably means advising them about features of plans. *See*, U.S. Dep't of Health & Human Servs., *Health Insurance Basics Course 2* at 18 (2013), attached as Ex. 1. In fact, HHS guidance states that "actually help[ing] an individual compare health plans, benefits, and carrier networks and assist[ing] the individual in choosing a health plan. . . . are *required* duties of a CAC." U.S. Dep't of Health & Human Servs., *Common Questions and Answers on Designation of Certified Application Counselors (CAC) Organizations in Federally-Facilitated Marketplaces* 7 (2013) [hereinafter *Common*

[4] *See* http://marketplace.cms-gov/training/get-training.html.

Questions] (emphasis added).[5] The ACA requires CACs to perform activities prohibited by HIMIA, namely advising consumers about the terms, benefits, and features of health plans.

Defendant suggests that, if plaintiffs are concerned that their activities would violate § 376.2002.3(3), they should become insurance agents. Def.'s Sugg. at 10. Defendant also suggests that the ACA contemplates that states may require Navigators to be licensed as agents. *Id.* Both suggestions, however, prevent the application of the ACA and stand as an obstacle to the accomplishment of its purposes, because the ACA requires that non-agents be Navigators: 42 U.S.C. § 18031(i)(2)(B) lists seven categories of non-insurance agents as types of Navigators and also provides that other entities that meet the three standards set forth in that section—none of which is compliance with state law or licensing as an agent—are eligible to be Navigators.

In addition, federal law requires at least one non-profit consumer group to be a Navigator in each Exchange. *See* 45 C.F.R. § 155.210(c)(2). As HHS has explained, a state requirement "that Navigators become agents or brokers would prevent the application of § 155.210(c)(2),because it would mean that only agents or brokers could be Navigators."[6] 78 Fed. Reg. 42831. Thus, the phrase "licensed if appropriate" set forth in 42 U.S.C. § 18031(i)(4)(A) must necessarily refer to licensing as a Navigator, not as an agent—otherwise the 42 U.S.C. § 18031(i)(2)(B) list of seven types of non-agent Navigators would be rendered meaningless.

Defendant also argues that the acts that HIMIA permits plaintiffs to engage in are "consistent with" their federal duties and responsibilities. Def.'s Sugg. at 10. In fact, however, Missouri's navigator definition impermissibly narrows the ACA definition in three important respects. First, the ACA authorizes Navigators to distribute fair and impartial information

[5]*See* http://marketplace.cms.gov/help-us/common-qandas-about-cac-designation.pdf.
[6]*See also* 78 Fed. Reg. 42,831 ("[H]olding an agent or broker license is neither necessary, nor by itself sufficient, to perform the duties of a Navigator, as these licenses generally do not address areas in which Navigators need expertise, including the public coverage options that will be available to some consumers.").

"concerning enrollment in QHPs." 42 U.S.C. § 18031(i)(3)(B). HIMIA, in contrast, limits Navigators to distributing such information "in connection with eligibility, enrollment, and program specifications of any health benefit exchange." §376.2002.2(1). HIMIA thus allows Navigators to provide information regarding the Exchange but not individual QHPs. Second, the ACA authorizes Navigators to facilitate "enrollment in" QHPs. 42 U.S.C. § 18031(i)(3)(C). HIMIA§ 376.2002.2(2), in contrast, authorizes Navigators only to facilitate the "selection of" a QHP—an action that occurs before enrollment. Third, whereas the ACA authorizes navigators to "facilitate" enrollment and thus help consumers throughout the process of enrolling,[7] 42 U.S.C. § 18031(i)(3)(C), HIMIA § 376.2002.2(3) allows Navigators only to "initiate" enrollment. In short, by preventing Navigators from carrying out fully the duties the ACA intends them to carry out, the HIMIA provisions both prevent the application of the ACA and stand as an obstacle to the accomplishment of its purposes.

B. Plaintiffs cannot comply with both the ACA and the HIMIA prohibition on non-insurance-agents providing information about health plan options off the Exchange.

HIMIA prohibits non-agents from providing information on other health plans and products offered off the Exchange. HIMIA § 376.2002.3(5). Defendant seeks to harmonize that prohibition with the federal mandates that Navigators "distribute fair and impartial information concerning enrollment in QHPs," 42 U.S.C. § 18031(i)(3)(B), that Navigators "acknowledg[e] other health programs," 45 C.F.R. § 155.210(e)(2), and that Navigators and CACs "provide information…about the full range of QHP options and insurance affordability programs for which they are eligible." *Id.* at §§ 155.215(a)(1)(D)(iii),155.225(c)(1). Defendant has not done so, however. Nor could he, since the federal and state provisions irreconcilably conflict.

[7] According to HHS, a CAC's duties in connection with enrollment include "creating an account, filling out eligibility information, comparing plans, and completing enrollment." Common Questions and Answers on Designation of CACs in FFMs at 8.

Defendant asserts that "the whole point of the ACA is to provide fair, accurate, and impartial information with respect to QHPs that are part of the exchange, and not to provide information or services about health benefit plans or other products outside the exchange."[8] Def.'s Sugg.at 11-12. This assertion is both unsupported by Defendant and contradicted by the language of the ACA (Navigators shall "facilitate enrollment in QHPs") and the regulatory language Defendant himself cites (Navigators and CACs must "provide information...about the full range of QHP options and insurance affordability programs"). QHPs are available both on and off the Exchange, 42 U.S.C. § 18021(a), and Medicaid and CHIP are also available off the Exchange. By prohibiting non-agents from providing information about either category of options, HIMIA both prevents the application of the ACA and stands as an obstacle to the accomplishment of its purposes.[9]

C. Plaintiffs cannot comply with both the ACA and the HIMIA agent-referral provision.

Plaintiffs cannot fulfill their duties under the ACA and also comply with the HIMIA § 376.2008—the agent-referral provision—because, under the ACA, plaintiffs have a duty to act in the best interest of the consumer, whereas agents have no such duty. Indeed, under Missouri law insurance agents have no duty to advise consumers of their needs, of the availability of particular coverage, or of the availability of optional coverage. *See, e.g. Emerson v. Elec. Co. v. Marsh & McLennan Co.*, 362 S.W. 3d 7, 13 (Mo. 2012); *Blevins v. State Farm Fire & Cas. Co.*, 961 S.W.2d 946, 951 (Mo. Ct. App. 1998).

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[8] Defendant also attempts to differentiate "acknowledging" other health programs from "providing information" about them. Def.'s Sugg. at 11. Apparently, Defendant would interpret the phrase "acknowledging other health programs" to mean stating that such programs exist, without providing any information about them. Such an interpretation is both strained and inconsistent with the ACA language Defendant himself cites.

[9] In addition, just as he did with respect to HIMIA's prohibition on non-agents providing advice about benefits, terms and features of health plans, see pg. 2, *supra,* Defendant argues that because Navigators and CACs can become insurance agents no conflict exists between the HIMIA off-Exchange prohibition for non-agents and the ACA's mandate to provide information about the "full range of QHP options and insurance affordability programs." Def.'s Sugg. at 12. For the reasons explained at pgs. 2-4, *supra*, this argument is without merit.

HHS's guidelines for CACs make clear how antithetical to the ACA HIMIA's agent-referral mandate is. HHS notes that both Navigators and CACs must provide information in the best interest of the consumer but that agents need not and that federally recognized Navigators must adhere to conflict of interest standards and CACs must disclose conflicts of interest, but agents need do neither. *See* HHS Course 1 at 22; *see also id.* at 29 (stating "key points," including: "Navigators and non-Navigator assistance personnel are required to provide unbiased information," and "Agents and brokers aren't required to provide unbiased information because they are compensated by insurance companies"). In addition, HHS has also provided that "CACs may make referrals to other assistance personnel, including agents and brokers, if a consumer requests it or if the consumer requires more information or assistance than the CAC is able to provide." *Common Questions* at 15. HIMIA's mandating agent referrals "upon contact," whether or not the consumer requests such referral or the CAC can provide the information the consumer requires, directly conflicts with the CAC's obligations under the ACA. HIMIA both prevents the application of the ACA and stands as an obstacle to the accomplishment of its purposes.

D. Defendant's claim that Missouri can impose requirements on both Navigators and CACs that federal law imposes on neither is incorrect.

Under federal law, Navigators and CACs are created by separate provisions and subject to different standards. Navigators are governed by 42 U.S.C. § 18031(i) and 45 C.F.R. §§ 155.210 and 155.215; CACs, by 42 U.S.C. § 300gg-93 and 45 C.F.R. § 155.225.

HIMIA defines Navigator differently than the ACA and implementing regulations and differently than the federal regulations defining CACs, and it subjects both Navigators and CACs to a third set of conflicting requirements. It therefore both prevents the application of and stands as an obstacle to the accomplishment of the purposes of the ACA, as explained at 4-5, *supra*. More fundamentally, and notwithstanding Defendant's argument to the contrary, *see* Def.'s Sugg.

at 15, federal law prohibits states which have ceded the operation of their Exchange to the federal government from regulating CACs.

Defendant seeks to avoid the plain meaning of HHS's statement that "the federal government is responsible for and states will not be involved in implementing the certified application counselor training program in" states with federally operated Exchanges. Notwithstanding that unambiguous statement, he appears to argue that states with federal Exchanges can still regulate CACs because states, along with private entities and the federal government, can fund CACs. Def.'s Sugg.at 15-16. The source of a CAC's funding, however, has no bearing on whether the state can regulate CACs.[10]

In addition, defendant does not even try to rebut plaintiffs' evidence indicating that Missouri's regulation of CACs is preempted. For example:

- Federal law provides that states may regulate Navigators but does not so provide for CACs. *Compare* 45 C.F.R. §155.210 (Navigators) *with* § 155.225 (CACs).

- The proposed CAC regulation required CACs to "compl[y] with applicable state law related to application counselors," but HHS eliminated that provision in the final rule, specifically because it did not believe states should limit the entities eligible to be CACs.[11] 78 Fed. Reg. 42845.

[10] There is also a serious question as to whether the initiative that Missouri voters approved in November 2012 permits Defendant Huff to regulate CACs in any manner that furthers the purposes of the ACA. Among other things, that measure prohibited any Missouri official from "providing assistance or resources of any kind" to the federal government related to the operation of a federally operated Exchange "unless such assistance or resources are authorized by state statute or a regulation promulgated thereto" or required by federal law. Mo. Rev. Stat. § 376.1186.5. It also established automatic standing for any Missouri taxpayer to sue any public official who cooperates with the federal government in violation of that prohibition. Mo. Rev. Stat. § 376.1186.6.

[11] In its proposed rule, HHS sought comment on "whether State Exchanges should have the authority to create additional standards for certification or otherwise limit eligibility of certified application counselors beyond what we proposed." 78 Fed. Reg. 42841. In withdrawing the proposed rule's requirement that CACs "compl[y] with applicable state law related to application counselors," HHS explained that some commenters supported giving states the flexibility to require CACs to comply with additional state standards, whereas other commenters "opposed permitting states to impose additional certification standards, expressing concerns that additional requirements might be burdensome and could limit the number of certified application counselors or favor some health insurers over others." 78 Fed. Reg. 42845. In the final rule HHS came down squarely on the side of the latter group of commenters. To the extent that it regulates CACs, HIMIA is exactly what HHS sought to prevent.

- HIMIA's regulation of CACs directly conflicts with 45 C.F.R. § 155.225(d): entities meeting the requirements of the regulation are entitled under federal law to perform the duties of CACs yet under HIMIA cannot perform those duties.

To the extent that HIMIA purports to regulate CACs, it is preempted by the ACA.

E. Other points Defendant raises do not cure the conflict between the ACA and HIMIA.

1. The ACA's provision relating to insurance agents.

Defendant states that the ACA permits insurance agents to be Navigators, and 42 U.S.C.§ 18031(i)(2)(B) does include insurance agents in its list of entities eligible to be Navigators. However, another ACA provision, 42 U.S.C.§ 18031(i)(4)(A)(ii), which defendant ignores, provides that a Navigator shall not

> receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment of any qualified individuals or employees of a qualified employer in a qualified health plan.

Because health insurance agents by definition receive compensation for selling health insurance policies, and because effective January 1, 2014 those health insurance policies will include qualified health plans as defined in the ACA, the net result of ACA sections 18031(i)(2)(B) and 18031(i)(4)(A)(ii) is to prevent health insurance agents from serving as ACA-defined Navigators. Thus, although auto insurance agents or other non-health agents could apparently serve as Navigators under the ACA, the ACA's disqualifying of health insurance agents as Navigators directly conflicts with HIMIA's automatically qualifying them as Navigators.

2. The HIMIA provisions relating to compensation of HIMIA-defined Navigators.

Defendant states that, to be regulated by HIMIA, a person must receive compensation. Section 376.2000.2(4) does define "Navigator" as "a person that, for compensation," provides certain information or services. Notably, plaintiffs in this case are receiving compensation for performing Navigator services: Plaintiffs St. Louis Effort for AIDS and Planned Parenthood obtained grants to perform CAC services; Plaintiff Dr. Letizia's business charges patients for the

full range of services, including the insurance advice his doctors provide to patients; Plaintiff Missouri Jobs with Justice employs individuals who discuss health insurance; and Plaintiff Jeanette Oxford receives a salary for leading discussions about health insurance and Medicaid, among other things.

Plaintiffs who perform Navigator services but who do not receive compensation, however, are also injured by HIMIA, due to three additional HIMIA provisions. First, § 376.2002.1 provides that no person can perform or offer to perform "any service as a Navigator" unless the person is licensed by the state. Does performing "any service as a Navigator" require the person performing the service to be compensated, or does it require the person only to perform the service the Navigator performs? While either interpretation seems reasonable, a second HIMIA provision, § 376.2004.2, confirms that the latter interpretation is the correct one. That section provides that

> An entity that acts as a navigator, supervises the activities of individual navigators, or receives funding to perform such activities shall obtain a navigator entity license.

HIMIA thus requires three different categories of entities to obtain a Missouri navigator license: (1) an entity that acts as a navigator, (2) an entity that supervises the activities of individual navigators, and (3) an entity that receives funding to perform "such activities." Grammatically, "such activities" in the third clause must relate back to both prior clauses.[12] Section 376.2004.2 thus applies both to entities that do not receive funding and either act as Navigators or supervise the activities of individual navigators (clauses 1 and 2), and to entities that do receive funding to

[12] If "such activities" were intended to relate back only to the second clause the section would have had to have been written as follows:

> An entity that acts as a navigator, or supervises the activities of individual navigators or receives funding to perform such activities, shall obtain a navigator license.

either act as or supervise navigators (clause 3). HIMIA therefore applies to all plaintiffs in this case, whether or not they receive compensation.

The third provision of HIMIA relating to compensation of HIMIA-defined navigators is the last sentence of § 376.2000.2(4). That sentence provides that a Missouri navigator "does not include any not-for-profit entity disseminating to a general audience public health information." However, all plaintiffs in this case disseminate or seek to disseminate insurance information, not public health information.[13] In addition, all plaintiffs disseminate information to limited or specialized audiences, not general audiences. Finally, two plaintiffs—Dr. Letizia and Dr. Fogarty—are not not-for-profit entities.[14] The last sentence of 376.2000.2(4) thus provides no protection for any plaintiffs in this case.

II. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR DUE PROCESS CLAIM.

A. HIMIA's "for other good cause" penalty provision fails to provide fair warning of the conduct it prohibits.

Defendant claims that the "for other good cause" provision of § 376.2010(1) provides fair warning of the conduct it proscribes. Def.'s Sugg. at 24. For support, defendant analogizes plaintiffs' case to a head shop owner's challenge to a municipal ordinance requiring businesses to obtain a license if they sell items "designed or marketed for use with" illegal drugs. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). That case, however, is nothing like this one. The regulation there regulated the conduct of business, *id.* at 496, whereas HIMIA regulates the speech of private individuals; the regulation there was aimed

[13] "Public health" is the "art and science dealing with the protection and improvement of community health by organized community effort and including preventive medicine and sanitary and social science." Merriam-Webster's Dictionary, *available at* http://www.merriam-webster.com/dictionary/public%20health.

[14] Plaintiff Chris Worth is also not a not-for-profit entity but he does not wish to perform Navigator services. Chris Worth is injured because he cannot obtain meaningful help with understanding his insurance options from the attorneys in his office because of HIMIA.

at conduct encouraging illegal activity, *id.*, whereas HIMIA seeks to regulate speech encouraging legal activity; the regulation there contained a scienter requirement, *id.* at 499-500, whereas the HIMIA "for other good cause" standard does not; and the municipality there had promulgated guidelines specifying the items required to be licensed—such as the roach clips and water pipes, *id.* at 492—whereas Defendant here has issued no guidelines providing any notice of what "for other good cause" proscribes. Defendant's reliance on *Hoffman Estates* is misplaced.

Defendant also argues, without citing any legal support, that the standard is not unduly vague because plaintiffs can seek to defend themselves if the Director prosecutes them for what he believes to be "other good cause." Def. Sugg. at 23. The procedural protections available to all American citizens, however, cannot cure a statute that is unconstitutionally vague. The Defendant cannot file an action against a Missouri resident and only then reveal the legal elements of the violation to the citizenry.

Finally, Defendant argues that under § 376.2010.1 the Director can levy a fine only on "any person who has, or is seeking to obtain, a Missouri navigator license." Def.'s Sugg. at 24. That is not what the statute says, however. Section 376.2010.1 provides that the Director "may levy a fine," period. Nothing in the statute prevents the Director from seeking to levy a fine on plaintiffs in this case, such as Dr. Forgarty and Jeanette Oxford, who neither have nor are seeking to obtain a Missouri navigator license.

III. PLAINTIFFS ARE LIKELY TO SUCCED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM.

A. HIMIA implicates Plaintiffs' right to free speech by regulating the content of speech.

Defendant declares that HIMIA "does not compel or restrict speech." Def.'s Sugg. at 18. On the contrary, as explained in detail in Plaintiffs' opening brief, three provisions of HIMIA unconstitutionally regulate the content of their speech and therefore implicate plaintiffs' first

amendment rights.[15] *See* Pls.' Sugg. at 14-18. Section 376.2008 requires Missouri navigators to refer certain individuals to licensed insurance agents, section 376.2002.3(3) prohibits non-agent Missouri navigators from providing people with advice about QHP features, and section 376.2002.3(4) forbids non-agent Missouri navigators from providing individuals with information about non-Exchange products. Defendant contends that the provisions merely prevent "someone – who is compensated –who may not understand a complex issue from giving bad advice." Def.'s Sugg. at 18. First, Defendant is wrong as matter of fact. HIMIA does not merely prevent compensated individuals from giving bad advice, it prevents anyone—compensated or not—from giving any advice. *See* HIMIA §§ 376.2002.3(3)-(4). Second, even assuming *arguendo* that HIMIA is intended to protect consumers by preventing bad advice, that intention does not render the law constitutional. For HIMIA's provisions to be upheld, defendant must show that they are the least restrictive means of achieving that intention—a burden that defendant has not meet. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

B. HIMIA regulates non-commercial speech, but is unconstitutional even under the more lenient test for commercial speech.

Defendant states that the speech at issue here is commercial, without providing any analysis or legal support for this proposition. *See* Def.'s Sugg. at 18. But the plaintiffs' speech is not commercial. Commercial speech is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S.

[15] Defendant claims that HIMIA's regulation of speech does not apply to several plaintiffs because they do not receive compensation for their speech. Since these plaintiffs are compensated for this speech, this argument is specious, as explained in detail above. Defendant's attempts to distinguish the Tennessee Navigator case, *Harrington v. Haslam*, No. 3:13-1090 (M.D. Tenn. Oct. 7, 2013), from this case are similarly unfounded. Def.'s Sugg. at 18. Contrary to Defendant's assertions, the plaintiffs in *Harrington* were compensated for their activity – one plaintiff engaged in the prohibited speech in the course of her duties as a librarian, another in her work as homecare provider. Ex.10, *Harrington*, Plf.'s Memo. in Support of TRO at 9-10. Thus, individuals in that case, like plaintiffs Consumer's Council of Missouri, Missouri Jobs with Justice, Oxford, Letizia, and Fogarty, were not licensed navigators, but were "still restricted from conducting public education or consumer assistance activities." Def.'s Sugg. at 18.

557, 562(1980). The test for whether speech is commercial is whether it "propose[s] a commercial transaction." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989). Speech that proposes a commercial transaction conveys the idea "I will sell you the X...at the Y price." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976). None of the provisions at issue here involve speech that proposes a commercial transaction. By definition, Navigators cannot receive compensation for enrolling clients in health insurance or otherwise have any conflict of interest. *See* 42 U.S.C. § 18031(i)(4)(A)(ii); 45 C.F.R. § 155.210(c)(1)(iv). Neither advising individuals about QHP features and benefits nor informing then about non-Exchange options (including non-commercial coverage like Medicaid) can be construed to suggest an exchange of money for goods or services. *See* HIMIA §§ 376.2002.3(3)-(4). Instead, these provisions stop "the speaker from conveying, [and] the audience from hearing...noncommercial messages" about such things as which Exchange plans offer wellness incentives or the availability of public coverage like Medicaid. *Bd. of Trustees of State Univ. of New York*, 492 U.S. at 474. HIMIA's requirement that Missouri navigators refer certain consumers to an insurance agent may indirectly promote a commercial transaction, but it is the transaction of the agent, not the navigator; the speech does not itself offer to sell any product or service. *See* HIMIA § 376.2008. In short, the HIMIA provisions plaintiffs challenge regulate the content of speech that is not commercial, strict scrutiny therefore applies, and the provisions cannot stand. *See* Pls.' Sugg. at 14-18.

Moreover, these provisions are unconstitutional even under *Central Hudson*'s intermediate scrutiny test for restrictions on commercial speech. The Supreme Court has rejected the idea that governments can completely "suppress or regulate" commercial speech. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562. When such speech concerns lawful activity and is

not misleading, the state's authority to regulate it is more "circumscribed." *Id.* at 564. For such a regulation to stand, the state must show that it directly advances a substantial governmental and it is not "more extensive than necessary." *Id.* at 566. HIMIA does not directly advance a substantial state interest, and it is far broader than necessary to serve the interest asserted.

HIMIA does not advance Defendant's asserted interest of protecting consumers from "unqualified or unscrupulous paid assistance." Def.'s Sugg. at 19. Notably, section 376.2008, which compels Missouri navigators to refer clients holding insurance purchased from an agent back to an agent, does not protect consumers from unqualified or unscrupulous assistance. In fact, such referral may have the effect of sending the individual to an insurance agent who lacks special expertise in the needs of the low-income and vulnerable populations who use the Exchange. Unlike Navigators and CACs who must provide impartial information, insurance agents have a legal duty to the insurer whose policies they sell and have no duty to act in the impartial best interests of the consumer. *See supra* pgs. 6-7. Rather than protect consumers, the HIMIA agent-referral provision protects the business interests of insurance agents. Further, HIMIA's impact on speech is far broader than necessary to advance any interest in protecting consumers because its distinction between consumers who hold coverage purchased through an agent and those who do not is arbitrary—the state has not put forth any reason why consumers who previously purchased coverage through an agent warrant special protection.

Sections 376.2002.3(3) and 376.2002.3(5), which prohibit Missouri navigators who are not agents from advising clients about features of QHPs or about non-Exchange products, also fail to directly advance the government's interest in protecting consumers. Rather than helping Missouri navigators protect consumers they prevent them from doing their job, by prohibiting them from providing Missourians with factual information crucial to making a choice about

health coverage—such as the benefits and features Exchange plans include and options that exist outside of the Exchange, like Medicaid and CHIP. As Justice Brennan stated, "no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities." *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 351 (1986) (Brennan, J. dissenting).

C. HIMIA is a prior restraint on speech, because it regulates the content of professional speech, not entry to the profession.

Defendant denies that HIMIA operates as an unconstitutional prior restraint on speech by proposing that it merely licenses professional conduct. Def.'s Sugg. at 20. But the provisions at issue do not determine who may be licensed as a navigator or insurance producer in Missouri, rather they prohibit Missouri navigators from fully advising clients about their ACA coverage options.[16] Defendant's own cases establish that his power to regulate entry to a profession does not give him free reign to regulate the content of professionals' speech. *See Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 168 (Mo. 2011); *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000). Defendant may only restrict plaintiffs' speech, even when it is spoken in their professional capacity, if the restriction is narrowly tailored to achieve a compelling government purpose. *Kansas City Premier Apartments*, 344 S.W.3d at 168 ("A state, however, does not have unlimited power to directly restrict speech through the regulation of a profession....Instead, to the extent that specific provisions of a regulatory scheme directly restrict speech, those provisions must survive strict scrutiny."). HIMIA's restrictions do not pass this test.

[16] HIMIA also prohibits anyone without a Missouri Navigator license from providing the public with even basic information about the Exchange. §§ 376.2002.1, 2002.2. Defendant does not dispute that these provisions are a prior restraint, nor does he make any attempt to show that these provisions are narrowly tailored to achieve a compelling government interest.

D. Defendant concedes that HIMIA is overbroad.

Defendant does not dispute that HIMIA is overbroad, effectively conceding plaintiffs' argument on this point. As explained in plaintiffs' opening brief, HIMIA's expansive limitations reach protected speech including information sessions on Medicaid and presentations about health insurance. *See* Pls.' Sugg. at 19-20. HIMIA's broad reach chills protected speech and is therefore unconstitutional. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

E. HIMIA hampers free association without a compelling government reason.

Defendant asserts without analysis that HIMIA does not impinge on plaintiffs' right of free association. But, as explained in plaintiffs' opening brief, HIMIA forces non-Missouri licensed navigator plaintiffs to affiliate with and be supervised by a Missouri navigator entity to engage in any expression that is considered a "Navigator duty." Mo. Rev. Stat. § 376.2004.1(6); *see* Plfs.' Sugg. at 21-22. Because, with no compelling interest, HIMIA requires plaintiffs to associate with a navigator entity in order to engage in expressive activity, it violates their right to free association. *See Glickman v. Wileman Bros. & Elliott, Inc,* 521 U.S. 457, 473 (1997).

IV. PLAINTIFFS WILL SUFFFER IRREPRABLE HARM AND THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR THEM.

Defendant contends that plaintiffs cannot have suffered irreparable harm, noting that Missouri has already licensed several hundred navigators. Def.'s Sugg. at 25. Only 88 entities have been licensed, however, and the majority of these are providers and insurance agents who are exempt from HIMIA's licensing requirements.[17] Missouri Dep't of Ins., *Navigator's Licensing Requirements and Application, Navigator Entities* (2013).[18] Moreover, this licensing activity does not establish that plaintiffs have not suffered harm. Plaintiffs—including not only licensed-Missouri navigators St. Louis Effort for AIDS and Planned Parenthood, but also those

[18] *See* http://insurance.mo.gov/otherlicensees/navigators.php.

who are not and do not wish to be licensed as Missouri navigators—have provided unrebutted testimony that their speech is being chilled and they are being otherwise harmed as a result of the HIMIA provisions challenged here. *See* Ex. 1-8 to Pls.'s Sugg. (plaintiffs declarations); *see also Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Moreover, defendant's assertion that HIMIA does not subject plaintiffs to irreparable harm since, "[i]f the Director attempts to enforce the state law, Plaintiffs may challenge the decision," misses the point. Def.'s Sugg. at 26. The very threat of an enforcement action itself establishes irreparable harm. *See, e.g., Dombrowski v. Pfister,* 380 U.S. 479, 487 (1965); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2004) (when a statute threatens enforcement action and "only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm"). The harm is especially great when, as here, Plaintiffs' reputation and business goodwill are threatened. *See Kroupa v. Nielsen*, 731 F.3d 813, 820 (8th Cir. 2013).

Similarly, Defendant has made an unfounded claim that the public interest and balance of harms favor the state because a preliminary injunction "would potentially allow unqualified individuals and nefarious scam artists to go undetected." Def.'s Sugg. at 26. Plaintiffs agree that—given that open enrollment in the Exchange closes on March 31, 2014—time is of the essence to resolve the issues in this case. But Director Huff and the State Attorney General have numerous other consumer protection tools at their disposal—including the power to initiate compliance actions and levy fines and to prosecute perpetrators of fraud—to protect the public from inexpert advice and scheming scammers. *See* Mo. Rev. Stat. §§ 27.030, 27.060, 374.046-049. And as explained in detail in plaintiffs' opening brief, the balance of harms can never favor

the state when, as here, its laws conflict with federal law and violate the U.S. Constitution, nor can such laws be found to serve the public interest.

CONCLUSION

Based on the foregoing, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: January 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served upon the Defendant a complete and accurate copy of this Memorandum in Support for a Motion for Preliminary Injunction, by placing a copy in the United States Mail, this 6th day of January, 2014, sufficient postage affixed and addressed as follows:

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