IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

RICHARD P. CARO, *et al.* Plaintiff and Plaintiffs-Intervenors, v. HON. ROD BLAGOJEVICH, *et al.* Defendants, STATE OF ILLINOIS, Intervenor.	))))))))))))	Case No. 07 CH 34353 The Honorable James R. Epstein

HON. ROD R. BLAGOJEVICH, BARRY S. MARAM AND HFS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION CONCERNING THE FAMILYCARE PROGRAM

The above named Defendants hereby submit their Sur-Reply in Opposition to Plaintiffs' Motion for a Preliminary Injunction concerning the FamilyCare Program (the "FCP"):

I. Introduction.

An administrative rule or regulation enjoys a presumption of validity and Plaintiffs bear the burden to show that the rule is clearly arbitrary, unreasonable or capricious before it can be invalidated. Plaintiffs have not met their burden to overturn HFS' Emergency Rule promulgating the FCP expansion. Defendants have refuted each and every one of Plaintiffs' challenges to the Emergency Rule by statutory authority, case law and/or stipulated fact.

As a result, Plaintiffs have abandoned multiple arguments and improperly raised new ones in their Reply in order to concoct some basis to try to undermine HFS' proper exercise of its delegated authority. In the process, Plaintiffs' challenge has become a moving target. But, while Plaintiffs' claims may appear at first blush to have a ring of plausibility, upon closer examination they are legally, factually and analytically unsound. Plaintiffs' challenge is a dressed-up policy argument attacking the Governor's prior intent to establish universal healthcare in Illinois

Committee Exhibit 54

through his Illinois Covered plan. Illinois Covered, however, is not at issue in this lawsuit. The only issue is the presumptively valid Emergency Rule by which HFS preserved and expanded a pre-existing program under express statutory authority and with appropriated funding as it is entitled to do. As a result, Plaintiffs' request for a preliminary injunction should be denied.

II. Relevant Facts

In their Reply, Plaintiffs do not contest Defendants' statement of the relevant facts. Instead, Plaintiffs present a factual "redux" that mischaracterizes and misstates certain facts to create the false impression that the FCP was newly created out of whole cloth. The factual record, however, is stipulated to and cannot be controverted. The record establishes that the FCP is not a new program and eligibility for parents under it has been repeatedly expanded, without challenge, from 49% of the federal poverty limit ("FPL") to 185% of FPL. The record further establishes that Congress sought to expand coverage to parents at 400% of FPL, that the bi-partisan Joint Health Care Task Force (which Plaintiffs ignore) recommended the same 400% eligibility level, and that New York proposed the same 400% limit for coverage. All HFS is doing is expanding the current program as authorized by statute to meet the growing need for insurance coverage for families in harmony with Congress, the Task Force and other states.

First, Plaintiffs claim that "*each* of the prior expansions was within the limitations that the General Assembly *expressly* authorized in CHIPA . . . ." (Reply at 2, emphasis in original) The income levels identified in § 106/20(a)(2), however, apply to coverage only for children, while this case concerns coverage for their parents. The General Assembly in CHIPA never set or authorized a specific income level for parents. Instead, in § 106/40(c), the General Assembly established a <u>minimum</u> income level of 90% of FPL and HFS was authorized to set the level at the amount it determined to be appropriate above 90%. The fact that the income test in

§ 106/20(a)(2) does not apply to "eligibility" under the waiver program authorized by § 106/40(a) is clear since § 106/20(a)(2) requires a minimum household income of 133% of FPL while § 106/40(c) requires a minimum of only 90% of FPL.

Second, Plaintiffs dispute that § 5-2(2)(b) of the Public Aid Code gives HFS the authority to set a cap of 400% of FPL. (Reply at 2.) Plaintiffs, however, fail to address the express authority in § 5-2(2)(b) "to disregard[] the maximum earned income level permitted by federal law." 305 ILCS 5/5-2(2)(b). The statutory grant of authority is specific, clear and undeniable. The statute did not have to identify any potential income eligibility level as the authority to set the level was delegated to the agency.

Third, Plaintiffs claim that there was no emergency justifying the expansion of the FCP because benefits were being funded by Congressional continuing resolutions. (Reply at 3.) While it is literally true that on November 7, 2007, when the emergency rule was promulgated, the SCHIP program and waiver were being funded by continuing resolutions, the complete truth is that the continuing resolutions would only last to December 31, 2007 (Stip. ¶ 24) and President Bush had already vetoed reauthorization legislation a month earlier on October 3, 2007 (Stip. ¶ 29). The emergency rule was promulgated only days after Congress passed a second bill on November 1, 2007 to reauthorize and expand SCHIP, which the President also vetoed.

In addition, there is no basis in the record that the expansion will swallow the original program, as claimed by Plaintiffs. The FCP and its expansion only cover those who have been without health insurance for the 12 months prior, or lost their insurance when their job ended, or exhausted their health insurance and cannot obtain affordable insurance, which is defined as not exceeding 4% of their family's income. 89 Ill. Admin. Code 120.33. Moreover, those above 200% of FPL pay substantial premiums. Therefore, as the income eligibility rises, it is logical

that fewer families will be eligible as people with higher income will be less likely to qualify.

Plaintiffs try to draw a negative inference from the fact that HFS has transferred the FCP participants eligible for a federal match into Medicaid as if Defendants are trying to mask the expansion. The argument if false and a classic red herring. The FCP is not a Medicaid program mandated by the federal or State law. HFS has no need or requirement to be under Medicaid. HFS transferred the participants in to Medicaid in order to gain as much federal matching funds as possible. If HFS wanted to fully fund and pay 100% of all the program's costs, it could have done so by not enrolling participants in Medicaid.[1]

Finally, in their Redux, Plaintiffs continue their effort to transform this lawsuit into a referendum on Illinois Covered. It is of no import that the Governor proposed a budget for Illinois Covered that had spending for the FCP, among multiple other healthcare programs, and that the General Assembly never voted on it. The only issue before this Court is whether HFS had the authority and funding to continue to expand the FCP program as it has repeatedly done before and the answer is undeniably yes, it did.[2]

III. HFS Has the Authority to Charge Premiums.

Plaintiffs continue to claim that HFS has no authority to charge premiums to participants in the FCP. This claim is wrong.

A. HFS has the inherent authority to charge premiums.

Plaintiffs first assert that agencies may only exercise expressly delegated power and, because Medicaid does not expressly authorize premiums to be charged, it bars premiums for participants. (Reply at 4-5.) In their response, Defendants established that there is no

[1] It is ironic that Plaintiffs challenge HFS' use of Medicaid to get a 50% federal match when their primary complaint is that the State should not be spending money on healthcare. The inclusion of eligible FCP enrollees is a 50% monetary windfall and not a restriction or limitation on the program.

[2] To the extent that Plaintiffs' now try to argue that Defendants' Answer to ¶ 35 of the Complaint can be construed to address the FCP expansion, it is contrary to the Stipulated Facts, which control.

prohibition in Medicaid against charging premiums, which Plaintiffs do not deny, but contend that there must be an explicit authority to do so. Plaintiffs' claim cannot be sustained.

First, HFS specifically advised the federal government by the State Plan Amendment that it is charging premiums under Medicaid. (Stip. Ex. 25, Bates No. STIP 1941) Of note, the amendment form contains a separate line requiring the disclosure of whether premiums are being charged, the amounts, and the income levels to which they apply. (*Id.*) If premiums were not allowed under Medicaid as Plaintiffs contend, the federal government would not allow the State to charge them and certainly would not have a form providing for their disclosure.

Moreover, HFS does not need explicit authority to charge premiums, as it is similarly well-established under Illinois law that agencies may also exercise powers that are implied by and incidental to expressly delegated authority. *Dep't of Public Aid v. Brazziel*, 61 Ill. App. 3d 168 (1st Dist. 1978).[3] In *Brazziel*, the Appellate Court upheld a rule promulgated by the Illinois Civil Service Commission. The court explained that, even though there was no express authority authorizing the rule, an agency also has authority that is "found, by fair implication and intendment, to be incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created." *Id.* at 172.

Here, HFS has the same such implied authority to charge premiums as matters incident to the provision of medical assistance. Furthermore, Section 5/12-13 of the Public Aid Code, upon which HFS also relied for the Emergency Rule, mandates that HFS "shall make all rules and regulations and take such action as may be necessary or desirable for carrying out the provisions of this Code, to the end that its spirit and purpose may be achieved and the public aid programs

[3] Plaintiffs cite *Abatron v. Department of Labor*, 162 Ill. App. 3d 697, 700 (2d Dist. 1987), for the proposition that agencies may only exercise expressly delegated power, but even *Abatron* recognizes that agencies may also exercise powers that are implied by and incidental to expressly delegated authority.

administered efficiently throughout the State." 305 ILCS 5/12-13. HFS has determined that premiums are necessary and/or desirable for carrying out the provisions of the FCP.[4]

In *MacNeil v. Chicago Park District*, 401 Ill. 556 (1948), the Illinois Supreme Court held that the park district could charge fees based on services it provides, even though such fees were not specifically authorized by statute. *Id.* at 563-64. The Supreme Court found that the park district's "power to establish and maintain rules and regulations must . . . carry with it the power to establish fees for a special use of park facilities. We know of no case which holds that a particular act complained of, such as the assessment of harbor fees in this case, must be supported specifically in exact words in a statute." *Id.* at 564. The Illinois Supreme Court thus has recognized that a specific statutory authorization is not required for every fee charged by an agency.

Further, if the General Assembly wanted to prohibit the charging of premiums under § 5-2(2)(b), it could have done so. For example, in § 5/5-2(8)(b)(iii), the General Assembly prohibited the charging of premiums to a narrow category of recipients of public assistance. Although § 5-2(8) does not apply here, it demonstrates that if the General Assembly wanted a similar prohibition against premiums in § 5-2(2), it could have imposed it. By not doing so, in light of its express prohibition in § 5-2(8), it is implied that the legislature intentionally did not want to include it. "Where a particular provision appears in legislation, the failure to include that same provision in another section of the legislation will not be deemed to have been inadvertent, but rather intended by the drafters." *Nolan v. Hillard*, 309 Ill. App. 3d 129, 144 (1st Dist. 1999). It is improper for the Plaintiffs to imply a prohibition against premiums when the General Assembly did not include it.

[4] Again, it is ironic that Plaintiffs, while premising their lawsuit on the basis that HFS should not spend funds on healthcare, now seek to stop the program on the basis that HFS collects premiums from the higher income earners to offset the costs of the program.

B. Charging premiums does not violate Article IX, Section 1 of the Illinois Constitution.

Plaintiffs further claim that the premiums charged for the FCP raise revenue in violation of Article IX, Section 1 of the Illinois Constitution. (Reply at 4-6.) In the face of Defendants' authority that premiums are permissible fees and not taxes barred by Article IX, Section 1, Plaintiffs, without authority, merely argue that the revenue article does not distinguish between taxes and fees. (*Id.* at 6.)

While Article IX, Section 1 does not itself define revenue or distinguish between taxes and fees, Courts have done so subsequently. In *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471, 475 (3d Dist. 2005), a tax is distinguished from a fee in that a tax is "assessed to provide general revenue," whereas a fee does not. A fee, therefore, by definition, does not raise revenue in violation of Article IX, Section 1. While Plaintiffs attempt to distinguish the *Church of Peace* decision, they fail because they do not challenge the fee versus tax analysis.

III. The FCP expansion is authorized by law.

By its express language, § 5-2(2)(b) authorizes HFS to "disregard[] the maximum earned income level permitted by federal law." That authority is the current law of Illinois and Plaintiffs have not met their burden to overcome it.

A. HFS does not rely on § 40(c) for the FCP expansion.

As an initial matter, Plaintiffs continue to misunderstand the interplay between CHIPA and the FCP expansion. Plaintiffs now claim that HFS is relying on CHIPA to support the expansion. (Reply at 6-7, citing Defendants' Response at 3, 5.) Defendants make no such claim. In fact, in their Response, Defendants acknowledge that when Congress reauthorized SCHIP on December 19, 2007, without additional funding and without the waiver, "the authority under § 40(c) expired." Plaintiffs' entire argument in Section II (A) is irrelevant.

In making their argument, however, Plaintiffs make an important concession as they admit that parents are "subject to income levels set by rule." (Reply at 7.) If the legislature had set or specified the eligibility limits, there would be no need to set a rule. Further, Plaintiffs' continue to misunderstand and misapply CHIPA and the waiver program by claiming HFS can only set the eligibility limits within the ranges for children. CHIPA only covered children and did not cover parents. The Illinois statute limits the eligibility of children in the basic CHIPA program to those with household incomes no less than 133% and no more than 200% (which is what Plaintiffs' continually cite) of FPL. Subsequently, through a waiver program that the State called FamilyCare, parents were able to receive coverage. The General Assembly mandated that HFS enter into the waiver program and set a separate and different income eligibility limit for the parents being covered with children (the families) than for the children being covered alone. In the original Section 40(c), the General Assembly directed HFS to set the eligibility for parents at no more than 65% of the FPL (215 ILCS 106/40(c)) and HFS set the income level at 49% of FPL. (Stip. ¶ 19(a).) Later, the General Assembly amended § 40(c) to require a minimum level of 90% of FPL while still allowing HFS to establish the income eligibility level. (215 ILCS 106/40(c)). Given the General Assembly's setting a minimum income eligibility level for families lower than the minimum CHIPA level for children (133% of FPL), Plaintiffs cannot legitimately claim that HFS' authority to set the eligibility limits for FCP is constrained to the eligibility limits for children.

Further, Section 40(c), although expired, remains important to demonstrate that what HFS is doing under Section 5-2(2)(b) is exactly what it was authorized to do and did under 40(c). Section 40(c), like § 5-2(2)(b), gave HFS the authority to set the income level at its discretion. HFS repeatedly exercised its authority under § 40(c) by expanding the FCP, without objection or

challenge. That is all HFS is doing now, but under its authority under § 5-2(2)(b). The Court should not interpret HFS' authority under 5-2(2)(b) any differently than under § 40(c).

B. Medicaid does not limit the Expansion.

Defendants' position is quite simple. Section 5-2(2)(b) allows HFS to disregard the maximum earned income level permitted by federal law when providing medical assistance. The only requirement associated with Medicaid is that the provision of such medical assistance incorporates all the TANF requirements, which the FCP does.

Plaintiffs, faced with the plain language of the FCP, have made their argument into a moving target. Initially, Plaintiffs claimed that § 5-2(2)(b) cannot be used as authority for the FCP expansion because it "was designed for a very different purpose" and was not intended to cover persons of "substantial wealth." (Brief at 7-8.) Plaintiffs' argument, made without any authority and based solely on the legislative history, was in fact just an advocation for a policy change, which is not within their or the Court's role. *Schultz v. Lakewood Electric Corp.*, 362 Ill. App. 3d 716, 722, 841 N.E.2d 37, 45 (1st Dist. 2005).

In any event, Defendants refuted this policy argument in their Response by demonstrating that the language codified in § 5-2(2)(b) does not conflict with the purposes of Medicaid to encourage people to work and that the statutory authority has remained in force since 1986, even though § 5-2 was amended on three separate occasions. (Response at 5-6.) Defendants established that: the FCP is limited to those individuals who demonstrate that they have been without insurance for 12 months; the recipients must meet the identified TANF requirements; the 400% figure was recommended by the bipartisan Task Force, other states, like New York, have proposed expansions up to 400% of FPL; and participation in the program requires payment of substantial premiums, which persons of means who had other sources of coverage would avoid.

(Response at 7-8.) Plaintiffs did not address any of Defendants' arguments in their Reply.

Instead, Plaintiffs improperly raise a new argument in their Reply that § 5-2(2)(b) cannot be used to set the income eligibility level at anywhere from 200-400% because TANF income limits "were always below 100% of the FPL." (Reply at 8.) No authority is given for this claim. Regardless, it does not comport with Plaintiffs' argument. Under this new theory, if HFS was obligated to limit its authority to 100% of FPL (despite the express delegation of authority to it in 5-2(2)(b)), then the income eligibility level could never be set at any level above 100%, including the 185% level, which Plaintiffs do not challenge.

Plaintiffs then go on to claim also for the first time that Section 5-2(2)(b) "is just part of a set of programs which reflect a considered structure of medical assistance to the exclusion of the program advanced by Defendants." (Reply at 8.) Again, no authority is given for this claim and it is contrary to the explicit language of the statute. Section 5-2(2)(b), which is not a program, but a grant of authority, was added in 1986, almost 20 years after § 5-2 was passed. And, by the express language of the statute, the General Assembly authorized HFS to disregard the income levels of TANF. The income levels cannot then be subject to TANF, as Plaintiffs claim, because to impose such a limitation, would improperly render the statute meaningless when it must be construed to give it effect.

Tellingly, Plaintiffs abandon a number of their original claims. Plaintiffs initially claimed that the emergency rule does not incorporate all Article IV (TANF) requirements. (Brief at 9.) Defendants refuted each and every one of Plaintiffs' claims and there is no mention of that issue in their Reply. In addition, Plaintiffs abandoned their claim that the delegation of authority under § 5-2(2)(b) is unconstitutional because it supposedly gives HFS "*carte blanch*" authority. (Brief at 8-9.) In the Response, Defendants established that the grant of authority by § 5-2(2)(b) is constitutional under *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 372 (1977). Plaintiffs

Plaintiffs ignore this issue in their Reply.

Finally, Plaintiffs continue to argue that HFS cannot avail itself of § 5-2(2)(b) because there was supposedly no coverage plan submitted to the Governor for approval. Section 5-2(2) provides that "Medical assistance under this Article shall be available to any of the following classes of persons in respect to whom a plan for coverage has been submitted to the Governor by the Illinois Department and approved by him." Stipulated Fact ¶ 38 establishes that this requirement was satisfied as it provides that "The Governor approved the FamilyCare program expansion submitted in the Emergency Rule." Defendants argued in their Response that the Governor necessarily approved the coverage plan as it is one and the same with the Emergency Rule. Plaintiffs now argue that there is no support for Defendants' proposition. (Reply at 9.)

Plaintiffs' argument is based on a distinction without a difference. There is no coverage plan other than the emergency rule. The emergency rule is the plan and by approving it, the Governor approved the coverage plan. Even, assuming *arguendo*, that they were different, it would not matter because all that is relevant is that the Governor approved the plan being put in place. That is all that is at issue.

IV. There are appropriations for the FCP expansion in the Illinois 2008 Budget.

In their Response, Defendants established that the Illinois 2008 fiscal year Budget contains appropriations for the FCP, including any expansion. (Response 9-10.) It is undisputed that under the Budget, HFS has the authority to spend almost $ 7 billion for medical services including those applying to the FCP. (*Id.*) In addition, in their Reply Plaintiffs fail to rebut Defendants' argument that there is no law requiring a separate line item appropriation for a program to exist. Otherwise, there would have to be line item appropriations for all programs and prior FCP expansions, such as the State's 35% share under CHIPA. No such appropriations, however, exist confirming that a specific line item is not required.

In response to Defendants' refutation of their claims, Plaintiffs improperly raise a new argument in their Reply to challenge the funding for the FCP. Plaintiffs, while conceding that there are appropriations that can be used to fund the FCP, now claim that Article VIII, Section 1(b) of the Constitution has been violated because there is supposedly no authorization in "substantive law" for the FCP as there must be before appropriations bills can fund existing programs. (Reply at 10.) There is no such violation here. Programs require both enabling legislation and appropriations. HFS has both for the FCP expansion. The enabling legislation is § 5-2(2)(b) that allows HFS to provide medical assistance. The appropriations for the program are set forth in the Stipulated Facts, ¶ 56-61. Unlike *Granberg v. Didrickson*, 279 Ill. App. 3d 886 (1st Dist. 1996), cited by Plaintiffs, the appropriations funding the FCP are not amending, contradicting, or expanding § 5-2(2)(b) in any way. They only fund it, which is appropriate.

Next, Plaintiffs claim that the appropriations identified to support the FCP are allegedly improper because "no separate amendment to the Appropriations Act was adopted with a legislative discussion or designation relating to funding the expansion of the FamilyCare program." (Reply at 10-11). In support of this claim, Plaintiffs make a series of contentions that are misguided and wrong.

First, Plaintiffs claim that the Governor proclaimed that the FCP expansion would be funded in a separate appropriation by an identifiable line item, but that bill was never passed. (*Id.* at 11.) The authority Plaintiffs rely upon, however, references the Governor's Illinois Covered proposal that was to cost $358 million and not the FCP expansion. (Stip Ex. 59, Bates # 3285.) The FCP was just a part of the Illinois Covered initiative and it is disingenuous for Plaintiffs to continue to try to lump the FCP expansion with Illinois Covered, as if they were one in the same, when they are not. What the Governor may have intended *vis a vis* Illinois Covered

has nothing to do with the appropriations at HFS' discretion to be used to fund FCP.

Second, Plaintiffs, claim that HFS claimed that the appropriations it received would be used for program maintenance and not program expansion. (*See* Stip. Ex. 11, Bates # 356-7.) This claim is false. The budget forecast Plaintiffs rely upon identifies funds of money (sources of revenue) available for medical care and not allocations to specific programs; for example, the General Revenue Fund and Tobacco Settlement Recovery Fund are identified. (*Id.*) The Family Care Fund identified is not the same as the FCP; it just identifies a funding source that has nothing to do with where the funds are applied. The identity of the funds has no bearing on the expansion. All General Revenue Fund appropriations to HFS for medical care are made as to purposes such as "physicians," "appliances" and "transportation," not as to programs. (Stip. Ex. 29, Article 280, § 10.) Moreover, there is no credence to the implication that the expansion is not included in the funds forecasted because the column "Population Served Expansion" is blank. *Id.* That column is blank for every fund identified.

Finally, Plaintiffs' retreat from their reliance on the decision in *Cook County v. Ogilvie*, 50 Ill. 2d 379 (1972), as standing for the proposition that the transfer provision that allows HFS to move funds from one purpose to another (*e.g.* transportation to physicians' services) is unconstitutional. (Brief at 11.) Defendants established that the *Ogilvie* decision is inapplicable because it is based on Article IV, § 17 of the 1870 Illinois Constitution, which was abandoned in the 1970 Illinois Constitution, and the provision here authorizes transfers between purposes, not programs. In their Reply, Plaintiffs just cite the decision on the basis that the separation of powers was preserved in the 1970 Constitution. Defendants do not dispute that as they rely on the same separation of powers as the basis to invalidate JCAR's attempted suspension of the Emergency Rule, but it has no bearing on the legitimacy of HFS' transfer of funds authority.

V. Defendants Repudiation of JCAR is not unlawful.

Plaintiffs claim that no emergency was present to support the promulgation of the Emergency Rule. Plaintiffs base their claim totally on unsupported attorney conjecture and JCAR's determination that no emergency existed. It is neither Plaintiffs' nor JCAR's role, however, to determine whether an emergency existed; that authority rests solely with HFS. As Defendants established in their Response (p. 11), under § 5-45 the authority to determine whether an emergency exists has been delegated exclusively to the agency. Because this authority was delegated to HFS, a committee of the legislature cannot constitutionally reject the agency's determination. In accordance with § 5-45, HFS found that an emergency existed and filed the necessary statement explaining the specific reasons for its finding. (Stip. ¶¶ 34-8.) While the Court can determine of the agency's determination is correct, JCAR's opinion to the contrary, which is all Plaintiffs cite, is not evidence that no emergency existed. Plaintiffs have not met their burden to overcome the agency's determination that an emergency existed.

Moreover, Plaintiffs now reveal that their challenge to the Emergency Rule on the basis of whether or not an emergency existed is another red herring argument. In their Reply, Plaintiffs for the first time acknowledge that they "have challenged not just the emergency rule, but the permanent rule and Defendants' conduct as commensurate with a rule. . ." (Reply at 12.) Plaintiffs are challenging the FCP expansion regardless of whether or not it is done temporarily as an emergency or permanently. The issue of the legitimacy of the HFS' claimed emergency thus does not bear upon the outcome of this lawsuit.

Despite Plaintiffs' claim, Defendants did nothing wrong by following their belief that JCAR's attempted suspension was an unconstitutional legislative veto. Following the Supreme Court decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (App.

Ex. A), the decisions of the 9 states that follow *Chadha* and strike down JCAR type committees, and the determination by former Governor James Thompson, a blue ribbon commission, the Bureau of the Budget, and a prior Attorney General opinion, Defendants had and have a good faith belief in the merits of their position. Defendants took an oath to obey the Illinois Constitution. There is no requirement that Defendants had to file a declaratory judgment lawsuit before taking action and Plaintiffs do not cite any. If the General Assembly believes that JCAR's legislative veto is constitutional, it could have brought its own declaratory judgment action in the face of HFS' open and public refusal to recognize the purported JCAR suspension. No member of the General Assembly has chosen to make such a challenge.

Finally, Plaintiffs claim that JCAR's actions were not a veto. (Reply at 14.) In support of their position, Plaintiffs claim that the General Assembly can undo anything that JCAR does by resolution. (*Id.*) Plaintiffs' reliance on a joint resolution as a cure-all is misplaced as it does not cure the separation of powers violations by the General Assembly's failure to adhere to the enactment and presentment clauses. When the General Assembly acts by joint resolution to suspend or prohibit a proposed rule, it is not making law as specified in article IV since a joint resolution does not have the force of law like an enacted bill. *Burritt v. Comm'rs of State Contracts*, 120 Ill. 322 (1887). This argument, if valid, would allow the General Assembly to amend statutes delegating rule making authority without passing a bill subject to veto by the Governor, as required by the Constitution.

IV. Conclusion.

Plaintiffs' Motion for Preliminary Injunction should be denied because their claims are without merit. As a matter of law, Plaintiffs cannot meet the burden of proof required for injunctive relief as they are not likely to succeed on the merits.

Respectfully submitted,

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