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COMMENT

Navigating the Health Insurance Exchanges: Will State Regulations Guide Consumers or Chart Them Off-Course?

KIRSTEN DUNHAM*

INTRODUCTION

One of the goals of the Patient Protection and Affordable Care Act (“ACA”) is to increase access to quality affordable health care.¹ One significant building block of universal coverage is the health insurance exchange or marketplace, which is meant to create a large pool of enrollees who share the risk and make health insurance more affordable than the individual market, state high risk pools, or paying 100% of premiums under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) after leaving or losing employment. Because a large pool is necessary, high enrollment in the health plans on the exchanges is crucial. The ACA required exchanges to establish a navigator program to provide information and assistance to consumers. This was not so different from the programs developed to assist Medicare recipients in reviewing, evaluating, and enrolling in prescription drug plans.²

The political battles over the ACA’s passage and implementation have been constant and have not excluded the exchanges and navigator programs. As the federal government moved towards full implementation in January 2014 and the Supreme Court upheld the constitutionality of the ACA’s mandate, some states began planning for a state-based exchange while other states opted for the federally-facilitated exchange. Many states that showed no interest in passing legislation to establish a state exchange were willing to pass state licensure requirements for navigators operating in the federal exchanges. Although such legislation is introduced in the name of consumer protection, ACA supporters view the laws as one more attempt to block the successful implementation of health reform.

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1. See *infra* Part I.A.2.

2. Jon Perr, *What’s the Difference Between a Medicare Navigator and an Obamacare Navigator?*, DAILY KOS (Jan. 19, 2014, 4:30PM), <http://www.dailykos.com/story/2014/01/19/1270318/-What-s-the-difference-between-a-Medicare-navigator-and-an-Obamacare-navigator#>.

Missouri has been an active state in response to the ACA since the moment President Barack Obama signed it into law. State citizens have twice passed ballot measures limiting implementation of the ACA, and the Missouri legislature has passed a state navigator licensing law.

This Comment examines the navigator program in the ACA and the political and legal issues surrounding state navigator licensure laws. To provide context, Part I outlines the legislative and legal background of the ACA at the federal level and in Missouri. Going into more detail on the navigator program, Part II first examines the federal regulations as they relate to the requirements of exchanges, the types and functions of consumer assistance programs, and the role of insurance agents and brokers. Part II then analyzes Missouri's state navigator licensure law and regulation.

To help the reader get a picture of the interested stakeholders and their positions, Part III looks at the participation and interests of insurance agents, state lawmakers, and consumer advocates in supporting or halting the state navigator licensure laws. Part IV analyzes similar licensure laws in other states, providing a sense of the trends and commonalities in states that oppose the ACA. Part V questions the legality of some of these state laws by reviewing several lawsuits and analyzing what the Eighth Circuit Court of Appeals might consider in the appeal of a lawsuit enjoining the Missouri law. Finally, this Comment looks at the on-going efforts in Missouri to impose additional state requirements on navigators and makes recommendations to protect consumers without interfering with the navigators' duties under the ACA.

This Comment concludes that rather than passing legislation that is legally questionable, duplicative of federal navigator certification requirements, and protective of certain interest groups, states with federal exchanges should either accept the federal navigator regulations as adequate or establish reasonable licensure requirements that supplement rather than duplicate federal certification and that do not prevent the implementation of the ACA.

PART I: ACA LEGISLATIVE AND LEGAL BACKGROUND

A. Federal Level – The Affordable Care Act

1. Patient Protection and the Affordable Care Act: General Background

The ACA was enacted on March 23, 2010.³ After multiple attempts over the course of several generations to craft national health reform legislation, Congress finally passed sweeping legislation that addressed health care access, quality, and cost.⁴ The goals of the federal law include quality, af-

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

4. *Id.*

fordable health care,⁵ expansion of public health programs,⁶ increasing the efficiency of health care delivery,⁷ improving public health,⁸ building the health care workforce,⁹ transparency and disclosure requirements for physicians and nursing homes,¹⁰ “improving access to medical therapies,”¹¹ and creating a public long-term care insurance program.¹²

Several states, along with the National Federation of Independent Businesses, challenged the constitutionality of the individual mandate in the ACA.¹³ The Supreme Court held that Congress did not have power under the Commerce Clause or the Necessary and Proper Clause to force people to engage in an activity by regulating “inactivity,”¹⁴ but the individual mandate is constitutional as a tax on individuals who do not purchase health insurance.¹⁵ The Court held that the fine was a tax and not a penalty because the fine was low, there was no scienter requirement, and the fine was collected by the IRS.¹⁶

2. Health Insurance Exchanges: ACA’s Goal to Increase Access for the Uninsured

One means used to increase access to quality, affordable health care was to establish health benefit exchanges, or marketplaces, that offer “qualified

5. Patient Protection and Affordable Care Act tit. I (including sections on individual and group market reforms, guaranteed issue and renewability, essential health benefit requirements, health benefit exchanges, premium tax credits, and cost sharing reductions).

6. Patient Protection and Affordable Care Act tit. II (including Medicaid expansion, additional federal funding for Children’s Health Insurance Program, and new options for Medicaid long term services and supports).

7. Patient Protection and Affordable Care Act tit. III (including outcome-based Medicare payments, new patient care models, Medicare innovation, and improving health care quality).

8. Patient Protection and Affordable Care Act tit. IV (including disease prevention, Medicare coverage of preventive services, health aging, nutrition, and support for healthier communities).

9. Patient Protection and Affordable Care Act tit. V (including funding to develop a health care workforce, federal student loans, education and training, and increasing available primary care).

10. Patient Protection and Affordable Care Act tit. VI.

11. Patient Protection and Affordable Care Act tit. VII.

12. Patient Protection and Affordable Care Act tit. VIII (establishing the Community Living Attendant Services and Supports (“CLASS”) Act). The CLASS Act was repealed as a part of the 2012 New Year’s Eve budget deal reached to avoid the “fiscal cliff.” American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642, 126 Stat. 2313, (2013).

13. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

14. *Id.* at 2572-73.

15. *Id.* at 2594-2600.

16. *Id.* at 2595-96.

health plans,” which uninsured individuals can choose based on information concerning quality and price.¹⁷ Consumers choose a bronze, silver, gold, or platinum plan based on the amount of coverage they need and how much cost-sharing they are willing to assume.¹⁸ Participants in the exchange may also be eligible for premium assistance tax credits,¹⁹ cost-sharing reduction,²⁰ or public programs like Medicaid.²¹ The exchanges must provide information to enrollees about these programs and screen applicants for eligibility.²²

The ACA gave states flexibility to implement and operate state health insurance exchanges that “facilitate[] the purchase of qualified health plans.”²³ The law directed the Secretary of Health and Human Services (“HHS”) to establish a federally-facilitated exchange (“federal exchange”) in the event that a state elected not to establish an exchange, the state exchange would not be operational by January 2014, or the state’s proposal did not meet the requirements of the ACA.²⁴ In establishing the guidelines for the federal exchange, HHS designed another option, the “State Partnership Exchange,” which provides states the ability to give input on the federal exchange and play a role in the areas of in-person assistance, plan management, and outreach.²⁵ This hybrid model provides a bridge for states that were working towards establishing a state exchange, or a permanent system for states that want to maintain some involvement without assuming the full responsibility of the exchange.²⁶

3. Navigators: ACA’s Goal to Provide Consumer Assistance

Consumers must make several decisions regarding health insurance based on factors such as their health care needs, income, and tolerance for risk. In addition, consumers may qualify for the various assistance programs available under the ACA.²⁷ Selecting a qualified health plan that meets an individual’s or family’s needs is a complex decision that requires some amount of knowledge about health care and finances. Low health literacy decreases an individual’s capacity to understand and process information

17. 42 U.S.C. § 18031(a)-(e) (2012 & Supp. 2013).

18. 42 U.S.C. § 18022(d) (2012 & Supp. 2013).

19. 26 U.S.C. § 36B (2012 & Supp. 2013).

20. 42 U.S.C. § 18071 (2012 & Supp. 2013).

21. 42 U.S.C. §§ 1396 to 1396w-1 (2012 & Supp. 2013).

22. § 18031(d)(4)(F)-(G).

23. § 18031.

24. 42 U.S.C. § 18041 (2012 & Supp. 2013).

25. U.S. HHS, *Guidance on the State Partnership Exchange*, CENTERS MEDICARE & MEDICAID SERVS. 3 (Jan. 3, 2013), <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/partnership-guidance-01-03-2013.pdf>.

26. *Id.* at 1.

27. See 26 U.S.C. § 36B (2012 & Supp. 2013), for information on premium assistance tax credits; see also 42 U.S.C. § 18071 (2012 & Supp. 2013), for information on reduction in cost-sharing for qualified enrollees.

about health care and services.²⁸ Therefore, the ACA requires exchanges, whether state-run or federal, to establish navigator programs in which an entity designated as a navigator will conduct public awareness activities, provide information about the health plans and the premium assistance and cost reduction programs, “facilitate enrollment in qualified health plans,” and make referrals to any state agency for grievances.²⁹ The law prohibits a health insurance issuer from being a navigator and disqualifies anyone who receives any direct or indirect payment in connection with signing up new members.³⁰

Navigators must be entities that have connections with the community.³¹ The navigator does not have to be an agent or broker, but individuals can enroll in a qualified health plan using a broker.³² During the Congressional battle over the ACA, groups like the National Association of Health Underwriters, an organization that represents insurance agents and brokers, questioned the need for a navigator program, pointing to the role that their members already play.³³ On one lobby day at Capitol Hill, over 1,000 independent insurance agents delivered a message that brokers wanted to maintain their role in assisting consumers in finding and purchasing health insurance despite any health reform.³⁴ They warned of unintended consequences if brokers, who are the “experts,” were replaced or duplicated by navigators.³⁵ Language was added to the bill to allow agents and brokers to become navigators.³⁶

In September 2010, the U.S. Department of Health and Human Services began awarding federal funding for implementation activities in the states,

28. See, e.g., Silvia Helena Barcellos, et al., *Preparedness of Americans for the Affordable Care Act*, 111 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 5497 (Mar. 24, 2014), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3992693/> (“Overall knowledge about health reform and health insurance was low This lack of knowledge is even more acute among those at the bottom of the income distribution and among those currently uninsured.”); Mark Kutner, et al., *Health Literacy of America’s Adult*, NAT’L CENTER FOR EDUC. STATS. (Sept. 2006), <http://nces.ed.gov/pubs2006/2006483.pdf> (“Adults who received Medicare or Medicaid and adults who had no health insurance coverage had lower average health literacy than adults who were covered by other types of health insurance.”).

29. 42 U.S.C. § 18031(i) (2012 & Supp. 2013).

30. § 18031(i)(4).

31. § 18031(i).

32. 42 U.S.C. § 18032(e) (2012 & Supp. 2013).

33. Nicholas Kusnetz, *Obamacare’s Hidden Battle: Insurance Agents Push State Regulation of Guides to New Marketplaces*, CENTER FOR PUB. INTEGRITY (Aug. 9, 2013), <http://www.publicintegrity.org/2013/08/09/13144/obamacares-hidden-battle-insurance-agents-push-state-regulation-guides-new>.

34. Arthur Postal, *Agents Storm Capitol Hill To Defend Key Role in Health Insurance Distribution*, NAT’L UNDERWRITER PROP. & CASUALTY (July 20, 2009), <http://www.propertycasualty360.com/2009/07/20/agents-storm-capitol-hill-to-defend-key-role-in-health-insurance-distribution>.

35. *Id.*

36. *Id.*; see also Kusnetz, *supra* note 33.

including grants to design and establish the health insurance exchanges.³⁷ Proposed rules for the navigators were published in April 2013, and the final rules were issued on July 12, 2013.³⁸ By this point, thirty-three states had decided to use the federal exchange,³⁹ and nineteen states had passed legislation or were debating legislation to regulate navigators in the federal exchanges.⁴⁰

B. Missouri's Response to the ACA

1. 2010: Saying "NO" to the Individual Mandate

In Missouri, the ACA has been a political platform for fights between the state executive and legislative branches as well as between the state and federal government, with the voters of Missouri weighing in at different points. In May 2010, following the signing of the ACA into law in March of that year, the Missouri General Assembly passed HB 1764, which stated that "[n]o law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system" and sent a referendum to the voters on the question of the individual mandate.⁴¹ In the August 2010 election, Proposition C asked voters whether the Missouri statutes should be amended to "deny the government authority to penalize citizens for refusing to purchase private health insurance or infringe upon the right to offer or accept direct payment for lawful health care services."⁴² The statutory change was a compromise of sorts, as one Senate Joint Resolution, SJR 25 (Cunningham), would have put the anti-ACA measure in the state constitution.⁴³ Proposition C passed with 71% of the votes.⁴⁴ Although the constitutionality of the measure was doubtful, the results provided momentum for

37. Office of Consumer Information and Insurance Oversight, *State Planning and Establishment Grants for the Affordable Care Act's Exchanges*, U.S. DEP'T HEALTH AND HUMAN SERVS. (July 29, 2010), http://www.cms.gov/CCIIO/Resources/Funding-opportunities/Downloads/exchange_planning_grant_foa.pdf.

38. Timothy Jost, *Implementing Health Reform: The Final Navigator Rule*, HEALTH AFF. BLOG (July 13, 2013), <http://healthaffairs.org/blog/2013/07/13/implementing-health-reform-the-final-navigator-rule/>.

39. *Id.*

40. Katie Keith, Kevin Lucia, & Christine Monahan, *Will New Laws in States with Federally Run Health Insurance Marketplaces Hinder Outreach?*, COMMONWEALTH FUND BLOG (July 1, 2013), <http://www.commonwealthfund.org/publications/blog/2013/jul/will-state-laws-hinder-federal-marketplaces-outreach>.

41. H.R. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

42. *2010 Ballot Measures*, MO. SEC'Y OF STATE, www.sos.mo.gov/elections/2010ballot/ (last visited Dec. 21, 2014).

43. S. Res. 25, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

44. *Election Night Reporting*, MO. SEC'Y OF STATE, www.sos.mo.gov/Enrweb/allresults.asp?arc=1&eid=283 (last visited Dec. 21, 2014).

organizing opposition to the ACA.⁴⁵ Members of the Missouri General Assembly viewed the results of the August 2010 election as advancing state efforts to limit the federal government and oppose the ACA in other states.⁴⁶

Depending on one's perspective, the passage of Proposition C presented a greater opportunity for politicians to prove either their credentials as defenders of limited government and pro-individual liberty, or their notoriety as self-serving candidates politicizing what is seen as a life and death issue for many Missourians. Lieutenant Governor Peter Kinder took Attorney General Chris Koster to task for not defending the "Missouri Health Care Freedom Act."⁴⁷ Lt. Gov. Kinder filed a lawsuit in his personal capacity, alleging that the ACA violated the Commerce Clause and Fourteenth Amendment.⁴⁸ However, the Eighth Circuit affirmed the lower court's dismissal of the suit for lack of standing because there was no alleged injury.⁴⁹

2. 2011: Just Say "NO" to Planning

Tensions also existed between the branches of government and political parties as the state executive departments began to work on ACA implementation. HB 609, introduced in the 2011 Missouri legislative session, would have set up a state health insurance exchange.⁵⁰ The bill passed the House but not the Senate.⁵¹ Although the legislature did not establish a state exchange, the state received a \$1 million federal planning grant to develop the

45. Tony Messenger, *Prop C Passes Overwhelmingly*, ST. LOUIS POST DISPATCH (Aug. 4, 2010), http://www.stltoday.com/news/local/govt-and-politics/article_c847dc7c-564c-5c70-8d90-dfd25ae6de56.html.

46. *Id.* Senator Jim Lembke said after the election, "This is going to propel the issue and several other issues about the proper role of the federal government." *Id.* Senator Jane Cunningham described the initiative as being "like a domino, and Missouri is the first one to fall," adding, "Missouri's vote will greatly influence the debate in the other states." *Id.*

47. Letter from Peter Kinder, Mo. Lieutenant Governor, to Chris Koster, Mo. Att'y Gen. (Feb. 3, 2011), available at <http://ltgov.mo.gov/press/02031lettertoAG.pdf>; see also *Attorney General Koster Files Amicus Brief in U.S. Supreme Court Case on Affordable Care Act*, MO. ATT'Y GEN. (Feb. 14, 2012), http://ago.mo.gov/newsreleases/2012/AG_Koster_Files_Amicus_Briefs_On_Affordable_Care_Act/; *Statement from Lt. Governor Kinder on Attorney General Koster Filing Amicus Brief in Florida Case*, LIEUTENANT GOVERNOR (Apr. 11, 2011), <http://ltgov.mo.gov/press/04111amicus.htm>.

48. *Kinder v. Geithner*, 695 F.3d 772, 775 (8th Cir. 2012).

49. *Id.* at 778.

50. H.R. 609, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The last action was on May 9, 2011. *Activity History for HB 609*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/BillActions.aspx?bill=HB609&year=2011&code=R> (last visited Dec. 21, 2014).

51. *Activity History for HB 609*, *supra* 50.

health insurance exchanges and began forming work groups.⁵² Questions that needed to be answered as a part of the planning process included whether Missouri would design its own exchange, how the exchange would be designed to interact with the Medicaid and the Children's Health Insurance Program, how Medicaid would be expanded (prior to the *NFIB v. Sebelius* decision), and who would enroll participants in the exchange.⁵³ Planning was halted, however, by opposition from the Missouri General Assembly.⁵⁴ In September 2011, certain state senators learned of a meeting at which a state board planned to award some of the federal exchange planning grant to consultants in order to begin working on the technical pieces of an insurance exchange. The senators accused the Nixon administration of implementing an exchange without approval from the General Assembly.⁵⁵ Action implementing the federal planning grant did not move forward, and the distrust set the stage for the 2012 legislative session.⁵⁶

3. 2012: Just Say "NO" to State Involvement in the Exchange

In 2012, the Missouri General Assembly again failed to establish a state-based exchange⁵⁷ but put another ballot proposition to the voters.⁵⁸ SB 464 prohibited the executive branch from implementing a health insurance exchange unless there was a vote of the people or an act of the legislature.⁵⁹ The question put to the voters was, "Shall Missouri Law be amended to prohibit the Governor or any state agency, from establishing or operating state-based health insurance exchanges unless authorized by a vote of the people or by the legislature?"⁶⁰ The measure, Proposition E, passed with 61.7% of the

52. *State Exchange Profiles: Missouri*, HENRY J. KAISER FAM. FOUND., <http://kff.org/health-reform/state-profile/state-exchange-profiles-missouri/> (last updated Dec. 21, 2012).

53. *See id.*

54. Associated Press, *Where States Stand on Implementing Health Care Law*, USATODAY (June 28, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-06-28/health-care-states/55889922/1>.

55. Associated Press, *Missouri To Vote Again on Health Exchange*, NEWS-PRESSNOW (Oct. 26, 2012), http://www.newspressnow.com/news/local_news/article_f6353ec0-ec1a-542e-ad3b-9cffee6f868a.html.

56. *Id.*

57. *See* S.B. 608, 96th Gen. Assemb. 2d Reg. Sess. (Mo. 2012). Senate Bill 608, introduced by Senator Wasson, attempted to establish a state-based exchange, but it did not progress much further than House Bill 609, introduced the previous year. *See* H.B. 609, 96th Gen. Assembly, 1st Reg. Sess. (Mo. 2011). Further actions on Senate Bill 608 can be found on the Missouri Senate's website. *SB 608 Current Bill Summary*, MO. SENATE, http://www.senate.mo.gov/12info/BTS_Web/Actions.aspx?SessionType=R&BillID=19610 (last visited July 14, 2014).

58. *See* S.B. 464, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2012).

59. *Id.*

60. *Adopted Referendum – Proposition E*, MO. GEN. ASSEMBLY (Nov. 6, 2012), http://www.moga.mo.gov/sessionlaws/2013/Part06_2013AdoptedRef2012.pdf.

votes.⁶¹ The underlying statutory language specifically prohibited the establishment of a state-based exchange by an Executive Order from the Governor.⁶² State agencies were expressly prohibited from engaging in any activity associated with the design, implementation, or acceptance of federal funding related to a federal- or state-based health insurance exchange.⁶³

The law also gives taxpayer standing to citizens and members of the General Assembly to bring a lawsuit against a state agency for violating any prohibitions on ACA implementation and health insurance exchanges.⁶⁴ The Supreme Court of Missouri has held that “in order to have standing, a taxpayer must demonstrate either (1) a direct expenditure of funds generated through taxation, (2) an increased levy in taxes, or (3) a pecuniary loss attributable to the challenged transaction of a municipality.”⁶⁵ The taxpayer standing provision may be constitutional. If a state agency official violates the provisions of SB 464 by engaging in activities such as rulemaking, performing any duties of an exchange, or providing assistance to entities working on a federal exchange, there will have been an expenditure of funds. At the very least, tax dollars would be paying the salaries of the state officials.

After the passage of Proposition E in November 2012 and the failure of state exchange legislation two years in a row, Missouri Governor Jay Nixon announced that Missouri would be using the federal-based exchange.⁶⁶ As is described with more detail in Part II, even though Missouri opted for a federally-operated health insurance exchange, the 2013 General Assembly passed, and Governor Nixon signed, legislation establishing state requirements for navigators in the federal exchange.⁶⁷

61. *State of Missouri – General Election – November 6, 2012*, MO. SEC’Y OF STATE (Dec. 5, 2012), <http://enrarchives.sos.mo.gov/EnrNet/Default.aspx> (accessed by searching for all results from the November 6, 2012, General Election in the “choose election type” archive index).

62. S.B. 464, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

63. MO. REV. STAT. § 376.1186.3 (Supp. 2013).

64. § 376.1186.6.

65. *State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 132 (Mo. 2000) (en banc) (citing *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43 (Mo. 1989) (en banc)).

66. *State Exchange Profiles: Missouri*, HENRY J. KAISER FAM. FOUND. (Dec. 13, 2012), <http://kff.org/health-reform/state-profile/state-exchange-profiles-missouri/>; see *Status of State Health Insurance Exchange Implementation*, CENTER ON BUDGET & POL’Y PRIORITIES 1, 3 (Aug. 6, 2013), <http://www.cbpp.org/files/CBPP-Analysis-on-the-Status-of-State-Exchange-Implementation.pdf>.

67. S.B. 262, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

PART II: NAVIGATOR PROGRAM IN THE AFFORDABLE CARE ACT

A. Federal Regulation of Navigators

1. Exchanges Must Establish Navigator Programs

The navigator program is established by the health insurance exchange.⁶⁸ The duties of navigators are to:

- (A) Conduct public education activities to raise awareness of the availability of qualified health plans;
- (B) Distribute fair and impartial information concerning enrollment in qualified health plans and the availability of premium tax credits and cost-sharing reductions;
- (C) Facilitate enrollment in qualified health plans;
- (D) Provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman . . . or any other appropriate State agency or agencies for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and
- (E) Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange or Exchanges.⁶⁹

The exchange must contract with and award grants to the navigator entities.⁷⁰ The law requires that the entities receiving the grants have existing relationships in the community or could quickly establish relationships with employees, employers, and individuals who will likely be served by the exchange.⁷¹ This requirement recognizes the need to quickly reach and enroll individuals in the exchange without taking time to develop the exchange and make connections in the community. Using groups with which people already naturally have a relationship theoretically would increase the ease and speed with which people get enrolled. Some examples of eligible navigator entities included in the statute are “trade, industry and professional associations, commercial fishing industry organizations, ranching and farming organizations, [and] community and consumer-focused nonprofit groups.”⁷² Licensed agents and brokers are included as eligible entities,⁷³ and the Secretary was directed to issue rules establishing standards for brokers to enroll

68. 42 U.S.C. § 18031(i) (2012 & Supp. 2013).

69. § 18031(i)(3).

70. § 18031(i).

71. § 18031(i)(2)(A).

72. § 18031(i)(2)(B).

73. *Id.*

individuals in qualified health plans and provide information about premium assistance and cost-sharing reduction programs.⁷⁴

The exchanges must fund the navigator programs with the operational income of the exchange and not with any federal grants received to establish the exchange.⁷⁵ The Secretary was given authority to establish the standards for navigators with direction from Congress that the standards could not allow a health insurance issuer to be a navigator nor could anyone who receives any “consideration directly or indirectly from any health insurance issuer in connection with the enrollment” of members.⁷⁶ Congress also left it to the Secretary to work with the states to define the standards for “fair, accurate and impartial” information that navigators must provide to consumers.⁷⁷

2. Navigator Regulations: Three Consumer Assistance Programs

In July 2013, HHS issued its final rules for the Navigator Program. The rules create three categories of persons who can assist consumers with various parts of the process of choosing and enrolling in a qualified health plan. The three programs are: Navigators, Non-Navigators (or “in-person assistance personnel”), and Certified Application Counselors (“counselors”).⁷⁸ The navigators operate in all three types of exchanges.⁷⁹ Non-navigators perform the same functions as navigators, but they only operate in a state-based or state-partnership exchange.⁸⁰ Because navigators cannot be funded with exchange planning grants, and since federal funding for navigators is limited, HHS recognized the need for additional options to ensure there would be an adequate level of assistance to enroll people in health plans.⁸¹ In states establishing state-based exchanges, the non-navigators can be funded with exchange planning grants.⁸² Although the grants are not ongoing, they are meant to give time for exchanges to build up operational funds to pay for navigators. The counselor program also allows more people to be involved in providing information and assisting consumers in enrollment. Although there

74. § 18031(i)(4).

75. § 18031(i)(6). The Exchange must be self-sustaining and one allowed method to accomplish this is to charge fees or assessments on the health insurance plans that participate in the Exchange. § 18031(d)(5)(A).

76. § 18031(i)(4)(A).

77. § 18031(i)(5).

78. 45 C.F.R. §§ 155.210, 155.215, 155.225 (2013); Jost, *supra* note 38; U.S. Dep’t of Health and Human Servs., *Assistance Roles To Help Consumers Apply & Enroll in Health Coverage Through the Marketplace*, HEALTH INSURANCE MARKETPLACE (July 2013), <http://www.cms.gov/CCIIO/Resources/Files/Downloads/marketplace-ways-to-help.pdf>.

79. U.S. Dep’t of Health and Human Servs., *supra* note 78.

80. *Id.*

81. Jost, *supra* note 38, at 15 (stating that there was only \$54 million in federal funds available for the thirty-three states opting for the federal exchange).

82. *Id.*

are certification requirements, the counselor standards are lower than those for navigators and non-navigators, and counselors do not perform all of the functions of navigators and non-navigators.⁸³

3. Navigators and Non-Navigators

Navigators must meet training requirements, demonstrate their ability to carry out the listed duties, and show that the entity has existing relationships in the community.⁸⁴ A state or exchange is permitted to establish licensure or certification requirements for navigators “so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.”⁸⁵ The rules added some detail to the duties of the navigator entities. In addition to conducting public awareness activities, the navigator must maintain expertise in eligibility requirements and program details.⁸⁶ The duty to provide culturally and linguistically appropriate services (“CLAS”) was enhanced in the rules.⁸⁷ The rule emphasizes navigators’ and non-navigators’ understanding of racial, ethnic, and cultural groups’ health beliefs and practices. Navigators must provide services and tools that accommodate people with disabilities in compliance with the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act.⁸⁸ Navigators and non-navigators also play a role in consumer assistance and education activities. Exchanges are required to have consumer assistance tools and programs, including a call center and website.⁸⁹ Similar to the enrollment activities, the consumer assistance tools must be accessible to people with disabilities.⁹⁰ The exchange must provide outreach and education in compliance with the accessibility standards.⁹¹

The rules also provide clarification on what it means to be free of a conflict of interest. In addition to disqualifying health insurance issuers and people receiving consideration from health issuers from being navigators, the rules also state that a navigator must not be a “subsidiary of a health insurance issuer” or “an association that includes members of, or lobbies on behalf of, the insurance industry.”⁹² The application to become a navigator includes an attestation that the applicant does not have any of the conflicts of interests described in the rule.⁹³ Navigator entities must disclose to consumers any

83. U.S. Dep’t of Health and Human Servs., *supra* note 78; *see* § 155.225(d).

84. 45 C.F.R. § 155.210(b) (2013).

85. § 155.210(c)(iii).

86. § 155.210(e)(1).

87. § 155.210(e)(5).

88. *Id.*

89. 45 C.F.R. § 155.205(a)-(b) (2013).

90. § 155.205.

91. § 155.205(e).

92. § 155.210(d)(1)-(2).

93. 45 C.F.R. § 155.215(a)(1)(i) (2013).

insurance business not covered by the restrictions, if navigators or their spouses had any employment within the last five years with a health insurance issuer or subsidiary, and if navigators have any expected future relationship with insurers.⁹⁴ Non-navigators must make similar attestations and disclosures.⁹⁵

The rules also established the training program for navigators and non-navigators that applies to federal exchanges and to non-navigators who are providing consumer assistance, outreach, and education funded through the exchange planning grants. Before operating as a navigator, entities and individuals must become certified by registering and completing HHS-approved training, achieving a passing score upon examination, and being prepared to navigate both the individual and the Small Business Health Options Program.⁹⁶ Navigators must re-certify with HHS each year.⁹⁷

4. Certified Application Counselors

Exchanges must also offer Certified Application Counselors (“counselors”) who, similar to navigators, provide information about qualified health plans, the available options, and the affordability programs and assist with enrollment in the exchange.⁹⁸ As a result of comments regarding these standards, HHS added language requiring counselors to provide information about the full range of qualified health plan options.⁹⁹ But compared to navigators, there are fewer restrictions on counselors. Counselors must work in the “best interest” of the consumer.¹⁰⁰ Conflicts of interest with an insurer do not automatically disqualify a counselor as they do a navigator.¹⁰¹ Instead, counselors must merely disclose any relationship that is a potential source of conflict.¹⁰² Counselors also do not have the same requirements to provide services in a culturally and linguistically appropriate manner, nor must they have the same knowledge and ability to serve people with disabilities.¹⁰³

94. § 155.215(a)(1)(iv)(B).

95. § 155.215(a)(2).

96. § 155.215(b)(1).

97. *Id.*

98. 45 C.F.R. § 155.225(c)(1) (2013).

99. 45 C.F.R. § 155.205(d)(1) (2013).

100. § 155.225(c)(1), (d)(4).

101. See Lisa Campbell, *CMS Enrollment Assister Bulletin: 2014-01*, CENTERS FOR MEDICARE & MEDICAID SERVS. (Aug. 15, 2014), <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/FINAL-Recertification-Bulletin-08-15-2014.pdf>.

102. § 155.225(d)(2). Rules finalized in July 2014 added a section prohibiting counselors from receiving “consideration directly or indirectly from any health insurance issuer . . . in connection with the enrollment of any individuals.” § 155.225(g)(2).

103. Compare § 155.225 with 45 C.F.R. § 155.215(b)(2)(viii) (2013).

5. Independent Agents and Brokers as Navigators

As required by law, the Secretary issued rules outlining the standards that independent agents and brokers must meet to serve as navigators.¹⁰⁴ Subject to federal requirements, a state has the option to allow brokers to serve as navigators, performing the functions of enrolling individuals and assisting consumers in applying for the premium assistance and cost-sharing reduction programs.¹⁰⁵ If a broker is using his or her own website to enroll an individual in a qualified health plan, the broker must use a disclaimer provided by HHS, give consumers all information and data about qualified health plans that is available through the exchange, and allow consumers to use the Exchange website if requested.¹⁰⁶ Brokers and agents must complete training on the qualified health plans, enrollment procedures, and affordability programs and must sign all agreements with the federal exchange.¹⁰⁷ HHS may terminate the agreement if any noncompliance is discovered.¹⁰⁸

6. Federal Preemption of State Regulation of Navigators

The ACA gave states flexibility in operating the exchanges and related activities, but included a preemption clause stating that the federal law preempts state regulations that prevent application of provisions of the law.¹⁰⁹ The July 2013 HHS navigator regulations gave states the ability to regulate navigators, even in states that opted for the federal exchange, “so long as such standards d[id] not prevent the application of the provisions of Title I of the Affordable Care Act.”¹¹⁰ HHS did not provide any specific guidance on what state activities would qualify as “prevent[ing] the application of the provisions of Title I.” Many states which had opted for the federal exchange began to implement state licensure requirements for federal navigators, non-navigators, and counselors, leading to legal challenges claiming the state laws were unconstitutional and preempted by the ACA.¹¹¹

In response to the state laws, HHS amended the navigator, non-navigator, and counselor rules to provide a non-exhaustive list of examples of state regulation that would prevent application of Title I of the ACA.¹¹² The new rules, which went into effect July 28, 2014, provide that standards which would be preempted include:

104. 42 U.S.C. § 18031(i)(4) (2012 & Supp. 2013).

105. 45 C.F.R. § 155.220(a)(1) (2013).

106. § 155.220(b)(1).

107. § 155.220(d)(2).

108. § 155.220(g)(1).

109. 42 U.S.C. § 18041(d) (2012 & Supp. 2013).

110. 45 C.F.R. § 155.210(c)(iii) (2013).

111. *See infra* Parts II.B, IV & V.

112. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240-01, 30,270-72 (May 27, 2014).

- (A) Except as otherwise provided under § 155.705(d), requirements that Navigators refer consumers to other entities not required to provide fair, accurate, and impartial information.
- (B) Except as otherwise provided under § 155.705(d), requirements that would prevent Navigators from providing services to all persons to whom they are required to provide assistance.
- (C) Requirements that would prevent Navigators from providing advice regarding substantive benefits or comparative benefits of different health plans.
- (D) Requiring that a Navigator hold an agent or broker license or imposing any requirement that, in effect, would require all Navigators in the Exchange to be licensed agents or brokers.
- (E) Imposing standards that would, as applied or as implemented in a State, prevent the application of Federal requirements applicable to Navigator entities or individuals or applicable to the Exchange's implementation of the Navigator program.¹¹³

In the preamble to the final rules, HHS made clear that it did not intend to “preclude a state from establishing or implementing a State law . . . so long as such laws do not prevent the application of Federal requirements.” For example, a state could require fingerprints or background checks as long as the administration of the application did not prevent the Exchange from operating.¹¹⁴

B. Navigators in Missouri

1. Health Insurance Marketplace Innovation Act of 2013

In 2013, the Missouri General Assembly passed the Health Insurance Marketplace Innovation Act of 2013 (“HIMIA”) to establish state licensure requirements to act as a “navigator, certified application counselor, in-person assister or other title.”¹¹⁵ HIMIA exempts non-profit organizations engaged in disseminating “public health information” to the general public.¹¹⁶ Licensed brokers, law firms, and licensed attorneys, as well as health care providers that do not receive federal funds to act as navigators, are exempt from

113. 45 C.F.R. § 155.210(c)(iii). The same preemption standards apply to non-navigators. 45 C.F.R. § 155.215(f) (2013). The Final Rule clarified that certified application counselors can be regulated by the state and includes the same preemption standards. 45 C.F.R. § 155.225(d)(8). The rule also prevents states from making counselors ineligible solely because their principal place of business is outside the exchange area. 45 C.F.R. § 155.225(b)(3).

114. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. at 30,270 (May 27, 2014).

115. MO. REV. STAT. § 376.2000 (Supp. 2013).

116. § 376.2000.2(4).

the state licensure requirements.¹¹⁷ The exemptions raised the question of whether the legislature intended that anyone other than a broker, attorney, or health care provider must be licensed to disseminate any information about options in the health insurance exchange.

A state-licensed navigator *may* perform the duties of providing information on the plans, facilitate the selection and enrollment in a plan, provide referrals for consumer assistance, and use culturally and linguistically appropriate services.¹¹⁸ But a navigator who is not also licensed as an insurance producer *must not* engage in activities such as “provid[ing] advice concerning the benefits, terms, and features of a particular health plan or offer[ing] advice about which exchange health plan is better or worse for a particular individual or employee” or “recommend[ing] or endors[ing] a particular health plan or advis[ing] consumers about which plan to choose.”¹¹⁹ Although it could be argued that this provision is simply trying to ensure fair and impartial information is disseminated to consumers, while only allowing those with specialized knowledge to make recommendations, this provision has a potential to restrict what navigators can tell consumers and to create a barrier for consumers who attempt to get their questions answered. HIMIA also requires that if a navigator discovers while working with a consumer that the consumer had previously obtained private insurance coverage through an insurance broker, the navigator “shall advise the person to consult with a licensed insurance producer regarding coverage in the private market.”¹²⁰

2. HIMIA Regulations: Easing the Hurdles

Application for a state navigator license is submitted to the Department of Insurance, Financial Institutions and Professional Registration (“Department of Insurance”).¹²¹ The Director of the Department of Insurance was given the authority to develop the application form, training, examination, and license renewal process; set the fees; monitor compliance; and take action to suspend, revoke, or refuse to issue a navigator license.¹²² On July 24, 2013, the Department of Insurance issued emergency rules to implement SB 262 and the final “Navigator Examination and Licensing Procedures and Standards” rule went into effect on January 30, 2014.¹²³ The final “Continuing Education for Individual Navigators” rule was effective on March 30, 2014.¹²⁴

117. MO. REV. STAT. § 376.2002.4 (Supp. 2013).

118. § 376.2002.2 (emphasis added).

119. § 376.2002.3(3)(4).

120. MO. REV. STAT. § 376.2008 (Supp. 2013).

121. See MO. REV. STAT. § 376.2004.1 (Supp. 2013); see also *Missouri Navigator Licensing Candidate Handbook*, PEARSON VUE 1 (Aug. 2013), <http://asisvcs.com/publications/pdf/122606.pdf>.

122. MO. REV. STAT. §§ 376.2004.1, 376.2006.2-3, 376.2010.1 (Supp. 2013).

123. MO. CODE REGS. ANN. tit. 20, § 400-11.100 (2013).

124. MO. CODE REGS. ANN. tit. 20, § 400-11.120 (2013).

The examination and licensure rule requires navigator applicants to take and pass a test that measures their knowledge of health insurance, exchanges, and navigator roles, but the rule allows applicants to demonstrate such knowledge by meeting the certification requirements under the federal navigator program in 42 U.S.C. § 18031(i) and receiving a passing score.¹²⁵ An applicant must also answer questions about his or her background, including questions about any past criminal convictions; administrative proceedings related to licensure; and any past findings of fraud, misrepresentation, conversion of funds, or breach of fiduciary duty.¹²⁶ The continuing education standards for individual navigators require twelve hours of instruction during the two-year licensure period, of which three hours must cover ethics and Missouri law.¹²⁷ The Department of Insurance minimized the burdens of state licensure by providing the option to meet the federal certification standards programs rather than mandating that separate state standards be met. The rule “allayed some concerns” by advocates that the state licensure requirement could add additional hurdles that would make it harder to quickly license an adequate number of navigators in the state.¹²⁸ Licensing individuals who have been certified through the federal training program also provides some reassurance that state-licensed navigators will have information on all the options and that their knowledge will not be limited by the bounds of SB 262.¹²⁹ Although the regulations were written to impose as few burdens on navigators as possible, as discussed in Part IV, the provisions of the statute itself are currently being challenged as unconstitutional.¹³⁰

PART III: THE STAKEHOLDERS AND THEIR POSITIONS

A. Insurance Agents and Brokers

Insurance brokers have been actively involved in efforts to shape the navigator program.¹³¹ The functions performed by navigators – informing individuals of qualified health plans and facilitating enrollment – could look like the loss of the brokers’ role as “middle men.” As described above, the lobbying activity on the part of insurance agents began when the ACA was

125. MO. CODE REGS. ANN. tit. 20, § 400-11.100(2)(A)-(B) (2013).

126. *Application for Navigator Entity License*, MO. DEP’T OF INS., <http://insurance.mo.gov/otherlicensees/documents/EntityApplication.pdf> (last visited Dec. 21, 2014).

127. MO. CODE REGS. ANN. tit. 20, § 400-11.120(2)(B)-(C) (2013).

128. Kusnetz, *supra* note 33, at 6; *see also* Center for Health Law Studies, *First Look: Emergency and Proposed Regulations on Missouri’s State Navigator License*, ST. LOUIS U. SCH. OF L., <http://slu.edu/Documents/law/Centers/Health%20Law/Medicaid/First%20Look%20Missouri%20Regs%20on%20Navigator%20Licensing.pdf> (last visited Dec. 21, 2014).

129. *Id.*

130. *See* discussion *infra* Part V.C.

131. *Id.*

debated in Congress.¹³² After passage of the ACA, the industry focused its lobbying efforts on the states.¹³³ The Center for Public Integrity reports that lobbying associations representing brokers spent at least \$683,000 on lobbying in the fifteen states that passed navigator legislation in 2013.¹³⁴ Groups provided legislative templates and recommendations for state legislators.¹³⁵ The National Association of Health Underwriters (“NAHU”) raised concerns about “unqualified and unscrupulous actors” and called on states to take action to protect consumers.¹³⁶ NAHU’s legislative recommendations included assuring brokers that they can enroll people in qualified health plans, training and certification requirements for navigators, criminal background screening, subjecting navigators to the state insurance code, and imposing legal liability on navigators.¹³⁷ Jessica Waltman with NAHU cautioned that buying health insurance is not as easy as simply going online to make a purchase and that a broker’s job is to solve the problems that are sure to arise when dealing with health insurance coverage.¹³⁸

The National Conference of Insurance Legislators (“NCOIL”) was paying attention. NCOIL passed a resolution in March 2013 calling on states to implement a regulatory framework for navigators that would include essentially all of the recommendations, nearly verbatim, from NAHU.¹³⁹ The findings of the conference included familiar language, concluding that navigators will initially lack knowledge and experience, state licensure of brokers would help ensure accountability, states should “intervene” to protect consumers against “unqualified and unscrupulous actors,” and that the failure of the state to act would create a “regulatory vacuum.”¹⁴⁰ The sponsor of the resolution acknowledged the brokers’ involvement and self-interest, but said he “honestly believe[d] that their primary interest was in protecting the consumer.”¹⁴¹ A representative from Consumers Union who testified at the NCOIL meeting regarding the concerns of consumer groups stated that, although consumer

132. See *supra* text accompanying notes 33-36.

133. Kusnetz, *supra* note 33, at 6.

134. *Id.*

135. See, e.g., *Recommendations for State-Based Regulation of Navigators*, NAT’L ASS’N HEALTH UNDERWRITERS (Dec. 2012), <https://www.nahu.org/legislative/connector/RecommendationsNavigatorDecember2012.pdf>.

136. *Id.*

137. *Id.*

138. Eric Whitney, *Insurance Brokers Look for Relevance as Health Exchanges Grow*, KAISER HEALTH NEWS (Oct. 3, 2013), <http://kaiserhealthnews.org/news/brokers-look-relevance-as-health-exchanges-grow/>.

139. *Proposed Resolution Regarding Health Benefit Exchange Navigator Programs*, NAT’L CONF. INS. LEGISLATORS (Mar. 8, 2013), <http://www.ncoil.org/DC30DayMemo/DraftExchangeNavigatorResolution.pdf>.

140. *Id.*

141. Kusnetz, *supra* note 33, at 6.

protection was the reason given for the resolution, “it was not supported by a single consumer group.”¹⁴²

Lobbying activities were also strong at state capitals in 2013, including in Missouri. Groups like the Missouri Association of Insurance and Financial Brokers, Missouri Association of Insurance Agents, and the Missouri Insurance Coalition hired several lobbyists, including many former state legislators.¹⁴³ Missouri and other states passed legislation resembling the NCOIL resolution, and the rationale given by industry representatives echoed the argument that consumers are better protected when working with brokers because of the strict requirements placed on licensed brokers. One member of NAHU stated, “We just want to make sure that somebody who is sitting down with a consumer, trying to help them make this major decision, is going to be properly prepared.”¹⁴⁴

B. State Lawmakers

State lawmakers’ support of, or opposition to, the ACA has had an impact on its implementation.¹⁴⁵ Many state officials have expressed opposition to the law by filing lawsuits, continuing with state activity or inactivity in setting up exchanges, regulating navigators, and expanding Medicaid.¹⁴⁶ Many states chose not to set up a state-based exchange.¹⁴⁷ Twenty-six states elected to have a federal-based exchange, seven states use a partnership model, and sixteen states established a state-based exchange.¹⁴⁸ Twenty-four of the states in the federal exchange have Republican governors, suggesting a political basis for opposition.¹⁴⁹

Some statements of opposition are blatant. For example, Georgia Insurance Commissioner Ralph Hudgens has said that along with the Governor, he

142. *Id.*

143. As of December 21, 2014, the Missouri Association of Insurance Agents employed eight lobbyists. *Missouri Ethics Commission: Principal/Lobbyist Report*, MO. ETHICS COMMISSION, <http://www.mec.mo.gov/Lobbyist/PrincipalLobbyist.pdf> (last visited Dec. 21, 2014). As of December 21, 2014, the Missouri Insurance Coalition had registered thirteen lobbyists. *Id.*

144. Bloomberg News, *Laws Could Complicate Enrollment*, COLUM. DAILY TRIBUNE (Aug. 25, 2013, 2:00 AM), http://www.columbiatribune.com/news/politics/laws-could-complicate-enrollment/article_c6194570-0d37-11e3-9733-10604b9f6eda.html.

145. Sheila Burke & Elaine Kamarck, *The Affordable Care Act: A User’s Guide to Implementation*, BROOKINGS 4 (Oct. 2013), <http://www.brookings.edu/~media/research/files/papers/2013/10/15%20affordable%20care%20act%20user%20guide%20burke%20kamarck/kamarckburkeaca%20user%20guide101513.pdf>.

146. *Id.* at 4, 15, 26-27.

147. *Id.* at 26-27.

148. *Id.* Utah is running a state-based exchange for small businesses and using the federal exchange for individuals. *Id.* at 5.

149. *Id.* at 26-27.

and his organization are doing “everything in [their] power to be . . . obstructionist[s].”¹⁵⁰ States are putting restrictions on what agencies can do to advise the uninsured.¹⁵¹ As discussed above, Missouri law prohibits state agencies from engaging in any activity related to implementing exchanges.¹⁵² Florida Governor Rick Scott took similar action and banned navigators from working at county health departments to enroll patients.¹⁵³ Governor Scott had earlier said the federal privacy protections in the navigator program were “behind schedule and inadequate” and that people should work instead with a licensed broker.¹⁵⁴

Concerns raised about navigators and decisions to license navigators in response to the lobbying efforts by insurance brokers and agents seems to correspond with some state lawmakers’ efforts to oppose ACA implementation.¹⁵⁵ The states that have taken legislative action and demonstrated the greatest concern over navigators are Republican-controlled.¹⁵⁶ Additionally, thirteen Republican state Attorneys General have raised concerns about the potential fraud and consumer privacy violations in the navigator program, and in Congress, the House Energy and Commerce Committee called for federally-funded navigators to provide detailed reports on training, travel, monitoring, and activities of the navigators.¹⁵⁷

C. Consumer Advocates

Although consumer protection is given as the reason state regulation of navigators is necessary, many consumer advocates do not agree. Some consumer advocates see these measures as another way for state lawmakers to prevent successful implementation of the ACA, and community groups worry about the impact the state laws could have on people accessing information and enrolling in health insurance.¹⁵⁸ Advocates believe that standards should

150. Karen Tumulty, *Main Threat to Health Law May Be States’ Resistance*, WASH. POST, Oct. 16, 2013, available at <http://www.highbeam.com/doc/1P2-35259350.html>.

151. *Id.*

152. See *supra* text accompanying notes 57-63

153. Tumulty, *supra* note 150.

154. Bloomberg News, *supra* note 144.

155. See discussion *infra* Part IV.

156. Burke & Kamarck, *supra* note 145, at 15.

157. Michael Ollove, *Health Insurance Navigators Draw State Scrutiny*, USA TODAY (Sept. 9, 2013), <http://www.usatoday.com/story/news/nation/2013/09/09/obamacare-health-insurance-navigators-draw-scrutiny/2787239/>.

158. See, e.g., Joan Bray, *Get Past Missouri Legislature’s Health Care Roadblocks*, ST. LOUIS POST DISPATCH (Oct. 9, 2013, 12:00 AM), http://www.stltoday.com/news/opinion/columns/get-past-missouri-legislature-s-health-care-roadblocks/article_7a9c69a4-bf77-56a5-9c6a-959a592d51de.html (presenting the views of the Consumer’s Council of Missouri); Center for Health Law Studies, *SB 262’s Navigator Provisions Hurt Consumers*, ST. LOUIS U. SCH. OF L., <http://www.slu.edu/Docu->

be set based on the navigators' duties but that broker licensure standards are not required.¹⁵⁹ One concern is that the state laws could prevent navigators from carrying out their duties in states that prohibit navigators from giving any advice about which plans have the benefits the consumer is looking for.¹⁶⁰ For example, if a navigator knows which plans cover more durable medical equipment than others, the navigator may be unable to highlight those plans for the consumer in states with such restrictions.

Another concern is that state licensure requirements will create a burden that is onerous enough to discourage community groups from serving as navigators.¹⁶¹ Many of these groups would be the kind of organizations with existing relationships in the community as envisioned by the federal navigator regulations.¹⁶² People with limited access to health care services or information, including people in rural areas, people with limited English proficiency, and other uninsured groups may not get the information or assistance they need if local groups are prevented from helping consumers enroll in the exchanges.

Consumer confusion is a strong possibility given the choice of plans on the marketplace coupled with the plans outside the exchange that can be sold by brokers and agents. Brokers who sell health plans on the exchange must undergo the training requirements to become navigators, but brokers who are not navigators do not have to share information about plans on the exchange.¹⁶³ This could affect individuals who may be eligible for the premium assistance program, which is only available for health plans on the exchange. Consumer advocates emphasize the importance of consumers considering all of their options and becoming familiar with the plans and benefits on the exchange.¹⁶⁴ This challenge will exist in all states, but it could be greater in states that are regulating navigators.¹⁶⁵ If there are fewer people who can

ments/law/Centers/Health%20Law/Medicaid/SB262NavigatorProvisions.pdf (last visited Nov. 8, 2014); Kusnetz, *supra* note 33; Ollove, *supra* note 157 (quoting a Community Catalyst representative saying, "The laws passed at the state level will slow down the process"); Wendell Potter, *Trickery in Missouri Shows How Insurers Enhance Their Profit*, HUFFINGTON POST (Aug. 24, 2013), http://www.huffingtonpost.com/wendell-potter/trickery-in-missouri-show_b_3490536.html.

159. Cheryl Fish-Parcham, *Navigators Need Not Be Licensed as Insurance Brokers or Agents*, FAMILIES USA (Mar. 2011), available at <http://familiesusa.org/product/navigators-need-not-be-licensed-insurance-brokers-or-agents> ("States should require navigators to be trained and pass competency exams, but they or the federal government should design training programs appropriate to navigators' duties.").

160. Keith, Lucia & Monahan, *supra* note 40.

161. *Id.*

162. *Id.*

163. Michelle Andrews, *Consumers Shopping for Health Policies Outside the Marketplaces May Be Confused by Mix of Plans Offered*, KAISER HEALTH NEWS (Oct. 8, 2013), <http://www.kaiserhealthnews.org/features/insuring-your-health/2013/100813-michelle-andrews-role-of-brokers-and-insurers.aspx>.

164. *Id.*

165. Keith, Lucia & Monahan, *supra* note 40.

meet the navigator requirements, or if fewer people can advise consumers about health options without a license, the avenues of information could be limited. Individuals may have to rely more on brokers, who may or may not be federally trained on all of the health plans and affordability provisions.

PART IV: EXAMPLES OF OTHER STATE NAVIGATOR LAWS

As Missouri did in 2013, several other states have passed similar legislation, including Texas, Georgia, and Tennessee.¹⁶⁶ Many of these states' provisions are similar, which is to be expected given the active lobbying by the insurance broker associations.¹⁶⁷ Such states are in contrast to states, such as Colorado, that have been planning for and implementing state-based exchanges.¹⁶⁸

A. Texas

Texas opted out of a state-based exchange and passed legislation regulating navigators operating within the state.¹⁶⁹ The Texas law defines "navigator" as an individual engaged in the activities, and fulfilling the duties, of navigators as described in the federal law.¹⁷⁰ Navigators must comply with the standards and requirements of the statute but do not need to obtain a license to practice.¹⁷¹ If the standards established in the federal regulations are determined to be "insufficient" by the Commissioner, the Commissioner will work in "good faith" with HHS to improve the standards, but may then implement the state's own standards.¹⁷² Limits are placed on advertising and on the information that can be provided to consumers.¹⁷³ Insurance brokers are not required to comply with this statute and are allowed to provide information on plans outside the exchange and advice on which plans best meet consumers' needs.¹⁷⁴

166. See *infra* Part IV.

167. *Id.*

168. See Kavita Patel, *Health Insurance Marketplace Premiums: Policy Considerations and Implications for Payers, Providers, and Patients*, BROOKINGS (Sept. 26, 2013), <http://www.brookings.edu/research/opinions/2013/09/26-health-insurance-marketplace-premiums-patel>.

169. Keith, Lucia & Monahan, *supra* note 40.

170. TEX. INS. CODE ANN. § 4154.002(3) (West 2013).

171. TEX. INS. CODE ANN. § 4154.003 (West 2013).

172. TEX. INS. CODE ANN. § 4154.051(b) (West 2013).

173. TEX. INS. CODE ANN. § 4154.052 (West 2013). Navigators cannot imply the superiority of their services. *Id.* Navigators cannot provide information on health benefits outside the exchange or advise consumers on which plan is "preferable." TEX. INS. CODE ANN. § 4154.101(a)(3), (4) (West 2013).

174. § 4154.101(b); TEX. INS. CODE ANN. § 4154.004(b)(1)-(3) (West 2013).

In September 2013, Governor Rick Perry directed the Texas insurance commissioner to draft strict regulations to implement SB 1795.¹⁷⁵ Quickly, the sponsor of the legislation protested that the law was written to make it easier for Texans to obtain health insurance and that the restrictions suggested by the Governor went beyond the authority of the Commissioner.¹⁷⁶ In an e-mail quoted by the *Texas Tribune*, a spokesperson for HHS said, “This is a blatant attempt to add cumbersome requirements to the navigator program and deter groups from working to inform Americans about their new health insurance options and help them enroll in coverage.”¹⁷⁷ In February 2014, the Texas Department of Insurance adopted final rules for the navigator program, finding the federal standards to be inadequate.¹⁷⁸ Texas licensure requirements include completing a forty-hour training program, scoring seventy percent correct on an examination, and submitting a set of fingerprints.¹⁷⁹

B. Georgia

Georgia passed HB 198 in 2013, finding regulation of navigators to be “necessary to avoid substantial risk to the health, safety, and welfare of the residents of the state.”¹⁸⁰ Like Missouri’s law, Georgia defines navigator more broadly than the ACA to include “assistors, application counselors or other persons” and requires state licensure before a navigator can “provide advice, guidance, or other assistance with regard to health benefit plans as a navigator under . . . the federal act.”¹⁸¹ Georgia’s law prohibits navigators from soliciting any individual or employer who currently has insurance coverage, and, similar to Missouri, navigators are prohibited from providing advice on the features of health plans and which option would afford the greatest benefit to the consumer.¹⁸² Georgia carves out an exception for “patient navigators,” defined as “an individual who offers assistance to patients, families, and caregivers to help overcome health care system barriers and to facilitate timely access to quality medical and psycho-social care.”¹⁸³ This provision is similar to Missouri’s exemption for health care providers who talk to patients about coverage options and financial issues related to medical treat-

175. Becca Aaronson, *Watson Responds to Perry’s Move to Regulate Insurance Navigators*, TEX. TRIB. (Sept. 18, 2013), <http://www.texastribune.org/2013/09/19/perry-directs-tdi-regulate-federal-navigator-progr/>.

176. *Id.*

177. *Id.*

178. 28 TEX. ADMIN. CODE §§ 19.4001-19.4017 (2013).

179. 28 TEX. ADMIN. CODE §§ 19.4006, 4008 (2014).

180. GA. CODE ANN. § 33-23-200 (West 2014).

181. GA. CODE ANN. § 33-23-201(3), -202(a) (West 2014).

182. GA. CODE ANN. § 33-23-203(b), (e)(3) (West 2014). Navigators cannot provide advice or make recommendations about health plans “except as specifically authorized by the provision of the federal act.” § 33-23-203(e).

183. GA. CODE ANN. § 33-23-205, -201(4) (West 2014).

ment,¹⁸⁴ but Georgia's "patient navigators" definition covers more individuals.¹⁸⁵

Regulations established the licensure application requirements.¹⁸⁶ An applicant must complete thirty-five hours of training, pass an examination, and submit fingerprints for a criminal background check.¹⁸⁷ The Commissioner "may" consider the twenty-five hour federal navigator training toward completion of the training requirement, with an applicant receiving the final ten hours of training from an approved training provider.¹⁸⁸

C. Tennessee

In 2013, the Tennessee legislature passed broad state navigator legislation.¹⁸⁹ The definition of navigators not only included individuals receiving federal funding or designated by the exchange as a navigator or counselor, but also "any person" other than a broker who "facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange."¹⁹⁰ The state insurance commissioner was charged with issuing regulations and was given the authority to issue a "cease and desist order" and to seek injunctive relief against a navigator who violated the rule.¹⁹¹ The Department of Commerce and Insurance issued emergency rules in October 2013. Subsequent lawsuits successfully claimed the restrictions chilled the free speech rights of individuals who were not licensed navigators.¹⁹² The rules have expired without being replaced by permanent rules, but an analysis of the emergency rules is instructive on how strict state regulation may be viewed by a federal court.

The licensure process established in the regulations included passing the federal training certification for navigators and counselors, submitting fingerprints, completing a criminal background check, and being found to "possess the requisite character and integrity" for becoming a navigator.¹⁹³ Permits were valid for twelve months, and renewal requirements included completing twelve hours of continuing education.¹⁹⁴ Similar to the laws of Georgia and Missouri, Tennessee regulations prohibited navigators and counselors from "recommend[ing] or endors[ing] a particular health plan or advis[ing] consumers about which health plan to choose;" or "provid[ing] any information

184. MO. REV. STAT. § 376.2002.4(3)(a)-(b) (Supp. 2013).

185. See MO. REV. STAT. § 376.1350(19)-(20) (Supp. 2013).

186. GA. COMP. R. & REGS. § 120-2-3-.48(2)(a)-(h) (West 2013).

187. § 120-2-3-.48(2)(d),(e),(g).

188. § 120-2-3-.48(4).

189. S.B. 1145, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. 2013).

190. TENN. CODE ANN. § 56-6-1301(3)(B) (West 2014).

191. TENN. CODE ANN. § 56-6-1303(1)-(2) (West 2014).

192. See *infra* Part IV.

193. TENN. COMP. R. & REGS. § 0780-01-55-.04 (2013) (expired).

194. TENN. COMP. R. & REGS. § 0780-01-55-.05 (2013) (expired).

or services related to health benefit plans or other products not offered in the exchange except as may be required or contemplated by the duties of such person under federal law or regulation on behalf of the exchange.”¹⁹⁵ Fines of \$1,000 were imposed for violations of the state law.¹⁹⁶

As discussed in greater detail below, an agreement reached in *League of Women Voters of Tennessee v. McPeak* stipulated that the emergency rules only apply to people who register with the federal government as navigators.¹⁹⁷ In response to the agreement, the Tennessee Department of Commerce and Insurance issued an official notice clarifying that only individuals registering with HHS as navigators or certified application counselors need to register with the state.¹⁹⁸ Individuals who did not register with HHS as federally-certified navigators and counselors did not have to be licensed by the state law in order to provide assistance to consumers, as originally required with the passage of SB 1145, “so long as the individual or entity offering such assistance is not representing itself/himself/herself as a navigator, navigator entity, certified application counselor, or certified application counselor organization.”¹⁹⁹ The state Department of Commerce and Insurance posted the final order and an accompanying explanation on its website, and the emergency rules have since expired without promulgation of permanent rules.²⁰⁰

D. Colorado

Colorado is one example of a state that created a state-based exchange. The Colorado legislature passed a bill in 2011 to create a state exchange in order “to fit the unique needs of Colorado, seek Colorado-specific solutions, and explore the maximum number of options available to the state of Colorado.”²⁰¹ The statute established the governing board of the exchange, defined board members’ qualifications and duties, instituted a legislative committee to make policy recommendations to the general assembly, and created the revenue and operational procedures for the exchange.²⁰² The exchange, called Connect for Health Colorado (“C4HCO”), contracts with the health

195. TENN. COMP. R. & REGS. § 0780-01-55-.06 (2013) (expired).

196. TENN. COMP. R. & REGS. § 0780-01-55-.07 (2013) (expired).

197. Agreed Final Order, *League of Women Voters of Tenn. v. McPeak*, No. 13-1365-IV, available at <http://www.tn.gov/attorneygeneral/cases/lwv/lwv.html>.

198. *Navigator and Certified Application Counselor Registration Requirements: Frequently Asked Questions*, TENN. DEPT. OF COM. & INS. (Oct. 8, 2013), http://www.tn.gov/insurance/documents/FAQ3_10_7_2013.pdf.

199. *Id.*

200. See *Insurance Division*, TENN. DEP’T. COM. & INS., <http://www.tn.gov/insurance/> (last visited Jan. 5, 2014).

201. COLO. REV. STAT. ANN. § 10-22-102 (West 2014).

202. COLO. REV. STAT. ANN. § 10-22-105 (West 2014); COLO. REV. STAT. ANN. § 10-22-110 (West 2014).

plans, conducts outreach and awareness activities, operates a customer service center, and assists consumers with enrolling in the marketplace plans.²⁰³

The exchange in Colorado utilizes a variety of navigator models, including a customer service center, navigators, and independent agents and brokers.²⁰⁴ The customer service center offers phone and online support to provide learning opportunities concerning the health plans, applying for the affordability programs, and purchasing insurance.²⁰⁵ The Health Colorado Assistance Network operates throughout the state at Assistance Sites, which hire and train navigators, called “Health Coverage Guides,” who provide in-person assistance with the support of federal and private funds.²⁰⁶ Coloradans also have the option to use independent agents and brokers that have completed a training program and passed a background check.²⁰⁷ Insurance companies compensate the brokers, with no differentiation between commissions from plans within and outside the exchange.²⁰⁸

E. Enrollment in the Federal Exchange

It is important to look at how these states are doing when it comes to the number of navigators or counselors hired and the number of people enrolled.

In Missouri, the Area Agencies on Aging and the organization Primaryis were awarded navigator funding from the federal government.²⁰⁹ Between the effective date of the emergency rules and January 23, 2013,²¹⁰ the Missouri Department of Insurance licensed ninety-four entities as navigators (including groups like Assurance Brokers Ltd., Croley Insurance and Financial Inc., Knowledge Management Associate, and Tagge Insurance Agency) as well as 757 individual navigators.²¹¹ At the end of the open enrollment peri-

203. *State Marketplace Profiles: Colorado*, HENRY J. KAISER FAM. FOUND. (NOV. 8, 2013), <http://kff.org/health-reform/state-profile/state-exchange-profiles-colorado/>.

204. *Id.*; Burke & Kamark, *supra* note 145, at 30.

205. *Help Center*, CONNECT FOR HEALTH COLO., <http://connectforhealthco.com/help-center/> (last visited Dec. 21, 2014).

206. *Id.*; *State Marketplace Profiles: Colorado*, *supra* note 203.

207. *Help Center*, *supra* note 205.

208. *Id.*

209. *Navigator Grant Recipients*, CENTER FOR MEDICARE & MEDICAID SERVS. 21-22, <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/navigator-list-10-18-2013.pdf> (last visited Dec. 21, 2014).

210. See *infra* Part V.C.

211. *Individual Navigators*, MO. DATA PORTAL, <http://data.mo.gov/Insurance/Individual-Navigators/w5xs-s3mj?> (last visited Dec. 21, 2014); *Navigator Entities*, MO. DATA PORTAL, <http://data.mo.gov/Insurance/Navigator-Entities/n7d6-s7dn?> (last visited Dec. 21, 2014).

od in 2014, 152,335 Missourians had selected private plans on the exchange, meaning Missouri had met 129% of its enrollment goal.²¹²

In Texas, eight organizations, including two United Way offices and the National Hispanic Council on Aging, were awarded federal navigator funding.²¹³ Over 733,000 Texans selected private plans, reaching 117% of the enrollment goal for Texas.²¹⁴

In Georgia, the group Structured Employment Economic Development Corporation (“SEEDCO”) and the University of Georgia Extension programs received federal funding to provide navigators statewide.²¹⁵ The Georgia Office of Insurance and Safety Fire Commissioner website lists 194 approved navigators.²¹⁶ Georgia met 155% of its projected goal of enrollment, with 316,543 Georgians selecting private plans on the exchange.²¹⁷

The Tennessee Primary Care Association and SEEDCO were awarded the navigator grants in Tennessee.²¹⁸ Tennessee reached 123% of its goal, enrolling 151,352 citizens in private plans on the exchange.²¹⁹

In Colorado, C4HCO awarded funding to fifty-seven groups that serve as the Regional Hubs in the Assistance Network, providing in-person assistance at seventy-five sites around the state.²²⁰ As of September 2013, 1,300 independent brokers had been certified.²²¹ By the end of the open enrollment period, 125,402 people in Colorado selected private plans on the exchange, representing 136% of the target.²²²

It is impossible to say what the enrollment levels would have been in the absence of challenges, such as the initial problems with the healthcare.gov enrollment website and the prohibitions on state agencies from assisting with enrollment in the exchanges. But even in states that passed state navigator licensure laws, enrollment goals were met, perhaps because of some legal challenges blocking implementation of the state laws discussed in Part V or due to increased advertising by the federal government and community agencies filling the gap.²²³

212. Haeyoun Park, et al., *Health Exchange Enrollment Ended with a Surge*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/interactive/2014/01/13/us/state-healthcare-enrollment.html?_r=2.

213. *Navigator Grant Recipients*, *supra* note 209, at 37-40.

214. Park, et al., *supra* note 212.

215. *Navigator Grant Recipients*, *supra* note 209, at 9.

216. *Navigators*, OFFICE OF INS. & SAFETY FIRE COMM’R, <http://www.oci.ga.gov/Navigators/> (last visited Dec. 21, 2014).

217. Park, et al., *supra* note 212.

218. *Navigator Grant Recipients*, *supra* note 209, at 36-37.

219. Park, et al., *supra* note 212.

220. *State Marketplace Profiles: Colorado*, *supra* note 203.

221. *Id.*

222. Park, et al., *supra* note 212.

223. *Id.* (stating that Connecticut, Rhode Island, New York, Colorado, and California passed state navigator licensure laws and met their goals); see Pat Willis, *Can We Achieve 100% Health Coverage for Children?*, VOICES FOR GA.’S CHILDREN (July

PART V: LEGAL CHALLENGES

The ACA gave states flexibility in operating the exchanges and related activities, but included a preemption clause stating that the federal law preempts state regulations that prevent application of provisions of the law.²²⁴ During 2013, as states passed legislation licensing navigators, advocates warned that the state laws could violate the federal standards and create legal conflicts.²²⁵ Lawsuits challenging the constitutionality of state navigator licensure laws were brought in Tennessee and Missouri.²²⁶ The agreements and rulings arising from those suits in Tennessee and Missouri may be instructional as to what results advocates in other states may achieve if they challenge their state's navigator laws.

A. League of Women Voters of Tennessee v. McPeak

The plaintiffs in *League of Women Voters of Tennessee v. McPeak* (“*LWV of Tennessee*”) filed a complaint for alleged injuries, including the fear of being subjected to penalties if they spoke or assisted others in enrolling in a qualified health plan through the insurance exchange.²²⁷ The plaintiffs were organizations and individuals, including members of a church, who wanted to help people sign up for health care as well as individuals seeking assistance with enrolling in a health plan.²²⁸ The organizations' members and the individual plaintiffs were in a position to educate individuals about the health insurance exchange and assist people in enrolling in a health care plan.²²⁹ The plaintiffs presented four main arguments: the Emergency Rules violated the Supremacy Clause, their First Amendment freedom of speech

17, 2014), <http://georgiavoices.org/2014/07/can-achieve-100-health-coverage-children/> (“In the fall of 2013, state ‘navigators’ and federal advertising began promoting enrollment under the Affordable Care Act.”); *infra* Part V.

224. 42 U.S.C. § 18041(d) (2012 & Supp. 2013).

225. Center for Health Law Studies, *supra* note 158 (“SB 262 conflicts with federal law that requires consumers have access to Navigators and others to help them understand their new health insurance.”); Potter, *supra* note 158 (“The [prohibition on giving advice about health plans] is an apparent violation of the federal law, which states that individuals other than agents and brokers . . . can . . . help people choose plans that are best suited for them.”); *see also* Jost, *supra* note 38 (“A major question that will need to be addressed is to what degree states can restrict the ability of navigators to fulfill their statutory responsibilities.”).

226. Agreed Final Order, *supra* note 197; Timothy Jost, *Implementing Health Reform: Court Blocks Missouri Restrictions on ACA Navigators*, HEALTH AFF. (Jan. 23, 2014, 4:32pm), <http://healthaffairs.org/blog/2014/01/23/implementing-health-reform-court-blocks-missouri-restrict-ions-on-aca-navigators/>.

227. Complaint at 2, *League of Women Voters of Tenn. v. McPeak*, No. 13-1365-IV, available at <http://www.tn.gov/attorneygeneral/cases/lwv/lwvcomplaint.pdf>.

228. *Id.* at 17-21, 23-25.

229. *Id.* at 15-27.

had been chilled, their freedom of association had been impinged, and their due process rights had been infringed upon.²³⁰

First, the plaintiffs argued that Tennessee's rules conflicted with the federal law because the rules more broadly defined navigators and prevented navigators from fulfilling their duties under Title I of the ACA.²³¹ The complaint alleged that the rules went beyond the federal definition of navigators by requiring background checks for anyone who facilitates enrollment, provides public education, and offers assistance.²³² The rules included language that the licensure requirements applied not only to navigators and certified application counselors registered with the federal exchange but also to any person who could "reasonably" be described as a navigator.²³³ The definition of navigators in the Tennessee law did not distinguish between individuals paid as navigators and those providing assistance for free as a community service or to help family.²³⁴ Also, the law did not exempt family members, teachers conducting educational activities, lawyers or accountants advising clients, or librarians providing information to community members.²³⁵ The rules were broad enough to cover more individuals than included in the federal law, although the rules exempted insurance brokers from the requirements.²³⁶

The complaint also alleged that, in addition to broadening the definition of navigator, the restrictions on state-licensed navigators violated federal law because the rule prevented the application of Title I of the ACA.²³⁷ The rules prohibited state-licensed navigators from discussing the various elements of the healthcare plans or offering advice to consumers.²³⁸ The complaint alleged that the rules prevented federally-certified navigators and counselors from fulfilling their duties to "provide information to consumers about the full range of qualified health plan options and insurance affordability programs for which they are eligible" and prohibited navigators from providing the kind of information necessary to "act in the best interest of the applicants."²³⁹

Second, plaintiffs' First Amendment claims alleged that the rules imposed a prior restraint on speech and unconstitutionally limited the content of navigators' speech.²⁴⁰ Plaintiffs were required to submit fingerprints and complete background checks before they could speak to their family mem-

230. *Id.* at 29-32.

231. *Id.* at 1-2.

232. *Id.* at 2.

233. *Id.* at 2, 8-9.

234. *Id.* at 12.

235. *Id.*

236. *Id.*

237. *Id.* at 32.

238. *Id.* at 2.

239. *Id.* at 14 (quoting 45 C.F.R. §§ 155.215(a)(2)(iv), 155.255(d)(4) (2013)) (citing 45 C.F.R. § 155.225(c)(3) (2013)).

240. *Id.* at 29-30.

bers, clients, parishioners, or fellow community members about the health plans or how to enroll.²⁴¹ Plaintiffs further alleged that the limits on the content of their speech (the prohibition against providing information about which benefits and plans might best meet the consumer's needs) violated the First Amendment and had a chilling effect on their speech.²⁴²

Third, *LWV of Tennessee* also raised a freedom of association claim because the rules required state-licensed navigators to be affiliated with a certified application counselor agency – even individuals who were not federally certified counselors.²⁴³ Two of the plaintiffs were community volunteers who wished to assist community members, but there was no certified application counselor in their area, making it difficult to affiliate with a counselor agency.²⁴⁴

Finally, the complaint included a count of due process violations under the Fourteenth Amendment and the Tennessee Constitution.²⁴⁵ The LWV of Tennessee argued that the state's definition of navigator included language that was too vague to give notice to plaintiffs as to which activities required licensure or when they might be fined for violating the law.²⁴⁶

A final agreement between the parties was filed on October 7, 2013.²⁴⁷ The State of Tennessee agreed that the rules applied only to people who have registered or are currently registered to be navigators or certified application counselors with the federal government under 45 CFR 155.215 and 155.225, or to people who hold themselves out to be navigators or counselors.²⁴⁸ As long as the person does not register with HHS, is not required to register with HHS, and does not represent him or herself as a navigator or counselor, that person does not have to obtain a state navigator license.²⁴⁹ As a result of the order, individuals like the plaintiffs can now talk to family, friends, and neighbors about the health plans and assist with enrolling. The agreement also addressed the free speech concerns. The final order stated that Tennessee's rules do not prohibit any activity that is authorized by the ACA statute and regulations.²⁵⁰ Although navigators may not steer someone toward a particular plan, he or she may give information to consumers about various

241. *Id.*

242. *Id.* at 29.

243. *Id.* at 30.

244. *Id.* at 26.

245. *Id.* at 31.

246. *Id.* at 31 (“The Emergency Rules purport to govern everyone who ‘facilitates enrollment’ or who ‘could reasonably be described or designated as, navigators, “non-Navigator assistance personnel” or “in-person assistance personnel,” enrollment assisters, application assisters or application counselors or certified application counselors.”).

247. Agreed Final Order, *supra* note 197.

248. *Id.* at 1-2.

249. *Id.* at 2.

250. *Id.*

elements of the plans so the consumer can make an informed decision.²⁵¹ Per the agreement, the Department of Commerce and Insurance posted the order on the website. The state also allowed the emergency rules to expire.²⁵²

B. *Harrington v. Haslam*

On the same day the agreed final order was filed in *LWV of Tennessee*, a federal judge issued a temporary restraining order to prevent the rules from being applied to the plaintiffs and similarly-situated Tennesseans in *Harrington v. Haslam*.²⁵³ The complaint alleged many of the same violations claimed in *LWV of Tennessee*.²⁵⁴ The plaintiffs in this case were Service Employees International Union Local 205 (whose members were in positions to assist consumers), an individual member who was a library employee, and another member who worked as an in-home personal attendant for Metro Nashville Department of Social Services.²⁵⁵ The plaintiffs expressed fear of being subjected to fines if they provided information or assistance to consumers.²⁵⁶

As in *LWV of Tennessee*, plaintiffs in *Harrington* alleged free speech violations under the First and Fourteenth Amendments and the Tennessee Constitution, violation of the Supremacy Clause, violation of the Americans with Disabilities Act, and a Fourteenth Amendment void for vagueness claim.²⁵⁷ First, the plaintiffs claimed that the rules constituted a free speech violation because the rules prohibiting the sharing of certain kinds of information and instituting a \$1,000 fine resulted in a chilling effect on anyone who communicated with a consumer.²⁵⁸ Second, the complaint offered examples of how the broad application of the licensure requirements to “virtually any kind of assistance” obstructed federal law.²⁵⁹ The plaintiffs argued that the ACA contemplates people other than navigators assisting people through the process of enrolling in health plans.²⁶⁰ Third, the *Harrington* complaint added an ADA violation, claiming that the state placed an undue

251. *Id.* at 3.

252. *Id.*; see *Insurance Division: News and Information: FAQ3 and Final Order of 10-7-2013: Navigator and Certified Application Counselor Registration Requirements*, TENN. DEP’T COM. & INS. (OCT. 8, 2013), <http://www.tn.gov/insurance/>.

253. Local 205 NewsWire, *Federal Judge Blocks TN’s “Emergency Rules” Regulating the Affordable Care Act*, SEIU LOCAL 205 (Oct. 7, 2013), <http://www.seiu205.org/2013/10/07/federal-judge-agrees-with-seiu-blocks-tns-emergency-rules-regulating-the-affordable-care-act/>.

254. Complaint at 1-2, *Harrington v. Haslam*, No. 3:13-cv1090 (M.D. Tenn. Oct 4, 2013), available at <http://blog.directcarealliance.org/wp-content/uploads/2013/12/Harrington-v.-Haslam-Complaint.pdf>.

255. *Id.* at 2-3.

256. *Id.* at 21, 23-24.

257. *Id.* at 2.

258. *Id.* at 9.

259. *Id.* at 8, 20.

260. *Id.* at 20 (citing 42 C.F.R. § 155.215(c)(3), (d)(2), (d)(4) (2013)).

burden on people with disabilities who needed assistance in enrolling in a health plan.²⁶¹ Plaintiffs argued that by allowing only state-licensed navigators to assist consumers in selecting and enrolling in a health plan, the rules prohibited family members from providing assistance to a relative with a disability.²⁶² Providing disabled individuals with only two options to either enroll independently or use a state-licensed navigator effectively screens out people with disabilities who need additional support from family or staff because such assistance could be seen as a violation of the state law.²⁶³

Judge Todd Campbell granted the motion for a temporary restraining order.²⁶⁴ The judge held that plaintiffs had a strong likelihood of success on the merits of their claim because the state rule “as applied to plaintiffs [was] an unconstitutional prior restraint in violation of the First Amendment.”²⁶⁵ The judge found that the state does have an interest in preventing people acting fraudulently, but the means were not narrowly tailored or carried out in the least restrictive manner as required by law.²⁶⁶ On the question of standing, the judge ruled that prior restraint on speech is an injury-in-fact and that it was important to hear the case “due to the important Federal questions implicated . . . the First Amendment and the implementation of the Federal Patient Protection and Affordable Care Act.”²⁶⁷ The free speech violations represented irreparable and immediate harm to plaintiffs, and the existence of such harm tipped the balance in favor of plaintiffs, particularly since the state had said it did not intend to enforce the rules against the plaintiffs’ speech.²⁶⁸ There was no harm to the public interest as evidenced by the state’s intention to not enforce the rules against plaintiffs.²⁶⁹

In its Answer, the state raised, among other defenses, the argument that the rules only applied to federally-certified navigators and certified application counselors, as agreed to in *LWV of Tennessee*.²⁷⁰ The state defended itself by claiming the plaintiffs lacked standing because they were not federally-certified navigators or certified application counselors and were not people with disabilities under the ADA.²⁷¹ The state also averred that the plaintiffs’ claims were moot and that plaintiffs no longer could maintain that the state rules violated the federal law.²⁷²

261. *Id.* at 2.

262. *Id.* at 11 (claiming this violated § 155.215(c)(3), (d)(2)).

263. *Id.* at 13.

264. Temporary Restraining Order at 1, *Harrington v. Haslam*, No. 3:13-cv1090 (M.D. Tenn. Oct 7, 2013).

265. *Id.* at 2.

266. *Id.*

267. *Id.*

268. *Id.* at 2-3.

269. *Id.* at 3.

270. Answer, *Harrington v. Haslam*, No. 3:13-cv1090 (M.D. Tenn. Oct 7, 2013).

271. *Id.*

272. *Id.*

Chief Judge Joseph Haynes signed a final order on May 19, 2014.²⁷³ Consistent with the *LWV of Tennessee*, the judge ordered and defendants agreed that Tennessee's regulations only applied to those who are, or hold themselves out to be, federally-certified navigators or counselors and that those who are not certified navigators can share information and assist others to enroll in a qualified health plan.²⁷⁴

C. *St. Louis Effort for AIDS v. Huff*

This lawsuit filed in the U.S. District Court for the Western District of Missouri made many similar claims to the plaintiffs who challenged the Tennessee law.²⁷⁵ The plaintiffs in *St. Louis Effort for AIDS v. Huff* ("*St. Louis EFA*") alleged that Missouri's law was unconstitutional because it violated the Supremacy Clause, the First Amendment, and the plaintiffs' due process rights.²⁷⁶

The parties were similar to the groups and individuals who brought the lawsuits in Tennessee. Two of the plaintiffs, St. Louis Effort for AIDS and Planned Parenthood, were organizations that had been certified by the federal exchange as certified application counselor organizations, and both received private funds to compensate their counselors.²⁷⁷ They were concerned about being forced to choose between fulfilling their ACA obligations and following the state law.²⁷⁸ Organizational plaintiffs Consumers Council of Missouri and Missouri Jobs with Justice were not federally-certified application counselors, but were involved in increasing access to health insurance for Missourians.²⁷⁹ They claimed their speech was chilled because they believed they could not conduct education activities or answer questions from community members regarding the health plans and how to enroll because they could be penalized for acting without a license.²⁸⁰ The individual plaintiffs had concerns that they could not provide or seek information from assisters of their choice about the benefits of the health plans and how to enroll.²⁸¹

273. Final Order, *Harrington v. Haslam*, No. 3:13-cv1090 (M.D. Tenn. May 19, 2014).

274. *Id.* at 1-3.

275. *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798, 802 (W.D. Mo. 2014).

276. *Id.* at 802.

277. *Id.* at 800.

278. Complaint and Prayer for Declaratory and Injunctive Relief at 18-19, 21-22, *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014) (Case No. 2:13-cv-4246).

279. *Id.* at 22.

280. *Id.* at 22-23.

281. *Id.* at 25-27 (stating that although doctors are exempt from being navigators, they are prohibited by state law from discussing any of the elements of the plans that might be beneficial for patients).

First, the plaintiffs argued that the federal law preempted HIMIA.²⁸² The plaintiffs claimed that several provisions in the Missouri law directly conflicted with the ACA and HHS regulations.²⁸³ Among these provisions were the definition of navigator,²⁸⁴ the prohibition against providing information and advice about the specific elements of health plans,²⁸⁵ the prohibition against offering any information on plans outside the exchange,²⁸⁶ and the requirement that someone who bought their current insurance from a broker be advised to consult with a broker.²⁸⁷

The complaint quoted the HHS standards that “individuals and entities providing application and enrollment assistance related to health insurance or insurance affordability programs are not required to be certified application counselors or . . . organizations designed by the Exchange in order to continue providing those services or communication with consumers.”²⁸⁸ Additionally, in states using the federal exchange, the federal government, rather than the states, is responsible for implementing the certified application counselor program.²⁸⁹ The state law therefore was said to violate the ACA because it changed the definition of navigator, allowed people to become navigators who did not meet the federal standards or who would not provide unbiased information, and regulated certified application counselors as a state.²⁹⁰

First, the two provisions that prohibit the kind of information that can be provided were alleged to prevent ACA navigators from fulfilling their duties.²⁹¹ The restrictions that prevent state-licensed navigators (who are not insurance brokers) from providing “advice concerning the benefits, terms, and features of a particular plan” and from providing “any information or services related to health benefits plans or other products not offered in the exchange” could inhibit navigators and counselors from giving consumers “fair, accurate and impartial” information about the full range of options.²⁹² The plaintiffs also alleged that a Missouri provision, requiring that people who bought their current insurance from a broker be advised to consult a broker, impeded counselors from acting in the person’s “best interest” per the ACA requirements.²⁹³

Second, the state law was alleged to have violated the First Amendment because the licensure requirement was a prior restraint on protected speech that had a chilling effect on the plaintiffs, causing them to fear the imposition

282. *Id.* at 4.

283. *Id.* at 11-13.

284. *Id.* at 11.

285. *Id.* at 2 (citing MO. REV. STAT. § 376.2002.3(3) (Supp. 2013)).

286. *Id.* (citing § 376.2002.3(5)).

287. *Id.* (citing MO. REV. STAT. § 376.2008 (Supp. 2013)).

288. *Id.* at 9.

289. *Id.* at 18-19, 21-22.

290. *Id.* at 11.

291. *Id.* at 12, 13.

292. *Id.* at 2, 12-13.

293. *Id.* at 14.

of fines for violations.²⁹⁴ Plaintiffs argued that the state law placed an “impermissible prior restraint on speech” because people could not speak about health insurance options until they had a state license.²⁹⁵ Plaintiffs also alleged that the prohibition against offering any advice on particular details of plans or options outside the exchange was an unconstitutional content-based restriction.²⁹⁶ Plaintiff’s third argument was that the language regarding penalties also violated the Fourteenth Amendment due process rights of the plaintiffs because language that results in penalties for violation of Missouri insurance laws and for “other good cause” is vague and undefined.²⁹⁷

In January 2014, U.S. District Judge Ortrie Smith ordered a preliminary injunction to enjoin implementation of HIMIA as applied to the Certified Application Counselor Organizations, navigators, and counselors.²⁹⁸ He found that while plaintiffs St. Louis EFA and Planned Parenthood would likely succeed on their claim and faced irreparable harm because they were receiving federal compensation to provide counselor/navigator services, the other plaintiffs were not covered by the Missouri law and thus were not harmed by it.²⁹⁹ For the court, the preemption and Supremacy Clause arguments were dispositive.³⁰⁰ The test for conflict preemption asks whether it is impossible to comply with both the state and federal law because the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁰¹ As applied in the context of the ACA, “state laws that make operation of the FFE [federally-funded exchanges] more difficult or onerous run afoul of the ACA’s purpose and are subject to preemption.”³⁰²

After rejecting the state’s argument that HIMIA does not apply to the counselor organizational plaintiffs (St. Louis EFA and Planned Parenthood), but agreeing that the remaining plaintiffs were excluded,³⁰³ Judge Smith found a likelihood of success on the merits of the claim because the additional state licensure requirements “obstruct[ed] the operation of the FFE,” and thus would be preempted.³⁰⁴ One Missouri state provision held to create a barrier to implementation of the federal law was Section 376.2002.3, a provision that prohibits state navigators who are not licensed brokers from engaging in certain activities such as providing “advice concerning the benefits,

294. *Id.* at 3.

295. *Id.*

296. *Id.*

297. *Id.* at 17.

298. *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798, 810 (W.D. Mo. 2014).

299. *Id.* at 804, 807-08.

300. *Id.* at 802.

301. *Id.* (citing *Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013) (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012))).

302. *Id.* at 803.

303. *Id.* at 807-08.

304. *Id.* at 805.

terms and features of a particular health plan[,] . . . offer[ing] advice about which exchange health plan is better or worse for a particular individual or employer[,]” and informing consumers about plans outside the exchange.³⁰⁵ This section was held to conflict with the ACA’s requirements that navigators “distribute fair and impartial information concerning enrollment,” provide information on “the availability of premium tax credits,” “facilitate selection of a QHP [qualified health plan,]” and provide information about options.³⁰⁶

Judge Smith also held that St. Louis EFA and Planned Parenthood demonstrated irreparable harm because they risked either violating HIMIA by performing their duties as federal navigators or losing their status as federal counselors by complying with the state law.³⁰⁷ The court found HIMIA’s enforcement provisions, which include suspending state navigators for “good cause,” to be evidence of the risks that the plaintiffs faced if they violated the state law in the process of complying with the ACA.³⁰⁸ Although the state argued that there were limiting principles to the use of enforcement mechanisms, the order indicated that the state did not suggest what those limitations were.³⁰⁹ The court held that there would be no hardship to the state if it were prevented from implementing HIMIA, and the public interest would be served by an injunction because navigators would be able to fulfill their duties in assisting people through the “myriad of deadlines” to apply for the ACA.³¹⁰ The state’s argument that the public has an interest in qualified, non-fraudulent navigators had no traction, as the court pointed out that the navigators and counselors are federally certified and the state showed no evidence why “HHS approval is insufficient.”³¹¹

The bottom line for Judge Smith seemed to be that Missouri could not have it both ways. The state made a very conscious choice not to operate an exchange, and it cannot then try to “impose additional requirements or limitations on the exchange,” thereby frustrating the efforts of HHS to operate a FFE.³¹² In addition to the analysis of specific state provisions that the court found conflicted with federal requirements, “the Court [was] of the view that any attempt by Missouri to regulate the conduct of those working on behalf of the FFE is preempted.”³¹³ This appears to be a broader interpretation of federal preemption than even HHS imagined in its regulations, which permit states to establish licensure or certification requirements for navigators “so long as such standards do not prevent the application of the provisions of title

305. *Id.* at 806 (quoting MO. REV. STAT. § 376.2002.3(3) (Supp. 2013)).

306. *Id.* (quoting 42 U.S.C. § 18031(i)(3)(B) (2012 & Supp. 2013); 45 C.F.R. § 155.210(e)(2)-(3) (2013)).

307. *Id.* at 808-09.

308. *Id.* at 809.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 807.

313. *Id.*

I of the Affordable Care Act.”³¹⁴ The current state law includes provisions that were found to conflict with the specific requirements in the ACA, but it does not necessarily follow that *any* attempt at state regulation would prevent compliance with the federal law.³¹⁵ For example, a state law requiring navigators to complete a certain number of hours of training on state-specific topics such as MO HealthNet or mental health service options would not force navigators to choose between compliance with the federal law or state law. Duplicative training may not be an efficient use of public funds, but a state may be able to legally craft certification requirements to meet specific state interests.

Perhaps on the assumption that the state would not appeal Judge Smith’s injunction, on February 6, 2014, the Missouri Association of Insurance Agents (“MAIA”) filed a motion to intervene as of right, arguing that the action for declaratory judgment would impede MAIA members’ ability to participate in the exchanges and that MAIA members have an interest in a well-regulated health insurance system that protects consumers and the fair and equal treatment of all who are participating in the health insurance exchange.³¹⁶ MAIA also argued that the current parties did not protect its interests because MAIA’s interests are separate and distinct from those parties.³¹⁷ MAIA members had economic interests at stake and a long history of providing insurance services to consumers.³¹⁸ In the alternative, MAIA moved for permissive intervention because it shared a common interest with the state in the interpretation and scope of the HIMIA.³¹⁹ Judge Smith denied MAIA’s motion to intervene, finding that MAIA did not have standing and did not assert any distinct interests or defenses that are unavailable to the defendant.³²⁰

D. *Appeal of St. Louis EFA v. Huff*

On February 24, 2014, the state filed its notice of appeal with the United States Court of Appeals for the Eighth Circuit.³²¹ In the appellant brief, filed prior to HHS issuing new rules on preemption, the state argued that the Missouri HIMIA merely regulated navigators as allowed by the federal regulation, and the District Court erred in holding that “the Missouri act is preempted even if it merely ‘attempts to regulate’ the conduct of federal naviga-

314. 45 C.F.R. § 155.210(1)(iii) (2013).

315. MO. REV. STAT. § 376.2002 (Supp. 2013).

316. Motion to Intervene at 10, *St. Louis Effort for Aids v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014) (2:13-cv-04246).

317. *Id.*

318. *Id.*

319. *Id.* at 11.

320. Order and Opinion Denying Motion to Intervene at 6, *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014) (2:13-cv-04246).

321. Notice of Appeal, *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014) (2:13-cv-04246).

tors.”³²² The state argued that Congress adopted a narrow preemption clause, which only preempts state regulations that prevent implementation of the ACA.³²³ HIMIA did not prevent application of Title I of the ACA because, among other reasons, (1) Missouri’s “prohibition on providing ‘advice’ . . . is different than ‘distribut[ing] fair and impartial information’” as required by the ACA, and (2) Missouri’s “prohibition on providing information on health plans outside the exchange . . . is different than ‘acknowledging’ other health programs” as required by the federal regulations.³²⁴

The appellees’ brief was filed after HHS published its final rules that identify instances when state regulation of federal navigators, non-navigators, and CACs would be preempted, and appellees argued that plaintiffs could not comply with Missouri HIMIA and the new Final Rule.³²⁵ Thus, the District Court was correct in holding the sections of HIMIA preventing advice on plans, preventing advice on off-exchange plans, and requiring referrals to agents were preempted.³²⁶ Appellant argued in its reply brief that “HHS’s 2014 regulations exceed the statutory authority of the ACA and, therefore, are due no deference.”³²⁷ The state argued deference is not owed to the agency because the statutory preemption provision is not ambiguous and the agency’s interpretation “is not a permissible construction” of the provision.³²⁸ Oral arguments were held on January 14, 2015.³²⁹

If the Eighth Circuit gives deference to HHS’ interpretation of the ACA preemption provision, it may find certain provisions of HIMIA are preempted. Analysts at the Commonwealth Fund identified state restrictions in Missouri that may be invalid under the Final Rule, including limitations on the advice that assisters may provide and mandated referrals to agents or brokers.³³⁰ The HHS Final Rule preempts state regulations that would prevent an assister from providing “advice regarding substantive benefits or compara-

322. Brief of Appellant at 14-16, *St. Louis Effort for AIDS v. Huff*, (No. 14-01520) (8th Cir. Mar. 6, 2014). The Missouri Association of Insurance Agents filed an amicus brief on behalf of the appellants. Brief of Missouri Association of Insurance Agents as Amicus Curiae Supporting Appellant and Reversal Filed with Consent, *St. Louis Effort for AIDS v. Huff* (No. 14-01520) (8th Cir. Mar. 6, 2014).

323. Brief of Appellant, *supra* note 322, at 19-25.

324. *Id.* at 33, 40.

325. Appellees’ Brief at 15, *St. Louis Effort for AIDS v. Huff* (No. 14-01520) (8th Cir. Mar. 6, 2014).

326. *Id.*

327. Appellant’s Reply Brief at 4, *St. Louis Effort for AIDS v. Huff* (No. 14-01520) (8th Cir. Mar. 6, 2014).

328. *Id.* at 5, 8.

329. *Argument Calendars: January 12-16, 2015 – St. Louis, Missouri*, U.S. CT. APPEALS EIGHTH CIR., <http://www.ca8.uscourts.gov/argument-calendars> (last visited Jan. 5, 2015).

330. Justin Giovannelli, Kevin Lucia & Sabrina Corlette, *State Restrictions on Health Reform Assistants May Violate Federal Law*, COMMONWEALTH FUND BLOG (June 25, 2014), <http://www.commonwealthfund.org/publications/blog/2014/jun/state-restrictions-on-health-reform-assisters>.

tive benefits of different health plans.”³³¹ Although Missouri Revised Statutes Section 376.2002.2 allows navigators to “provide fair and impartial information” and “facilitate the selection” of a health plan, Subsection 3 explicitly prohibits anyone other than insurance brokers from “provid[ing] advice concerning the benefits, terms, and features of a particular health plan or offer[ing] advice about which exchange health plan is better or worse for a particular individual or employer.” The first half of Subsection 3 seems to fall squarely within the type of state regulation preempted by Section 155.210 – Missouri would prevent “advice” on the benefits of plans. The HHS rules do not allow an assister to recommend a particular plan,³³² and so the second half of subsection 3 may be valid.

The HHS Final Rule may also preempt the HIMIA mandate that a navigator, non-navigator, and CAC advise a consumer to consult an insurance broker if the consumer previously obtained his or her current coverage through an agent. The HHS rule preempts state regulations that require assisters to refer a consumer to someone who is not required to give “fair, accurate, and impartial information.”³³³ There is a possibility that advising someone to consult a broker is not the same as a referral if the navigator continues to assist the consumer. One criticism of the HHS Final Rule is that the preamble states that the rule does not prohibit referrals when the assistance of a broker would be helpful to a consumer.³³⁴ Additionally, no state is going to agree that brokers do not provide “fair, accurate, and impartial information,” allowing states to work around the HHS Rule.

If the Eighth Circuit does not give deference to the HHS Rule but conducts its own preemption analysis, it may find that conflict between the state and federal law is speculative. The District Court order for preliminary injunction cites *Keller v. City of Freemont*³³⁵ in the discussion of conflict preemption.³³⁶ In *Keller*, the Eighth Circuit held that federal law did not preempt a Freemont, Nebraska, city ordinance related to checking immigration status of renters.³³⁷ *Keller* may offer clues as to how the Eighth Circuit will rule on the question whether HIMIA creates barriers to implementation of the Affordable Care Act, thus making it preempted by federal law.

Among the housing provisions of the Freemont ordinance were the requirements that prospective renters obtain an occupancy license prior to taking possession of the property and that the police department conduct a back-

331. 45 C.F.R. § 155.210(c)(iii)(C) (2013).

332. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30240-01, 30277 (May 27, 2014).

333. § 155.210(c)(iii)(A).

334. Timothy Jost, *Implementing Health Reform: Final 2015 Exchange and Insurance Market Standards Rules*, HEALTH AFF. BLOG (May 27, 2014), <http://healthaffairs.org/blog/2014/05/17/implementing-health-reform-final-2015-exchange-and-insurance-market-standards-rule/>.

335. 719 F.3d 931 (8th Cir. 2013).

336. *St. Louis Effort for Aids v. Huff*, 996 F. Supp. 2d 798, 802 (W.D. Mo. 2014).

337. *Keller*, 719 F.3d at 945.

ground check with the federal government to verify immigration status.³³⁸ If the applicant's status comes back as "unlawfully present," and the status is not changed within sixty days, the occupancy permit is revoked and penalties are imposed on anybody who "harbors" a person unlawfully in the U.S.³³⁹ The district court held that the revocation of the occupancy permits and the penalties for harboring unlawful immigrants interfered with the federal scheme for immigration control and were therefore preempted.³⁴⁰

The Eighth Circuit did not agree that federal law preempted the city's ordinance.³⁴¹ The court held that the claim that the ordinance would cause the removal of illegal immigrants and interfere with government objectives was speculative.³⁴² The court also held that the impact of the ordinance on the movements of immigrants was indirect, that such reasoning was "too broad," and that "far greater specificity" is required when analyzing conflict preemption.³⁴³ In response to the United States' argument that the fluidity of immigration status makes it harder to tell the city whether an immigrant is lawful, the court found no explanation for "why a local law is conflict-preempted when the federal government has the complete power to avoid the conflict."³⁴⁴ The court was also unwilling to "speculate" whether the ordinance would create barriers to the achievement of federal goals before it was implemented.³⁴⁵ The court reversed the district court's ruling that federal immigration law preempted the rental provisions of the ordinance.³⁴⁶

There are some similarities between the City of Freemont's ordinance and HIMIA. Both laws established a licensure requirement and imposed penalties for violations.³⁴⁷ In both cases, local governments were implementing law in fields in which there was significant federal statutory and regulatory power.³⁴⁸ In *Keller*, the Eighth Circuit did not find conflict preemption,³⁴⁹

338. *Id.* at 938.

339. *Id.*

340. *Id.*

341. *Keller*, 719 F.3d at 945.

342. *Id.*

343. *Id.* at 944.

344. *Id.* at 945 (finding that conflict is avoided because the rental provisions are ineffective if the federal government is unable to identify an applicant as "unlawfully present").

345. *Id.* ("In determining whether a law is facially invalid [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, (2008))).

346. *Id.* at 951.

347. *See Keller*, 719 F.3d at 938-39; MO. REV. STAT. §§ 376.2002, .2010 (Supp. 2013).

348. *See, e.g., Keller*, 719 F.3d at 940 ("Power to regulate immigration is unquestionably exclusively a federal power." (quoting *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976))); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

349. *Keller*, 719 F.3d at 945.

even in the field of immigration control which is “unquestionably exclusively a federal power.”³⁵⁰ Health care is a field of even greater concurrent jurisdiction in which states have a great power to regulate insurance companies, license health practitioners, design and administer public health programs, and run the Medicaid program.

One question is whether the Eighth Circuit will find that the plaintiffs in *St. Louis EFA* have conducted a “conflict preemption analysis” with “greater specificity” than did the plaintiffs in *Keller*.³⁵¹ The legal effect of the Fremont ordinance was to revoke occupancy permits and penalize people who harbored illegal immigrants, but the ordinance itself did not regulate the removal of immigrants (which is a federal issue).³⁵² The plaintiffs in *St. Louis EFA* and the district court order outlined ways in which HIMIA directly prevents or imposes barriers to achieving the federal goals of the ACA and the Exchanges.³⁵³ There is arguably a direct effect of HIMIA on the goal of enrolling people in the Exchanges because there are specific prohibitions on what the state navigators and counselors can share with consumers.³⁵⁴ State regulations that prevent navigators from sharing information about plans outside the exchange, or that inhibit navigators from providing the kind of information that consumers need to select a plan, present barriers to achieving the goal of the navigator program. In other words, it is not an indirect effect but a direct constraint imposed by a state on navigators who are operating in a federally-managed exchange.

In *Keller*, the Eighth Circuit found that the “federal government has complete power to avoid the conflict.”³⁵⁵ Assuming the HIMIA provisions actually prevent navigators from carrying out their duties, the federal government does not have the power to avoid the conflict. If the state navigators were not found to be in compliance with federal regulations, HHS would have to enforce the penalties by withdrawing the groups’ eligibility and grants to serve as navigators and counselors.³⁵⁶ In that case, there would be no navigators in the federal exchange in Missouri due to the fact that they could not meet both the state and federal licensure requirements, and obviously the exchange would fail, thwarting the “accomplishment and execution of the full purposes and objectives of Congress.”³⁵⁷

While it can be argued that HIMIA has a direct effect on a federal scheme and that the statute as written could lead to the obstruction of HHS goals, the Eighth Circuit may be hesitant to accept those arguments as anything more than predictions. Like the landlords in Fremont, Nebraska, navi-

350. *De Canas v. Bica*, 424 U.S. 251, 554 (1976).

351. *Keller*, 719 F.3d at 944 (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)).

352. *Id.* at 959.

353. *See supra* Part V.C.

354. *See supra* Part V.C.

355. *Keller*, 719 F.3d at 944.

356. 45 C.F.R. § 155.210(e)(6)(ii)-(iii) (2013).

357. *Id.*

gators in Missouri face the risk of penalties if they do not comply with the local law. But in *Keller*, the Eighth Circuit did not want to speculate on the effects of the ordinance before it had been implemented.³⁵⁸ HIMIA was in effect prior to the injunction,³⁵⁹ but the plaintiffs' claims that they would be unable to carry out their federal duties without violating the state law and risking penalties might be viewed as "hypothetical" or "imaginary" cases.³⁶⁰ For example, the difference between providing "information" and providing "advice" (which is disallowed by HIMIA) and whether such a distinction prevents a navigator from providing information necessary to choosing a plan may depend on implementation by state officials. It is also uncertain how, and to what extent, the state will enforce HIMIA and impose penalties. The fear that the state will impose fines on a navigator who tells a consumer about Medicaid, which is outside the exchange, may seem too "imaginary." The Eighth Circuit's caution in declining to hold that the Freemont ordinance was facially preempted³⁶¹ could influence the decision in *St. Louis EFA*.

Whether the HHS Final Rule is dispositive or the Eighth Circuit conducts its own conflict analysis, it is likely the court will not agree with the District Court that any state attempt to regulate federal navigators, non-navigators, and counselors is preempted.³⁶² The HHS Final Rule allows state licensure, including regulation of counselors, as long as the state actions do not prevent application of Title I, and the preamble to HHS Final Rule anticipates states can impose provisions such as background checks, as long as such measures as applied do not prevent federal assisters from carrying out their obligations.³⁶³

PART VI: ANOTHER VOLLEY IN MISSOURI'S POLITICAL BATTLE OVER THE ACA

In the 2014 legislative session, Missouri lawmakers introduced legislation to impose additional requirements on state navigators.³⁶⁴ The General Assembly passed, but Governor Jay Nixon vetoed, Senate Bill 508 (Parson), which would have required the Director to create a state-specific certification

358. *Id.* at 945 ("Before the rental provisions have been construed and implemented by state and local officials, and before we know how federal authorities will respond . . . we decline to speculate whether the rental provisions might, as applied, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

359. See *Navigators Licensing Requirements and Application*, MO. DEP'T INS., <http://insurance.mo.gov/otherlicensees/navigators.php> (last visited Dec. 21, 2014).

360. *Keller*, 719 F.3d at 945 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008)).

361. *Id.*

362. See *supra* notes 337-340 and accompanying text.

363. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30240-01, 30270 (May 27, 2014).

364. SB 508, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

program, would not have allowed a passing score on the federal certification exam to satisfy the state requirement, and would have required criminal background checks for navigators.³⁶⁵ The Governor announced that he vetoed SB 508 because the final bill, based on model legislation from the American Legislative Exchange Council (“ALEC”), referenced the wrong federal statute, and given ongoing litigation, the error was serious enough to require a veto.³⁶⁶ In effect, this would have undone the mitigating effect of Missouri’s rule accepting completion of the federal navigator training as adequate for state licensure purposes.³⁶⁷ Separate state training could waste state dollars if the training is duplicative. A separate training program could also be confusing if the training includes information that contradicts the federal training or prevents navigators from carrying out the duties they learned about in the federal training.

The bill would also have required Missouri to follow Georgia and Tennessee’s examples by implementing a criminal background check.³⁶⁸ Requiring applicants to submit fingerprints and consent to a criminal background check is a way to ensure that people who have a history of fraud or financial exploitation are not in a position to access consumers’ financial and personal information.³⁶⁹ As discussed previously, measures such as these are not preempted as long as they are implemented in a manner that does not prevent implementation of Title I of the ACA.³⁷⁰ Whether the background check requirement is a consumer safety measure or rather another attempt to block effective implementation of the health insurance marketplace seems to depend on political perspective.³⁷¹

Although unsuccessful, some senators attempted to put even more measures in place to regulate state navigators. Senate Bill 498, sponsored by Senator Kurt Schaefer, would have made it unlawful for a navigator to disclose a consumer’s private information except to appropriate government

365. *Id.*

366. Letter from Jeremiah W. Nixon, Governor, Mo., to Jason Kander, Secretary of State, Mo. (July 7, 2014), available at <http://governor.mo.gov/sites/default/files/SB%20508%20veto.pdf>.

367. See *supra* Part II.B.2 for a discussion on how the emergency regulations allayed some fears of the negative impact of HIMIA.

368. SB 508, *supra* note 364.

369. *Id.*

370. See *supra* note 112 and accompanying text.

371. See, e.g., Wendell Potter, *Missouri Lawmakers Renew Cynical Efforts to Derail Obamacare Navigators*, CENTER PUB. INTEGRITY (Feb. 17, 2014), <http://www.publicintegrity.org/2014/02/17/14249/missouri-lawmakers-renew-cynical-efforts-derail-obamacare-navigators> (“To discourage folks from signing up for coverage on the Obamacare exchanges, Republican lawmakers in several states have pushed through bills making it difficult for people to get free help from specially trained ‘navigators’ authorized by the Affordable Care Act.”); *Missouri Bills Would Require Exams, Background Checks for Insurance Navigators*, INS. J. (Feb. 13, 2014), <http://www.insurancejournal.com/news/midwest/2014/02/13/320435.htm> (“Republican supporters said the bills would protect Missourians from fraud.”).

agencies and would have created a right of action for a person whose personal information was wrongly disclosed.³⁷² The fear of a lawsuit could prevent navigators from carrying out legitimate activities such as sharing personal identification information with a health insurance plan at the request of the consumer who needs assistance in communicating with the plan.³⁷³ The legislation proposed no intent requirement, and damages were the greater of actual damages or \$50,000.³⁷⁴ This potential for minimum liability without the need to prove actual damages could discourage participation by navigators.

SB 498 would also have required state-licensed navigators to be covered by a bond in the amount of at least \$100,000 to allow consumers to collect damages in the case of wrongful disclosure of personal information.³⁷⁵ Even though most navigator organizations have their staffs bonded, many agencies see such proposed legislation as another hoop for navigators to jump through and a misunderstanding of the consumer protections already in place.³⁷⁶

CONCLUSION

There is something compelling about Judge Smith's observation: "Having made the choice to leave the operation of the exchange to the federal government, Missouri cannot choose to impose additional requirements or limitations on the exchange."³⁷⁷ The states highlighted as examples in this Comment, as well as others, had a choice to design a state exchange in a way that state lawmakers and officials felt would best meet their citizens' needs. For example, if the states had created their own exchanges, they could have created and designed a state navigator training program to include information the state felt was necessary to protect the well-being of consumers, rather than adding additional or conflicting requirements to the federal certification process.

In the context of Missouri's history of trying to block or slow implementation of the ACA (on the part of lawmakers and the voting public) and comments made in the media by leaders in other states, it is hard not to see state navigator laws as further opposition to the ACA. Missouri DIFP's more reasonable rules, basing state licensure on the completion of federal certifica-

372. SS SB 498, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

373. Center for Health Law Studies, *Missouri's 2014 Navigator Bills*, ST. LOUIS U. SCH. OF L., <http://slu.edu/Documents/law/Centers/Health%20Law/Medicaid/2014Navigatorbills3-7-14.pdf> (last visited Dec. 21, 2014).

374. SS SB 498, *supra* note 372.

375. *Id.*

376. Jodie Jackson, Jr., *Schaefer Seeks Added Requirements for Health Insurance Navigators*, COLUM. DAILY TRIB. (Jan. 8, 2014, 2:00 PM), http://www.columbiatribune.com/news/politics/schaefer-seeks-added-requirements-for-health-insurance-navigators/article_43b3b7fe-788b-11e3-928c-10604b9f7e7c.html.

377. *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798, 807 (W.D. Mo. 2014).

tion, caused the Missouri General Assembly to respond by explicitly rejecting federal training as adequate for state licensure requirements. The expenditure of time and resources regulating federal navigators in the federal exchange could have been used in designing a state-based exchange and involving citizens in the process, something that was done in Colorado.

State lawmakers and officials argue in favor of state licensure laws as a necessary consumer protection against fraud and uninformed navigators. These claims must be considered in the context of the interests of the insurance agents and brokers, as well as the amount of resources spent lobbying Congress and the states. There is an anti-competitive nature to the state navigator licensure laws. The additional burdens on state navigators, the prohibitions on what navigators can say or share with consumers, and exemption of licensed brokers from the state navigator licensure requirements could discourage community non-profits from serving as navigators or limit the effectiveness of the services, if not both. The HIMIA requirement that navigators advise someone who acquired their current private insurance through an insurance broker to consult with a broker³⁷⁸ appears to be a fairly direct measure to protect the business of brokers.

The duties of a navigator and a licensed broker are not the same.³⁷⁹ A navigator can provide general information without selling insurance or negotiating rates.³⁸⁰ Navigators need to understand the plans in the exchange, the rules for premium assistance programs, and eligibility for Medicaid and the Children's Health Insurance Program, but they do not need to have the detailed knowledge to sell insurance.³⁸¹ Just because becoming a licensed broker is not appropriate for the navigator program does not mean that it is not appropriate for licensed brokers to become navigators as allowed by the ACA³⁸² and HHS regulations.³⁸³ Colorado has enrolled brokers as navigators, and one Colorado insurance broker has expressed the view that rather than being worried about the competition, he anticipates that the exchange "is

378. MO. REV. STAT. § 376.2008 (Supp. 2013).

379. See 45 C.F.R. § 155.210 (2013). *Contra* MO. REV. STAT. § 375.014 (Supp. 2013).

380. See, e.g., National Association of Insurance Commissioners, *Producer Licensing Model Act* (2005), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.naic.org%2Fstore%2Ffree%2FMDL-218.pdf&ei=jIGXVNWjKmb2yQTzZiCoAw&usg=AFQjCNEpcHpyQ1R-VkXiUXTKeueP5_AGEA&sig2=u4cvMHx_Sh5ZldKggQTC_w&bvm=bv.82001339,d.aWw ("A person shall not sell, solicit or negotiate insurance in this state for any class or classes of insurance unless the person is licensed for that line of authority in accordance with this Act.").

381. Ollove, *supra* note 157.

382. 42 U.S.C. § 18031 (2012 & Supp. 2013).

383. 45 C.F.R. § 155.220 (2013).

the single best opportunity for [insurance brokers] to grow.”³⁸⁴ But while individuals may be looking for ways to participate in the exchange, the powerful lobbying groups involved are pushing a different message.³⁸⁵

The ongoing lobbying efforts by insurance brokers and the legal challenges by community groups suggest that tension over the role of navigators will remain constant. Some federal district court judges have already decided that federal law preempts some of the state licensure laws, which has resulted in changes to the rules in Tennessee and an injunction in Missouri.³⁸⁶ HHS attempted to clarify examples of state regulations that would be preempted by federal law. The Final Rule offers some guidance to state lawmakers and federal courts, but the rule does not offer an exhaustive list and leaves the door open to state regulation that consumers may not like. To one commentator, the preface to the rule “seems to . . . leave the scope of preemption of state mandated-referral laws wholly unclear.”³⁸⁷ In Missouri, the General Assembly was not deterred, however, and passed legislation imposing additional requirements on navigators following the federal judge’s injunction order, although the Governor vetoed the bill.³⁸⁸

Depending on the results of settlements and appeals, the continued implementation of state licensure laws could result in too few navigators if smaller organizations or individuals do not want to take the risks or deal with the additional burdens of becoming state navigators. In Tennessee, under amended rules, and in Missouri, as interpreted by Judge Smith in *St. Louis EFA*, the licensure requirement does not include community groups or individuals who do not receive any federal compensation and want to provide assistance.³⁸⁹ In these states, the laws may not inhibit the kinds of assistive roles that community groups, churches, personal attendants, and librarians can provide.³⁹⁰

An effective navigator and counselor network is a necessary component to enrollment in a health plan. People need information on the fundamentals of each health plan in order to evaluate and choose the plan that best meets their needs and budget. HHS and the states have an interest in ensuring quality services and protections against fraud. It is possible to meet both the enrollment interests of the exchange and the valid consumer protection interests of the states.

384. Eric Whitney, *Insurance Brokers Look for Relevance as Health Exchanges Grow*, KAISER HEALTH NEWS (Oct. 3, 2013), <http://kaiserhealthnews.org/news/brokers-look-relevance-as-health-exchanges-grow/>.

385. *Id.*

386. See Agreed Final Order, *supra* note 197, at 1; see also *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798, 810 (W.D. Mo. 2014).

387. Jost, *supra* note 334.

388. See *supra* notes 364-366 and accompanying text.

389. Agreed Final Order, *supra* note 197, at 1; see also *St. Louis Effort for AIDS*, 996 F. Supp. 2d at 810.

390. Agreed Final Order, *supra* note 197, at 1; see also *St. Louis Effort for AIDS*, 996 F. Supp. 2d at 810.

First, state licensure requirements should be written in a way that does not prevent implementation of the federal navigator rules. If consumers turn to navigators and counselors for enrollment assistance, they should be able to get their questions answered. Like the agreement in *LWV of Tennessee*, state laws could include language explicitly allowing navigators to carry out authorized activities under the ACA.

Second, brokers can be navigators as long as they meet the HHS requirements to be free of conflicts of interest and provide informed choices to consumers. There is no reason to impose anti-competitive measures to protect the insurance brokers' financial interests since navigator services are different from negotiating and selling insurance. Language prohibiting navigators from talking to consumers about plans "outside the exchange" could limit their ability to talk about state Medicaid programs. Additionally, mandatory referrals to insurance brokers may not make sense if consumers can select a qualified health plan with the assistance of a navigator.

Third, state licensure requirements can be implemented in a way that does not restrict consumers' access to assistance or result in a chilling effect on navigators and counselors. States can narrowly define "navigators" to be clear that the licensure requirements only apply to those organizations that receive compensation for the purposes of carrying out navigator and counselor activities and hold themselves out to be navigators and counselors. If the definition of covered entities and individuals clearly does not apply to churches, librarians, neighbors, health care providers, attorneys, and consumer groups who do not receive navigator funding, then criminal background checks may not create a burden or reduce the number of people providing assistance. A state, as well as navigator entities, can avoid duplicative costs by including the federal exam as the major component of satisfying the state requirements and adding additional state training hours for state-specific elements, such as background checks, the state's Medicaid system, and state penalties for disclosure of personal information.

The navigator issue will remain an important one as people move in and out of the health insurance exchanges and as states and courts interpret the 2014 HHS Final Rule. Some state legislatures and interest groups have not given up on state licensure requirements that create additional hurdles for navigators and protect the interests of insurance brokers. Rather than making it more difficult for community organizations to become navigators or trying to carve out business for the brokers, states with federal exchanges should either accept the federal navigator regulations as adequate or establish reasonable licensure requirements that supplement, rather than duplicate, federal certification and that do not prevent the implementation of the ACA.