No. 14-6191

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA WILSON, *et al.*,

Plaintiffs-Appellees,

v.

DARIN GORDON, in his official capacity as Deputy Commissioner of the Tennessee Department of Finance & Administration and Director of the Bureau of TennCare, *et al*.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Middle District of Tennessee, No. 3-14-1492

APPELLANTS' REPLY BRIEF

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INTRODUCTION

If the Court reaches the merits in this appeal, it will be obliged to resolve an interrelated set of novel legal questions concerning the interplay between the Affordable Care Act ("ACA") and the Medicaid Act. These questions arise against a highly fluid factual backdrop as state and federal officials labor to implement the ACA's sweeping changes to the Medicaid program and to address delays in processing Medicaid applications like those Plaintiffs experienced.

All agree that the ACA for the first time directed federal officials to participate directly in the administration of the Medicaid program by accepting and adjudicating Medicaid eligibility applications. It likewise appears to be common ground that Tennessee is powerless to supervise the federal agency that operates the Federal Exchange. Nevertheless, Plaintiffs and the United States ask the Court to hold that Congress required State Medicaid agencies to make eligibility determinations and to provide fair hearings to applicants in cases in which the applicants applied to the Federal Exchange and the "federally facilitated Exchange is unable to make a timely determination of Medicaid eligibility," Brief for the United States as Amicus Curiae ("U.S.Br.") 12, even where federal officials have provided no information whatever to the State about the applications submitted to the Federal Exchange. Neither the ACA nor the Medicaid Act require such a

counter-intuitive result. Congress has not imposed duties on State Medicaid agencies even as it deprived them of the authority necessary to carry them out.

But the Court need not dive into the bramble patch of constitutional and federalism principles, statutes, and regulations implicated by the merits of this appeal, for the case is moot. There is no dispute that each of the individual Plaintiffs' claims became moot before the class was certified when they enrolled in TennCare as part of an agreement they made with the State. That is the end of the matter, for one cannot *choose* to leave an uncertified class and continue to sue on its behalf. In this "era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies," federal courts must be especially vigilant about observing the limits of their power under Article III. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Because Plaintiffs voluntarily relinquished their claims by agreeing to be enrolled in TennCare, this case is moot and must be dismissed.

ARGUMENT

I. THIS CASE MUST BE DISMISSED AS MOOT.

A. Plaintiffs Voluntarily Relinquished Their Claims by Bargaining for and Agreeing to the Special Process Through Which They Were Enrolled in TennCare.

Under this Court's cases, when "the named plaintiffs' claims [are] voluntarily relinquished" prior to class certification, the case is moot and must be

dismissed. *Pettrey v. Enterprise Title Agency, Inc.*, 584 F.3d 701, 705 (6th Cir. 2009); *see also* Appellants' Opening Brief ("St.Br.") 21–25. That rule makes sense because a key purpose of the mootness doctrine is to assure a concrete, adversarial presentation of disputes—an Article III necessity that one who willingly accedes to the mooting of his individual claims cannot provide. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976). Plaintiffs do not dispute this understanding of the law but instead argue that the particular agreement they made with the State was not the sort of voluntary relinquishment that makes an uncertified class action moot. Brief of Plaintiffs-Appellees ("Pl.Br.") 55–59. They are wrong.

Plaintiffs first contend that they did not voluntarily relinquish their claims because there was no "full settlement" between the parties. *Id.* at 56. Whatever Plaintiffs mean by "full settlement," they cannot deny that their claims in this lawsuit were completely mooted pursuant to an agreement that they voluntarily entered. In *Pettrey*, this Court drew a sharp distinction between claims that were "involuntarily terminated" as in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and claims that were "voluntarily relinquished," thus depriving the Court of a "live controversy." 584 F.3d at 705; *see also Ruppert v. Principal Life Ins.*

Co., 705 F.3d 839, 843 (8th Cir. 2013); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99 (4th Cir. 2011). There can be no question that this case falls on the voluntary side of that line because Plaintiffs bargained for and agreed to receive the relief that mooted their individual claims. If Plaintiffs' point is that the agreement at issue here did not purport to be an official "settlement" of claims, they never explain why that formalism matters. It is the named plaintiffs' voluntary decision to leave the class prior to certification—not the particulars of how they took that step—that deprives them of any continuing concrete interest in the case and compels dismissal.

Plaintiffs also argue that their failure to relinquish their asserted rights to attorneys' fees and costs "distinguishes the cases [the State] relies upon." Pl.Br. 57. That is not accurate. The Supreme Court has squarely held that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). Thus, in *Ruppert* the Eighth Circuit dismissed as moot a putative class action in which the named plaintiffs were still pursuing fees and costs. 705 F.3d at 844; *see* St.Br. 23. And although the named Plaintiffs in *Pettrey* had relinquished their rights to fees and costs, this Court stated that, quite apart from that fact, "it is doubtful that there is a live controversy here

because the named plaintiffs' claims were voluntarily relinquished …." 584 F.3d at 705.

Neither does it make any difference that under the terms of the deal the parties struck, "the State gave no assurances that it would in fact adjudicate [the named plaintiffs'] delayed claims." Pl.Br. 57–58. Again, the question is whether Plaintiffs voluntarily agreed to the arrangement that resulted in the mooting of their claims, and the record is crystal clear on that point. The Plaintiffs agreed to give the State more time to respond to their preliminary injunction and class certification motions in exchange for two related agreements by the State. First, the State agreed to enroll in TennCare named plaintiff newborns who applied and qualified for a new presumptive eligibility program. Declaration of Kim Hagan, R.E. 53 at 672, ¶ 12. Second, the State agreed, if CMS would cooperate, "to provide a final decision" on the adult named Plaintiffs' TennCare applications. *Id.* "Through the resolution process" to which Plaintiffs agreed, all of the named plaintiffs were enrolled in TennCare. *Id.* at ¶ 13; Supplemental Declaration of Wendy Long ("Long Supp. Decl."), R.E. 80-3 at 1193, ¶ 8. Having provided the State with information about the named plaintiffs "to obtain eligibility determinations," Declaration of Sara Zampierin, R.E. 70-1 at 1018, ¶ 3, and bargained for an arrangement under which the State would use that information to

attempt to adjudicate their applications, Plaintiffs cannot now protest that they were enrolled in TennCare without their consent.

Plaintiffs next argue that they did not voluntarily relinquish their claims because "the ability of the State to adjudicate the Named Plaintiffs' claims, and [its] legal obligation to do so, was independent of any purported negotiation." Pl.Br. 58. But even assuming the State were legally obligated to adjudicate Plaintiffs' applications without regard to the parties' agreement (it was not), nothing in *Pettrey*, *Ruppert*, or the other cases on point suggests that a named plaintiff may voluntarily relinquish his claim and continue to sue on behalf of a putative class so long as the relinquished claim was meritorious. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013) (Normally, a plaintiff's "prospects of success are … not pertinent to the mootness inquiry."). Plaintiffs also err when they assert that a class action defendant's *capacity* to unilaterally moot the named plaintiff's individual claims means that the named plaintiff can *agree* to the mooting of his claims and continue to sue on behalf of the uncertified class. To the contrary, the cases draw a sharp distinction between unilateral actions by a defendant and mutual actions of both parties that moot a named plaintiff's claims. *See, e.g.*, *Pettrey*, 584 F.3d at 705; *Roper*, 445 U.S. at 332; *Ruppert*, 705 F.3d at 844.

Finally, Plaintiffs argue that their agreement with the State had nothing at all to do with adjudication of their TennCare applications but only concerned "the

appropriate briefing schedule" in the district court. Pl.Br. 58–59. But the parties' joint motion in the district court makes clear that Plaintiffs only consented to the State having more time "[b]ased on the State's agreement to take certain actions to alleviate the immediate concerns of the Plaintiffs." Joint Motion, R.E. 24 at 370–71.[1] Those bargained-for actions mooted the named plaintiffs' individual claims. The substance of the parties' agreement is described in the Declarations submitted by both sides in the court below and is not in dispute. Despite Plaintiffs' creative reinterpretations of the bargain the parties struck, the substance of that bargain is clear: Plaintiffs consented to the State taking more than nine days to respond to their motions, and in exchange the State agreed to attempt to adjudicate their TennCare applications if CMS provided the necessary information. The agreement was implemented by both sides in accordance with its terms, and as a result, all of the individual claims of the named Plaintiffs were mooted. By agreeing to this arrangement and becoming enrolled in TennCare as a result, Plaintiffs voluntarily relinquished their claims.

[1] Plaintiffs assert that they "never withdrew their request for an expedited hearing," Pl.Br. 55 n.16, but the parties' joint motion says that "Plaintiffs respectfully withdraw their motion for an expedited hearing…," Joint Motion, R.E. 24 at 370–71; *see* Order, R.E. 28 at 376 ("Plaintiffs have withdrawn this Motion").

B. This Case Must Be Dismissed Because Plaintiffs' Claims Became Moot Prior to Class Certification.

Plaintiffs acknowledge that all of their individual claims became moot prior to class certification, *see* Pl.Br. 53, and they do not dispute that the usual rule in class action cases is that "[w]here … the named plaintiff's claim becomes moot *before* certification, dismissal of the action is required." *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993) (emphasis in original). Thus, the only question is whether the narrow exceptions to that rule save this case from dismissal. They do not.

1. Plaintiffs emphasize cases that say courts should be reluctant to dismiss a class action as moot where it appears the defendant has attempted to evade class-wide proceedings by "picking off" the named plaintiffs. Pl.Br. 47–51. As an initial matter, the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), casts substantial doubt on that line of authority. *See* St.Br. 28. The Court characterized its earlier pronouncements against the strategic "picking off" of named plaintiffs as "dicta," and blessed a Fair Labor Standards Act defendant's efforts to evade a collective action by unilaterally mooting the named plaintiff's claim. *Genesis*, 133 S. Ct. at 1527, 1532. And this Court anticipated *Genesis*, suggesting that a defendant's efforts to avoid class-wide proceedings are not an independent and sufficient reason to refuse to dismiss an uncertified class action as moot: even where "picking off the named plaintiff [is] a

concern, we are not at liberty to create a controversy where one no longer exists." *Pettrey*, 584 F.3d at 707.

Plaintiffs' only answer is to assert that "*Genesis* actually reaffirms" the older cases, Pl.Br. 51, but the portion of the opinion Plaintiffs cite discusses the " 'inherently transitory' relation-back rationale" for declining to dismiss a class action—not whether worry about the defendant "picking off" named plaintiffs independently justifies suspending the usual mootness rules. *Genesis*, 133 S. Ct. at 1531. That some "claims for injunctive relief challenging ongoing conduct" are inherently transitory and thus survive the pre-certification mooting of a named plaintiff's individual claim says nothing about what happens when a defendant picks off claims like those at issue here, which are not inherently transitory. *Id.*; *see infra* 11–12.

In any event, the question in this case is not whether the older "picking off" precedents survive but whether the Court should *extend* them to a scenario in which the named plaintiffs themselves *agreed to* and *participated in* the arrangement that mooted their individual claims. Plaintiffs elide this issue by characterizing the State's fulfillment of its obligations under the parties' agreement as a "strategy" the State "employed … against not just the Named Plaintiffs but also other putative class members brought to its attention by Plaintiffs' counsel." Pl.Br. 49. But asserting that the State acted unilaterally does not make it so. As

demonstrated above, the record clearly shows that the State enrolled the individuals in question into TennCare in fulfillment of its obligations under the agreement it entered with the Plaintiffs. *See supra* 2–7; *see also* St.Br. 19–20. Plaintiffs more than "welcome[d]" the State's efforts to adjudicate those Medicaid applications, Pl.Br. 50—this was Plaintiffs' price for agreeing to allow the State more time to respond to their class certification and preliminary injunction motions.

Federal courts are normally reluctant to conclude that a governmental defendant is attempting to evade judicial review by picking off named plaintiffs. *See* St.Br. 26–28 (citing cases). Plaintiffs insist that there is enough to support such a conclusion here because the State did not make the cumbersome process by which Plaintiffs were enrolled available to the allegedly "thousands of *unidentified* putative class members" who suffered delay at the hands of the Federal Exchange. Pl.Br. 50. At bottom, this argument boils down to the contention that because the State has not conceded defeat on the merits, it must have been trying to evade judicial review when it adjudicated the TennCare applications Plaintiffs' counsel identified. Similar arguments were not enough to save suits from dismissal on mootness grounds in *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001), and *Sze v. INS*, 153 F.3d 1005, 1008 (9th Cir. 1998). As in those cases, the record does

not support the conclusion that the State was attempting to avoid class-wide procedures when it enrolled Plaintiffs in TennCare.

2. Plaintiffs' claims are not "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Geraghty*, 445 U.S. at 399. Plaintiffs argue that a claim is inherently transitory whenever it is uncertain how long any particular named plaintiff will remain in the class. Pl.Br. 51–53. But that is not the test. The Supreme Court recently explained that a claim is inherently transitory only if "no plaintiff possesse[s] a personal stake in the suit long enough for litigation to run its course" such that the challenged conduct would be "effectively unreviewable" if a former class member is not allowed to seek certification. *Genesis*, 133 S. Ct. at 1531; *see also Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (question is whether mootness will occur "before the district court can reasonably be expected to rule on a certification motion.").

To be sure, in an unpublished opinion issued prior to *Genesis*, this Court suggested that "uncertainty about the length of time a claim will remain alive" is important to whether a claim is inherently transitory. *Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152, 158–59 (6th Cir. 2010). But even if uncertainty can be relevant to the inquiry, the ultimate question after *Genesis* is whether the nature of the claimed violation is so fleeting that no plaintiff could maintain a claim for

long enough to complete class certification before mootness set in, thus making the challenged conduct "effectively unreviewable."

Plaintiffs clearly cannot meet that demanding standard—indeed, they do not even assert that they can—because they alleged delays several times longer than the 41 days it took the district court to rule on their motion for class certification. *See* St.Br. 31. Accordingly, the "inherently transitory" exception to mootness does not apply.

3. Plaintiffs halfheartedly defend the district court's ruling that their claims are capable of repetition but evading review. Pl.Br. 54–55. But once someone is enrolled in TennCare, he or she will *never* need to reapply to the Federal Exchange to remain enrolled, the State is not currently redetermining TennCare eligibility for individuals after they are enrolled, and individuals remain enrolled in TennCare during the pendency of any delay in redetermining their eligibility. St.Br. 32–33. Plaintiffs do not dispute any of those points, and each of them would be independently sufficient to establish that there is no "reasonable expectation" or "demonstrated probability" that Plaintiffs will again suffer delays of the sort at issue in this suit. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

4. Finally, Plaintiffs argue that even if the Court concludes that this case is moot, it should nevertheless remand to allow substitution of additional named plaintiffs. Pl.Br. 46 n.12. But this Court has held that "[w]here … the named

plaintiff's claim becomes moot before certification, *dismissal of the action is required*." *Brunet*, 1 F.3d at 399 (emphasis added); *see also Foster v. Gardner*, 894 F.2d 407 (6th Cir. 1990) (unpublished) (dismissing putative class action where named plaintiff's claim became moot prior to certification). Even if the course Plaintiffs are advocating were permissible, it would not be prudent. To the extent any unnamed class members have outstanding claims, they are perfectly free to commence a new action, for there is no statute of limitations bar. *See Sze*, 153 F.3d at 1010 (rejecting remand to permit unnamed class members to intervene following mootness).

Moreover, the facts surrounding the implementation of the ACA have changed significantly since Plaintiffs filed this lawsuit last summer. At that time, CMS had not provided the State with *any* information whatever concerning the applications submitted to the Federal Exchange. *See* Declaration of Wendy Long, R.E. 54 at 684–85, ¶ 3(h). After the court below had ruled, however, CMS began providing the State with special "flat files" that provide some information concerning applications pending at the Exchange. *See* St.Br. 10–12; U.S.Br. 14. Any new claims by unnamed class members should be brought in a new suit in which a record may be developed documenting current conditions. With no prospect that dismissal would prejudice either the class or unnamed class members,

the better course is simply to remand to the district court with instructions to dismiss this suit as moot.

II. PLAINTIFFS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM THAT THE STATE IS RESPONSIBLE FOR DELAYS AT THE FEDERAL EXCHANGE.

A. Plaintiffs Can Only Succeed on the Merits if the Medicaid Act, as Amended by the ACA, Charges the State with "Supervising" Federal Officials.

1. The linchpin of Plaintiffs' argument on the merits is the Medicaid Act's requirement that "a single State agency [must] administer or … supervise the administration of the plan." 42 U.S.C. § 1396a(a)(5); Pl.Br. 26–27; *see also* U.S.Br. 9–10. Both Plaintiffs and the United States assert that this provision requires TennCare to take ultimate responsibility for determining eligibility on a timely basis and for providing fair hearings even when it has delegated certain functions to other entities. Both Plaintiffs and the United States do not deny that the ACA, for the first time, required federal officials to participate in the administration of State Medicaid programs by accepting and adjudicating eligibility applications and providing fair hearings to Exchange applicants. Both accept the proposition that neither governing statute authorizes the State to supervise federal officials, but nevertheless argue that the State is legally responsible whenever federal officials fail to carry out their obligations under the ACA. *See* Pl.Br. 32–33; U.S.Br. 11–12.

In addition to contravening common sense, Plaintiffs' argument cannot be squared with the statutory text. Again, the Medicaid Act provision on which the argument is based authorizes the "single State agency to administer or to *supervise* the administration of the plan." 42 U.S.C. § 1396a(a)(5) (emphasis added). Plaintiffs and the United States say that this statutory directive requires the Court to hold the State liable for the failings of Federal Exchange officials charged with carrying out the ACA's statutory directive to participate in the administration of the Medicaid Plan by adjudicating eligibility and providing fair hearings, yet they agree that the State lacks the power to "supervise" these federal officials.

They cannot have it both ways. If the Medicaid Single State Agency provision imposes liability against the State for actions taken by the Federal Exchange pursuant to its obligations under the ACA, then it necessarily follows that Congress has authorized the State agency to "supervise" the federal Exchange. 42 U.S.C. § 1395a(a)(5). But as we explained in our opening brief, that interpretation raises insuperable constitutional issues by turning federalism on its head (wholly apart from the intractable practical problems it creates), *see* St.Br. 35–39, and both Plaintiffs and the United States admit that such a view is untenable.

Plaintiffs implicitly acknowledge these problems when they variously describe the State's duty under Section 1396a(a)(5) as being "to oversee its

program," "to ensure that all federal laws are followed," and "to take appropriate measures if federal laws are not being followed." Pl.Br. 28, 29, 30. Those formulations only paper over what the text of Section 1396a(a)(5) makes unmistakably clear: if the State's duty to "supervise the administration of the plan" requires the State to hold hearings on delayed applications submitted for adjudication by the Federal Exchange, then the State must also "supervise" the federal officials who operate the Federal Exchange.

Plaintiffs and the United States attempt to sidestep this fatal flaw in their position by pointing out that the preliminary injunction on appeal does not purport to give the State authority to manage the Federal Exchange's day-to-day operations. Pl.Br. 32; U.S.Br. 11–13. But this misses the point. By its plain terms, where Section 1396a(a)(5) applies, it does not merely impose on the single state agency *liability* for violations of federal law by its agent; it also gives the single state agency *authority* to see that federal law is followed. And if the statute did not already unambiguously say that power and responsibility are placed on the same shoulders, federal regulations would resolve the matter: the single state agency "[m]ust ensure" that any entity it supervises "[c]omplies with all relevant Federal … law" and "exercise appropriate oversight over the eligibility determinations and appeals decisions" made by that entity. 42 C.F.R. § 431.10(c)(3). Thus, the necessary implication of Plaintiffs' reading of Section

1396a(a)(5)—and, by extension, their entire position on the merits—is that determination states like Tennessee must "supervise" and "exercise appropriate oversight over" the federal officials who operate the Federal Exchange.

2. The Medicaid Act and the ACA require no such thing, for the better reading of the relevant statutes is that federal officials stand in the State's shoes, unsupervised by State officials and responsible for their own actions, when they adjudicate Medicaid applications or carry out other functions that, prior to the ACA, were the exclusive province of the States. In states that do not set up their own exchanges, Congress instructed "the Secretary [to] … establish and operate such Exchange within the State" and to "take such actions as are necessary to implement such other requirements" that apply to state exchanges. 42 U.S.C. § 18041(c)(1). Promptly adjudicating applications submitted to the exchange is one of the "requirements" that Section 18041(c)(1) directs the Secretary to "implement." *See* 42 U.S.C. § 18083(a) (Exchange must accept applications for Medicaid benefits and system established by the Secretary must ensure that individuals found to be eligible for Medicaid are enrolled.). Thus, to the extent Medicaid applications are submitted to the Federal Exchange (as were all of Plaintiffs' applications in this case), federal officials succeed to the State's duty to oversee the adjudication of those applications under Section 1396a(a)(5) and to hold hearings under Section 1396a(a)(3).

Plaintiffs agree that the ACA imposes these duties on the Secretary, but argue that Section 18041(c)(1) "does not relieve TennCare of its obligation to oversee its program" and "does not ordain CMS as the chief czar of all eligibility determinations for all state programs." Pl.Br. 28–29. That badly mischaracterizes the merits issue before the Court. The question is whether the Federal Exchange is solely responsible for the Medicaid applications it receives and is required by law to adjudicate—not whether other sorts of Medicaid applications, other aspects of a state's Medicaid program, or other state programs are the responsibility of the federal government.

Like the district court, Plaintiffs and the United States ultimately fall back on 42 U.S.C. § 18118(d), which states that "[n]othing in this title (or an amendment made by this title, unless specified by direct statutory reference) shall be construed to modify any existing Federal requirement concerning the State agency responsible for determining eligibility for" Medicaid. *See* Pl.Br. 28; U.S.Br. 11; Preliminary Injunction Order, R.E. 91 at 1284. That provision of the ACA is inapposite for two reasons. First, contrary to the argument advanced by the United States, *see* U.S.Br. 11, the ACA *does* contain a "direct statutory reference" that modifies a pre-existing federal requirement concerning the State agency responsible for determining eligibility: as explained above, Section 18083(a) unambiguously changes the pre-ACA requirement that only State Medicaid

agencies or their agents may determine eligibility to a regime under which the Federal Exchange must also accept and ensure the adjudication of Medicaid applications. Second, state supervision of federal officials was not an "existing Federal requirement concerning the State agency" when the ACA became law. 42 U.S.C. § 18118(d); *see* St.Br. 36–37. Thus, it is Plaintiffs and the United States, not the State, that are arguing that the ACA "implicitly modified the State Medicaid agency's responsibilities" by charging the State for the first time with overseeing elements of the Medicaid program that are administered by the federal government. *See* U.S.Br. 11. There is simply no precedent—in Medicaid or any other federal program—for the State supervision of federal officials that Plaintiffs' reading of Section 1396a(a)(5) would require.

Plaintiffs and the United States argue to the contrary by pointing to 42 C.F.R. § 435.541, *see* Pl.Br. 32; U.S.Br. 12, but that regulation only underscores how their approach would turn the normal federal-state Medicaid relationship on its head. Under Section 435.541(a), states ordinarily must defer to the Social Security Administration's ("SSA's") disability determinations for purposes of determining Medicaid eligibility when someone *applies to the state* for Medicaid benefits on the basis of disability. But if SSA is slow to act on a parallel application for social security disability benefits, the regulations direct the state Medicaid program to make its own disability finding based on the Medicaid

application submitted to the State. *Id.* § 435.541(c)(2) & (3). That does not make state Medicaid programs "legally liable for failures of the Federal Government," Pl.Br. 32, nor does it contemplate State supervision of SSA. Instead, the regulation merely provides a rule of decision that the states must follow when processing the applications *they receive*. It most certainly does not require State officials to determine or hold hearings on federal applications for social security disability benefits pending before SSA that SSA fails to promptly adjudicate. Yet Plaintiffs ask the Court to impose an equivalent form of state oversight of federal officials here.

B. Federal Regulations and the United States' Self-Serving Statement of Interest Lend No Support to Plaintiffs' Novel Theory.

Plaintiffs point to federal regulations providing that the single state agency is generally responsible for the actions of an entity to which it delegates adjudicatory authority. *See* Pl.Br. 34 (citing 42 C.F.R. §§ 431.10, 435.1200). But neither of those regulations addresses the specific scenario at issue here—what happens when federal officials accept Medicaid applications (as they are required to do under the ACA) but fail to adjudicate them in a timely manner (as also required by the ACA). The United States' amicus brief does not argue otherwise. *See* U.S.Br. 10 (observing that "[l]ongstanding [pre-ACA] regulations provide that a State … may not delegate authority to supervise the administration of its plan" but never suggesting that those regulations address whether the same rule applies when the

federal government administers the plan (citation omitted)). For the reasons already explained, both the text of the ACA and fundamental principles of federalism compel the conclusion that federal control of the adjudicatory process alters the chain of command that prevailed under the pre-ACA Medicaid Act.

That leaves Plaintiffs with the United States' litigation-driven position that the State "retains the ultimate responsibility to ensure that a reasonably prompt decision is made on applications" submitted to federal officials for adjudication. U.S. Statement of Interest, R.E. 85 at 1244; *see* U.S.Br. 9–13. Plaintiffs suggest that this position deserves judicial deference because "[t]he United States is not a party in this action," Pl.Br. 34, but of course the United States submitted its papers in this case in an effort to avoid becoming a party and being held liable for the Federal Exchange's flaws. And the agency has never previously said that a state is vicariously liable for the Federal Exchange's mistakes, thus making deference to the federal government's litigating position inappropriate. *Smiley v. Citibank (S.D.), NA*, 517 U.S. 735, 741 (1996).

In any case, the United States' argument deserves little weight because it never explains how the State can "ensure … a reasonably prompt decision" is made by federal officials whom the State does not control. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (A court should only defer to agency position based on, *inter alia*, "the thoroughness evident in its consideration, the validity of

its reasoning … and all those factors which give it power to persuade."). Plaintiffs are even further off the mark when they claim that the Court should give the United States' litigating position deference as an interpretation of regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), for the United States never suggests that federal regulations specifically address the allocation of "supervision" responsibilities under section 1396a(a)(5) when the *federal government* administers elements of a state Medicaid program.

C. Plaintiffs' Broader Attacks on the State's Efforts To Implement the ACA Are Irrelevant to the Merits of the Preliminary Injunction on Appeal.

Recognizing the weakness of their submission that the State should be held liable for the failures of the Federal Exchange, Plaintiffs repeatedly attempt to change the subject. For example, Plaintiffs assert several times that Tennessee is alone among determination states in not operating its own separate system for processing Modified Adjusted Gross Income ("MAGI")-based Medicaid applications. *See, e.g.*, Pl.Br. 6–7, 29, 31, 36. But that has nothing to do with this case, for the Plaintiffs all submitted their applications to the Federal Exchange as authorized by the ACA, and CMS authorized the State to direct MAGI applicants to the Exchange. *See* St.Br. 7–8. Moreover, the problem Plaintiffs actually faced—delay at the hands of the Federal Exchange—arises in every state where federal officials accept and adjudicate Medicaid applications. The district court

did not decide whether the State has a "separate mandate to accept and process Medicaid applications itself," Pl.Br. 29, but only that the State must stand in the breach when the Federal Exchange fails to do its job.

Plaintiffs repeatedly argue that this case also concerns non-MAGI applicants who submitted Medicaid applications to the State. *See* Pl.Br. 5, 13, 16, 35–36. Not so. Every single named Plaintiff applied to the Federal Exchange, not to the State. *See* Complaint, R.E. 1 at 23–32, ¶¶ 99, 103, 109, 115, 120, 127, 133–34, 141. Plaintiffs do not deny this, but instead argue that unnamed class members submitted non-MAGI applications to the State. Pl.Br. 35–36. There is no evidence in the record to support this assertion. None of the four declarations Plaintiffs cite, *see id.* at 16–18, were submitted by unnamed class members because none of them claimed to have been denied the opportunity for a hearing on their allegedly delayed applications, *see* Declaration of Carlene LeCompte, R.E. 66 at 976–78; Declaration of Derrick Simpson, R.E. 67 at 980–86; Declaration of M.A.B., R.E. 70-2 at 1049–51; Declaration of Tracey Barnes, R.E. 83-2 at 1215–16; *see also* Order Granting Class Certification, R.E. 90 at 1278 (limiting class to individuals "who have not been given the opportunity for a 'fair hearing' by the State Defendants"). In any case, as Plaintiffs admit, *see* Pl.Br. 20, the applications of all four individuals were resolved prior to class certification. In short, there was no

one before the district court—and no one before this Court—who submitted a delayed Medicaid application to the State.

* * * *

Through the complex thicket of statutes and regulations relevant to the Plaintiffs' likelihood of success on the merits, a commonsense principle emerges. Under the Medicaid Act, the ACA, and their implementing regulations, power and responsibility are allocated in the same way, with the federal government and the State each legally liable for the elements of the Medicaid program under their respective control. Because Plaintiffs applied to the Federal Exchange to have their applications adjudicated by federal officials, Plaintiffs' only remedy is against the federal government.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY ENTERING THE PRELIMINARY INJUNCTION.

Even when a court is convinced that the plaintiff will succeed on the merits, it may not issue a preliminary injunction unless the plaintiff further demonstrates irreparable injury, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The State demonstrated in its opening brief that, in several respects, the district court abused its discretion when it undertook the required balancing of interests. Plaintiffs have not persuasively argued otherwise.

A. The Public Interest Is Not Served by a Preliminary Injunction that Diverts the State's Limited Resources Away from Other Efforts To Eliminate Delays in the Processing of TennCare Applications.

The State's opening brief outlined its extensive efforts to work with CMS to find solutions to problems certain categories of TennCare applicants have had enrolling via the Federal Exchange. *See* St.Br. 8–12, 39–42. In particular, as soon as the federal government began providing the State with lists of individuals whose TennCare applications were delayed by the Federal Exchange's inability to process income verification and other supplemental materials, the State began using those lists together with information in its own files or supplied by applicants to attempt to adjudicate the Federal Exchange's delayed applications. *Id.* at 11. In the State's judgment, this is a more efficient means of dealing with processing delays than the cumbersome hearings the district court ordered, and the federal courts owe the State deference on this issue. *See Community Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002).

In a footnote, Plaintiffs dismiss the State's actions as coming too late, *see* Pl.Br. 45 n.11, but the timing of the State's efforts to adjudicate delayed TennCare applications was dictated entirely by the federal government. When this suit was filed, the State had *no idea* who had applied to the Federal Exchange, much less which TennCare applicants had been unable to obtain prompt decisions from federal officials. *See* Long Decl. at 684–85, ¶ 3(h). Only when the Federal

Exchange began providing that critical information did the State's alternative approach become possible. These factual developments underscore why tossing a preliminary injunction into the middle of ongoing state and federal efforts to implement a new program was not in the public interest.

B. The District Court Improperly Blinded Itself to Alternatives that Would Have Required Further Action by the Federal Government.

Plaintiffs appear to agree that the federal officials to whom they submitted their applications are required by law to adjudicate applications "without undue delay," 45 C.F.R. § 155.310(e)(1), and to hear applicant appeals in cases of undue delay, *id.* § 155.510(b); 42 C.F.R. §§ 431.10(c)(1)(ii), 431.220(a)(1); *see* Pl.Br. 37. The Federal Exchange has all the information it needs to fulfill those legal obligations but has failed to do so. The obvious solution to that problem is to order the federal government to comply with the law, and it was an abuse of discretion for the district court to not even consider that alternative before ordering the State to hold hearings on delayed applications submitted to the Federal Exchange. Neither Plaintiffs nor the United States as amicus dispute that the Federal Exchange is in a better position than the State to solve the central problem giving rise to this lawsuit, and that alone is a sufficient basis for reversing the preliminary injunction.

Citing *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990), Plaintiffs argue that a joint tortfeasor in a damages action is not a mandatory party under Rule 19. *See*

Pl.Br. 37. But *Temple* involved a joinder claim under FED. R. CIV. P. 19(b), and it has no bearing on whether the United States is a necessary party under Rule 19(a) in an injunction action concerning the portion of the Medicaid program that the United States administers. More importantly, Plaintiffs do not even defend the district court's improper failure to consider whether a different injunction—one issued against the United States—would have better balanced the respective hardships and served the public interest.

C. The Preliminary Injunction Exposes the State to Inconsistent Legal Obligations.

One of the "[p]rocedural rights of the applicant" at a Medicaid hearing is that "[t]he applicant … must be given an opportunity to … [e]xamine at a reasonable time before the date of the hearing and during the hearing … [t]he content of the applicant's … case file." 42 C.F.R. § 431.242. The record establishes, and Plaintiffs do not dispute, that the State does not have access to class member case files. *See* Long Supp. Decl., R.E. 80-3 at 1191, 1194–95, ¶¶ 4, 11. Accordingly, the State cannot comply with the preliminary injunction without violating 42 C.F.R. § 431.242.[2]

[2] Plaintiffs are wrong when they argue that the State did not make this argument before the district court issued the preliminary injunction. *See* State's Memorandum in Support of Motion To Dismiss, R.E. 58 at 31.

Plaintiffs attempt to circumvent this problem by claiming that the State need only provide applicants with "all the evidence related to the applicant[s] that [the State] possesses," Pl.Br. 40, but they do not even attempt to reconcile this construction with the regulation's clear text. A State Medicaid agency that has delegated eligibility functions to a private entity that it supervises could not conduct appeals without providing the applicant with access to the case file if the State's agent had refused to send it to the State. It makes no difference that the United States endorses Plaintiffs' atextual interpretation of Section 431.242 in its brief. *See* U.S.Br. 14. "[I]f the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an *amicus* brief will necessarily be plainly erroneous or inconsistent with the regulation," and thus deserves no deference. *Chase Bank USA, NA v. McCoy*, 131 S. Ct. 871, 882 (2011) (internal quotation marks omitted).

It is no answer to say that Congress expected the Secretary to establish a system under which applicants could appeal to either the Exchange or the State Medicaid agency. *See* Pl.Br. 40–41; *see* also 42 U.S.C. § 18081(f) (instructing Secretary to "establish procedures" for Exchange hearings). The Secretary is still in the process of developing a system for sharing Federal Exchange case files, and the system implemented to date does not encompass delayed application cases. Until the Secretary begins providing States with the delayed application files, the

single state agency cannot conduct fair hearings. The problem here is that the State cannot order the Federal Exchange to produce the case files it needs, and so far federal officials have declined to do so voluntarily.

The State cannot avoid the inconsistent legal obligations created by the injunction by simply adjudicating delayed applications submitted to the Federal Exchange before a hearing is scheduled. In most cases, the State does not know enough about the applicant to determine Medicaid eligibility without asking for information previously submitted to the Federal Exchange.[3] Such duplicative requests for information violate 42 U.S.C. § 18083(b)(2).

Plaintiffs do not deny that duplicative requests are necessary under the injunction or that they violate the clear command of Section 18083(b)(2). Instead, they claim that the "purpose" of the provision is to "streamline the application process" and it should not be used as a basis for putting off the adjudication of Medicaid applications. Pl.Br. 42. But this case does not require the Court to choose between continuing delays in the processing of Medicaid applications and duplicative requests for information that violate 42 U.S.C. § 18083(b)(2). If the

[3] The United States contends that the State does not need to ask applicants for additional information because the "flat files" it now provides the State "include the income attested to by the applicant." U.S.Br. 14. But the flat files do *not* include income verification information submitted by applicants to the Federal Exchange, and the State normally needs that verification information to adjudicate the applications in question. *See* Long Supp. Decl., R.E. 80-3 at 1192, ¶ 6.

district court had simply ordered the Federal Exchange to adjudicate the applications in its sole possession, or at least to fully cooperate with the State's efforts to adjudicate them, it could have addressed Plaintiffs' concerns while not exposing the State to inconsistent legal obligations.

CONCLUSION

The preliminary injunction should be vacated and the case should be remanded with instructions to dismiss it as moot. In the alternative, the preliminary injunction should be reversed on the merits.

February 17, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations provided in Fed. R. App. 32(a)(7)(B). The foregoing brief contains 7,000 words of Times New Roman (14 point) proportional type. The word processing program used to prepare this brief was Microsoft Word 2013.

s/Michael W. Kirk

DOCUMENTS TO BE DESIGNATED

Record Entry No.	Description	Pages
1	Complaint	1–40
4-1	Declaration of Samuel Brooke	174–298
24	Joint Motion to Expedite Entry of Scheduling Order	370–372
28	Order	376
52	Declaration of Darin Gordon	660–666
53	Declaration of Kim Hagan	667–675
54	Declaration of Wendy Long	676–703
55	Declaration of Tracy Purcell	704–724
58	Defendants' Memorandum in Support of Their Motion To Dismiss	753–793
66	Declaration of Carlene LeCompte	975–979
67	Declaration of Derrick Simpson	980–1002
70-1	Declaration of Sara Zampierin	1018–1048
70-2	Declaration of M.A.B.	1049–1055
80-3	Supplemental Declaration of Wendy Long	1189–1196
83-2	Declaration of Tracey Barnes	1214–1217
85	Statement of Interest of the United States	1244–1246
90	Order Granting Class Certification	1271–1279
91	Preliminary Injunction Order	1280–1288

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 17th day of February, 2015, via the Court's Electronic Case Filing system.

s/Michael W. Kirk