**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

A.M.C., by her next friend, C.D.C., et al.,

Plaintiffs,

v.

STEPHEN SMITH, in his official capacity as Deputy Commissioner of Finance and Administration and Director of the Division of TennCare,

Defendant.

Civil Action No. 3:20-cv-00240

Class Action

Chief Judge Crenshaw
Magistrate Newbern

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: April 10, 2020

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Plaintiffs move pursuant to Rule 65(a) of the Federal Rules of Civil Procedure for a preliminary injunction (1) requiring Defendant to prospectively reinstate TennCare coverage for members of the proposed Plaintiff Class whose TennCare coverage was involuntarily terminated and who are not currently enrolled, and notify them of the reinstatement; and (2) prohibiting Defendant from involuntarily terminating any such individual's TennCare coverage until the person receives notice and an opportunity for a fair hearing that complies with due process.

In the alternative, Plaintiffs ask the Court to enter a preliminary injunction (1) requiring Defendant to prospectively reinstate TennCare coverage for those members of the Disability Subclass (a) who were previously enrolled in a disability-linked TennCare eligibility category,[1] (b) whose coverage was involuntarily terminated, and (c) who are not currently enrolled, and notify them of the reinstatement; (2) prohibiting Defendant from involuntarily terminating any such individual's TennCare coverage until the person receives notice and an opportunity for a fair hearing that complies with due process; and (3) requiring Defendant, in compliance with due process, to provide effective notice to the remaining members of the proposed Plaintiff Class whose TennCare coverage was involuntarily terminated and who are not currently enrolled, and offer them an expedited hearing on their eligibility.

PRELIMINARY STATEMENT

Defendant's failure to properly administer the TennCare program has deprived members of the proposed Plaintiff Class necessary health coverage to which they are entitled under federal law. This unjustified denial of medical benefits would warrant preliminary injunctive relief under normal circumstances, but the ongoing harms to Plaintiffs' health and well-being are currently

[1] The disability-linked categories are comprised of individuals whom the State identified as eligible on the basis of disability, for purposes of determining the amount the State paid its managed care contractors for the individuals' TennCare coverage.

exacerbated by the accelerating spread of the novel coronavirus and resulting COVID-19 pandemic in Tennessee. Defendant has acknowledged this risk by taking advantage of increased Medicaid funding under the Families First Coronavirus Relief Act ("FFCRA"), which is conditioned on TennCare ceasing all further involuntary terminations of TennCare coverage for the duration of the national emergency and reinstating coverage for those terminated since March 18, 2020.[2]

While Plaintiffs welcome Defendant's suspension of *prospective* terminations, there are still thousands of members of the proposed Plaintiff Class whom Defendant deprived of TennCare coverage in the past year, and they need urgent relief. As explained in the Complaint (Doc. 1), the TennCare redetermination process utterly and systematically fails to accurately evaluate eligibility, properly notify TennCare enrollees when and why their coverage is being terminated, and provide them with a fair hearing to protect their entitlement to benefits in violation of their due-process rights under the Fourteenth Amendment and the Medicaid Act, 42 U.S.C. § 1396a(a)(3). TennCare's policies and procedures also violate the rights of enrollees with disabilities by using methods of administration that screen them out from benefits and deny them equal access to health coverage. Members of the proposed Plaintiff Class therefore not only face an ongoing difficulty in managing their existing health conditions while uninsured, but also now face an imminent risk of contracting the coronavirus and developing COVID-19 without the health insurance to which they are entitled. Indeed, many of them have underlying medical conditions that put them at higher risk

[2] *See* P-Ex. 69, Families First Coronavirus Response Act, Pub. L. No. 116-127, §6008(b)(3), 134 Stat 178, 208–209 (2020); Ctrs. for Medicare & Medicaid Servs., "Family First Coronavirus Response Act – Increased FMAP FAQs," 5, https://www.medicaid.gov/state-resource-center/downloads/covid-19-section-6008-faqs.pdf.

of severe complications if they fall ill. Defendant's decision to temporarily pause involuntary terminations in the future does not remedy this continuing harm to Plaintiff Class members who still lack the coverage to which they are entitled.

As set forth in their motion, Plaintiffs ask the Court to enter a preliminary injunction:

> (1) requiring Defendant to prospectively reinstate TennCare coverage for members of the proposed Plaintiff Class whose TennCare coverage was involuntarily terminated and who are not currently enrolled, and notify them of the reinstatement; and
>
> (2) prohibiting Defendant from involuntarily terminating any such individual's TennCare coverage until the person receives notice and an opportunity for a fair hearing that complies with due process.

In the alternative, Plaintiffs ask the Court to enter a preliminary injunction:

> (1) requiring Defendant to prospectively reinstate TennCare coverage for those members of the Disability Subclass (a) who were previously enrolled in a disability-linked TennCare eligibility category, (b) whose coverage was involuntarily terminated, and (c) who are not currently enrolled, and notify them of the reinstatement;
>
> (2) prohibiting Defendant from involuntarily terminating any such individual's TennCare coverage until the person receives notice and an opportunity for a fair hearing that complies with due process; and
>
> (3) requiring Defendant to provide notice and offer an expedited hearing process that complies with due process for the remaining members of the proposed Plaintiff Class whose TennCare coverage was involuntarily terminated and who are not currently enrolled.

Plaintiffs satisfy the requirements for preliminary relief. *First*, under Sixth Circuit precedent, members of the proposed Plaintiff Class have already suffered irreparable harm by going without health insurance to which they are entitled. Without a preliminary injunction, they will suffer even greater harm in the current pandemic environment: without insurance coverage, they cannot adequately manage their health conditions and are more likely to develop severe symptoms

requiring intensive care, thus exposing them to a heightened risk of serious illness or death. *Second*, Plaintiffs are likely to succeed on the merits of their claims, most importantly because there is no question that Plaintiffs and members of the proposed Plaintiff Class did not receive adequate notices or fair hearings before Defendant terminated their TennCare coverage, and Defendant systematically denied qualified persons with disabilities the ability to receive TennCare services. *Third*, the harm to Plaintiffs' health significantly outweighs the potential administrative and financial burdens that preliminary relief may impose upon Defendant, many of which are mitigated by the State's acceptance of additional Medicaid funding under the FFCRA. *Fourth* and finally, by enabling Plaintiffs to better manage their health conditions without requiring scarce hospital intensive care, the preliminary injunction serves the public's overriding interests in facilitating the treatment and containment of the most severe pandemic in more than a century.

The Court should grant Plaintiffs' motion for preliminary injunctive relief.

FACTUAL BACKGROUND

Defendant's redetermination process erroneously terminates TennCare benefits for eligible individuals and fails to provide notice and an opportunity for a fair hearing allowing those individuals to appeal the wrongful termination of their health coverage. In response to a long history of public criticism and judicial scrutiny of Defendant's Medicaid programs and administration,[3]

[3] In 2014, for example, Defendant's processing of initial applications for TennCare coverage was riddled with delays and illegally barred applicants from appeals of eligibility determinations. A court in this District enjoined the State from denying appeals to challenge these delays, and the order was affirmed by the Sixth Circuit Court of Appeals. *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016). Pursuant to mitigation plans approved by the Centers for Medicare & Medicaid Services ("CMS"), Defendant suspended all redeterminations from January 2014 through October 2015. P-Ex. 60 at 46. When Defendant restarted redeterminations, the process terminated hundreds of thousands of children primarily because their parents or guardians allegedly failed to respond to requests for information – information that in many cases the State had failed to request

Tennessee spent years developing the TennCare Eligibility Determination System ("TEDS"), a computer system to handle Medicaid eligibility determinations and notices. On March 19, 2019, TennCare launched TEDS statewide with assurances that it would accurately and reliably determine eligibility for thousands of low-income and disabled individuals and notify them of the results.[4] TennCare's actual operation over the past year, however, perpetuated existing flaws and manifested new ones, at the expense of health coverage for tens of thousands of vulnerable enrollees.

A. Defendant's Redetermination Process Is Flawed

In general, to enroll in Medicaid, individuals must meet specific eligibility criteria in any one of more than 20 eligibility groups. They must meet "categorical eligibility" requirements by showing that they are aged, blind, disabled or pregnant, or that they are children or parents of dependent children. 42 U.S.C. § 1396a(a)(10)(A). They must also show that their income is below certain limits, which vary depending on the categorical eligibility group to which they belong. *Id.*; *see also id.* § 1396a(e)(14) (describing income eligibility based on modified adjusted gross income). A few categorical eligibility groups must meet additional limits on the amount of resources, or assets an individual may own. *E.g.*, 42 U.S.C. § 1396a(a)(10)(A)(ii)(XV), (XVI); *id.* § 1396a(r).

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or process. *See* Compl. ¶¶ 135, 137, 372-73, P-Ex. 1-A: C.D.C. Decl., P-Ex. 15-A: D.R. Decl., P-Ex. 27 ¶¶ 15-17 & Figs. 1-2: Amanda Asgeirsson Decl.

[4] Agreed Factual and Evidentiary Stipulations ¶¶ 34-35, *Wilson v. Gordon,* No. 3:14-CV-01492 (M.D. Tenn. Sept. 17, 2018), ECF No. 244. The Court may take judicial notice of its own records. *Holder v. Holder*, 305 F. 3d 854, 866 (9th Cir. 2002).

Federal regulations require states to redetermine enrollees' Medicaid eligibility every 12 months, 42 C.F.R. § 435.916, and states must do so *without* requiring information from an individual if the state possesses or can access reliable information in its own or federal records. *Id.* §§ 435.916(a)(2), (b), 435.948; *Crippen v. Kheder*, 741 F.2d 102, 106–07 (6th Cir. 1984).

TEDS was purportedly created to comply with these and other federal Medicaid requirements. Indeed, the State's contract with Deloitte Consulting, LLP ("Deloitte"), which developed and now operates TEDS, provides for the automated system to, among other things, verify eligibility data with Federal and State data sources, determine eligibility automatically based on available data and without worker intervention when possible, generate and mail standardized notices and letters, and receive, store, and process eligibility documents and requests for appeals.[5]

Defendant's redetermination process, however, is plagued with systemic errors. TennCare does not use information that the State already possesses to redetermine eligibility. Instead, Defendant routinely concludes that individuals are ineligible for Medicaid when state and federal records indicate otherwise. For instance, Children and adults who are approved by the Social Security Administration ("SSA") to receive cash assistance through the Supplemental Security Income ("SSI") program are automatically enrolled in Medicaid.[6] *Id.* § 1396a(a)(10)(A)(i)(II)(aa);

[5] P-Ex. 24 at 9: TennCare & Deloitte Contract. *See also* P-Ex. 25 at 2 (imposing similar standardized requirements on state's contract with Keystone Peer Review Organization, Inc. to operate TennCare's Application Processing Center, which is also involved in Defendant's redetermination of eligibility). Telephone communications with enrollees are conducted through the TennCare Connect call center, which is operated under contract by Automated Health Systems. *See* P-Ex.26 (Automated Health Systems contract). Those communications are similarly standardized, with operators' use of call scripts monitored and enforced with the threat of liquidated penalties. *Id.* at 9-16.

[6] To qualify for SSI, a person must be blind, over 65 or be disabled as defined by the Social Security Act, have limited resources and have an income that does not exceed 78% of the federal poverty level (currently $31,900 a year for an individual). 42 U.S.C. § 1396a(a)(10)(A)(i)(II)(aa); 42

42 C.F.R. § 435.120. Defendant has access to federal databases identifying current and former recipients of SSI.[7] Once SSA makes an eligibility determination, Defendant is simply required to maintain Medicaid coverage as long as the individual is receiving SSI benefits.[8] The State must also cover certain individuals who formerly received SSI, and who remain eligible for TennCare as if still receiving SSI, including: Disabled Adult Children ("DAC"), 42 U.S.C. § 1383c(c), Tenn. Comp. R. & Regs. §§ 1200-13-20-.02(26), 1200-12-20-.08(2);[9] individuals eligible under the federal Pickle Amendment, Unemployment Compensation Amendments of 1976, Pub. L. 94-566, § 503, 90 Stat. 2667 (1976);[10] and widows/widowers who are disabled and between the ages of 50 and 65, Tenn. Comp. R. & Regs. § 1200-13-20-.08(4).[11] TennCare has nonetheless erroneously terminated coverage for individuals eligible under these categories, including named Plaintiffs Vivian Barnes, Charles Fultz, Michael Hill, William Monroe, and Kerry Vaughn, who were without Medicaid coverage until earlier this week, when TennCare finally restored their coverage.[12] Thousands of other similarly situated members of the proposed Plaintiff Class, who are not named

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C.F.R. § 435.120. Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3060 (Jan. 17, 2020).

[7] P-Ex. 49 at 3: TennCare Policy Manual Number 115.025: SSI Cash Recipient.

[8] P-Ex. 49, at 1.

[9] P-Ex. 45: TennCare Policy Manual Number 115.010: Disabled Adult Children.

[10] P-Ex. 48: TennCare Policy Manual Number 115.020: Pickle Passalong.

[11] P-Ex. 50: TennCare Policy Manual Number 115.030: Widow/Widower Categories.

[12] Compl. ¶¶ 200-219, 286-322, 348-362, 411-419; P-Ex. 4-A: Surrett Decl.; P-Ex. 9-A: Fultz Decl.; P-Ex. 10-A: Noe Decl.; P-Ex. 13-A: Monroe Decl.; P-Ex. 17-A: Vaughn Decl. Defendant may not "pick off[]named plaintiffs in a class action before the class is certified," to render a case moot. *Wilson v. Gordon*, 822 F.3d 934, 951 (6th Cir. 2016). "Refusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses." *Id.* (internal quote and alteration omitted).

plaintiffs and have not had such efforts made on their behalf, remain without Medicaid coverage for which they are eligible.[13]

Moreover, TennCare does not request the necessary information from enrollees to evaluate eligibility under these disability-linked categories. TennCare uses a standardized two-page questionnaire to assess an enrollee's potential eligibility in all categories. The questionnaire consists of eight questions, each to be answered with a "yes" or "no."[14] If a member answers "no" to all questions, TennCare will determine that the member is ineligible for TennCare. None of the questions asks whether the member receives or has received SSI.[15] The questionnaire does not seek information regarding whether a person could be eligible because they have been hospitalized or institutionalized for 30 days or more.[16] Nor does it ask if the enrollee has physical or intellectual disabilities for which she is receiving home and community-based care,[17] even though these are

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[13] Plaintiffs seek certification of one class and one subclass. (Doc. 5.) The Plaintiff Class asserts claims under the Medicaid Act and Due Process Clause and is proposed to include: "All individuals who meet the eligibility criteria for TennCare coverage and who, since March 19, 2019, have been or will be disenrolled from TennCare. The class excludes individuals, and the parents and legal guardians of individuals, whose termination is due to a requested withdrawal from the TennCare program." In addition, Plaintiffs S.F.A., S.L.C., Carlissa Caudill, Charles E. Fultz, Michael S. Hill, William C. Monroe, Linda Rebeaud, Kerry Vaughn and Johnny Walker seek to represent this Disability Subclass in asserting a claim under Title II of the ADA. The Disability Subclass comprises "Plaintiff Class members who are 'qualified individuals with a disability' as defined in 42 U.S.C. § 12131(2)." As described in the Complaint, the class and subclass include thousands of individuals. *See* Compl. ¶¶ 435–36. Carlissa Caudill and Kerry Vaughn were identified in the Complaint as qualified individuals with disabilities but were inadvertently omitted from the list of plaintiffs representing the Disability Subclass. Compl. ¶¶ 220–22, 411–12, 434; P-Ex. 5-A: Caudill Decl.; P-Ex. 17-A: Vaughn Decl.

[14] *See e.g.*, P-Ex. 4-C at 5-6; P-Ex. 5-G; P-Ex. 7-C; P-Ex. 9-E; P-Ex. 18-C.

[15] *Id. Cf.* P-Ex. 45: TennCare Policy Manual Number 115.010: Disabled Adult Children; P-Ex. 48; P-Ex. 49; P-Ex. 50.

[16] P-Ex. 46: TennCare Policy Manual Number 115.015: Institutional Medicaid; P-Ex. 47: TennCare Policy Manual Number 125.005: Institutional Status.

[17] P-Ex. 63: TennCare Policy Manual 130.005: CHOICES; Compl. ¶¶ 253–55; P-Ex. 7-A: C.B.C. Decl.

all ways that individuals with disabilities can establish categorical eligibility. *See* 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(V), 1396b(f)(4)(C), 42 C.F.R. § 435.236).

B. Defendant's Notices and Fair Hearing Processes Leave Enrollees Without Recourse to Challenge Their Wrongful Loss of Coverage

Medicaid regulations require a state to timely inform enrollees of eligibility decisions, describe the basis for each decision, and explain available appeal rights including an opportunity for a fair hearing that satisfies due process under federal Medicaid law and the Constitution. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.205; *Hamby v. Neel*, 368 F.3d 549, 559-60 (6th Cir. 2004). They further require that states' written communications, including renewal forms, use plain language that is accessible to persons with disabilities. 42 C.F.R. §§ 435.905(b), 435.916(g). Moreover, the state must provide a fair hearing and render a decision within 90 days from an individual's timely appeal. 42 C.F.R. § 431.244(f)(1)(i). If the appeal is resolved in favor of the appellant, the state must take prompt corrective action, retroactive to the date of the incorrect action. *Id.* § 431.246.

The TEDS enrollee portal and call center are both called TennCare Connect, and their communications with enrollees are highly scripted and standardized. The State's contract with Deloitte prescribes in detail how the contractor is to fulfill those responsibilities and contains a catalogue of enrollee notice templates that are to be used, including the standardized notices that the named Plaintiffs all received.[18]

The standardized notices TennCare relies on are confusing and inaccurate. They fail to explain the basis for TennCare's decision or how enrollees can maintain their coverage, incorrectly state that all information has been used to determine eligibility for all categories of eligibility, and

[18] P-Ex. 24 at 10-21. *See* n. 5, *supra*.

mislead enrollees regarding their appeal rights. On top of this, the notices are frequently riddled with errors and internal inconsistencies that make them incomprehensible.[19] In particular, enrollees with certain disabilities find it especially difficult to understand and respond to Defendant's forms correctly and in a timely manner.[20]

Furthermore, TennCare's automatically generated notices are frequently misaddressed or never actually sent, resulting in individuals discovering that their coverage was involuntarily terminated without their knowledge or being informed that they have the right to appeal.[21] If enrollees do receive notice and wish to appeal, TennCare further subjects all appeal requests to an initial screening requiring the enrollee to demonstrate that the appeal presents a "valid factual dispute." Specifically, TennCare Rule 1200-13-19-.05(3) provides:

> When the Agency receives an appeal from an appellant, the Agency will dismiss this appeal unless the appellant has established a valid factual dispute relating to the appeal. The Agency will screen all appeals submitted by appellants to determine if each appellant has presented a valid factual dispute. If the Agency determines that an appellant failed to present a valid factual dispute, the Agency will immediately provide the appellant with a notice informing him that he must provide additional information as identified in the notice. If the appellant does not provide this information within ten (10) days of the date of the notice, the appeal will be dismissed without the opportunity for a fair hearing. …If the appellant responds but fails to provide adequate information, the Agency will provide a notice to the appellant, informing him that the appeal is dismissed without the opportunity for a fair hearing.

[19] Compl. ¶¶ 202-203, 206, 225; P-Ex. 4-A: Barnes Decl., P-Ex. 4-B, P-Ex. 4-C; P-Ex. 5-A: Caudill Decl., P-Ex. 5-B, P-Ex. 5-C.
[20] Compl. ¶¶ 294-295, 350, 353-354, 425-429; P-Ex. 9-A: Fultz Decl.; P-Ex. 13-A: Monroe Decl.; P-Ex. 18-A: Walker Decl.
[21] Compl. ¶¶ 140, 148, 150, 266-268, 271, 273-275; P-Ex. 3-A: C.M.A. Decl.; P-Ex. 8-A: D.D. Decl.

The rule states that it is applicable to only certain types of TennCare eligibility appeals, but TennCare's form notices prove that Defendant applies this requirement across the board: all termination notices advise enrollees that their right to appeal is subject to the state review process, and appeals are closed for failure to provide the required "valid factual dispute" justification.[22]

C. Tennesseans Without Health Insurance, Particularly Those Eligible for TennCare, Face Grave Risks During the COVID-19 Pandemic

The coronavirus and related COVID-19 pandemic are a serious threat to the public health and welfare of Tennessee. According to Plaintiffs' expert Dr. Brenda Butka, a retired pulmonologist, former Director of the Pulmonary Program at Vanderbilt Stallworth Rehabilitation Hospital, and former Assistant Professor of Medicine at Vanderbilt University, "COVID-19 is an acute respiratory disease" which can "progress[] to acute respiratory distress, and, in some cases, organ failure and death."[23] COVID-19 also manifests in serious respiratory illnesses, such as pneumonia. "There is no vaccine or cure for the disease" and "[n]o vaccine is expected to be available for at least 12 months."[24] COVID-19 is highly contagious and easily spread.[25] Millions of Tennessee residents are expected to contract the virus, with "a mid-range projection" that half of the state's population could become infected.[26] While many cases are mild or asymptomatic and can be resolved without medical intervention, severe manifestations of COVID-19 can require intensive care, "includ[ing] advanced life support with ventilation for those who are most seriously

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[22] *See, e.g.*, P-Ex. 56; Compl. ¶¶ 317, 366–67, 375, 404; P-Ex. 10-A: Noe Decl.; P-Ex. 14-A: Rebaud Decl.; P-Ex. 15-A: D.R. Decl.; P-Ex. 16-A: T.J.T. Decl. Form TN 602.2. *See, e.g.*, P-Ex. 3-C; P-Ex. 5-B; P-Ex. 5-C; P-Ex. 24 at 17–21.
[23] P-Ex. 19 ¶ 4, Butka Decl.
[24] *Id.*
[25] *Id.* ¶ 6; P-Ex. 57, Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How Covid-19 Spreads* (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.
[26] P-Ex. 19 ¶ 7.

compromised."[27] "[C]urrent estimates are that 10%" of Tennessee's expected infected population, "approximately 350,000 [people], will require hospitalization" to treat their COVID-19 symptoms.[28]

Individuals with underlying illnesses or comorbidities, as well as the elderly "whose immune systems have been weakened by age," face particularly high risks if they develop COVID-19.[29] According to the CDC, 80% of reported deaths due to COVID-19 are among patients age 65 or older.[30] The CDC also cautions that "[p]eople of all ages with underlying medical conditions are at higher risk for severe illness, particularly if the underlying medical conditions are not well

[27] *Id.* ¶ 5.
[28] *Id.* ¶ 8. *See also* P-Ex. 61, Tennessee State Gov't, *COVID-19 Section 115(a) Demonstration Application Template*, https://www.tn.gov/content/dam/tn/tenncare/documents/TennesseeCOVID19SafetyNetFundWaiver.pdf ("[P]ublic health experts estimate that roughly 10 percent of individuals who develop COVID-19 need hospital care, and three percent need intensive inpatient care.")
[29] P-Ex. 19 ¶ 10.
[30] P-Ex. 64, Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Older Adults* (Apr. 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html. The Tennessee Department of Health does not publish its own COVID-19 statistics, and instead refers people to the CDC website. *See, e.g.*, P-Ex. 65, Tennessee Dep't of Health, Coronavirus Disease (COVID-19), https://www.tn.gov/health/cedep/ncov.html ("Click here to access CDC's COVID-19 webpage for the most up to date information"); P-Ex. 66, Tenn. Office of the Governor, Coronavirus Information and Resources, https://www.tn.gov/governor/covid-19.html ("Stay up-to-date with the Centers for Disease Control & Prevention").

controlled."[31] These conditions include chronic lung disease or asthma, diabetes, severe obesity, and individuals with compromised immune systems (such as those undergoing cancer treatment).[32]

The lack of TennCare coverage exacerbates the potential harm that eligible individuals already face. According to Dr. Butka, "[h]ealth insurance coverage or its absence has a significant impact on the availability and adequacy of medical care and, ultimately, health outcomes. As the Institute of Medicine summarized the research literature on the effects of being uninsured, individuals who lack coverage generally 'live sicker and die sooner.'"[33] In Dr. Butka's opinion:

> Individuals who lose or have lost Medicaid coverage are at heightened risk of harm… [and] are at especially elevated risk of serious consequences from COVID-19 while they are uninsured. Uninsured former Medicaid enrollees with underlying medical conditions, including many of those whose conditions have been found to meet Social Security Administration disability criteria, are in particular danger from COVID-19, especially if they are not able to access the medications and treatments they need to manage their underlying medical conditions.[34]

In addition, lack of TennCare coverage means that former enrollees who "become ill with COVID-19, especially those at higher risk, are less able to take their current prescribed medications exactly as directed, adhere to other treatment as directed or obtain the medical supplies needed to manage their symptoms" so they "do not worsen to the point where they need supportive

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[31] P-Ex. 59, Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Groups at Higher Risk for Severe Illness* (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html; P-Ex. 58, Ctrs. for Disease Control and Prevention, *People with Moderate to Severe Asthma* (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html. *See also* P-Ex. 67, World Health Organization, *Coronavirus*, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Apr. 9, 2020) ("Older people, and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.").

[32] *Id.*

[33] P-Ex. 19 ¶ 13, Butka Decl. (citing Institute of Medicine (US) Committee on the Consequences of Uninsurance, *Care Without Coverage: Too Little, Too Late*, Washington, DC: National Academies Press (US) (2002)).

[34] *Id.* ¶ 14.

care in a hospital."[35] "[L]ack of health coverage not only endangers uninsured patients themselves but puts additional stress on health care resources, potentially at the expense of caregivers and other patients.[36]

The Plaintiff Class is at risk. When Plaintiffs filed the Complaint, several named Plaintiffs remained without Medicaid coverage, despite their repeated efforts asking Defendant to restore their benefits.[37] Only weeks after this action was filed did TennCare reinstate their coverage. The named Plaintiffs, though now covered themselves, are equally medically vulnerable as absent class members who remain uninsured and urgently need the protection of injunctive relief. For instance, A.M.C., D.R., and three of D.D.'s children suffer from asthma; according to the State, 15.1% of children enrolled in TennCare in 2014-2016 had asthma.[38] In particular, A.M.C. was repeatedly hospitalized when unable to access her medications after losing her TennCare coverage.[39] Plaintiff Vivian Barnes is elderly and suffers from multiple chronic conditions, including diabetes, hypertension, and heart disease, any one of which would place her at high risk from COVID-19.[40] Plaintiff Charles Fultz is 74 years old, has advanced chronic obstructive pulmonary disease (COPD) and is reliant on costly medications, oxygen, and a ventilator.[41] Defendant's tactical decision to

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[35] *Id.* ¶ 15.
[36] *Id.*
[37] Specifically, Vivian Barnes, Charles E. Fultz, Michael S. Hill, William C. Monroe, and Kerry Vaughn lacked coverage at the time the Complaint was filed. Compl. ¶¶ 92, 200-19, 286-322, 348-362, 411-419.
[38] P-Ex. 68: Tenn. Dep't of Health, *Childhood Asthma in Tennessee*, (May 2019) *https*://www.tn.gov/content/dam/tn/health/documents/statistics/Childhood_Asthma_in_Tennessee_2007-2016.pdf.
[39] Compl. ¶¶ 133–46; P-Ex. 1-A: C.D.C. Del.
[40] Compl. ¶¶ 200–01; P-Ex. 4-A: Surrett Decl.
[41] Compl. ¶ 286; P-Ex. 9-A: Fultz Decl.

restore TennCare coverage for a handful of named Plaintiffs does not resolve problems for thousands of other ill, at-risk Tennesseans who are members of the proposed Plaintiff Class.

The federal government as well as state and local governments across the country have recognized that to save as many lives as possible, the spread of COVID-19 must be slowed. Both the State and the federal government have recognized the danger inherent in the lack of medical coverage to hamper the ability to control the pandemic. On March 18, 2020, Congress enacted and the President signed the Families First Coronavirus Response Act into law. Pursuant to that law, Defendant ceased involuntary terminations of TennCare coverage for the duration of the national emergency and reinstated coverage for those terminated since March 18, 2020. Defendant has also sought a waiver from the federal government to establish a special fund for healthcare providers fighting COVID-19, and said: "Tennessee's proposed COVID-19 demonstration is intended to ensure that uninsured Tennesseans seek prompt treatment without fear of potential hospital bills or other medical debt, and to support the sustainability of Tennessee's healthcare system overall so that it continues to be able to provide robust services to Medicaid patients throughout the pandemic and post-pandemic."[42]

While the state has fortunately paused redeterminations going forward for TennCare enrollees who had coverage on March 18, 2020, Defendant's actions have left many eligible Tennesseans without Medicaid benefits since March 19, 2019, and therefore continues to expose them to significant danger from the current pandemic.

[42] P-Ex. 61: TennCare COVID-19 Safety Net Fund Waiver Application Excerpt.

ARGUMENT

Plaintiffs meet the standard for a preliminary injunction because (1) they are "likely to suffer irreparable harm in the absence of preliminary relief;" (2) they are "likely to succeed on the merits"; (3) "the balance of the equities tips in [their] favor"; and (4) an "injunction is in the public interest." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).[43] The Sixth Circuit has "often cautioned that these are factors to be balanced, not prerequisites to be met." *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017). "As long as there is some likelihood of success on the merits, these factors are to be balanced, rather than tallied." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017) (citation omitted). "In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction." *Roth v. Commonwealth Bank*, 583 F.2d 527, 538 (6th Cir. 1978) (citation omitted), *cert. dismissed*, 442 U.S. 925 (1979). "For example, the failure to establish a strong probability of success on the merits does not preclude relief if there are 'serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued.'" *Manlove v. Volkswagen Aktiengesellschaft,* No. 1:18-cv-145, 2019 WL 2291894, at *9 (E.D. Tenn. May 17, 2019) (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399-400 (6th Cir. 1997)).

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[43] The Sixth Circuit has periodically utilized a factor assessing whether "the issuance of the injunction would cause substantial harm to others[,]" *e.g., Handel's Enters. v. Schulenburg*, 765 Fed. App'x. 117, 121 (6th Cir. 2019), in place of the factor that assesses the balancing of the equities between the parties, which is derived from the Supreme Court's preliminary injunction formulation announced in *Winter*, 555 U.S. at 20. As demonstrated *infra* Part III, Plaintiffs meet either factor.

The same standard applies to both prohibitive and mandatory injunctions. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998); *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at *6 (M.D. Tenn. Oct. 5, 2017).

I. Plaintiffs Will Suffer Irreparable Harm During the Public Health Crisis Without Preliminary Relief Reinstating their TennCare Coverage

The serious threat to Plaintiffs' health in the midst of the current pandemic as a result of Defendant terminating their TennCare coverage weighs heavily in favor of granting them preliminary relief. "Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *McLemore v. Gumucio*, No. 3:19-cv-00530, 2019 WL 3305131, at *12 (M.D. Tenn. July 23, 2019) (quoting Wright & Miller, *Federal Practice and Procedure* § 2948.1); *see also D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019) (noting that irreparable-harm requirement is "indispensable"). A plaintiff must demonstrate that irreparable harm is not merely possible, but likely. *Winter*, 555 U.S. at 22. "[H]arm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *accord Obama for Am.*, 697 F.3d at 436.

"Courts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services and the party against whom the injunction is issued claims that the injunction places significant costs on them." *Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016). Even without a pandemic, loss of TennCare therefore entails a risk of

irreparable harm to eligible individuals whose coverage was terminated involuntarily. In the context of the current public health emergency, however, the risk is more imminent and even more grave. The coronavirus is highly infectious and COVID-19 has a significant mortality rate, particularly for individuals with underlying health conditions that are not well controlled, which disproportionately describe members of the proposed Plaintiff Class and Disability Subclass.[44]

As named Plaintiffs demonstrate, members of the Plaintiff Class are likely to have diagnoses or conditions that place them at increased risk of complications from COVID-19. For example, respiratory illnesses are common: A.M.C. suffers from asthma for which she has been repeatedly hospitalized and unable to access her medications due to inappropriate breaks in her TennCare coverage, D.R. has asthma, D.D. has three children with asthma, and Carlissa Caudill and Charles Fultz suffer from COPD. Many plaintiffs are also elderly in addition to living with other medical complications, such as Vivian Barnes (who is diabetic, hypertensive, and has heart disease), and William C. Monroe (who also has heart disease). Finally, many disabled plaintiffs are dependent on elderly caretakers who are at high risk, such as S.L.C. who suffers from a brain injury and is cared for by 80-year old family members, and Michael S. Hill who has cognitive impairment and whose caretaker is 75 years-old.[45]

These individuals represent many others in the proposed Plaintiff Class who are medically vulnerable and consequently face a graver risk of complications and even death due to COVID-19.[46] Without restoration of TennCare, members of the proposed Plaintiff Class will suffer this irreparable harm.

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[44] P-Ex. 19 ¶¶ 6–11, 13–15: Butka Decl.
[45] *Id.* ¶ 11.
[46] P-Ex. 59: CDC, *Groups At Higher Risk of Severe Illness,* (last visited Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html;

II. There Is a Strong Likelihood that Plaintiffs' Will Succeed on Their Due Process and ADA Claims.

Plaintiffs' declarations and exhibits demonstrate the likelihood of establishing that they have been denied due process and, in the case of those in the Disability Subclass, have been subject to systemic discrimination on the basis of disability. Because the redetermination process is so automated, and TennCare's interactions with enrollees are systematized, Plaintiffs have a substantial probability of success on the merits of their claims that Defendant has violated the constitutional due process and federal statutory and regulatory rights of the Plaintiff Class and Disability Subclass.[47] Alternatively, they present, at a minimum, questions going to the merits, coupled with a showing of irreparable harm that markedly and decidedly outweighs any potential harm to Defendant in the absence of preliminary injunctive relief.

"At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, L.L.C., v. Tenke Corp*., 511 F.3d 535, 543 (6th Cir. 2007)). A court need only "satisfy itself, not that the plaintiff certainly has a right, but that he has a fair question to raise as to the existence of such a right." *Brandeis Machinery & Supply Corp. v. Barber-Greene Co*., 503 F.2d 503, 505 (6th Cir. 1974). Accordingly, "the standard that must be met in order to establish the requisite likelihood of success on the merits is not a particularly stringent one." *Riverside Park Realty Co. v. F.D.I.C.*, 465 F. Supp. 305, 310 (M.D. Tenn. 1978).

P-Ex. 58: CDC, *People with Moderate to Severe Asthma*, (last reviewed Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html.

[47] *See*, n. 13, *supra.*

A. Defendant Administers TennCare in Violation of the Due Process Clause and the Medicaid Act

Defendant's continuing conduct violates Plaintiffs' constitutional and statutory rights to due process. TennCare enrollees are entitled to due process under the Fourteenth Amendment, which requires adequate notice and a meaningful opportunity for a fair hearing before the State terminates their coverage. *Hamby*, 368 F.3d at 559–60. The Medicaid Act similarly requires that a state plan "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied." 42 U.S.C. § 1396a(a)(3). Implementing regulations require a state, when taking any action affecting a beneficiary's eligibility, to provide written notice informing the beneficiary of his right to a fair hearing and right to request an expedited fair hearing, of the methods by which he may obtain a hearing, that he may represent himself or use a representative, and of the time frames in which the agency must take final administrative action. 42 C.F.R. § 431.206(b), (c)(2); *see also id.* § 431.201 (defining "action"). Such notice must be provided in plain language and in a manner that is accessible and timely to individuals living with disabilities. *Id.* §§ 431.206(e), 435.905(b)(2). The regulations further require such notice to contain, among other things, a clear statement of the specific reasons and regulations that support the action, an explanation of the individual's right to request a hearing, and an explanation of the circumstances under which coverage is continued if a hearing is requested. *Id.* § 431.210; *Crawley v. Ahmed*, No. 08-14040, 2009 WL 1384147, at *26 (E.D. Mich. May 14, 2009). TennCare's notices fail to live up to these standards.

1. Defendant Has Systematically Deprived Plaintiff Class Members of Adequate Notice of Termination of Their TennCare Coverage.

TennCare's notices violate the Due Process Clause and the Medicaid Act. The standardized notices suffer from numerous deficiencies. They fail to explain the specific reasons for the State's action.[48] For example, the notice regarding changes in income uses form language that "we've made a change to your income" but does not specify the change in the letter, instead advising individuals to find this information online or by calling TennCare.[49] This generic statement does not meet the level of specificity required by 42 C.F.R. § 431.210 or provide the kind of detailed explanation that due process requires, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (due process requires a notice "detailing the reasons for a proposed termination" and including "the legal and factual bases" for the decision.); *Barry v. Lyon*, 834 F.3d 706, 720 (6th Cir. 2016) (agency must provide "specific, individualized reasons for the agency action"). The instruction to log-in online or call TennCare would not cure the deficiency, even if enrollees could obtain the essential information by following the instructions, for "[D]efendant cannot satisfy due process by requiring notice recipients to call elsewhere." *Barry*, 834 F.3d at 720. Unfortunately, in TennCare's case,

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[48] Form TN 301.2 and TN 301.3 and TN 301.4. *See, e.g.,* P-Ex. 1-J, P-Ex. 1-K, P-Ex.1-L; P-Ex. 2-B; P-Ex. 3-B; P-Ex. 4-B, P-Ex. 4-D; P-Ex. 5-D, P-Ex. 5-E, P-Ex. 5-F; P-Ex. 6-B; P-Ex. 7-B; P-Ex.8-B; P-Ex. 9-B, P-Ex. 9-C, P-Ex. 9-D; P-Ex. 10-B, P-Ex. 10-C, P-Ex. 10-D; P-Ex.11-B; P-Ex. 12-B; P-Ex. 13-B, P-Ex. 13-C; P-Ex. 14-B, P-Ex. 14-C; P-Ex. 15-B, P-Ex. 15-C; P-Ex. 17-B; P-Ex. 18-B, P-Ex. 18-D.

Many notices are not reliably mailed and therefore never reach their intended recipients. Compl. ¶¶ 135, 137, 139, 163-164, 168, 181-182, 189, 204-205, 226, 229266, 274, 328, 336-337, 372, 377, 386, 397-398; P-Ex. 1-A: C.D.C. Decl.; P-Ex. 2-A: J.Y. Decl.; P-Ex. 3-A: C.M.A. Decl.; P-Ex. 4-A: Surrett Decl.; P-Ex. 5-A: Caudill Decl.; P-Ex. 8-A: D.D. Decl.; P-Ex. 11-A: King Decl.; P-Ex. 11-B; P-Ex. 12-A: J.N.L. Decl.; P-Ex. 15-A: D.R. Decl.; P-Ex. 16-A: T.J.T. Decl.

[49] Form TN 305.2. *See, e.g.*, P-Ex. 3-D; P-Ex. 3-E; P-Ex. 3-F; P-Ex. 9-H; P-Ex. 10-E; P-Ex. 12-E; P-Ex. 12-I; P-Ex. 12-J. *See also* Compl. ¶¶ 297, 314; P-Ex. 9-A: Fultz Decl.; P-Ex. 10-A: Noe Decl.

calling or going online does no good, because enrollees who do so still cannot get the needed information.[50]

Further, the form notices omit vital information about the enrollees' rights and responsibilities. This includes information that is especially important for people whose failure to meet state deadlines to appeal or submit information, are caused by the failure to receive notices or requests for information.[51] The notices fail to explain that regulations authorize the extension of deadlines for good cause,[52] and that, if coverage is terminated for failure to timely submit requested information, the recipient can regain coverage by submitting the missing information within 90 days.[53] The notices thus fail to provide "specific notice of the recipient's right to appeal." *Barry*, 834 F.3d at 719 (internal quote omitted); *accord* 42 C.F.R. § 431.206(b), 210.

Further, the notices incorrectly state, "Remember, when we make our decision, we look at all of your facts, all of our program rules, and each kind of group we have."[54] This statement is false for at least three reasons. *First*, TennCare routinely fails to check all of the information in its

[50] Form TN 305.2. *See, e.g.*, P-Ex. 3-D; P-Ex. 3-E; P-Ex. 3-F; P-Ex. 9-H; P-Ex. 10-E; P-Ex. 12-E; P-Ex. 12-I; P-Ex. 12-J. *See also* Compl. ¶¶ 297–99, 314; P-Ex. 9-A: Fultz Decl.; P-Ex. 10-A: Noe Decl.

[51] *See, e.g.*, Compl. ¶¶ 241–42, 337; P-Ex.6-A: Cleveland Decl.; P-Ex. 12-A: J.N.L. Decl.

[52] Form TN 301.2 and TN 301.3. *See, e.g.*, Compl. ¶¶ 242, 351, 375, 424; P-Ex. 6-A: Cleveland Decl.; P-Ex. 13-A: Monroe Decl.; P-Ex. 15-A: D.R. Decl.; P-Ex. 18-A: Walker Decl., P-Ex. 13-B; P-Ex. 3-B; P-Ex. 11-C; P-Ex. 13-C; P-Ex. 18-B. *Cf.* P-Ex. 54, Tenn. R. & Reg. 1200-13-19-.06(3).

[53] Form TN 301.2 and TN 301.3. *See, e.g.*, Compl. ¶¶ 351, 424; P-Ex. 13-A: Monroe Decl., P-Ex. 13-C; P-Ex. 18-A: Walker Decl., P-Ex. 18-B; P-Ex. 3-B; P-Ex. 11-C. *Cf.* 42 C.F.R. 435.916(a)(3)(C)(iii).

[54] Form TN 301.2, TN 301.3 and TN 301.4. *See, e.g.*, P-Ex. 1-J, P-Ex. 1-K, P-Ex. 1-L; P-Ex. 2-B; P-Ex. 3-B; P-Ex. 4-B, P-Ex. 4-D; P-Ex. 5-D, P-Ex. 5-E, P-Ex. 5-F; P-Ex. 6-B; P-Ex. 7-B; P-Ex. 8-B; P-Ex. 9-B, P-Ex. 9-C, P-Ex. 9-D; P-Ex. 10-B, P-Ex. 10-C, P-Ex. 10-D; P-Ex. 11-C; P-Ex. 12-B; P-Ex. 13-B, P-Ex. 13-C; P-Ex. 14-B, P-Ex. 14-C; P-Ex 15-B, P-Ex. 15-C; P-Ex. 17-B; P-Ex. 18-B, P-Ex. 18-D.

files. Rather, TennCare routinely issues standardized notices directing enrollees to submit documentation to confirm their eligibility, despite existing state records that already establish it.[55] *Second*, TennCare does not collect all information needed to evaluate eligibility. The forms it uses do not request information TennCare would need in order to be able to assess eligibility for several disability-linked eligibility categories.[56] *Third*, TennCare does not screen for all eligibility categories, even when enrollees or their advocates bring information establishing eligibility to TennCare's attention.[57] TennCare's inaccurate notices discourage appeals by providing false assurance that TennCare's finding of ineligibility is correct. *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974) (notice especially important because of "human tendency, even among those more experienced and knowledgeable in the ways of bureaucracies than … disabled persons … to assume that an action taken by a government agency in a pecuniary transaction is correct"). Moreover, these individuals, having been told they were ineligible, have no reason to think applying for TennCare now will result in a different outcome for them.

Courts have repeatedly found that a state Medicaid agency is required to go through the process of determining whether an individual is ineligible under all Medicaid categories before

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[55] Forms TN 304, TN 303.3, TN 303d, TN 608. *See, e.g.,* Compl. ¶¶ 203, 223, 238, 254, 290-291, 393, 400, 403, 425; P-Ex. 4-A; P-Ex. 5-A, P-Ex. 5-G, P-Ex. 5-H; P-Ex. 6-A; P-Ex. 7-A, P-Ex. 7-C; P-Ex. 9-A, P-Ex 9-E; P-Ex. 16-A; P-Ex. 18-A, P-Ex. 18-C; P-Ex. 1-I; P-Ex. 4-C, P-Ex. 4-F; P-Ex. 6-C; P-Ex. 1-H.

[56] Form TN 304. P-Ex. 9-E. Form TN 301.2, TN 301.3 and TN 301.4. *See, e.g.*, P-Ex. 1-J, P-Ex. 1-K, P-Ex. 1-L; P-Ex. 2-B; P-Ex. 3-B; P-Ex. 4-B, P-Ex. 4-D; P-Ex. 5-D, P-Ex. 5-E, P-Ex. 5-F; P-Ex. 6-B; P-Ex. 7-B; P-Ex. 8-B; P-Ex. 9-B, P-Ex. 9-C, P-Ex. 9-D; P-Ex. 10-B, P-Ex. 10-C, P-Ex. 10-D; P-Ex. 11-C; P-Ex. 12-B; P-Ex. 13-B, P-Ex. 13-C; P-Ex. 14-B, P-Ex. 14-C; P-Ex 15-B, P-Ex. 15-C; P-Ex. 17-B; P-Ex. 18-B, P-Ex. 18-D.

[57] Compl. ¶¶ 205, 208–09, 221–24, 230–31, 244, 257, 259, 302, 312–19, 416–18,429; P-Ex. 4-A: Surrett Decl.; P-Ex. 5-A: Caudill Decl.; P-Ex. 5-I; P-Ex. 6-A: Cleveland Decl.; P-Ex. 7-A: C.B.C. Decl.; P-Ex. 7-D; P-Ex. 9-A: Fultz Decl.; P-Ex. 10-A: Noe Decl.; P-Ex. 12-A: J.N.L. Decl., P-Ex. 12-K, P-Ex. 12-L; P-Ex. 10-D ¶ 3; P-Ex. 17-A: Vaughn Decl., P-Ex. 17-C; P-Ex. 18-A: Walker Decl., P-Ex. 18-E.

terminating coverage. *E.g., Crippen*, 741 F.2d at 106–07; *Crawley*, 2009 WL 1384147, at *22–23 ; *Mass. Ass'n of Older Ams. v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983), *Stenson v. Blum*, 476 F. Supp. 1331, 1339–42 (S.D.N.Y. 1979). Finally, TennCare's standard notice discourage appeals in another way: by incorrectly stating, that individuals only have a right to a hearing if they can show that TennCare made a mistake of fact.[58] This is a misstatement of the hearing rights that 42 C.F.R. §§ 431.206(b), 431.210(d), 431.220 require the State to include in its notices, for it denies the crucial right to challenge terminations based on an inaccurate application of law or policy. Because TennCare's notices are standardized and use consistent language, Plaintiffs' claims are likely to succeed on a class-wide basis.[59]

2. Defendant Has Routinely Denied Plaintiff Class Members Meaningful Opportunities for Fair Hearings to Contest the Erroneous Termination of Their Tenncare Coverage

The State's policies and practices deny enrollees fair hearings. In addition to the inaccurate information regarding appeal rights contained in the notices described above, the State also routinely fails to grant timely requests for hearings.[60] And TennCare denies some appeals, or continuation of coverage pending the appeals, on the grounds that the request was not timely, even where

[58] Form TN 301.2, 301.3, 301.4 and 301.5; P-Ex. 1-B; P-Ex. 1-C; P-Ex. 1-D; P-Ex. 1-J; P-Ex. 1-K; P-Ex. 1-L; P-Ex. 2-B; P-Ex. 3-B; P-Ex. 4-B; P-Ex. 4-D; P-Ex. 4-E; P-Ex. 5-D; P-Ex. 5-E; P-Ex. 5-F; P-Ex. 6-B; P-Ex. 7-B; P-Ex. 8-B; P-Ex. 9-B; P-Ex. 9-C; P-Ex. 9-D; P-Ex. 10-C; P-Ex. 10-D; P-Ex. 11-C; P-Ex. 12-B; P-Ex. 12-F; P-Ex. 13-B; P-Ex. 13-C; P-Ex. 14-B; P-Ex. 14-C; P-Ex. 15-B; P-Ex. 16-D; P-Ex. 17-B; P-Ex. 18-B; P-Ex. 18-C; P-Ex. 18-D. This statement reflects TennCare Rule 1200-13-19-.05(3), discussed *infra*, and is a misstatement of the enrollee's rights, for the same reason that the rule is unlawful.

[59] *See* n. 5, *supra*.

[60] *E.g.*, Compl. ¶¶ 300, 337, 404–07; P-Ex. 9-A: Fultz Decl.; P-Ex. 12-A: J.N.L. Decl., P-Ex. 12-M; P-Ex. 16-A: T.J.T. Decl.; P-Ex. 16-B: S.L.T. Decl; Compl. ¶¶ 308–10, 312–13, 319–21, 416–18; P-Ex. 10-A: Noe Decl.; P-Ex. 17-A: Vaughn Decl., P-Ex. 17-D; Compl. ¶¶ 152, 165, 280, 375, 383, 387–88; P-Ex. 1-A: C.D.C. Decl.; P-Ex. 2-A: J.Y. Decl.; P-Ex. 8-A: D.D. Decl.; P-Ex. 15-A: D.R. Decl.

an enrollee asserts the good cause that she never received a notice and attempted to appeal as soon as she learned of her termination.[61] *See* Tenn. R. & Reg. 1200-13-19-.06(3).

Finally, Defendant subjects every appeal to an unlawful vetting process. Federal law requires a state to grant an opportunity for a hearing to any individual who requests one on the grounds of erroneous termination, unless "the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all beneficiaries." 42 C.F.R. § 431.220. But TennCare dismisses any appeal, without a hearing, unless the individual provides sufficient information to show a "valid factual dispute." TennCare Rule 1200-13-19-.05(3). The redetermination process that has cost Plaintiff Class members their coverage has involved no change in federal or state law, as the eligibility rules have not changed. The only change is Defendant's implementation of a dysfunctional system.[62] The policy, thus, extends well beyond the narrow circumstances described in the regulation and is facially unconstitutional under the due process mandates announced in *Goldberg*, 397 U.S. at 268.

Appeals that survive the vetting process frequently still come to grief. Before the enrollee receives a fair hearing, she may receive a TennCare notice informing her that the appeal is closed, because TennCare says it has made a decision agreeing with the enrollee. But when a notice of decision arrives, it informs the enrollee that she is still denied coverage, and no corrective action is taken.[63] The enrollee is left without recourse.

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[61] *E.g.*, Compl. ¶ 183, 301; P-Ex. 3-A: C.M.A. Decl., P-Ex. 3-C; P-Ex. 9-A: Fultz Decl. ¶ 3; P-Ex. 9-F; -Ex. 52; P-Ex. 54.
[62] *See,* e.g., Complaint, ¶¶ 148-150, 271-275, 338-342, 398, 400; P-Ex. 1-1; P-Ex.8-A: D.D. Decl.; P-Ex. 12-A: J.N.L. Decl.; P-Ex.16-A: T.J.T. Decl.
[63] Compl. ¶ 216; P-Ex. 4-A, P-Ex. 4-G, P-Ex. 4-H; P-Ex. 9-F.

B. Defendant's Methods of Administration Discriminate against Persons With Disabilities in Violation of the ADA

The State's systematic termination of TennCare coverage for individuals with qualifying disabilities violates Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "The ADA's prohibition of discrimination in services, programs, or activities 'encompasses virtually everything that a public entity does.'" *Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 F. App'x 215, 219 (6th Cir. 2018) (quoting *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998)). Whether intentional or not, a public entity's denial of meaningful access to the services or benefits it provides is actionable under Title II. *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 909–10 (6th Cir. 2004). To prevail on a Title II claim, a plaintiff must demonstrate (1) that she is a qualified individual with a disability; (2) that the defendant is subject to the ADA; and (3) that the plaintiff was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant by reason of plaintiff's disability. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003). The Plaintiffs representing the Disability Subclass are likely to establish all three elements.

1. The Members of the Disability Subclass Are Qualified Individuals with Disabilities, and Defendant Is Subject to the ADA

Plaintiffs S.F.A., Vivian Barnes, Carlissa Caudill, S.L.C., Charles E. Fultz, Michael S. Hill, William C. Monroe, Linda Rebeaud, Kerry Vaughn and Johnny Walker, as well as the Disability Subclass members they represent, are "qualified individuals with a disabil-

ity," as defined by the ADA.[64] That is because they each have "a physical or mental impairment that substantially limits one or more major life activities", and each "with or without reasonable modifications to rules, policies, or practices, … meets the essential eligibility requirements for the receipt of [TennCare] services." 42 U.S.C. §§ 12102(1)(A) and 12131(2).

As a public entity, 42 U.S.C. § 12131(1)(A), (B), TennCare must comply with the obligations of Title II of the ADA and ensure that no qualified individual with a disability, by reason of disability, is excluded from participation in or is denied the benefits of TennCare, or is subject to discrimination by TennCare. 42 U.S.C. § 12132. This includes an obligation to not employ criteria or other methods of administration that have the purpose or effect of impairing the objective of the program with respect to individuals with disabilities. *Id.*; 28 C.F.R. § 35.130(b)(3). As a public entity, TennCare is further obligated to make reasonable modifications in policies, practices, and procedures as necessary to avoid discrimination on the basis of disability unless TennCare can demonstrate that doing so would fundamentally alter the nature of the program. 28 C.F.R. § 35.130(b)(7).

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[64] The ADA definition of disability "shall be construed in favor of broad coverage of individuals Under this Act." 42 U.S.C. § 12102(4)(A); *accord* 28 C.F.R. § 35.108(a)(2)(i) (broad construction in favor of "expansive" coverage, "to the maximum extent permitted by the terms of the ADA") (U.S. Dept. of Justice regulations implementing Title II of the ADA). "The primary object of attention" in ADA Title II cases "should be whether public Entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity." Accordingly, the definition of disability "should not demand extensive analysis." *Id.* § 35.108(d)(ii). Indeed, there are Plaintiffs and many other people who are eligible for TennCare through non-disability linked categories—such as parent/caregivers like Plaintiff D.R., and enrollees in the Breast and Cervical Cancer Program, like Plaintiff Rebeaud—who satisfy the ADA definition as well. Plaintiffs are not seeking reinstatement of coverage for these individuals at this time.

2. Defendant Has Denied the Members of the Disability Subclass the Opportunity to Participate in or Benefit from Tenncare's Services and Benefits, and Has Subjected Them to Discrimination Based on Their Disability

Because Congress has expressly delegated Title II rulemaking authority to the Attorney General, the regulations implementing Title II of the ADA "are entitled to 'controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984)). Defendant has violated the rights of Disability Subclass members under the U.S. Attorney General's implementing regulations, 28 C.F.R. § 35.130(b)(3) and (b)(8). The Attorney General has interpreted Section 35.130(b)(3) to prohibit a public entity from "utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities[.]" 28 C.F.R. § Pt. 35, App. B. "The phrase 'criteria or methods of administration' refers to official written policies of the public entity and to the actual practices of the public entity." *Id.* The regulation thus "prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face but deny individuals with disabilities an effective opportunity to participate." *Id.* Another regulation, Section 35.130(b)(8), further prohibits a public entity from "impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out . . . any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."

a. Defendant's administration of TennCare tends to screen out persons with disabilities eligible under disability-linked eligibility categories.

TennCare does not reliably screen for categories of eligibility related to disability status, thereby terminating enrollees who should be eligible under disability-related categories of eligibility.

Plaintiffs Barnes, Caudill and Walker receive SSI on the basis of disability and are eligible for TennCare for that reason alone, 42 C.F.R. § 435.120. TennCare's policy makes clear that documentation sufficient to support an eligibility determination for SSI recipients comes directly from SSA:

> TennCare receives a file directly from the SSA that contains all SSI eligibility determinations. TennCare automatically loads the State Data Exchange (SDX) file to TEDS to enroll SSI cash recipients in TennCare Medicaid.[65]

Plaintiffs Barnes, Caudill and Walker received SSI and TennCare without incident for years before the implementation of TEDS. The fact that they lost TennCare coverage through the TEDS-eligibility system strongly suggests that a flaw in TEDS is responsible. Whatever the cause, there is no question regarding their eligibility. Ms. Barnes and other current SSI recipients who remain without coverage should be immediately reinstated.

Plaintiffs S.L.C., Hill and Vaughn are eligible in the DAC category; Plaintiff Cleveland is eligible in the disabled Widow category; and Plaintiffs Fultz and Monroe are eligible under the Pickle Amendment. All have been eligible on the basis of a finding that they meet Social Security's disability standard. Yet all have suffered the loss of their TennCare coverage; Plaintiffs Fultz, Hill, Monroe and Vaughn remain without coverage.

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[65] P-Ex. 49 at 3.

The loss of coverage by these and other individuals whose coverage was grounded in their disability-linked eligibility is traced to Defendant's systemic failure to consider those categories when redetermining eligibility. This failure is reflected in the standard pre-termination questionnaire that TennCare uses, which fails to ask for information necessary to determine eligibility in these disability-linked categories.[66] Enrollees who truthfully answer the questionnaire and who belong to any of those disability-linked categories are routinely screened out and denied continued participation in the TennCare program. *But see* Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 77 Fed. Reg. 17,181 (Mar. 23, 2012) ("We have added a new paragraph to § 435.916(f)(1), to clarify that, in accordance with longstanding policy the agency must consider all bases of eligibility when conducting a renewal of eligibility. To meet this requirement, renewal forms will need to include basic screening questions, . . . *to indicate potential eligibility based on disability* or other basis other than the applicable MAGI standard." (emphasis added)); *see also Crawley,* 2009 WL 1384147, at *21 (describing obligation to screen for Medicaid eligibility "under disability-based categories" prior to terminating benefits).

The bureaucratic nightmare in which Plaintiff Vivian Barnes, a 74-year-old widow, finds herself typifies the experience of members of the Disability Subclass who remain without coverage. She has been receiving TennCare for over 25 years because she is SSI-eligible. Although her SSI eligibility has never changed, in June 2019, Ms. Barnes received two conflicting form notices from Defendant. One indicated that her TennCare application was approved; the other, that her TennCare coverage would end.[67] This second notice also included the eight-item questionnaire,

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[66] *See* p. 8, *supra*.
[67] P-Ex. 4-B; Ex. 4-C.

which Ms. Barnes filled out truthfully.[68] Thereafter, Ms. Barnes lost her TennCare coverage without prior notice or opportunity for a hearing, despite maintaining her SSI eligibility. Defendant advised her to fill out a new application and requested detailed—and irrelevant—information.[69] This information request included phone and utility bills, homeowner's insurance premiums, and life insurance policies, none of which are relevant to any category of eligibility. Defendant also requested proof that Ms. Barnes is Medicare-eligible, despite the fact that TennCare has been paying Ms. Barnes's Medicare premiums for years.[70] This request from TennCare was too complex for Ms. Barnes, so she relied on her daughter to assist her in gathering this information, which delayed her application.[71] None of this should have been necessary, as she should have been continuously eligible through her SSI status. Ms. Barnes remains without full coverage for which she is eligible.

b. Defendant's redetermination process systematically denies TennCare enrollees with disabilities access to health coverage.

Defendant's redetermination process denies TennCare enrollees with disabilities effective exercise of their due process rights to contest the wrongful denial or termination of benefits.

In years past, TennCare tacitly acknowledged that successful completion of the redetermination process was more difficult for persons with disabilities than for those without disabilities, and that the program must therefore make necessary modifications to accommodate their needs. For those enrollees whom its own eligibility records identified as qualified individuals with disa-

[68] P-Ex. 4-C at 5–6; Plaintiffs Caudill, Cleveland, S.L.C., Fultz, and Walker are eligible for TennCare through their SSI status and were also subjected to the questionnaire.
[69] Compl. ¶¶ 205–09; P-Ex. 4-A: Surrett Decl.
[70] *Id.* ¶ 211.
[71] *Id.* ¶ 209.

bilities, TennCare recognized that its due-process obligations required the implementation of appropriate systemic procedures for reasonable accommodation, through its recordkeeping, individual outreach and assistance and appeal processes. Specifically, for enrollees who were eligible on the basis of severe and persistent mental illness, those accommodations included the identification of community mental-health centers where each enrollee had most recently received treatment, and notification of those centers to conduct outreach and proactively assist with the reverification of their eligibility. [72] *Rosen v. Goetz,* 410 F.3d 919, 923 (6th Cir. 2005). Accommodation also involved notification to all enrollees of the availability of a good cause extension of deadlines for responding to state requests and for submitting appeals. *Id.*

The current redetermination process is at least as challenging for enrollees to successfully complete as it was when TennCare implemented those systemic accommodations, and the current process is plagued by systemic problems of which TennCare officials are well aware.[73] Yet TennCare abandoned those systemic procedures for accommodating the needs of those known to the State to be qualifying individuals with disabilities.

TennCare's current eligibility records identify those who qualify for coverage on the basis of disability. TennCare has even more granular information that identifies enrollees who are currently receiving treatment for disabling conditions. TennCare receives the information monthly from its managed care contractors in electronic reports of every patient encounter between a TennCare enrollee and provider that resulted in a paid claim during the previous month.[74]

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[72] The eligibility category in which these individuals qualified was abolished in 2005, and their Eligibility in surviving disability-related categories was evaluated through a redetermination process similar to the process at issue here. *Rosen*, 410 F.3d at 923–24.
[73] *See* pp. 6–9, *supra*.
[74] P-Ex. 23 at 10-12.

TennCare knows not only who has qualified on the basis of disability but knows the identity of all enrollees who, for example, are receiving treatment for a psychiatric or neurological diagnosis that requires accommodation.[75]

TennCare ignores that information and no longer arranges for outreach or other assistance it knows enrollees need to successfully complete the redetermination process. Indeed, TennCare does not even disclose the availability of a potential good cause exception to time limits and refuses to actually apply the exception even when enrollees seek extensions based on disability or the failure to receive TennCare notices, circumstances that clearly constitute good cause.[76]

Members of the Disability Subclass are greatly harmed by these systemic defects that cause loss of TennCare coverage and resulting damage to their health.[77] Plaintiffs are likely to succeed on the merits of their ADA claim.

III. The Balance of the Equities Favors Protecting Plaintiffs' Health and Well-Being Over Defendant's Potential Administrative Burden

Any conceivable burden on Defendant does not come close to matching, let alone dwarfing, Plaintiffs' risk of suffering medical complications as a result of being unable to control their underlying medical conditions without TennCare coverage. The third factor for obtaining a pre-

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[75] *Cf.*, *e.g.,* Compl., ¶¶ 234, 241, 363, 368, 420, 427; P-Ex. 6-A (encounter data would have included diagnosis of depression); P-Ex. 14-A (encounter data would have included diagnoses of depression and anxiety); P-Ex 18-A (encounter data would have included diagnoses of traumatic brain injury and seizure disorder).

[76] Form TN 301.2 and TN 301.3. *See, e.g.*, Compl. ¶¶ 240-242, 351, 375, 377-380, 423, 424, 426, 428; P-Ex. 3-B; P-Ex. 6-A: Cleveland Decl., P-Ex. 6-B; P-Ex. 11-C; P-Ex. 13-A: Monroe Decl., P-Ex. 13-C; P-Ex. 15-A: D.R. Decl., P-Ex. 15-B; P-Ex. 18-A: Walker Decl., P-Ex. 18-B.

[77] Plaintiff A.M.C., for example, required two emergency hospitalizations after she lost TennCare without notice and her mother was unable to obtain anti-seizure medications for her. Compl., ¶¶ 135-136, 142-144; P-Ex.1-A: C.D.C. Decl.

liminary injunction "refers to the balance of equities between the movant and other parties." *Rhinehart v. Scutt*, 509 F. App'x 510, 515 (6th Cir. 2013). "Courts routinely" conclude that the type of "irreparable harm involv[ing] delay in or inability to obtain medical services" at issue here outweighs and "significant costs" or administrative hassle claimed by the party opposing the injunction. *Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016).

In this case, the conceivable potential harms that a preliminary injunction would impose on TennCare include administrative burdens involved in prospectively reinstating coverage, issuing notices, and/or providing hearings. Those costs are outweighed not just by risks of harm to the Plaintiffs, but by the State's own paramount interests that would be served by the issuance of the injunction. Governor Lee has predicated his declaration of a state of emergency on a finding that "taking proactive steps to prevent a substantial risk to the public health and safety is paramount."[78] At the time of a global public health emergency, the State's interest in protecting the health and lives of its residents is consistent with, rather than opposed to, the entry of the preliminary injunction.

Moreover, the costs to the State are at least partially offset by TennCare's receipt of increased federal funding to contend with the COVID-19 emergency. Section 6008(a) of the Families First Coronavirus Response Act (the "FFCRA"), Pub. L. No. 116-127, 134 Stat. 177, 208, provides states with a temporary 6.2-percentage-point increase in Federal Medical Assistance Percentage ("FMAP") funding during the emergency period, with certain conditions. A key condition is that states refrain from terminating Medicaid coverage for any individual who was enrolled as of March 18, 2020, or who enrolls during the emergency period, through the end of the month in

[78] P-Ex. 29: Tennessee Governor's Executive Order No. 14: (March 12, 2020).

which the emergency period ends, unless the individual requests voluntary termination of eligibility or ceases to be a resident of the state. *Id.* § 6008(b)(3). TennCare has accepted these conditions, consistent with Governor Lee's March 19 executive order authorizing TennCare "to create policies or modify existing policies as is necessary to ensure that members of the TennCare and CoverKids programs continue to receive medically necessary services without disruption during this state of emergency".[79] Any burdens to Defendant associated with the grant of injunctive relief will be marginal by comparison to the human costs that are likely to be incurred in the absence of such relief.

IV. The Public Interest Strongly Favors Ensuring that Plaintiffs Have TennCare Coverage During the COVID-19 Pandemic

The public "has an interest in guaranteeing that those in financial need are not unreasonably terminated from public assistance benefits." *Watkins v. Greene Metro. Hous. Auth.*, 397 F. Supp. 3d 1103, 1110 (S.D. Ohio 2019) (quotation marks omitted); *see also Soave v. Milliken*, 497 F. Supp. 254, 262 (W.D. Mich. 1980) ("Maintaining the personal dignity and stability of persons on the edge of poverty serves not only their personal interests, but the interests of the society in which they live."). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

The extraordinary actions taken by the President, the Governor and the Congress to address the COVID-19 pandemic all attest to the paramount public interest in slowing the spread of infection. On March 13, the President issued a proclamation invoking his authority under the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1601 *et seq.*),

[79] P-Ex. 31 ¶¶ 34: Tennessee Governor's Executive Order No. 17 (March 22, 2020).

to "find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency." The President noted that the federal government had already taken "sweeping action to control the spread of the virus in the United States," but that emergency measures would be needed to slow the spread of the virus and treat those infected.[80] Congress passed one of the most expensive bills in American history, the FFCRA, to support the physical and financial well-being of the country as it faces this crisis.

In Tennessee, Governor Bill Lee issued Executive Order 14 on March 12 invoking his emergency powers under state law to suspend laws and regulations "to facilitate the treatment and containment of COVID-19."[81] The Governor explicitly said that "taking proactive steps to prevent a substantial risk to the public health and safety is paramount." Executive Order 15's authorization for TennCare to create or modify policies to ensure that TennCare enrollees receive essential medical services was "necessary to maximize those efforts and avoid undue strain on the health care systems."[82]

The national coronavirus emergency adds a compelling and urgent factor to the Court's calculus of the public interest. As Dr. Butka explains, in normal circumstances, individuals who lose insurance coverage face greater risks to their health.[83] In the extraordinary circumstances of the present pandemic, Defendant's unjustified termination of TennCare coverage for members of the proposed Plaintiff Class poses a risk not just to them individually, but to the health of the public overall. Inability to manage underlying conditions or COVID-19 at home will lead to more overcrowding in hospitals and a greater demand for emergency resources, which are already in short

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[80] P-Ex. 28.
[81] P-Ex. 29.
[82] P-Ex. 31.
[83] P-Ex. 19, ¶¶ 13-14.

supply. Thus, "lack of health coverage not only endangers uninsured patients themselves but puts additional stress on health care resources, potentially at the expense of caregivers and other patients."[84] The grant of preliminary injunctive relief that affords Plaintiffs access to health coverage during the national emergency thus serves the public interest by facilitating the nationwide effort to slow the pandemic and save lives.

V. Plaintiffs' Requested Relief Aims for Reinstatement and Is Therefore Appropriately Tailored to Address the Harm Caused by Defendant's Illegal Deprivation of their TennCare Coverage

Plaintiffs seek prospective reinstatement of all eligible TennCare enrollees who involuntarily lost coverage between March 19, 2019 and March 18, 2020. This simply puts them in the position in which they would be absent Defendant's wrongful conduct terminating their coverage. Plaintiffs also request that Defendant properly and promptly notify these beneficiaries that their coverage has been reinstated. Because of the unreliability of TennCare's processes for delivering notices to enrollees' correct addresses, the injunction should include a requirement that TennCare make use of its website, public media, and other appropriate outreach to reach members of the proposed Plaintiff Class. At least one other court in this Circuit has granted similar relief for similar due process violations. *Crawley*, 2009 WL 1384147, at *22 ("Plaintiffs[] in the present case are entitled to continuing Medicaid benefits while the Defendants review the Plaintiffs' eligibility under the disability-based or SSI-related Medicaid categories."); *see also USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982) ("A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."

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[84] *Id.* ¶ 15.

(quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (noting that a court "may mold its decree to meet the exigencies of the particular case." (citation omitted)).

In the alternative, Plaintiffs seek prospective reinstatement of TennCare coverage for members of the Disability Subclass whose benefits were terminated in the past year despite their obvious eligibility under disability-linked categories. At a minimum, TennCare should reinstate this smaller group and inform them of their reinstated coverage. They are easy to identify because TennCare pays its managed care contractors an enhanced monthly premium, or "capitation rate," for these individuals and has records of their current or past receipt of SSI.[85] In addition, this alternative injunction should require Defendant to expedite a proper notice and hearing process to determine which members of the proposed Plaintiff Class are eligible for immediate prospective reinstatement of their benefits. Again, because of TennCare's poor track record of providing enrollees with timely and adequate notice, the expedited reinstatement process should be broadly publicized and appropriately targeted to members of the proposed Plaintiff Class. This would remedy the Due Process violation inherent in Defendant's deprivation of public benefits without appropriate notice, hearing, and appeal procedures. Ultimately, this will have the same effect of putting members of the proposed Plaintiff Class and Disability Subclass in the position they would have been without Defendant's unlawful conduct, but carries the risk of undue delay that is inconsistent with the present health emergency.

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[85] P-Ex. 23 at 14.

VI. This Court Should Waive the Bond

Plaintiffs request that they not be required to post a cash bond under Rule 65. This Court has discretion to issue a preliminary injunction without requiring a security. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538–39 (6th Cir. 1978). Plaintiffs, as "[p]oor persons . . . are by hypothesis unable to furnish security as contemplated by Rule 65(c)." *Denny v. Health & Soc. Servs. Bd. of State of Wis. Dep't of Health & Soc. Servs.*, 285 F. Supp. 526, 527 (E.D. Wis. 1968). Especially in a suit like this, brought in the public interest to enforce important federal rights, it is appropriate to waive the bond. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995); *see also Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971).

CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction (1) requiring Defendant to prospectively reinstate TennCare coverage for members of the proposed Plaintiff Class whose TennCare coverage was involuntarily terminated and who are not currently enrolled, and notify them of the reinstatement; and (2) prohibiting Defendant from involuntarily terminating any such individual's TennCare coverage until the person receives notice and an opportunity for a fair hearing that complies with due process.

Dated: April 10, 2020 By: /s/ *Catherine Millas Kaiman*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document is being served via the Court's electronic filing system on this 10th day of April, 2020 on the following counsel for Defendant:

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