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
Chief District Judge Crenshaw
Magistrate Judge Newbern

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

May 22, 2020

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It is undisputed that all 35 Plaintiffs are currently enrolled in TennCare. Indeed, 32 of them—over 90 percent—were enrolled prior to this suit being filed. Thus, every single one of Plaintiffs' alleged injuries *happened in the past*, yet the form of relief that they request—declaratory and injunctive relief—provides protection against *future* injuries. But because none of the 35 Plaintiffs has alleged, or could allege, that any future injuries are "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), they lack standing to maintain a claim for injunctive or declaratory relief. It is a fundamental principle of Article III jurisdiction that, although "[p]ast harm allows a plaintiff to seek damages," "it does not entitle a plaintiff to seek injunctive or declaratory relief." *Kanuszewski v. Michigan Dep't of Health & Human Servs.*, 927 F.3d 396, 406 (6th Cir. 2019). "This is because the fact that a harm occurred in the past '*does nothing* to establish a real and immediate threat that' it will occur in the future, as is required for injunctive relief." *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (emphasis added)). Because all the Plaintiffs are now enrolled in TennCare, there is no longer a case or controversy under Article III. This Court should grant the State's motion to dismiss.

STATEMENT

Plaintiffs are 35 TennCare enrollees who allege that they have experienced various procedural errors in the past during the TennCare eligibility-determination process, causing many of them to be temporarily disenrolled from the program. Complaint, Doc. 1 ¶¶ 8–25, 133–432 (Mar. 19, 2020).[1] They filed this lawsuit on March 19, 2020, alleging violations of Title II of the Americans with Disabilities Act (ADA) and the procedural due process protections of the Medicaid statute and the Fourteenth Amendment. *Id.* ¶¶ 447–60. Their complaint seeks declaratory

[1] Plaintiffs S.L.C., J.C.K., M.S.K., E.I.L., M.X.C., M.A.C., T.J.T., S.L.T., F.T., Y.A.D. and Kerry Vaughn never lost TennCare coverage.

and injunctive relief: (1) "prohibiting the Defendant from terminating TennCare coverage of Plaintiff Class members unless and until the Defendant has considered all potential coverage for which they may be eligible, and only after giving enrollees advance individualized written notice and an opportunity to appeal"; and (2) "requiring the Defendant to prospectively reinstate TennCare coverage of the Plaintiff Class members until such time as the state determines that enrollees are in fact no longer eligible, based on a redetermination process that reliably complies with the Medicaid Act, Due Process Clause, 42 U.S.C. § 1396a(a)(3) and the ADA." *Id.* at pp. 114–15.

Prior to filing suit, 32 of the 35 Plaintiffs had been enrolled in TennCare. *See id.* ¶¶ 154, 174–75, 196–97, 232, 245, 260–61, 284, 332–33, 345, 368, 389–90, 409, 431; *see also* Hagan Decl. ¶ 2, Doc. 29-2.[2] Since then, the remaining three Plaintiffs—Vivian Barnes, Charles Fultz, and William Monroe—have been enrolled. *See id.*; *see also* Mem. of Law in Supp. of Pls.' Mot. for a Prelim. Inj., Doc. 26-1 at 7, 14 (Apr. 10, 2020). It is thus undisputed that "all named Plaintiffs are currently enrolled in TennCare." Pls.' Opp'n to Def's Mot. to Stay All Br. on Pls.' Mot. for Prelim. Inj. or to Extend the Time for Def. to Respond, Doc. 31 at 3 (Apr. 13, 2020).

[2] Although Plaintiffs' complaint is ambiguous as to whether they allege that five Plaintiffs lacked TennCare coverage on the date of the complaint, Director Hagan's declaration clarifies the true state of the facts, and this Court may take into account her declaration in determining whether it has subject-matter jurisdiction over this case. *See Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1364 (3d ed.). There is an alternative line of Sixth Circuit precedent suggesting that the analysis must be "confined to the four corners of the complaint," *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 706 (6th Cir. 2015), but the "four corners" line of cases appears to post-date the cases allowing consideration of declarations in adjudicating jurisdiction, *see Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019) (Sixth Circuit panels are bound by the earlier-in-time precedent where there is tension between precedents). In any event, the analysis is the same if one assumes that 30 out of the 35 Plaintiffs had been re-enrolled in TennCare prior to the filing of the complaint (rather than the true number of 32 out of 35).

On March 20, Plaintiffs moved to certify a class and a disability subclass, *see* Doc. 5, which they re-filed on March 27, *see* Doc. 12.[3] Plaintiffs moved for a preliminary injunction on April 10 and requested expedited briefing. *See* Docs. 26, 28. The State cross-moved for an extension of the preliminary-injunction briefing schedule, which this Court granted on April 14, Doc. 34 at 3. The State's responses to Plaintiffs' class-certification and preliminary-injunction motions are due on May 29, with any Plaintiff replies due on June 5.

ARGUMENT

Article III of the Constitution limits federal court jurisdiction to "Cases" or "Controversies." U.S. CONST., art. III, § 2. To demonstrate standing, a plaintiff must show (1) "injury in fact" in the form of "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotation marks and citations omitted). Because standing is "a threshold matter [that] spring[s] from the nature and limits of the judicial power," it must be addressed before the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (second alteration in original).

"The party invoking federal jurisdiction bears the burden of establishing th[e] [three] elements [of standing]." *Lujan*, 504 U.S. at 561. In assessing whether the plaintiff has carried its burden, "standing cannot be inferred . . . from averments in the pleadings, but rather must affirmatively appear in the record, nor will naked assertion[s] devoid of further factual

[3] This Court later denied Plaintiffs initial class-certification motion as duplicative of their subsequent, corrected motion. *See* Order, Doc. 34 at 3 (Apr. 14, 2020).

enhancement suffice." *White v. United States*, 601 F.3d 545, 551–52 (6th Cir. 2010) (quotation marks and citations omitted) (alteration in original). "Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 552 (quotation marks omitted). Thus, where standing is premised on the threat of future injury, "[a]llegations of *possible* future injury do not satisfy the requirements of Art. III," *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added), and "a highly attenuated chain of possibilities[ ] does not satisfy the requirement that threatened injury must be certainly impending," *Clapper*, 568 U.S. at 410.

While standing "is to be assessed under the facts existing when the complaint is filed," not based on post-filing events, *Lujan*, 504 U.S. at 569 n.4, mootness ensures that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) . . . continue[s] throughout its existence (mootness)," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189–90 (2000). Although "[t]he doctrines of standing and mootness are similar . . . they are not the same." *Sumpter v. Wayne Cty.*, 868 F.3d 473, 490 (6th Cir. 2017). "[S]tanding applies at the sound of the starting gun, and mootness picks up the baton from there." *Id.* Mootness, therefore, necessarily looks to the factual context post-dating the complaint in assessing whether the plaintiff continues to meet Article III's requirements. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734–35 (2008).

I. 32 Of The 35 Named Plaintiffs Lack Standing To Bring This Lawsuit.

Plaintiffs' claims are procedural in nature; all three counts of their complaint allege violations of asserted procedural rights. Count 1 alleges violations of the "Due Process Provisions of the Medicaid Act," relying on 42 U.S.C. § 1396a(a)(3)'s requirement that the State "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 or is not acted upon with reasonable promptness." Doc. 1 ¶ 447. Count 2 alleges violations of the "Procedural Protections under the Due Process Clause" of the Fourteenth Amendment. *Id.* at p. 111. And Count 3 alleges that the "processes and methods of administration for the redetermination of TennCare eligibility, and for the administration of the redetermination and eligibility appeal process" violate Title II of the ADA. *Id.* ¶ 458. Thus, the alleged injuries of which Plaintiffs complain are *procedural* injuries that arise during the TennCare eligibility-determination process.

To remedy these alleged procedural injuries, Plaintiffs' complaint seeks forward-looking relief in the form of a declaratory judgment and injunction. *See* Doc. 1 at pp. 114–15. That is not surprising, since the State's sovereign immunity would bar Plaintiffs from seeking backward-looking relief in the form of damages against Defendant in his official capacity. *See Quern v. Jordan*, 440 U.S. 332, 341–42 (1979); *Edelman v. Jordan*, 415 U.S. 651, 664–68 (1974). While "[p]ast harm allows a plaintiff to seek damages [absent sovereign immunity,] . . . it does not entitle a plaintiff to seek injunctive or declaratory relief." *Kanuszewski*, 927 F.3d at 406; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–11 (1995); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (allowing a claim for damages to proceed but holding that plaintiff lacked standing to bring a claim for declaratory and injunctive relief). "This is because the fact that a harm occurred in the past 'does nothing to establish a real and immediate threat that' it will occur in the future, as is required for injunctive relief," *Kanuszewski*, 927 F.3d at 406 (quoting *Lyons*, 461 U.S. at 106); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 98 (2013); *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 257 (6th Cir. 2018), and "[o]btaining standing for declaratory

relief has the same requirements as obtaining standing for injunctive relief," *Kanuszewski*, 927 F.3d at 406.[4]

To obtain declaratory and injunctive relief, Plaintiffs must either show that their *past* injuries have "continuing, present adverse effects" on Plaintiffs, *Lyons*, 461 U.S. at 102, or that *future* procedural injuries are "certainly impending," *Clapper*, 568 U.S. at 402. The Sixth Circuit has held that this exacting standard requires "at least a substantial risk that the harm will occur," *Kanuszewski*, 927 F.3d at 410, and the Supreme Court insists that the risk of harm must be "sometime in the relatively near future," *Adarand Constructors, Inc.*, 515 U.S. at 211.

In addition, Plaintiffs must show that *they*, in particular, will suffer *the same* procedural injuries that they allege give rise to their claims. *See Lyons*, 461 U.S. at 106 n.7 (plaintiff must "demonstrate that he, himself, will" be subjected to the same injury in the future). As the Supreme Court has instructed:

> That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that *they personally* have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) (emphasis added); *see also Lyons*, 461 U.S. at 105–06; *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Waskul*, 900 F.3d at 257–58. Thus, even if it were crystal-clear that members of the proposed class would, in the near future, suffer the same alleged procedural injuries that the named Plaintiffs assert—and

[4] Thus, although Plaintiffs ask for a declaration that "Defendant *has violated*" federal law, Doc. 1 at p. 114 (emphasis added), this is still a form of forward-looking relief requiring a showing of future injury.

there is no such allegation in the complaint, nor could there be—that would be irrelevant to assessing standing, because the named Plaintiffs must demonstrate their *own* standing first. *See Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982); *E. Kentucky Welfare Rights Org.*, 426 U.S. at 40 n.20.

Judged by these well-established principles of Article III jurisdiction, it is readily apparent that 32 of the 35 named Plaintiffs lack standing. All the alleged procedural injuries in the complaint occurred in the past, and under the foregoing authorities, those alleged injuries cannot confer standing on Plaintiffs to seek declaratory and injunctive relief. And because 32 of the 35 named Plaintiffs were enrolled in TennCare as of the date of the complaint (and continue to be enrolled today), *see* Hagan Decl. ¶ 2, Doc. 29-2, their alleged past procedural injuries "ha[ve] no continuing, present adverse effects and cannot establish standing for declaratory and injunctive relief," *Blakely v. United States*, 276 F.3d 853, 873 (6th Cir. 2002); *see also Waskul*, 900 F.3d at 256–57 (named plaintiffs did not have standing to seek preliminary injunction against alleged due process violations because plaintiffs had received complete relief before filing the complaint); *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001).[5]

Nor have any of the Plaintiffs alleged procedural injuries that are "certainly impending" in the future. *Clapper*, 568 U.S. at 402. As an initial matter, it is undisputed that TennCare has suspended indefinitely all involuntary eligibility terminations (other than for non-residents of Tennessee and cases of death) for the duration of the national emergency arising from the COVID-19 pandemic. Hagan Decl., Doc. 29-2, at ¶ 4; *see also* Doc. 34 at 2 ("Based on this information,

[5] Because Vivian Barnes, Charles Fultz, and William Monroe were not enrolled in TennCare as of the filing of the complaint, they arguably had continuing effects from their past alleged procedural injuries, but those effects became moot upon their enrollment in TennCare, as discussed below.

and without ruling on the merits of Plaintiff's motion for injunctive relief, the Court does not find that Plaintiffs would face irreparable harm absent expedited briefing, particularly because Defendant has suspended involuntary disenrollments indefinitely."). But even absent the indefinite suspension of terminations, Plaintiffs have not come close to alleging "certainly impending" injury. Their own scattered anecdotes of alleged past injuries are insufficient as a matter of law. *See Lyons*, 461 U.S. at 100, 105 (allegation of 15 deaths resulting from challenged police practice insufficient to show necessary risk of future injury); *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020) (per curiam) (allegations of past injuries insufficient for standing to seek injunctive relief). And Plaintiffs' unsupported allegations that they, in particular, are "at risk of irreparable harm" when they undergo redetermination for TennCare eligibility at some point in the indefinite future, *see, e.g.*, Doc. 1 ¶ 159, clearly do not satisfy their burden. Such "naked assertion[s] devoid of further factual enhancement" are insufficient to establish standing. *White*, 601 F.3d at 551–52 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (alteration in original)). "Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quotation marks omitted).

Indeed, several features of the complaint strongly cut *against* Plaintiffs' allegation of future injury. All the injuries that Plaintiffs attribute to the TennCare Eligibility Determination System ("TEDS") occurred between March 19, 2019 and March 19, 2020, the first year that TEDS was operational. *See* Doc. 1 ¶¶ 74, 433 (defining the proposed class as those who have been or will be disenrolled from TennCare since March 19, 2019). It is not at all surprising for a new, large, and complex system to have start-up errors, but there is no reason to suppose that such errors will continue once they are identified. At the same time, several of Plaintiffs' alleged past injuries occurred under the *previous* eligibility-determination process that was in place *before* TEDS went

into effect, *see, e.g.*, *id.* ¶¶ 135–37 (detailing events from 2018), 372–76 (detailing events from 2017), 377 (detailing events in 2018), 379–81 (same), 413 (detailing events in 2017), and it makes no sense to assume that those errors will recur under the *current* system. Finally, some of Plaintiffs' alleged injuries are inherently one-time events. For example, Plaintiffs K.A. and E.I.L. allege that they were incorrectly denied TennCare coverage at birth, *see id.* ¶¶ 163, 334–37, but since birth only occurs once, this injury will never happen to those Plaintiffs again. Plaintiffs have simply failed to carry their burden to plausibly allege that their future injuries are certainly impending.

In fact, there is affirmative evidence that such injuries will *not* recur.[6] The audit report *upon which Plaintiffs rely* to estimate the size of the alleged class concluded that TennCare has, historically, "substantially performed the established eligibility redetermination process as required by federal regulations and appropriately removed children from TennCare and CoverKids with only minor exceptions."[7] Among its conclusions were:

- "[A]ll members tested were appropriately terminated based on the documented reason."[8]
- The auditor "did not note any problems with either of [TennCare's] mailing processes."[9]

[6] "On a motion to dismiss, the Court may consider attachments to a complaint or documents cited in a complaint without converting the motion into a motion for summary judgment." *Newsboys v. Warner Bros. Records Inc.*, No. 3:12-CV-0678, 2013 WL 3524615, at *1 n.2 (M.D. Tenn. July 11, 2013); *see also Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421, 425 (6th Cir. 2018).

[7] TENN. COMPTROLLER, PERFORMANCE AUDIT REPORT, SPECIAL PROJECT: DIVISION OF TENNCARE'S REDETERMINATION PROCESS AND THE IMPACT ON CHILDREN'S ENROLLMENT 11 (Feb. 2020), https://bit.ly/2APHVRz.

[8] *Id.* at 15.

[9] *Id.* at 12.

- 97% of those disenrolled due to excessive income were correctly determined to be ineligible.[10]
- TennCare "appropriately processed appeals and documented its final administrative action for each member tested."[11]

See Lyons, 461 U.S. at 108 (although "it may be that among the countless encounters between the police and the citizens . . . there will be certain instances in which" the alleged injury will occur, "it is surely no more than speculation to assert that" plaintiff himself "will again be" subject to the injury).

As Plaintiffs' own alleged experience demonstrates, TennCare appropriately identifies and corrects such problems, which is why *91 percent* of the named Plaintiffs had been enrolled in TennCare *prior* to filing this lawsuit, with the remainder enrolled shortly thereafter. Not only is there absolutely no evidence that TennCare's alleged procedural errors are "systemic," *see, e.g.*, Doc. 1 ¶ 1, the evidence *in Plaintiffs' own complaint* shows that any such errors are aberrations that are appropriately remedied when brought to TennCare's attention. *See Lyons*, 461 U.S. at 105 (allegations of "routine[ ]" violations of law "fall[ ] far short of the allegations that would be necessary to establish a case or controversy"). Of course, even if there were no evidence affirmatively demonstrating that Plaintiffs' experiences were aberrations highly unlikely to be repeated, Plaintiffs would still lack standing, since it is *their burden* to plausibly allege future injuries that are certainly impending, *see Lujan*, 504 U.S. at 561, which they have not done. There is thus no basis for concluding that *Plaintiffs themselves* face a "substantial risk" of experiencing *the same procedural injuries* when they go through the redetermination process in the near future.

[10] *Id.* at 16.

[11] *Id.* at 23.

In many ways, this case is quite similar to *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020) (per curiam). Like this case, the claims in *Shelby Advocates* were procedural: plaintiffs alleged that the administration of elections in Shelby County was so plagued with errors that it "burden[ed] [plaintiffs'] right to vote, dilute[d] their votes, and disenfranchise[d] them in violation of the Fourteenth Amendment's Equal Protection and Due Process clauses." *Id.* at 979–80. Like this case, the plaintiffs alleged a variety of past errors, *id.* at 980, and because elections occur on a predictable, regular basis (like TennCare annual redeterminations, at least prior to the current indefinite suspension), they alleged that they feared future injury based on this past experience, *id.* at 981. And like this case, they sought declaratory relief and an injunction requiring changes to the procedures at issue. *Id.* at 980.

The Sixth Circuit unanimously affirmed the district court's order granting the defendant's motion to dismiss for lack of standing. *Id.* at 983. It stated that plaintiffs' theories of standing "share[d], at a minimum, an imminence problem" because "[t]he complaint's allegations with respect to injury all boil[ed] down to prior system vulnerabilities, previous equipment malfunctions, and past election mistakes." *Id.* at 981. Citing *Lyons*, the Sixth Circuit observed: "Past may be precedent. But the Supreme Court has not been sympathetic to claims that past occurrences of unlawful conduct create standing to obtain an injunction against the risk of future unlawful conduct." *Id.* Like this case, *see, e.g.*, Doc. 1 ¶¶ 93–102, many of the procedural problems alleged in *Shelby County* were the result of human error, but "[f]ear that individual mistakes will recur, generally speaking, does not create a cognizable imminent risk of harm," 947 F.3d at 981. And as to those that were machine errors, "plaintiffs ha[d] not plausibly shown that there [was] a substantial risk" of injury. *Id.* at 982.

Again relying on *Lyons*, the Sixth Circuit held that, to demonstrate standing based on the risk of future injury, the plaintiffs had to plausibly allege "(1) that *all* [relevant government officials] *always* take the challenged action . . . when interacting with any citizen with whom they happen to have an encounter, or (2) that the [government itself] ordered or authorized [the relevant officials] to act in such manner." *Id.* at 981 (emphases in original) (quotation marks omitted). Neither was true in *Shelby Advocates*, so the plaintiffs lacked standing, and neither is true here. Plaintiffs do not allege (nor could they) that TennCare *always* commits procedural errors during the redetermination process or has an established *policy* of committing procedural errors during that process. Thus, none of the named Plaintiffs can establish standing based on future injuries, and 32 of the 35 named Plaintiffs had no lingering effects of their past injuries at the time they filed the complaint. Accordingly, at least 32 of the 35 Plaintiffs (all except Vivian Barnes, Charles Fultz, and William Monroe) lack standing and should be dismissed from this case.

II. The Remaining Three Named Plaintiffs' Claims Are Moot.

While none of the Plaintiffs can demonstrate standing based on future procedural injuries, three of the Plaintiffs—Vivian Barnes, Charles Fultz, and William Monroe—arguably continued to experience "continuing, present adverse effects" of their alleged procedural injuries for a few days after the filing of the complaint because they were not yet re-enrolled in TennCare. *Lyons*, 461 U.S. at 102.[12] But Plaintiffs concede that *all* Plaintiffs are now enrolled in TennCare, including

[12] It is unclear whether Mr. Monroe had standing when the complaint was filed. It is undisputed that Mr. Monroe was not receiving full Medicaid coverage at the time he went through renewal. He was enrolled in a Medicare Savings Program ("MSP"), and TennCare began the process of terminating his MSP coverage when Mr. Monroe failed to return his renewal packet. Prior to losing that coverage, however, the packet was returned and an appeal was filed, so he never lost his coverage. To the extent that, due to timing, one month's Medicare premiums were deducted from his Social Security income, that injury was redressed well before the complaint was filed. Plaintiffs complain that TennCare allegedly did not follow a regulatory requirement to screen

Plaintiffs Barnes, Fultz, and Monroe, *see* Doc. 31 at 3; Doc. 26-1 at 7, 14, so any lingering effects of their alleged procedural injuries have ended, and their claims are now moot, *see Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (constitutional challenge to state procedures for return of seized property was moot once the property was returned); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 671 & n.5 (2016), *as revised* (Feb. 9, 2016) (collecting cases that became moot upon defendant curing the lingering effect of an injury); *Waskul*, 900 F.3d at 256–57; *Blakely*, 276 F.3d at 874; *Grendell*, 252 F.3d at 832.

Implicitly conceding that the claims of these three Plaintiffs are moot, Plaintiffs invoke the "picking off" *exception* to mootness as described by the Sixth Circuit in *Wilson v. Gordon*, 822 F.3d 934, 947–51 (6th Cir. 2016). *See* Doc. 31 at 2 n.1; Doc. 26-1 at 7 n.12.[13] But neither of the criteria that *Wilson* used to determine whether the exception applies are present here. First, this is not a case in which the State "did not address [any of the plaintiffs' injuries] until after the lawsuit and contemporaneous motion for class certification were filed" even though the State had been aware of the injuries of some of the plaintiffs "before the lawsuit was filed." *Wilson*, 822 F.3d at 950. The Defendants enrolled all 11 of the *Wilson* plaintiffs *after* the complaint and the class certification motion were filed. *Id*. at 942. Here, in stark contrast, over *90 percent* of Plaintiffs were enrolled in TennCare *before* Plaintiffs filed this lawsuit, and the State was not aware of the injuries to the remaining three plaintiffs until the complaint was filed. *See* Staniewski Decl. ¶ 3.

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him for full Medicaid coverage before starting to terminate his MSP coverage, but it is unclear under these facts that TennCare had an affirmative obligation to screen him for other categories of coverage since it never terminated the coverage he had. In any event, once a full Medicaid application was submitted, he was found eligible.

[13] Although the State believes that *Wilson* is easily distinguishable from this case, Defendant reserves the right to argue, in subsequent proceedings, that *Wilson* is misguided, conflicts with Supreme Court precedent, and should be overruled. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77–78 (2013); *Wilson*, 822 F.3d at 959–60 (Sutton, J., dissenting).

And whereas the State in *Wilson* "created a new, ad hoc process to address Plaintiffs' claims," 822 F.3d at 951, the enrollment of the remaining three Plaintiffs in this case post-complaint may fairly "be characterized as 'incidental' or 'a matter of standard operating procedure,' " *id*. at 950. The State's standard practice (as demonstrated by the enrollment of 32 out of 35 Plaintiffs prior to this lawsuit being filed) is to resolve any eligibility errors promptly whenever such errors are brought to the State's attention from any source of information. *See* Staniewski Decl. ¶¶ 2–3.[14] These facts make this case dramatically different from *Wilson*; there is no plausible inference of a strategic attempt to "pick off" the named Plaintiffs and moot the case.

Indeed, this case is even less susceptible to a picking-off analysis than *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017), where a majority of the same Sixth Circuit panel that decided *Wilson* *rejected* application of the picking-off exception. *Unan* arose in a factual context similar to this case. The two named plaintiffs in that would-be class action for declaratory and injunctive relief alleged that procedural errors in Michigan's Medicaid system violated their due process rights under the Medicaid statute and the Fourteenth Amendment by systematically disqualifying them from the coverage to which they were entitled. *Id.* at 283–84. Two days after the named plaintiffs filed their complaint, Michigan deemed both of them qualified for full Medicaid coverage. *Id.* at 284. "The individual claims of the named plaintiffs were not resolved until after the lawsuit and contemporaneous motion for class certification were filed," and the named plaintiffs' alleged injuries were only resolved via an "ad hoc process" that "mooted the individual named plaintiffs' claims on a case-by-case basis after they were identified in th[e] lawsuit." *Id.* at 286 (Opinion of

[14] Regardless of whether this Court may take into account facts outside the complaint for purposes of assessing *standing*, *see supra* note 1, there is no doubt that it may do so for purposes of assessing *mootness*, since mootness necessarily entails consideration of facts that arose after the filing of the complaint, *see, e.g.*, *Already*, 568 U.S. at 96–98 (considering affidavits in assessing mootness); *Sherwood v. Tennessee Valley Auth.*, 842 F.3d 400, 405–07 (6th Cir. 2016) (same).

Moore, J.). Nevertheless, a majority of the panel declined to invoke the exception. *See id.* at 294 (White, J., concurring in part); *id.* at 294–96 (Sutton, J., dissenting). If granting relief to all named plaintiffs *after* the lawsuit was filed using a *novel* procedure was insufficient to apply the picking-off exception in *Unan*, granting relief to over 90 percent of the named plaintiffs *before* the lawsuit was filed using an *established* procedure compels rejection of the picking-off exception in this case.

In fact, if *this* case qualifies for the picking-off exception, it is hard to imagine *any* proposed class action that could *ever* go moot if the defendant redresses the plaintiffs' alleged injuries after the filing of the complaint, in direct violation of *Wilson*'s statement that "[w]here . . . the named plaintiff's claim becomes moot *before* certification, the ordinary rule is that dismissal of the action is required." 822 F.3d at 942. The picking-off exception is inapplicable.[15]

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Because the claims of Vivian Barnes, Charles Fultz, and William Monroe are moot, and because the remaining 32 Plaintiffs did not have standing to bring their claims, this Court lacks Article III jurisdiction. It is irrelevant that Plaintiffs have brought this as a would-be class action. As *Wilson* itself made clear, a case that goes moot prior to class certification must be dismissed if no exception to mootness applies. *See* 822 F.3d at 942; *see also Brunet v. City of Columbus*, 1 F.3d 390, 399–400 (6th Cir. 1993). Similarly, as noted above, a federal court has no jurisdiction over a

[15] Plaintiffs correctly do not invoke the capable-of-repetition-but-evading-review and inherently transitory exceptions because they are clearly inapplicable. Just as no named Plaintiff has standing based on a substantial risk of future injury, there is no "*reasonable expectation* that the *same parties* will be subjected to the same [procedural injuries] again." *Wilson*, 822 F.3d at 951 (emphases in original). And far from being "*certain* [that] other class members are suffering the injur[ies]" alleged by Plaintiffs, *id.* at 945 (emphasis added), Plaintiffs have offered *no evidence at all* that *any* other individuals are currently experiencing the same procedural errors that they allege.

would-be class action if the named plaintiffs did not have standing when the complaint was filed. *See Blum*, 457 U.S. at 1001 n.13; *see also Lyons*, 461 U.S. at 105–06; *E. Kentucky Welfare Rights Org.*, 426 U.S. at 40 n.20; *O'Shea*, 414 U.S. at 494. Accordingly, this case must be dismissed.

The Sixth Circuit confronted a similar situation in *Waskul*—and held that the appealing plaintiff lacked standing to seek injunctive relief. In that case, three individual plaintiffs sued a state Medicaid agency over a reduction in the budget that disabled individuals could use to pay for community-based services, alleging lack of notice and a hearing prior to the change in policy, in violation of the plaintiffs' due process rights. 900 F.3d at 253–54. An association was also a plaintiff in the action and brought suit on behalf of its 169 members who had received notices of impending budget reductions, a class that included the three individual plaintiffs. *Id.* at 254. Prior to filing suit, however, all three individual plaintiffs had received the hearings they wanted. *See id.* at 254 n.2.

The plaintiffs moved for a preliminary injunction, which the district court denied, and the association appealed. *Id.* at 254. The Sixth Circuit affirmed. *Id.* at 258. Focusing on whether the association had standing to pursue preliminary-injunctive relief (a forward-looking form of relief), the Sixth Circuit held:

> As the Association freely admits, "[t]he three named [members] . . . [received] administrative law hearings" prior to the date of the complaint, the precise relief that the Association now seeks for its unnamed members. It's impossible to conclude that the named members were suffering actual or imminent injury at that time from a loss of due process that would find redress through (1) fresh notices and (2) hearing rights.

Id. at 256. Nor could the association establish standing through its other members, all of whom alleged only *past* injuries: "We do not deny the possibility that at least one (or more) of the Association's named members (and thus the Association) could establish standing in district court to assert a due process claim." *Id.* at 257. Indeed, "[e]ach named member individually alleged that

they had been denied the full panoply of due process rights," but, quoting *Lyons*, the Sixth Circuit stated: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* (alteration and quotation marks omitted). "The fact that all its named members had received apparently adequate administrative hearings at the time the complaint was filed foreclosed the Association's ability to [subsequently] seek fresh notices and hearing rights for all its unnamed members." *Id.* at 257–58.

The same is true here: the re-enrollment of 32 of the 35 named Plaintiffs in TennCare prior to the commencement of this lawsuit deprived them of standing to seek forward-looking relief—the only kind of relief they could have sought—and the subsequent enrollment of the remaining three named Plaintiffs mooted their claims for such relief. Accordingly, this Court lacks jurisdiction over the case, and it is irrelevant whether any other would-be class member could potentially have a claim. This case must be dismissed.

CONCLUSION

The State respectfully requests that this Court grant its motion to dismiss.

May 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via the Court's electronic filing system on this 22nd day of May, 2020.

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