**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**

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| A.M.C., by her next friend, C.D.C., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>STEPHEN SMITH, in his official capacity as Deputy Commissioner of Finance and Administration and Director of the Division of TennCare,<br><br>Defendant. | Civil Action No. 3:20-cv-00240<br><br>Class Action<br><br>Chief Judge Crenshaw<br>Magistrate Newbern |

# REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OR, IN THE ALTERNATIVE, CLASS DISCOVERY

Date: June 5, 2020


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Pursuant to the Court's April 14, 2020 Order (Doc. 34), Plaintiffs submit this reply in further support of their motion for class certification or, in the alternative, class discovery (Doc. 12).

## ARGUMENT

The State's opposition, in relying on self-serving declarations, misses the point of class certification. The merits of Plaintiffs' claims are not at issue. Rule 23(a) and (b)(2) are.

At this juncture, the main inquiry under Rule 23(a) is whether class members share a single common question. In this case, they share many: the State's boilerplate pre-termination notices to them all lacked information required by law, and the State's refusal to provide timely hearings harmed them all. The State's emphasis on the particular errors in each Plaintiff's case is irrelevant. No matter the reason why an individual was terminated, the process the State provided was insufficient to prevent the erroneous deprivation of their rights. Moreover, the State's utter failure to establish a system for granting requests for reasonable accommodations harmed disabled class members. Because they all arise out of the same course of conduct by the State, Plaintiffs' claims are also typical of those of absent class members. Plaintiffs will also adequately represent the interests of the class because their claims remain alive. As the State does not even contest the numerosity of the class—nor could it, given its admission that nearly 180,000 class members exist—Plaintiffs meet all the requirements of Rule 23(a).

This civil-rights action also satisfies Rule 23(b)(2), because the State has acted on grounds that apply generally to hundreds of thousands of Tenncare-eligible individuals and families, as in *Wilson v. Gordon*, No. 3-14-1492, 2014 WL 4347585, at *2 (M.D. Tenn. Sept. 2, 2014). Finally, the State's last-ditch argument that the proposed class lacks administrative feasibility is plainly foreclosed by Sixth Circuit precedent. The Court should therefore grant Plaintiffs' motion.

### I. Plaintiffs Meet the Requirements of Rule 23(a) and (b)(2).

Contrary to the State's assertions (Opp., Doc. 61, at 11–21), Plaintiffs satisfy Rule 23(a)

and (b)(2). Rule 23(a) requires showings of numerosity, commonality, typicality, and adequate representation, and Rule 23(b)(2) requires that the State "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(a), (b)(2).

**Numerosity.** The State does not contest numerosity.[1]

**Commonality.** The Court should reject the State's overly narrow focus on purportedly uncommon issues of its choosing. Opp., Doc. 61, at 11–16. Commonality and typicality are "not demanding and the interests and claims of the various plaintiffs need not be identical" in the Rule 23(b)(2) context. *Kerns v. Caterpillar, Inc.*, No. 3:06-CV-01113, 2007 WL 2044092, at *5 (M.D. Tenn. July 12, 2007). A "single issue common to all members of the class" will suffice. *Wilson*, 2014 WL 4347585, at *2.[2] Plaintiffs share many common questions. Mot., Doc. 12-1, at 16–21 (describing systemic flaws in State's administration of TennCare). For example, they share with all class members the common procedural injury of inadequate pre-termination notices, which supported class certification in *Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008, at

[1] Nor could the State credibly make such an argument, given its admission that ***179,037*** eligible individuals were involuntarily terminated between March 19, 2019, and April 17, 2020, and remain disenrolled today. Opp., Doc. 61, at 4, 10 (citing Second Hagan Decl., Doc. 63 ¶ 74). The proposed class is thus so numerous that it would be impracticable to join its members individually. *See Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) ("Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.").

[2] *See also, e.g.*, *Powers v. Hamilton Cty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (holding that commonality "is satisfied if there is a single factual or legal question common to the entire class."); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013) (same).

*22 (E.D. Mich. Oct. 29, 2014).[3] The State's policies (or lack thereof) regarding redetermination, notices, fair hearings, appeals, and reasonable accommodations support certification here. The State's own witness admits to systemic "problems" and "potential issues" in TEDS that harm class members. Second Hagan Decl., Doc. 63 ¶¶ 25, 35. Her assertions to the contrary that these are "one-time issues" that "for the most part" are being resolved behind the scenes go to the merits, not this procedural motion. *Id.* ¶ 26.

**Typicality.** Typicality is met because "Plaintiffs' claims arise from the same practice and course of conduct that give rise to the claims of other potential class members." *Wilson*, 2014 WL 4347585, at *3. As in *Wilson*, the declaratory and injunctive relief sought here would benefit all class members by requiring the State to reinstate coverage for the class, which the State has already demonstrated it can easily identify, and apply an adequate redetermination process with adequate notice and an opportunity for a fair hearing, before terminating individuals' coverage. *Id.*

The State's argument that alleged *different phases* of its flawed high-level process led to the deprivation of Plaintiffs' rights on numerous occasions defeats commonality and typicality is an absurdity. Different manifestations of the State's flawed policies in individual Plaintiffs' cases does not render their claims atypical of those of the rest of the class because they all were injured by the same policies. In *Beattie v. CenturyTel, Inc.* (cited in Opp., Doc. 61, at 17), for example, the Sixth Circuit upheld a finding of typicality because the plaintiffs' "claims [arose] from the

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[3] *See also, e.g.*, *M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 278–79 (W.D. Mo. 2018) (certifying class and finding commonality established by allegations "challeng[ing] system-wide policies and practices that place all members of the proposed class at substantial risk of harm" of future due process violations); *McMillon v. Hawaii*, 261 F.R.D. 536, 544 (D. Haw. 2009) (certifying class asserting ADA claims in part on ground that allegations of a "systemwide practice or policy of discrimination, which allegedly results in discriminatory conditions and access barriers . . . [and] challeng[ing] a system-wide practice or policy that affects all of the putative class members" met the "permissive burden to demonstrate commonality").

same allegedly deceptive [] practice" by the defendant "that [gave] rise to the claims of the other class members." 511 F.3d 554, 561 (6th Cir. 2007). The court rejected the same argument the State makes here—that "facts unique to" each plaintiff necessitated denial of the certification motion—on the ground that "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law," for typicality to be satisfied. *Id.*[4]

**Adequacy.** Defendant's argument on this element—that "named Plaintiffs here [ ] have no incentive to pursue the claims of other class members because their claims have already been redressed" (Opp., Doc. 61, at 18–19)—was squarely rejected by the *Wilson* court. 2014 WL 4347585, at *3-4 (denying argument "that the claims of the named [p]laintiffs ha[d] been satisfied (albeit after the class certification motion was filed) and, therefore, the named [p]laintiffs no longer ha[d] common interests with the unnamed members of the class"). This Court should not sanction Defendant's repeated attempt to defeat adequacy by "picking off" named plaintiffs here, either.

**Rule 23(b)(2).** Plaintiffs satisfy Rule 23(b)(2) given that "(1) [their] claims arise from the same acts or refusals to act by [the State]; (2) the final declaratory and injunctive relief sought apply to the class as a whole, not individually; and (3) [their] claim for injunctive relief predominates over any claim for damages." *Wilson*, 2014 WL 4347585, at *5. "Civil rights cases" like this one "against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011); *accord Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976) ("Lawsuits alleging class-wide discrimination are particularly well

[4] *See also Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (holding that "mere fact that [the plaintiff's] throttle body assembly stuck, while other class members' throttles have not stuck" did not render the plaintiff "atypical" where his and class members' claims arose out of the "same practice" and "same defect" and were "based on the same legal theory").

suited for 23(b)(2) treatment."). Defendant cannot rely on *Romberio v. Unumprovident Corp.* (cited in Opp., Doc. 61, at 20–21) because the plaintiffs in that case sought a constructive trust that the court found would require "individualized review of every claim that was denied." 385 F. App'x 423, 430, 433 (6th Cir. 2009). Apart from the fact that it involved the denial of health insurance, *Romberio* bears absolutely no resemblance to this case.[5]

## II. Administrative Feasibility Does Not Apply to this Action

The State wastes pages of ink arguing that certification must be denied on the ground that the proposed class definitions are not "administratively feasible" under *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012). Opp., Doc. 61, at 1–2, 7, 8–11. In *Cole v. City of Memphis*, however, the Sixth Circuit squarely held that *Young*'s feasibility requirement applies only to Rule 23(b)(3) actions and "is inappropriate in the (b)(2) context." 839 F.3d 530, 541–42 (6th Cir. 2016); *see also* 1 Newberg on Class Actions § 3:7 (5th ed.) ("The First, Third, Sixth, and Tenth Circuits hold that plaintiffs in Rule 23(b)(2) class actions need not show that a definite class exists[,] . . . [and] there is no precedent taking direct issue with [their] analysis."). The "precise identity of each class member need not be ascertained" in a (b)(2) action because the "main purpose of a (b)(2) class is to provide relief through a single injunction or declaratory judgment" and "notice is not required as it would be in a (b)(3) class." *Id*. Administrative feasibility is simply irrelevant here.[6]

## CONCLUSION

The Court should grant Plaintiffs' motion for class certification.

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[5] The *Romberio* court also applied a similar ascertainability requirement, 385 F. App'x at 431, that the Sixth Circuit later rejected in *Cole v. City of Memphis*, 839 F.3d 530, 541–42 (6th Cir. 2016).

[6] The State fails to cite this "controlling adverse authority." *United States v. Hill*, 79 F.3d 1477, 1489 n.6 (6th Cir. 1996); *see also Lumaj v. Gonzales*, 462 F.3d 574, 576 n.1 (6th Cir. 2006).

Dated: June 5, 2020

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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 5th day of June, 2020 on the following counsel for the Defendant:

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