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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: June 5, 2020

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PRELIMINARY STATEMENT

The State's motion should be denied because the complaint establishes that all Plaintiffs have standing to seek injunctive and declaratory relief for the State's violations of the Due Process Clause, Medicaid Act, and Americans with Disabilities Act ("ADA"), and none of Plaintiffs' claims are moot. The State's effort to dismiss the complaint in its entirety ignores basic law: If even one named Plaintiff has standing, this class action can go forward. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015); *Am. Civil Liberties Union of Ky. v. Grayson Cty.* ("*ACLU*"), 591 F.3d 837, 843 (6th Cir. 2010).

The complaint plausibly alleges the standing of all 35 named Plaintiffs, who are all reasonably likely to experience future harm in the absence of declaratory and injunctive relief. Specifically, these Plaintiffs, like all TennCare enrollees, are subject to the State's eligibility redetermination process at least annually, and at any additional time the State receives information that potentially affects their eligibility. But the State's automated redetermination system is plagued by due-process defects that produce erroneous eligibility decisions, fails to timely inform enrollees of terminations in their coverage and their rights to appeal, and fails to provide fair hearings to access such appeals. Consequently, all Plaintiffs are at high risk of multiple future injuries.

In addition to the strong probability of suffering *future harm*, nine Plaintiffs were suffering actionable *ongoing harms* caused by the State at the time the complaint was filed. The State concedes that three of them—Barnes, Fultz and Monroe—remained without coverage when the complaint was filed and thus had standing. The State contended that two others—Hill and Vaughn—were ineligible and was unlawfully delaying hearings on their eligibility appeals. And the State does not dispute that four young children—Plaintiffs A.M.C., E.I.L., J.Z., and K.A.—remain burdened *today* by outstanding medical bills their parents incurred after the State unlawfully terminated their coverage. The State's prospective reinstatement of their coverage has not resolved these

ongoing adverse effects, and the State continues to unlawfully deny them a timely appeal process to restore their benefits to cover their outstanding bills. These undisputed allegations, which must be taken as true in considering its motion to dismiss, are dispositive of standing for these four children. Because any one of them can maintain this action and represent the proposed class, the State's motion should be denied. *Parsons*, 801 F.3d at 710; *ACLU*, 591 F.3d at 843.

Having admitted that Plaintiffs Barnes, Fultz, and Monroe have standing, the State cannot carry its heavy burden of showing that its voluntary and unexplained reinstatement of their coverage days after the complaint was filed mooted their claims. Even if it could, the due-process and disability claims at issue both fall within well-recognized exceptions to mootness for claims that are inherently transitory and those that will "continually evade[] review" if "declared moot merely because defendants have voluntarily ceased the illegal practice complained of in the particular instance," *Blankenship v. Secretary of HEW*, 587 F.2d 329, 33 (6th Cir. 1978). The State addresses neither of these exceptions in its motion, focusing instead on arguing that binding Sixth Circuit precedent on the "picking off" exception was wrongly decided. The Court need not decide that issue to resolve the State's mootness argument but, if determined to reach it, can easily conclude that the State attempted to pick off Plaintiffs in this case and therefore cannot have mooted any claims. Simply put, soon after Plaintiffs filed their complaint and moved for class certification, the State managed to reinstate coverage and drop any objections to eligibility affecting any of the 35 named Plaintiffs. In fact, the State's identical conduct in other class actions was the reason that the Sixth Circuit adopted the "picking off" exception in the first place. *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016); *Unan v. Lyon*, 853 F.3d 279, 285–86 (6th Cir. 2017).

The Court should therefore deny the State's motion to dismiss.

RELEVANT FACTUAL BACKGROUND

A. Plaintiffs Have Been and Continue to Be Harmed by Systemic Defects in the State's TennCare Redetermination Process

On March 19, 2019, after years of broken promises to fix the systemic problems enjoined by federal courts and investigated by CMS, *e.g.*, *Wilson*, *supra*, the State implemented a computerized redetermination system called TEDS. *See generally* Compl., Doc. 1 ¶¶ 67–77. Despite the State's assurances of TEDS's accuracy and reliability, its defects continue to cause the termination of coverage for eligible enrollees, send them incorrect and contradictory information or no notice at all during the redetermination process, and deny them access to fair hearings and continued benefits. *Id*. ¶ 79. Enrollees often end up submitting entirely new applications after losing coverage, but they routinely encounter the same systemic problems that caused their wrongful termination in the first place. *Id*. ¶ 80. Even successful applications result only in prospective coverage, saddling enrollees with unpaid debts during coverage gaps. *Id.*

The State's annual redetermination process seems designed to deny coverage and frustrate any attempts by eligible individuals to regain it. The State fails to use information possessed by or easily available to it to redetermine eligibility, *id.* ¶¶ 81–83; requires enrollees to submit irrelevant information and terminates their coverage if they fail to do so, *id.* ¶¶ 84–86; fails to ask for information that *is* necessary to redetermine eligibility, *id.* ¶¶ 87–92; fails to provide enrollees necessary notices and terminates their coverage for failing to respond, *id.* ¶¶ 93–97; ignores material information enrollees *do* submit and terminates their coverage for their purported failure to provide it, *id.* ¶¶ 98–102; issues form notices that fail to explain the basis for terminating coverage and misrepresent that the State considered all relevant facts and all possible categories of eligibility, *id.* ¶¶ 103–10; fails to timely process appeals, *id.* ¶¶ 111–113; dismisses appeals pursuant to state

policy on grounds not permitted by federal law, *id.* ¶¶ 114–21; and has failed to implement protocols for responding to requests for accommodation of enrollees with disabilities, *id.* ¶¶ 122–29.

All Plaintiffs have suffered harms resulting from these systemic defects. At the time the complaint was filed on March 19, 2020, Plaintiffs Barnes, Fultz, and Monroe remained improperly disenrolled from TennCare coverage. *Id.* ¶¶ 200–19, 286–304, 348–62. Plaintiffs Hill and Vaughn had temporary coverage pending appeal, but the State, due to its systemic failure to consider the disability-related categories in which they are eligible, still wrongly maintained that they were ineligible and was not affording them a timely appeals hearing. *Id.* ¶¶ 321, 418. In addition, Plaintiffs A.M.C., E.I.L., J.Z., and K.A. suffer ongoing harms in the form of outstanding medical bills resulting from their prior gaps in coverage. *Id*. ¶¶ 155, 164, 168, 170–75, 344, 381.

B. The State's Voluntary, Temporary Suspension of Terminations

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act, Pub. L. 116-127. Section 6008 provides additional Medicaid funding to states that comply with certain requirements, including the suspension of terminations of coverage during the period of the national pandemic emergency. The State subsequently paused terminations from TennCare accordingly.[1] These terminations will resume once the State returns to normal operations, and Plaintiffs will once again be subjected to the its defective redetermination process. *See id.* ¶ 56.[2]

[1] During an April 8, 2020 teleconference, counsel for the State could not confirm whether the State intended to comply with § 6008. Plaintiffs first learned of the state's commitment from the State's April 13 motion to extend the time to brief Plaintiffs' pending motions for a preliminary injunction and class certification. Doc. 29. The accompanying declaration of TennCare Director of Member Services Kimberly Hagan omits the date on which the moratorium began, *see* Doc. 29-2 ¶ 4, and none of State's subsequent submissions has clarified it. *E.g.*, Decl. Kimberly Hagan Opp. Pls.' Mot. Class Cert. & Prelim. Inj. ("Hagan Decl."), Doc. 63 ¶ 41.

[2] During the April 8 teleconference, counsel indicated that the State had found Plaintiffs Barnes, Fultz, and Monroe to be eligible, reinstated their coverage, and issued them notices to that effect.

ARGUMENT

The State's argument that the *entire* complaint must be dismissed because *all* Plaintiffs either lack standing or have had their claims mooted lacks merit. The doctrines of standing and mootness arise out of the "case-or-controversy requirement of Article III, § 2 of the Constitution." *Sullivan v. Benningfield*, 920 F.3d 401, 407 (6th Cir. 2019). A plaintiff bears the burden of establishing standing, which a court must determine as of the time the complaint is filed. *Id*. The mootness doctrine requires that there be a live controversy at the time a federal court decides the case, and it requires dismissal only where a defendant has carried the "heavy burden" of demonstrating its application. *Id.* at 407, 410. Plaintiffs have carried their burden. The State has not.

I. All Plaintiffs Have Standing

The complaint establishes every Plaintiff's standing to seek injunctive and declaratory relief. The State's arguments do not require a contrary finding, and the State's purported evidence is irrelevant at this stage. Because "only one plaintiff needs to have standing in order for the suit to move forward," *Parsons*, 801 F.3d at 710, the Court need not determine every named Plaintiff's standing once it is satisfied of its jurisdiction over the claims of one. *See ACLU*, 591 F.3d at 843 ("The presence of one party with standing is sufficient."); *accord Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cty.*, 796 F. Supp. 2d 900, 909 (M.D. Tenn. 2011).

At the pleadings stage, a court must accept the allegations of the complaint as true and draw all inferences in a plaintiff's favor. *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). A court's analysis "must be confined to the four corners of the complaint," *Parsons*, 801 F.3d at 706,

and a defendant's motion should be "denied if facts pleaded in the complaint are sufficient to infer jurisdiction," *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010).[3]

Article III standing has three elements: injury-in-fact, causation, and redressability. *Price v. Medicaid Dir.*, 838 F.3d 739, 745 (6th Cir. 2016). The State's standing argument focuses only on injury-in-fact. Mot., Doc. 59-1, at 4–12. To establish it, a plaintiff must show "some invasion of her legal interests that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Price*, 838 F.3d at 745 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff seeking injunctive or declaratory relief may show either that a past injury is "ongoing or accompanied by continuing adverse effects at the time the complaint was filed," *Sullivan*, 920 F.3d at 408, or that there is a "substantial risk" of impending future harm, *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 405–06, 409–10 (6th Cir. 2019). Past wrongs bear on the threat of future harm. *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982). At the pleading stage, general factual allegations of injury are sufficient. *Mosley*, 942 F.3d at 756; *Parsons*, 801 F.3d at 710.[4]

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[3] Although the State acknowledges that Plaintiffs' factual allegations must be "accepted as true" at this stage, it nonetheless asks the Court to consider extraneous facts from the self-serving Hagan Declaration (Doc. 29-2). *Compare* Mot., Doc. 59-1, at 4, *with id.* at 2 n.2, 7. In doing so, the State ignores the "crucial distinction" between facial and factual attacks on standing, *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). Because this is a facial attack, the Hagan Declaration should be ignored for purposes of determining Plaintiffs' standing. *Parsons*, 801 F.3d at 706. If the Court instead construes the State's motion as a factual attack and considers documents outside the pleadings for standing purposes, "it must do so in a manner that is fair to the non-moving party." *Hatcher v. United States*, 512 F. App'x 527, 528 (6th Cir. 2013). Fairness here would require that Plaintiffs "be afforded an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 918 (6th Cir. 1986) (internal quotation marks omitted).

[4] The State quotes *White v. United States*, 601 F.3d 545 (6th Cir. 2010), for the proposition that "standing cannot be inferred . . . from averments in the pleadings, but rather must affirmatively appear in the record." Mot., Doc. 59-1, at 3–4. Yet the State omits *White*'s preceding sentence: "General factual allegations of injury may suffice to demonstrate standing, 'for on a motion to

A. Nine Plaintiffs Suffered Ongoing Injuries or Continuing Adverse Effects When the Complaint Was Filed

Nine named Plaintiffs had standing when this litigation began based on their ongoing harms or the continuing adverse effects of past harms. Three of them—Barnes, Fultz, and Monroe—remained improperly excluded from TennCare, Compl., Doc. 1 ¶¶ 217–18, 301–02, 356–62, as the State admits, Mot., Doc. 59-1, at 2, 7 n.5. In addition, the State was still contending that two others, Hill and Vaughn, were ineligible and withholding a hearing on their eligibility appeals. Compl., Doc. 1 ¶¶ 321, 418. The State cannot rely on its own one-sided assertions to dispute this well-pleaded allegation. *Mosley*, 942 F.3d at 756. Although the State's mootness argument—that its post-filing reinstatement of these Plaintiffs' coverage mooted their claims (Mot. at 12–15)—is wrong for the reasons set forth in Section II, below, the Court need not reach that issue.

Four Plaintiffs—A.M.C., E.I.L., J.Z., and K.A.—suffer continuing adverse effects of past harms sufficient to confer standing, and the State has not even attempted to carry its "heavy burden" to show *their* claims are moot. *Sullivan*, 920 F.3d at 410. The State continues to deny each of these Plaintiffs the timely appeals process necessary to restore their TennCare coverage for medical bills that remain outstanding—and continue to accrue interest—as a result of the State's prior improper ineligibility decisions. Compl., Doc. 1 ¶¶ 138–57, 164–75, 334–42, 377–84, 389. The unpaid bills for A.M.C.'s and E.I.L.'s care have been sent to collections and threaten their parents' credit scores. *Id.* ¶¶ 155, 344. These continuing adverse effects suffice to establish their standing. *See Wilson*, 822 F.3d at 940–41, 959 (affirming preliminary injunction requiring TennCare to provide fair hearings); *James v. City of Dallas*, 254 F.3d 551, 563–64 (5th Cir. 2001)

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dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *White*, 601 F.3d at 551 (quoting *Lujan*, 504 U.S. at 561).

(debts incurring "ongoing interest charges" and affecting plaintiffs' credit ratings sufficed to confer standing), *abrogated on other grounds by M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839–41 (5th Cir. 2012); *Long v. Gaines*, 167 F. Supp. 2d 75, 92–93 (D.D.C. 2002) (denying motion to dismiss claims to enjoin government's "fail[ure] to provide prompt probable cause determinations and fail[ure] to provide reasonably timely revocation hearings").

The State is wrong in arguing that Plaintiffs' injuries are limited to their enrollment status alone. Mot., Doc. 59-1, at 7. To be sure, "[t]he denial of Medicaid benefits to which an applicant would otherwise be entitled is a cognizable injury for standing purposes." *Markva v. Haveman*, 168 F. Supp. 2d 695, 704 (E.D. Mich. 2001), *aff'd*, 317 F.3d 547 (6th Cir. 2003). But "actual financial injuries" like those of A.M.C., E.I.L., J.Z., and K.A. also establish standing to seek injunctive relief. *Lambert v. Hartman*, 517 F.3d 433, 437 (6th Cir. 2008). Because a single Plaintiff with standing can maintain this action, the State's motion fails. *Parsons*, 801 F.3d at 710.

B. All Plaintiffs Face a Substantial Risk of Future Injury When the State Redetermines their Eligibility Using the Same Flawed Process

In any event, all Plaintiffs have standing because they, like all TennCare enrollees, are substantially likely to experience similar future injuries when the State conducts its annual redetermination of their eligibility. Importantly, the standing inquiry is relaxed in the context of vested procedural rights: litigants can assert them "without meeting all the normal standards for . . . immediacy." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517–18 (2007) (quoting *Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special[.]")); *Parsons*, 801 F.3d at 712 (same); *Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013) (same); *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 677 (6th Cir. 2005) (same). Plaintiffs nonetheless satisfy even the stricter "substantial risk" standard for future harm. *Kanuszewski*, 927 F.3d at 405–06, 409–10.

The complaint contains specific allegations of numerous injuries to Plaintiffs:

- at least **seven** were forced to provide duplicative information or face the loss of coverage, despite the State's possession of the same information, Compl., Doc. 1 ¶¶ 81–83;
- at least **six** were erroneously terminated for purported ineligibility despite their undisputed qualification for disability-based eligibility categories, *id*. ¶¶ 84–92;
- at least **ten** did not receive redetermination requests and/or termination notices that the State purportedly sent them, despite maintaining up-to-date address information and receiving other TennCare information at the updated address, *id*. ¶¶ 93–97;
- at least **four** suffered termination for purported failure to provide requested information, although they in fact submitted the requested information, *id.* ¶¶ 98–102;
- at least **three** received inadequate and/or contradictory termination notices that unlawfully failed to explain the basis for the State's decision, *id.* ¶¶ 103–10;
- at least **seven** were denied appeals despite timely requests, *id.* ¶¶ 111–13;
- at least **eight** were wrongly denied continuing coverage pending appeal, *id.* ¶¶ 114–21;
- at least **four** were harmed by the State's unlawful failure to maintain procedures to accommodate persons with disabilities, *id.* ¶¶ 122–29; and
- at least **six** were harmed by the State's failure to screen for disability-related eligibility categories, id. ¶¶ 219, 304, 322, 362, 370, 432.

The complaint further details the specific ordeals each Plaintiff experienced while struggling to navigate the State's labyrinthine TennCare bureaucracy. *See generally id.* ¶¶ 133–432. The State admits to numerous "errors" in the TEDS system that each harmed a number of Plaintiffs, including the "process of converting eligibility data into TEDS," "the programming logic of TEDS that produced erroneous effective dates of coverage of some newborns," "a TEDS programming defect that blocked transitional Medicaid coverage for some children," another "TEDS defect that failed to load the most recent Social Security income information from the SSA," and yet another "gap in TEDS programming" regarding Pickle eligibility. Opp. Pls.' Mot. Class Cert., Doc. 61, at 5. The State's unsupported contention that these admitted defects in TEDS were merely "isolated and idiosyncratic issues" (*id.*) is both meritless (given the devastating harm they have

caused Plaintiffs and tens of thousands of other eligible individuals in the past year alone) and outside the scope of information properly considered at the motion to dismiss phase.

Plaintiffs more than plausibly allege—and the State effectively concedes—that their injuries resulted from systemic defects in the State's administration of TennCare, and their allegations must be taken as true, *Mosley*, 942 F.3d at 756. The State employs form notices, for example, that are defective on their face by failing to explain the basis for terminating coverage, misrepresenting that the State has considered all available facts and eligibility categories before terminating coverage, failing to inform recipients of their right to appeal termination and maintain coverage pending appeal, and falsely representing that the State has authority to deny appeals guaranteed under federal law. *Id*. ¶¶ 105–09. In addition, the State universally applies a written policy requiring dismissal of any appeal that does not present a "valid factual dispute," which systematically violates beneficiaries' right to a fair hearing. *Id.* ¶¶ 114–20. The State further unlawfully fails to maintain *any* written regulations, policies, protocols, or guidelines for the provision of reasonable accommodations to qualified persons with disabilities. *Id.* ¶¶ 122–28.

The State's effort to cast all these appalling facts as simply "aberrations" (Mot., Doc. 59-1, at 10) is absurd. Whether it is actually "not at all surprising for a new, large, and complex system to have start-up errors," as the State contends without any basis in fact or law (*id*. at 8), that assertion at most bears on the *merits* of Plaintiffs' claims, not this Court's *jurisdiction* to hear them. It is thus "quite realistic" to infer that the defective TEDS system will cause Plaintiffs similar harms when the State next redetermines their eligibility. *Blum*, 457 U.S. at 1001; *see also Kanuszewski*, 927 F.3d at 408–12 (plaintiffs had standing to seek injunctive and declaratory relief based on ongoing storage of blood samples previously drawn without consent and "substantial risk" of future

chemical analysis of samples); *cf. Mosley*, 942 F.3d at 760–61 (plaintiff had standing to seek injunctive relief under ADA Title III where complaint plausibly alleged he had visited non-compliant facility once in the past and would visit again in the future); *Kirola v. City & County of San Francisco*, 860 F.3d 1164, 1174–75 n.3 (9th Cir. 2017) (despite the "different application and different standards for relief on the merits" under ADA Titles II and III, "the answer to the *constitutional question* of what amounts to injury under Article III is the same").

Plaintiffs' risk is particularly certain because the Medicaid Act requires the State to redetermine the eligibility of enrollees each year. Compl., Doc. 1 ¶ 56. The Supreme Court has repeatedly held that injuries foreseen in the administration of the decennial census "months away" are "sufficiently concrete and imminent" for standing purposes. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y.), *aff'd sub nom Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) ("[A]lthough the census is still months away, such an injury [resulting from the use of a citizenship question] is sufficiently 'imminent' to invoke federal-court jurisdiction now."); *accord Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 327, 332 (1999) (plaintiffs had standing to enjoin census plan scheduled to begin implementation 13 months from filing of complaint, with final census date 25 months away). The State's annual redetermination process is just as imminent.

Blum v. Yaretsky was an analogous Medicaid class action in which the Supreme Court held that the named plaintiffs had standing to seek injunctive protection against future procedural injuries. 457 U.S. at 1000. Although a prior consent judgment enjoined the state from permitting or ordering the plaintiffs' transfers to different levels of care without advance notice and fair hearings, the Court found that the threat of such future transfers by the plaintiffs' private nursing homes was not "imaginary or speculative" and was "sufficiently substantial" to confer standing. *Id.* (internal quotation marks omitted). The Court reasoned that the plaintiffs had previously experienced such

transfers, so their future threat was "quite realistic." *Id.* at 1001.[5] The threat of future recurring harm to Plaintiffs here is even more pronounced. *Blum* concerned future actions that were probable, though not certain, and subject to the intervening decisions of individuals. Plaintiffs, by contrast, have alleged systemic defects in the State's statutorily mandated annual redetermination process. *See generally* Compl., Doc. 1 ¶¶ 79–132. The State's repeated past violations of Plaintiffs' rights further support a finding that Plaintiffs will likely suffer the same injuries in the future. *See, e.g.*, *Blum*, 457 U.S. at 1001 (holding that past injuries made future similar harm "quite realistic").

The State's characterization of a state audit report cited in the complaint (Doc. 1 ¶ 435(d)) as "affirmative evidence that [Plaintiffs'] injuries will *not* recur," Mot., Doc. 59-1, at 9, is unsupported. That report expressly states that the audit "did not include testwork on the new TennCare Connect/TEDS process."[6] Instead, it examined the terminations of children to whom state contractor Maximus had purportedly mailed redetermination packets prior to March 2019, when TEDS became operational.[7] *See* Compl., Doc. 1 ¶ 74. As the State implicitly concedes, the report's only relevance is to show that coverage terminations occur on a scale that readily satisfies Rule 23's numerosity requirement. *See id.* ¶ 435(d)–(f) (using audit report's findings to estimate that approximately 9,362 enrollees were involuntarily terminated and 7,076 lost coverage for allegedly failing to respond, between March 2019 and February 2020); Mot., Doc. 59-1, at 9 (noting that Plaintiffs

[5] The *Blum* Court further held that the plaintiffs did not have standing to challenge the threat of transfers to higher levels of care, because they had not previously experienced any such transfers or the threat of them and because such transfers were categorically different than the type of transfers the plaintiffs did have standing to challenge. 457 U.S. at 1001–02. On the merits, the Court held that the plaintiffs had failed to establish "state action" on the part of the private nursing homes and had therefore failed to assert a constitutional deprivation. *Id.* at 1012.

[6] Docs. 26-13—17. Tenn. Comptroller of the Treasury, Performance Audit Report, Special Project: Division Of Tenncare's Redetermination Process And The Impact On Children's Enrollment 7 (Feb. 2020), https://bit.ly/2APHVRz.

[7] *Id.* at 7–8.

rely on the audit report "to estimate the size of the alleged class"). The report's findings are therefore irrelevant to Plaintiffs' realistic and substantial risk of future harm from the State's use of the defective TEDS system to redetermine their TennCare eligibility.[8]

The State's heavy reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020), is also misplaced. *Lyons* turned on whether the plaintiff "was likely to suffer future injury from the use of the chokeholds by police officers." 461 U.S. at 105. The Supreme Court held that his allegation that city policy permitted the use of chokeholds even where deadly force was not threatened failed to establish that *he* specifically "might be realistically threatened" with another chokehold. *Id.* at 106. The Court reasoned that such policy could still permit chokeholds only where a suspect resisted arrest or attempted escape, and it was unlikely that the plaintiff would do either if stopped by police, or that any officer who stopped him in the future would violate policy by choking him. *Id.* In *Lyons*, the plaintiff's allegations of a policy governing local police conduct that he may never again encounter is the precise opposite of *this* complaint's thorough allegations of systemic and officially sanctioned defects in the State's statutorily mandated redetermination process, which each Plaintiff will necessarily go through annually, Compl., Doc. 1 ¶¶ 56, 79–132; *see also Honig v. Doe*, 484 U.S. 305, 320-22 (1988) (distinguishing *Lyons* and finding threat of future injury where state had implicitly authorized past violative conduct of *another* school district, because statutory obligations of new school district toward plaintiff made future violations probable). This case also lacks

[8] The State also suggests that its voluntary, temporary cessation of TennCare terminations until the end of the national pandemic emergency bears on Plaintiffs' standing. Mot. 7–8. But the State *itself* acknowledges that such "post-filing events" are irrelevant to standing. *Id.* at 4.

"the prudential limitations circumscribing federal court intervention in state law enforcement matters" that informed the *Lyons* Court's decision. *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (citing *Lyons*, 461 U.S. at 112). *Lyons* simply does not support the State's position here.

Nor is *Shelby Advocates* applicable. In that case, the plaintiffs alleged "a variety of election administration problems," including the county's "use of digital voting machines" that the plaintiffs contended were "vulnerable to hacking and cyberattacks." 947 F.3d at 979–80. The plaintiffs argued that they had standing to seek injunctive relief based on "their alleged future risk of vote dilution or vote denial stemming from maladministration and technology problems." *Id.* at 981. The Sixth Circuit held that the plaintiffs' general fears that such "individual mistakes" would recur was insufficient to "create a cognizable imminent risk of harm." *Id.* The court highlighted the fact that the plaintiffs' sole allegation of past harm that was tied to systemic (rather than individual human) error "[n]ever happened to any of them or in any election in which they were candidates." *Id.* Plaintiffs here, by contrast, have alleged past injuries that are *systemic* in nature and that are likely, if not certain, to recur when the State redetermines each Plaintiff's eligibility. *See generally* Compl., Doc. 1 ¶¶ 79–132. *Shelby Advocates* thus does not support the State's position, either.[9]

* * *

In short, nine Plaintiffs were experiencing ongoing harms or continuing adverse effects of past harms sufficient to confer standing at the time the complaint was filed, and the State's utter

[9] The State's contention that *Waskul v. Washtenaw County Community Mental Health*, 900 F.3d 250 (6th Cir. 2018), involved "a similar situation" is mistaken. Mot., Doc. 59-1, at 16–17. *Waskul* involved a wholly different legal issue: the "heightened standard" for standing on a motion for a preliminary injunction, which "does not apply at the pleadings stage." 900 F.3d at 255 n.3. The appeal concerned only a "very narrow" issue of associational standing. *Id.* at 256. Indeed, the district court found that the individual plaintiffs had standing both to seek a preliminary injunction and to assert their claims. *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 221 F. Supp. 3d 913 (E.D. Mich. 2016); *Waskul v. Washtenaw Cty. Cmty. Mental Health*, No. 16-10936, 2019 WL 1281957 (E.D. Mich. Mar. 20, 2019). *Waskul* is inapposite.

failure to dispute those harms is sufficient to deny its motion. In addition, all Plaintiffs have demonstrated the requisite risk of future procedural harm to establish their standing.[10] Because "only one plaintiff needs to have standing in order for the suit to move forward," *Parsons*, 801 F.3d at 710, the Court need not reach the State's arguments on mootness.

II. None of Plaintiffs' Claims Are Moot

The State's mootness argument focuses solely on Plaintiffs Barnes, Fultz, and Monroe. It argues that the State's post-filing reinstatement of their coverage mooted their claims and so the *entire* action. "The heavy burden of demonstrating mootness rests on the party claiming mootness." *Sullivan*, 920 F.3d at 410 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 531 (6th Cir. 2001)). As explained above, six more Plaintiffs had standing based on their ongoing harms or continuing adverse effects of past harms, but the State's mootness argument ignores them altogether. The State's two-page analysis come close to proving that Barnes's, Fultz's, and Monroe's claims of ongoing harm are moot, let alone *six other* Plaintiffs' claims

[10] The State does not dispute the two remaining elements of standing: causation and redressability. The complaint establishes both elements. First, Plaintiffs' injuries—including the denial of due process, discrimination on the basis of disability, gaps in coverage, and resulting financial harms—were plainly caused by the State's policies and practices. *See* Compl. ¶¶ 81–132; *Markva v. Haveman*, 317 F.3d 547, 557 (6th Cir. 2003) (holding that the plaintiffs' financial burdens were "caused by the defendants' policy of differentiating between parent and non-parent caretakers in calculating Medicaid eligibility and benefit levels"); *see also Massachusetts*, 549 U.S. at 517–18 (noting relaxed standard for causation in procedural-injury cases). Second, Plaintiffs have established redressability. An injury is "redressable" if it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (internal quotation marks omitted). A plaintiff need not establish that the court's intervention will remedy every injury she suffered; a showing that she would benefit personally from it in a tangible way is sufficient. *Id.* at 851. Plaintiffs here would personally, tangibly benefit from the declaratory, injunctive, and ancillary relief they seek. *Compare* Compl. at 114–15 *with Price*, 838 F.3d at 747 (rejecting redressability challenge and affirming district court's injunction requiring state Medicaid agency "to notify class members of the court's injunction and of their right to use [the state's] administrative procedures to obtain any past Medicaid benefits to which the plaintiffs might be entitled under the injunction.").

of ongoing harm and *all* Plaintiffs' claims of future harm are moot.

A. The State's Voluntary Conduct Changes Nothing Because It Is Temporary

The State's choice to reinstate TennCare coverage for Plaintiffs Barnes, Fultz, and Monroe does not moot their due-process or ADA claims. "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). In particular, "[d]efendants bear a heavy burden to demonstrate mootness in the context of voluntary cessation" of the challenged conduct. *Sullivan*, 920 F.3d at 410; *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) ("And the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." (quoting *Friends of the Earth*, 528 U.S. at 189)). "A defendant's voluntary cessation of a challenged practice moots a case only in the rare instance where subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Sullivan*, 920 F.3d at 410 (internal quotation marks omitted). For obvious reasons, "before voluntary cessation of a practice could ever moot a claim, the challenged practice must have *actually ceased*." *Id.* at 411.

The State's reinstatement of coverage does not meet this demanding standard. There is no dispute that the State's change to three Plaintiffs' current coverage status alters *nothing* about its redetermination process, TEDS, its facially defective notices, its deficient hearing and appeals standard, or its systemic acts of discrimination against disabled enrollees. *Cf. In re City of Detroit*,

841 F.3d 684, 693–694 (6th Cir. 2016) (city's alteration of policies concerning termination of water services mooted procedural due process claim because new policies presented substantially different controversy than one that existed when suit was filed). Adherence to the *status quo* precludes the State from claiming mootness, because if "the current procedure 'operates in the same fundamental way' its predecessor did, the original controversy remains alive." *Id.* at 693 (quoting *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 823 (6th Cir. 2012)); *see also Unan*, 853 F.3d at 288–89 (holding that the State failed to prove it was "absolutely clear that a systemic computer problem of the type that caused [the plaintiffs' prior] injuries could not reasonably be expected to recur," despite "evidence that DHHS took significant steps to correct the systemic problem").

Nor does the State's temporary moratorium on terminations during the national pandemic emergency mean that it has "actually ceased" terminations or due process violations permanently. *Sullivan*, 920 F.3d at 411 (alterations omitted). Doing so would be impossible under the Medicaid Act, which requires that eligibility be redetermined on an annual basis (and sometimes, more frequently). Compl., Doc. 1 ¶ 56. The State concedes that the pause is temporary. Second Hagan Decl., Doc. 63 ¶ 41. Thus, the State could at any point decline the additional funds tied to the pause on redeterminations, and restart them. Even if the State continues to abide by these federal requirements, they will be lifted as soon as "the President deems the national COVID-19 emergency to be over." *Id*.[11] Once the emergency ends, Plaintiffs will again face identical obstacles to retaining

[11] The President has expressed his eagerness to reopen the country. *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (May 24, 2020, 10:41 PM) ("Schools in our country should be opened ASAP. Much very good information now available."), https://bit.ly/2MowbYH; The White House (@WhiteHouse), Twitter (May 3, 2020, 9:33 PM) ("We have to safely reopen our great Country!"), https://bit.ly/3czIyeR. Tennessee has recently begun the reopening process. *See* Exec. Order No. 38 (May 22, 2020), *available at* https://bit.ly/2Xu6Wu5.

their coverage, as well as the mountain of other problematic practices alleged in the complaint. *Lyda*, 841 F.3d at 693–694.

To permit the State's temporary, voluntary changes in conduct to moot *any* Plaintiffs' claims here would allow the exception to follow the rule. If it succeeds, the State will simply "pick up where [it] left off, repeating this cycle" of systematic due-process violations. *Already*, 568 U.S. at 91. There will be no end to the State's temporary reinstatement of coverage for plaintiffs who file claims against it, with no change to the systemic problems underlying those claims.[12]

B. These Claims Cannot Be Moot When Plaintiffs Will Encounter the Same Systemic Errors in the Future

Even if this case were the rare exception to the voluntary-cessation doctrine—and it is not—such that Plaintiffs' claims were otherwise moot, the State's cursory argument ignores that these three Plaintiffs' procedural-due-process claims are protected by numerous exceptions to mootness: (1) the inherently transitory exception, (2), the capable-of-repetition-but-evading-review exception, and (3) the "picking off" exception. Each of these exceptions, standing on its own, provides a sufficient basis to deny the State's motion to dismiss.

[12] The State further ignores that Plaintiffs Barnes, Fultz, and Monroe allege not only that their due-process rights under the Medicaid Act and the Fourteenth Amendment were violated, but also that the State denied them public benefits in violation of the ADA. *See* Compl., Doc. 1 ¶¶ 433–34, 447–60. Even if the State had made this argument, its temporary reinstatement of coverage does not resolve Plaintiffs' claims that they were wrongfully denied reasonable accommodations and screened out by reason of their disabilities. "Ultimately, the 'test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" *Sullivan*, 920 F.3d at 410 (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). The declaratory and injunctive relief sought by Plaintiffs to remedy the State's utter failure to properly provide relief to disabled enrollees will certainly still make a difference here.

1. The "Inherently Transitory" Exception Applies Because the State Can Reinstate TennCare Coverage Quickly and at Uncertain Times

Eligibility for TennCare coverage is redetermined annually, and often multiple times each year when the state receives information that may affect eligibility. Compl., Doc. 1 ¶ 56. The inherent uncertainty of how long any eligible individual may remain unlawfully deprived of Medicaid eligibility makes claims brought on behalf of a class (like Plaintiffs') inherently transitory, so they "relate back" to the date the complaint was filed. *Wilson*, 822 F.3d at 944, 945.

There are two requirements for the inherently transitory exception to mootness to apply where named plaintiffs obtain relief before class certification: "(1) that the injury be so transitory that it would likely evade review by becoming moot before the district court can rule on class certification, and (2) that it is certain other class members are suffering the injury." *Wilson*, 822 F.3d at 935 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). "[T]he essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class." *Id.* at 936 (internal quotation marks and emphasis omitted). The plaintiffs need not to show "that they personally will be subject to the same practice again." *Id*. at 945; *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) (discussing *Gerstein*).

Both elements are met here. First, the annual nature of the redetermination process is sufficiently short to be so transitory as to evade review before class certification can be fully adjudicated. Even if one year provided sufficient time, as soon as Plaintiffs seek to appeal allegedly wrongful terminations of their TennCare coverage, there is no certainty as to how long it will take for the State to adjudicate that application or, as in this case, simply reinstate their coverage without explanation. *See Wilson*, 822 F.3d at 945 (applying exception where "Plaintiffs did not know how long their claims for injunctive relief from delay would remain live . . . . The State could quickly either hold a hearing on their delayed applications for Medicaid or enroll them in TennCare at any

point . . . , as actually occurred in this case, before the district court could reasonably be expected to rule on the class certification motion"). The State's ability to "quickly and unilaterally grant relief to [Plaintiffs] once litigation begins"—which is precisely what the State did in this case—further strengthens applicability of the "inherently transitory" exception here. *Unan*, 853 F.3d at 287 (applying exception to plaintiffs whose coverage the State reinstated shortly after filing suit).

Second, there is no question that other TennCare-eligible class members remain without coverage as a result of the State's systemically flawed processes. Plaintiffs' proposed class definition includes all eligible individuals eligible for TennCare who nonetheless lack coverage as a result of the State's flawed redetermination processes. Compl., Doc. 1 ¶ 433. The State has vehemently insisted that Plaintiffs "have not produced a shred of evidence that even one such person exists," Doc. 29-1, at 5, and continues to insist it "is not aware of a single TennCare-eligible person who is not currently on the program," Doc. 61, at 34. The State's argument that it has correctly determined the eligibility of all 179,037 individuals involuntarily terminated in the past year, and that any who might have been incorrectly cut off have been reinstated (*id.* at 1, 4), is incredible on its face.[13] Newly filed declarations of class members poignantly refute that argument:

- **Brenda Pelletier** has multiple physical and mental disabilities. TEDS had seven open cases for her, producing incorrect and conflicting notices throughout summer and fall of 2019, culminating in her loss of QMB coverage. She was unable to regain coverage until TJC contacted TennCare counsel. Ex. A, Pelletier Decl.

- **D.T.'s** son K.C. lost coverage late September or early October of 2019. She only learned this when she took him to the ER and was told he did not have coverage. She reapplied on or around October 8, which is when TennCare reinstated him, but there was the gap in coverage so owes outstanding hospital bills. TJC found notices in her

[13] The Court should not grant any weight to Defendant's unsupported—albeit frequent—assertion that Plaintiffs all lost their TennCare coverage as a result of isolated "human error." Mot., Doc. 59-1, at 11. The logical extension of this argument (that Plaintiffs' counsel managed to locate the *only* individuals in the entire state who were wrongfully terminated) is not credible.

online TennCare Connect account that she had never received. Her appeal to correct the effective date was closed without a hearing. Ex. B, D.T. Decl.

- **Diana Gallaher's client, L.L.**, has multiple physical and mental disabilities. L.L. lost QMB in April 2020 for failure to return a renewal packet that TennCare sent to an address she had never heard of. Her appeal was closed without a decision or hearing. With the help of a social worker, she submitted a new application and supporting documents April 16, 2020, only to have those disappear from her online account without a trace and without notice. The social worker submitted another application for her on May 18, 2020. Though Pickle eligible, her TennCare Medicaid application was denied immediately, according to her online account, but no notice has issued. L.L. remains without either QMB or TennCare, though eligible for both. Her Social Security check is reduced and she has had to go without addiction treatment. Ex. C, Gallaher Decl.

- **Grace Senesac** is 18 years old. She lost coverage when TennCare merged her case with her mother who is also on TennCare. She received no notice and did not know until she tried to fill a prescription in December 2019. Her online account contains no notices of termination or appeal rights. She was able to get coverage restored only when TJC wrote to TennCare counsel. Ex. D, Senesac Decl.

- **Lisa Lesnik**'s brother is a Disabled Adult Child who moved to Tennessee in May 2019. TennCare did not recognize his DAC eligibility and denied his application. He won an eligibility appeal in January 2020 but, in April, the Social Security Administration notified him that his Medicare premiums were being deducted from his Social Security benefits, because TennCare had stopped paying them. He received no notice from TennCare. Ex. E, Lesnik Decl.

- **M.D.'s** baby daughter, **H.G.C.**, was hospitalized in January 2020, and only then did M.D. learn the baby had been terminated for failure to return a renewal packet she had never received. M.D. provided documentation of her children's eligibility only to learn in March, when she tried to fill a prescription, that her daughter's TennCare had been terminated again. TennCare informed her on the phone that her daughter had been terminated when their cases were merged. She was reinstated when TJC wrote to TennCare General Counsel, but there remains an unresolved issue with the effective date of H.G.C.'s coverage. Ex. F, M.D. Decl.

- **Pamela Sullivan**'s family was terminated without notice on March 17, 2020. She learned of it only when taking one of her children to a doctor's appointment. She filed a new application for herself and her husband, which was erroneously denied because the State failed to properly count the Social Security income of two of their children. An appeal is pending without continuation of coverage. Ex. G, Sullivan Decl.

- **R.L.B.'s** stepdaughter, **M.R.R.**, was terminated from TennCare while pregnant because she did not respond to notices that TennCare sent to incorrect addresses from January to April 2020. She was unable to get prenatal care as a result. She now owes $20,000 in hospital bills, and her baby missed her one-month doctor's visit because M.R.R. and her baby remain without coverage. Ex. H, R.L.B. Decl.

2. The Systemic Nature of The States' Violations Makes Plaintiffs' Injuries "Capable of Repetition" and Likely to "Evade Review"

The capable-of-repetition-but-evading-review exception also separately prevents Plaintiffs' claims from being mooted. This exception has two requirements: "First, it must be too short in duration to be fully litigated before it ceases … Second, there must be a reasonable expectation that the same parties will be subjected to the same action again." *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 430 (6th Cir. 2013).

First, as noted above, the timeline for eligibility redeterminations is notoriously short: redetermination must occur each year, at a minimum, Compl., Doc. 1 ¶ 56, but may be triggered to occur more frequently by a variety of events, 42 C.F.R. § 435.916(d). These notices are sent, at a minimum, on an annual basis when an enrollee's coverage is redetermined. One-year periods have been held to satisfy the first element of this exception to mootness (as have longer time frames). *E.g.*, *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months' imprisonment for failure to pay child support was too short in duration to be fully litigated); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) (18-month interval between legislative authorization of proposal and submission to voters was too short to obtain complete judicial review of challenge to prohibition on campaign contributions regarding the proposal).

Second, the State's undisputed failure to change any of the systemic flaws that caused Plaintiffs to lose their TennCare coverage without due process and be discriminated against under the ADA makes it reasonably likely that Plaintiffs will be subjected to the same action in the future. *See, e.g.*, *Honig*, 484 U.S. at 320-22 (holding plaintiff established "reasonable likelihood" of future deprivation of his statutory rights based on state's statutory obligations to continue managing his education); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 332–33 (6th Cir. 1978) (rejecting mootness argument on the ground that "the defendants may expedite processing for any plaintiffs

named in a suit while continuing to allow long delays with respect to all other applicants. . . . [R]efusal 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."). Plaintiffs are at the State's mercy when it comes to redetermination of their eligibility; there is no predicate action that the Court needs to presume Plaintiffs will commit in the future before their rights are likely to be violated. And, at least with respect to Plaintiffs' due-process claims, it is *certain* that the State will continue to issue facially defective notices and apply an overly broad and impermissible restriction on fair hearings.[14] For these reasons, the State's voluntary reinstatement of TennCare coverage for these Plaintiffs cannot moot their notice claims.

3. Even If these Exceptions Are Inapplicable, the State Cannot Manufacture Mootness by "Picking Off" Named Plaintiffs

Either the "inherently transitory" exception or the "evading review" exception is sufficient to deny the State's motion to dismiss. The Court thus need not reach the "picking off" exception that takes up significant real estate in the State's motion to dismiss. Should the Court choose to reach this issue, however, the State's arguments are easy to reject. Not only does the State misrepresent the elements of the "picking off" exception but, in the same breath, it contends that binding Sixth Circuit precedent on the issue was "wrongly decided." The State is wrong on both counts and the facts in this case show that Plaintiffs were picked off.

[14] *Wilson*'s "evading review" analysis is distinguishable in this respect. The *Wilson* court declined to presume, without "any evidence" from the plaintiffs, that the State would fail to comply with a new requirement under the Affordable Care Act ("ACA") when it had "not yet created a post-ACA redetermination process." 822 F.3d at 951. Here, the State will apply the same defective process, subject to the same federal requirements, to redetermine Plaintiffs' eligibility in the future that violated their rights in the past. *See* Hagan Decl., Doc. 63 ¶¶ 25–26, 35 (describing errors); *id.* ¶¶ 42–43, 59 (describing use of same system after pandemic).

The State contends that its reinstatement of coverage for Plaintiffs Barnes, Fultz, and Monroe soon after the complaint was filed mooted their claims and this entire class action. "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's [actions] before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions" and "would invite waste of judicial resources." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (concerning Rule 68 offers of judgment). The Sixth Circuit applies this exception even when a motion for class certification is still pending, because "the defendant is on notice that the named plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists." *Wilson*, 822 F.3d at 947; *accord Unan*, 853 F.3d at 285; *but see id.* at 294 (White, J., concurring in part) (finding "picking off" exception unsupported by record and unnecessary to reach where "inherently transitory" exception to mootness applied).[15]

As it did in *Wilson*, the State here attempted to "pick off" named Plaintiffs by reinstating their TennCare coverage shortly after the complaint and motion for class certification were filed. *Cf. Wilson*, 822 F.3d at 941, 951 (exception applied where Tennessee re-enrolled named plaintiffs one month after filing of complaint and day before hearings on motions for class certification and preliminary injunction). As the district court in *Wilson* explained, the State "cannot 'opt out' of a class action lawsuit by simply providing relief to the named Plaintiffs." *Wilson v. Gordon*, No. 3-14-1492, 2014 WL 4347585, at *3 (M.D. Tenn. Sept. 2, 2014) (quoting *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005)).

[15] Other circuits similarly apply exceptions to mootness before a class is certified. *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir.1992); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir.1978).

The State's arguments to the contrary depend on its fatal misinterpretations of this binding precedent. According to the State, the "picking off" exception should apply *only* when (1) it has sufficient pre-litigation notice of claims to infer culpable intent in its post-litigation resolution of them, *and* (2) it resolves those claims based on "a new, ad hoc process." Mot., Doc. 59-1, at 13–14.[16] The *Wilson* court found this type of evidence potentially relevant to its conclusion that the "picking off" exception applied in those cases, but at no point adopted them as requirements. Indeed, the court rejected the State's argument that the plaintiff must prove the defendant acted with motive to prematurely terminate the putative class action. *Wilson*, 822 F.3d at 950 n.4 (rejecting argument that motive is required and explaining precedent has "focused on the ability and action of the defendant in mooting named plaintiffs' claims, *whatever the reason*." (emphasis added)). Nor, as the State falsely asserts, did "a majority of the same Sixth Circuit panel" that decided *Wilson* "*reject*[]" the "picking off" exception in *Unan*. Mot., Doc. 59-1, at 14. Rather, the concurring judge in *Unan* briefly explained that, although she was "not convinced" the facts of the case supported application of the "picking off" exception, it was "unnecessary to reach the issue given that the 'inherently transitory' exception applie[d]." 853 F.3d at 294 (White, J., concurring in part). *Unan* thus does not include any majority opinion on the "picking off" exception, though, as explained above and utterly ignored by the State, the *Unan* court did squarely rule that the "inherently transitory" exception to mootness did apply to both the individual and class claims.[17]

[16] While the State may argue in its motion that Mr. Staniewski's declaration shows an "official" or "standard" practice behind the reinstatement of Barnes, Fultz, and Monroe's coverage, Mot., Doc. 59-1, at 13–14, the witness himself repeatedly describes the State's pattern of reinstating litigants as "informal," Doc. 59-2 ¶¶ 2, 3. If the Court is nonetheless inclined to favor the State's interpretation, Plaintiffs respectfully request permission to depose Mr. Staniewski to test the State's assertions that it acted without motive or foreknowledge.

[17] To the extent *Wilson* conflicts with *Unan*, which described them both "strikingly similar," 853 F.3d at 285, the State implicitly concedes that *Wilson*'s "earlier-in-time precedent" controls, Mot., Doc. 59-1, at 2 n.2 (quoting *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019)).

CONCLUSION

For the foregoing reasons, the State's motion to dismiss should be denied.

Dated: June 5, 2020

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CERTIFICATE OF SERVICE

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