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

November 12, 2021

Herbert H. Slatery III
Attorney General and Reporter

Sue A. Sheldon TN BPR #15295
Senior Assistant Attorney General
Meredith Bowen TN BPR #34044
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 770-1903
Meredith.bowen@ag.tn.gov

Michael W. Kirk*
Nicole J. Moss*
William V. Bergstrom*

COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
mkirk@cooperkirk.com
nmoss@cooperkirk.com
wbergstrom@cooperkirk.com

*Appearing *pro hac vice*

Counsel for the Defendant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 2

ARGUMENT 3

I. 32 Of The 34 Named Plaintiffs Lack Standing To Bring This Lawsuit. 4

II. The Remaining Two Named Plaintiffs' Claims Are Moot. 11

A. The Remaining Two Plaintiffs' Enrollment in TennCare Moots Their Claims. 11

B. CMS Certification Of TEDS Independently Moots Plaintiffs' Claims. 13

1. CMS Conducted A Comprehensive, Years-Long Review of TEDS. 15

2. CMS's Certification Of TEDS Is Entitled To Substantial Deference 17

C. Plaintiffs' Claims Do Not Fit Under Any Mootness Exceptions 20

1. Picking-Off 20

2. Inherently Transitory 22

3. Capable of Repetition, but Evading Review 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page**

Ailor v. City of Maynardville, 368 F.3d 587 (6th Cir. 2004) 11, 12, 14

Already, LLC v. Nike, Inc., 568 U.S. 85 (2013)....................5, 11

Alvarez v. Smith, 558 U.S. 87 (2009)....................11

Blakely v. United States, 276 F.3d 853 (6th Cir. 2002) 7, 11

Blum v. Yaretsky, 457 U.S. 991 (1982)....................6

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993)....................23

Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016) 11

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 5, 6, 7, 9, 10, 23

Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013) 1, 4, 5, 7

Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) 4

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 4

Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013)....................20

Grendell v. Ohio Supreme Court, 252 F.3d 828 (6th Cir. 2001) 7, 11

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006)....................17, 18

Irwin v. Tennessee Valley Auth., 2013 WL 3968553 (E.D. Tenn. July 31, 2013)....................13

Kanuszewski v. Michigan Dep't of Health & Human Servs., 927 F.3d 396 (6th Cir. 2019)...1, 5, 6

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 3, 4

McPherson v. Mich. High Sch. Athletic Ass'n, Inc., 119 F.3d 453 (6th Cir. 1997)....................1, 2, 24

Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378 (6th Cir. 2020)....................8

Quern v. Jordan, 440 U.S. 332 (1979) 5

Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005)....................17

Shelby Advocates for Valid Elections v. Hargett, 947 F.3d 977 (6th Cir. 2020)....................8, 9, 10

Sherwood v. Tennessee Valley Auth., 842 F.3d 400 (6th Cir. 2016) 11

Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 6

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 18

Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019) 12, 13

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)....................3

Sumpter v. Wayne Cnty., 868 F.3d 473 (6th Cir. 2017)....................4

Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645 (2017) 6

Unan v. Lyon, 853 F.3d 279 (6th Cir. 2017)....................21

United States v. Mead Corp., 533 U.S. 218 (2001) 18

United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) 22

Waskul v. Washtenaw Cnty. Cmty. Mental Health,
900 F.3d 250 (6th Cir. 2018) 5, 6, 7, 11, 23, 24

Welchly v. First Bank, 2014 WL 2615808 (M.D. Tenn. June 12, 2014) 13

White v. United States, 601 F.3d 545 (6th Cir. 2010) 3, 4, 8

Whitmore v. Arkansas, 495 U.S. 149 (1990) 4

Wilson v. Gordon, 822 F.3d 934 (6th Cir. 2016) 20, 21, 22, 23

Statutes and Regulations

42 U.S.C.

§ 1396b(a)(3)(A)(i) 18
§ 1396b(a)(3)(B) 18
§ 1396b(r) 18

42 C.F.R.

§ 433.112(b) 18
§ 433.112(b)(1) 14
§ 433.112(b)(3) 14
§ 433.112(b)(12) 14
§ 433.112(b)(14) 14
§ 433.112(b)(16) 14
§ 433.112(b)(17) 14
§ 433.112(b)(18) 14
§ 433.116 18

Other Authorities

13C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 3533.7 (3d ed.)....12

It is undisputed that all 34 Plaintiffs are currently enrolled in TennCare, and 32 of them were enrolled before this suit was filed. Thus, all of Plaintiffs' alleged injuries *happened in the past*, yet they request declaratory and injunctive relief to redress only *future* injuries. None of the 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), and as a result, they all lack standing to maintain a claim for injunctive or declaratory relief. It is a fundamental principle of Article III jurisdiction that "[p]ast harm allows a plaintiff to seek damages" but "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. 96, 105 (1983) (emphasis added)).

Moreover, the Centers for Medicare & Medicaid Services' ("CMS") recent certification of TennCare's eligibility system, the Tennessee Eligibility Determination System ("TEDS"), confirms the system is not flawed. Plaintiff's central argument is that TEDS's alleged inherent defects will create a risk of future injury; but CMS's approval of TEDS requires the conclusion that the opposite is true. After years of thorough review, CMS determined that TEDS complies with the extensive statutory and regulatory requirements that are predicate for hundreds of millions of dollars in enhanced federal funding. Plaintiffs' request for injunctive relief essentially asks this Court to second guess CMS's determination that TEDS meets the relevant, extensive requirements for the proper functioning of such systems. CMS's certification demonstrates that this relief, if granted, would not "make a difference to the legal interests of the parties." *McPherson v. Mich.*

High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (quotation marks and citations omitted). This Court should grant the State's motion to dismiss.

STATEMENT

Plaintiffs are TennCare enrollees who allege that they have experienced various procedural errors in the past during the TennCare eligibility-redetermination process, causing many of them to be temporarily disenrolled from the program. Compl., Doc. 1 ¶¶ 8–25, 133–432 (Mar. 19, 2020).[1] They filed this lawsuit as a putative class action 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 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.

Before filing suit, 32 of the 34 Plaintiffs[2] were 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* Decl. of Kimberly Hagan ¶ 2, Doc. 29-2 (Apr. 13, 2020) ("Hagan Decl."). Shortly after the complaint was

[1] Eleven 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.

[2] One original Plaintiff, Charles Fultz, passed away after the suit was filed. *See* Doc. 78, Pls.' Suggestion of Death Upon the Record (July 8, 2020).

filed, the remaining two Plaintiffs who lacked full Medicaid coverage—Vivian Barnes and William Monroe—were enrolled. *See id.* It is undisputed that all named Plaintiffs are currently enrolled in TennCare.

In February 2021, this Court denied without prejudice Plaintiffs' Motion for Class Certification, Plaintiffs' Motion for a Preliminary Injunction, and Defendant's Motion to Dismiss. Order, Doc. 106 (Feb. 19, 2021). The Court found that CMS's "recent certification of [TEDS] is now a central issue in this case," and "it would be improper to rule on the pending motions before the parties fully brief this new development." *Id.* The Court ordered that "[t]he parties may file renewed motions that address CMS's certification of TEDS, but they shall not do so until at least thirty (30) days after the Magistrate Judge files a notice on the docket stating that the pending motion to compel (Doc. 104) and any related discovery issues have been resolved." *Id.* at 1. Magistrate Judge Newbern issued this notice on September 20. Order, Doc. 136 (Sept. 20, 2021).

ARGUMENT

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 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 [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 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 Cnty.*, 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 34 Named Plaintiffs Lack Standing To Bring This Lawsuit.

Plaintiffs' complaint alleges 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

Case 3:20-cv-00240 Document 139-1 Filed 11/12/21 Page 8 of 30 PageID #: 4457

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.

To remedy these alleged procedural injuries, Plaintiffs' complaint seeks only forward-looking relief in the form of a declaratory judgment and injunction. *See* Doc. 1 at pp. 114–15. Indeed, the State's sovereign immunity bars any claim for 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). 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 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 Cnty. Cmty. Mental Health*, 900 F.3d 250, 257 (6th Cir. 2018). "Obtaining standing for declaratory relief has the same requirements as obtaining standing for injunctive relief," *Kanuszewski*, 927 F.3d at 406.

To obtain declaratory or 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. 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; *Waskul*, 900 F.3d at 257–58. Thus, even if it were crystal-clear that members of the proposed class would suffer the same alleged procedural injuries that Plaintiffs assert they suffered in the past—and 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); *Simon*, 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 34 named Plaintiffs lack standing. All of their alleged procedural injuries occurred in the past, and under the authorities cited above, those alleged injuries cannot confer standing on Plaintiffs to seek declaratory and injunctive relief.[3] And because these 32 Plaintiffs were enrolled

[3] One Plaintiff—A.M.C.—alleged that she had an outstanding appeal for backdated coverage when the complaint was filed. *See* Doc. 1 ¶¶ 155–56. But alleged outstanding appeals for backdated coverage cannot support standing to bring *this* lawsuit because the only forms of injunctive relief Plaintiffs requested in their complaint were a *prohibition on termination* of coverage or the *prospective restoration* of coverage, neither of which would redress an alleged failure *to timely process an appeal* relating to *retroactive* coverage. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017). In any event, A.M.C. lacks standing to seek a

in TennCare as of the date of the complaint (and continue to be enrolled today), *see* Hagan Decl. ¶ 2; Declaration of Kimberly Hagan (Nov. 12, 2021) ("2021 Hagan Decl.") (filed herewith) ¶ 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).[4]

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. ¶ 4; *see also* Order, Doc. 34 at 2 (Apr. 14, 2020) ("Based on this information, and without ruling on the merits of Plaintiff's motion for injunctive relief, the Court does not find 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

---

preliminary injunction because her coverage was backdated to resolve any gaps in coverage *before* the complaint was filed. *See* Decl. of Kimberly Hagan, Doc. 63, ¶ 94 (May 29, 2020) ("May 2020 Hagan Decl.").

[4] Because Vivian Barnes 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.

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); *see also Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386–87 (6th Cir. 2020) ("When the plaintiffs' allegations of future injury are based on past human errors, the plaintiffs face a high bar to demonstrate standing."). And Plaintiffs' unsupported allegations that they particularly are "at risk of irreparable harm" when they undergo redetermination for TennCare eligibility in the future clearly do not satisfy their burden. *See, e.g.*, Doc. 1 ¶ 159. 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 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 recur. 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). It makes no sense to assume those errors will recur under the *current* system. Finally, many of Plaintiffs' allegations do not involve the redetermination process at all, *see, e.g.*, *id.* ¶¶

234–46; May 2020 Hagan Decl. ¶ 132; and 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* Doc. 1 ¶¶ 163, 334–37, but since birth only occurs once, this injury cannot happen to those Plaintiffs again. Plaintiffs have simply failed to carry their burden to plausibly allege that their future injuries are certainly impending.

As Plaintiffs' own alleged experience demonstrates, TennCare appropriately identifies and corrects such problems, which is why over *90 percent* of the named Plaintiffs had been enrolled in TennCare *prior* to filing this lawsuit, with the remaining two 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").

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, 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 980-81. 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. The Court held 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, 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; *see, e.g.*, Doc. 1 ¶¶ 93–102. 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.[5]

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*, 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 34 named Plaintiffs had no

[5] Although the plaintiffs in *Shelby Advocates* did not experience the systemic error they alleged, the Sixth Circuit went on to hold that—even if the plaintiffs *had* sufficiently alleged past harm—they still would not have had standing. *See* 947 F.3d at 981–82.

lingering effects of their past injuries at the time they filed the complaint. These 32 Plaintiffs (all except Vivian Barnes and William Monroe) lack standing and should be dismissed from this case.

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

A. The Remaining Two Plaintiffs' Enrollment In TennCare Moots Their Claims.

Plaintiffs have conceded that *all* Plaintiffs are now enrolled in TennCare, *see* Pls.' Opp'n to Def's Mot. to Stay, Doc. 31 at 3 (Apr. 13, 2021), 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*, 577 U.S. 153, 164 & n.5 (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.

Even if Plaintiffs Barnes and Monroe had standing at the initiation of this lawsuit, their enrollment in TennCare shortly after the complaint was filed mooted their claims; their procedural injuries were resolved and are unlikely to recur.[6] "Mootness addresses whether the plaintiff continues to have an interest in the outcome of the litigation." *Ailor v. City of Maynardville*, 368 F.3d 587, 596 (6th Cir. 2004). In other words, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " *Already*, 568 U.S. at 91 (quoting *Alvarez*, 558 U.S. at 93)). Thus, "if events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then

[6] This Court may take into account facts outside the complaint 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).

the case is moot and must be dismissed." *Ailor*, 368 F.3d at 596 (quotation marks omitted); *see also* 13C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 3533.7 (3d ed.) ("[M]ootness may result if the defendants have accorded all the relief the court is prepared to give.").

The Sixth Circuit has explained that a case becomes moot when "the injuries suffered in the complaint had been remedied by events subsequent to the filing of the lawsuit, with no showing of a reasonable likelihood of recurrence." *Ailor*, 368 F.3d at 600. So too here. As discussed above, *all 34 named Plaintiffs* are currently receiving TennCare benefits. And there is no reasonable likelihood that the issues Plaintiffs experienced will recur. Those problems were either caused by human error or fixed by TennCare through TEDS design updates over the past year. *See* May 2020 Hagan Decl. ¶ 84; 2021 Hagan Decl. ¶ 3.

The Sixth Circuit has also held that "the burden in showing mootness is lower when it is the government that has voluntarily ceased its conduct." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Indeed, courts "presume that the same allegedly wrongful conduct by the government is *unlikely* to recur." *Id.* at 767 (emphasis added); *see also* 13C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 3533.7 (3d ed.). That presumption is justified here when one examines the claims of the two Plaintiffs who arguably had standing. Plaintiff Barnes' disenrollment began with an error during the conversion of files into the new TEDS system, a one-time event that will never recur. May 2020 Hagan Decl ¶¶ 109, 120, 141, 149. Plaintiff Monroe's reduced coverage stemmed from a bizarre confluence of factors that likewise cannot be expected to recur. *Id.* ¶ 175. And the State has made *numerous* changes to TEDS and its redetermination process to prevent the kinds of errors experienced by these Plaintiffs. *See id.* ¶¶ 109–10, 120, 143, 149.

"[S]elf correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Speech First*, 939 F.3d at 767 (internal quotation marks omitted). There is no evidence that would rebut this presumption of good faith in the present case. *See, e.g.*, *Irwin v. Tennessee Valley Auth.*, 2013 WL 3968553, at *3–4 (E.D. Tenn. July 31, 2013) (determining that plaintiffs did not rebut the presumption by offering circumstantial evidence to suggest that the self-corrective measures were not genuine and speculation that the defendant intended to reinstate the challenged policy); *see also Welchly v. First Bank*, 2014 WL 2615808, at *9 (M.D. Tenn. June 12, 2014) (concluding that the case was moot because the "record demonstrate[d] that [the defendant] made a good-faith effort to comply with the ADA and the 2010 Standards, [was currently] in compliance, and ha[d] taken concrete steps to ensure future compliance"). Indeed, the fact that the State had *already* redressed the alleged injuries of 32 of the 34 Plaintiffs *before* the complaint was filed shows genuine self-correction. And the State's prompt attention to the remaining two Plaintiffs shortly after the complaint was filed also shows good faith. What is more, TennCare has no incentive to restore any of the bugs in the initial rollout of TEDS that led to the idiosyncratic problems described in the complaint, all of which have been fixed. Again, the evidence shows that not only are the State's actions to remedy Plaintiffs' alleged injuries genuine, but the TEDS issues that Plaintiffs described in their complaint are discrete problems that are very unlikely to recur.

B. CMS Certification Of TEDS Independently Moots Plaintiffs' Claims.

At the heart of this lawsuit is Plaintiffs' contention that TEDS is systemically flawed. *See, e.g.*, Doc. 1 at ¶ 1. But after years of thorough review, CMS has now certified that TEDS meets the extensive statutory and regulatory requirements that a State Medicaid agency must satisfy to obtain enhanced Federal Financial Participation ("FFP") for the continued operation of TEDS. *See* 2021 Hagan Decl., Exhibits 3 and 4. CMS's certification affirmatively demonstrates that there is

no reasonable likelihood that Plaintiffs will incur the same injury in the future. *See, e.g.*, *Ailor*, 368 F.3d at 600.

As relevant here, before CMS may approve a system for enhanced FFP for operation expenditures, it must determine that:

- The system "is likely to provide more efficient, economical, and effective administration of the State plan";
- "The system is compatible with the claims processing and information retrieval systems used in the administration of Medicare for prompt eligibility verification and for processing claims for persons eligible for both programs";
- "The agency ensures alignment with . . . accessibility standards established under section 508 of the Rehabilitation Act, or standards that provide greater accessibility for individuals with disabilities, and compliance with Federal civil rights laws . . .";
- The system "[s]upport[s] accurate and timely processing and adjudications/eligibility determinations and effective communications with providers, beneficiaries, and the public";
- "The system supports seamless coordination and integration with the Marketplace, the Federal Data Services Hub, and allows interoperability with health information exchanges, public health agencies, human services programs, and community organizations providing outreach and enrollment assistance services as applicable";
- "For [eligibility and enrollment] systems, the State must have delivered acceptable MAGI–based system functionality, demonstrated by performance testing and results based on critical success factors, with limited mitigations and workarounds"; and
- "The State must submit plans that contain strategies for reducing the operational consequences of failure to meet applicable requirements for all major milestones and functionality."

42 C.F.R. § 433.112(b)(1), (3), (12), (14), (16), (17), (18).

1. CMS Conducted A Comprehensive, Years-Long Review Of TEDS.

Over the course of several years, TennCare provided extensive information and data to the CMS certification team. TennCare completed the Medicaid Eligibility and Enrollment Toolkit ("MEET Toolkit") created by CMS to provide technical assistance to states developing and implementing new or updating existing eligibility and enrollment systems. *See* CMS, DIV. OF STATE SYS., MEDICAID ELIGIBILITY & ENROLLMENT LIFE CYCLE 5 (Aug. 2018) (attached as Exhibit 1 to the 2021 Hagan Decl.). The steps in the MEET Toolkit help ensure that, among other things, a state's system meets the federal requirements for eligibility and enrollment systems. *See id.* As required by CMS, TennCare engaged an independent verification and validation ("IV&V") contractor, who "represents the interests of CMS, and as such, provides an independent and unbiased perspective on the progress of the [system] development and the integrity and functionality of the system." *Id.* at 11.

In late 2019, CMS invited Tennessee to complete the Outcomes-Based Certification Pilot ("OBC Pilot") as "an alternative pathway for approval of the TN TEDS system by CMS . . . based on the information and evidence evaluated through the pilot intake form, live demonstrations, and data on metrics (referred to as key performance indicators [KPIs] for this pilot) submitted by the state." CMS, DIV. OF STATE SYS., ELIGIBILITY & ENROLLMENT SYSTEM CERTIFICATION REVIEW REPORT; TENNESSEE ELIGIBILITY DETERMINATION SYSTEM (TEDS) 3 (Nov. 2, 2020) ("Certification Report") (attached as Exhibit 3 to the 2021 Hagan Decl.). In participating in this robust review process over the course of several years, TennCare provided CMS with ample evidence regarding the design, implementation, and operations of TEDS prior to CMS completing its virtual Certification Review of the system on July 9, 2020. *See id.*

After reviewing the materials TennCare submitted and conducting the Certification Review, CMS concluded that "the state has successfully met the requirements for certification." Certification Report at 7. In its cover letter to the Certification Report, CMS listed the criteria used for its evaluations, which include: the Social Security Act; Affordable Care Act; 42 CFR Part 433, Subpart C (regarding "mechanized claims processing and information retrieval systems"); 42 CFR Part 435 (regarding Medicaid eligibility); the Health Insurance Portability and Accountability Act; and "[c]urrent legislation and CMS policies." *Id.* at 2. CMS also explained that its decision was "based upon CMS's comprehensive review of TEDS, including all documentation provided by Tennessee, discussions with the Tennessee and vendor staff, and observations prior to, during, and after the CMS review." *See* Letter from Edward Dolly, Dir., Div. of State Sys., CMS to Stephen M. Smith, Deputy Comm'r, Div. of TennCare 1 (Nov. 2, 2020) ("Certification Letter") (attached as Exhibit 4 to the 2021 Hagan Decl.).

As a result of the certification, Tennessee is eligible to receive 75 percent enhanced FFP, retroactive from the TEDS implementation date, for the operation and maintenance of TEDS. *See id.* at 1 (citing 42 C.F.R. § 433.116). Indeed, in the 2021 Implementation Advance Planning Document for TEDS, CMS approved on November 19, 2020, *hundreds of millions of dollars of funding* for the enhancement, maintenance, and operations of TEDS projecting into federal fiscal year 2023. *See* DIV. OF TENNCARE, IMPLEMENTATION ADVANCE PLANNING DOCUMENT UPDATE, TENNESSEE ELIGIBILITY DETERMINATION SYSTEM 84 (Sept. 25, 2020) (approving approximately $307 million enhanced FFP for 2021, $256 million for 2022, and $222 million for 2023) (attached as Exhibit 5 to the 2021 Hagan Decl.).

CMS's certification of, and significant investment in, TEDS provides further proof that TEDS is fully capable of properly completing eligibility determinations for all types of TennCare

categories. *See* 2021 Hagan Decl. ¶¶ 6-9. The Certification Report states that CMS "performed a comprehensive review of functionality [of TEDS] for both Modified Adjusted Gross Income (MAGI)-based and non-MAGI based eligibility supported by [TEDS]." Certification Report at 3. CMS also confirmed that TEDS complies with relevant federal regulations and statutory requirements for making eligibility determinations, including annual redeterminations. CMS certified TEDS, concluding that "there were no critical findings." *Id.* at 7. As a result, TennCare will receive from CMS hundreds of millions of dollars for the operation of TEDS annually for the next several years. It blinks reality that CMS would sign off on a system for enhanced FFP that will cost the federal government hundreds of millions of dollars if there was any reasonable likelihood that TEDS has the *systemic* flaws described in Plaintiffs' conclusory allegations.

2. CMS's Certification Of TEDS Is Entitled To Substantial Deference.

The Sixth Circuit affords "substantial deference" to decisions made by CMS when administering the Medicaid statute. *See Rosen v. Goetz*, 410 F.3d 919, 927 (6th Cir. 2005); *cf. Harris v. Olszewski*, 442 F.3d 456, 465–68 (6th Cir. 2006). In particular, the Court has afforded this deference to agency determinations that a state plan or procedure complies with a relevant Medicaid statutory requirement or regulation. For example, the Sixth Circuit has afforded *Chevron* deference to a federal Department of Health and Human Service ("HHS") determination that a state Medicaid program lawfully offered eligible enrollees freedom to choose a medical provider. *See Harris*, 442 F.3d at 460, 466–68. The Court has also given CMS substantial deference in approving a state's proposed disenrollment process. *See Rosen*, 410 F.3d at 927. CMS's decision that TEDS is functioning in compliance with the applicable federal regulations and entitled to enhanced FFP is likewise entitled to substantial deference due to the role that the Congress has assigned to the federal agency to supervise state Medicaid programs.

Congress has conferred on the Secretary of HHS the authority, here delegated to CMS, to certify that a state's enrollment and information systems meet the statutory requirements of the Medicaid Act, and that the program is therefore entitled to enhanced FFP.[7] In certifying TEDS, therefore, CMS exercised an "express delegation of specific interpretive authority," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), under Section 1396b that is comparable to that which HHS exercised under Section 1396a in *Harris*. CMS's certification decision is informed by the sort of "specialized experience and broader investigations and information" that only a federal agency, charged with overseeing the operation of a nationwide program in each state, could possess. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944); *see also Harris*, 442 F.3d at 468 (quoting *Wis. Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 497 (2002)) (reliance on a federal agency's " 'significant expertise [is] particularly appropriate in the context of a complex and highly technical regulatory program' like Medicaid").

CMS exercised a considerable degree of care in reaching its decision, assigning eleven professionals to perform the virtual review. *See* Certification Report at 7. CMS devoted six months to review preparation, during which time it held regular meetings with TennCare, to

[7] *See* 42 U.S.C. § 1396b(a)(3)(A)(i) (directing the Secretary to make 90-percent FFP payments for the "design, development, or installation" of mechanized claims process and information systems which "*the Secretary determines* are likely to provide more efficient, economical, and effective administration of the plan and to be compatible with the claims processing and information retrieval systems utilized in the administration of subchapter XVIII [Medicare]. . . ." (emphasis added)); *id.* § 1396b(a)(3)(B) (directing the Secretary to make 75-percent FFP payments for the "operation of systems" described in subparagraph (A)(i), "which are approved by the Secretary"); *id.* § 1396b(r) (setting forth, in detail, the findings that the Secretary must make in order to certify a mechanized claims processing and information retrieval system for FFP); *see also* 42 C.F.R. § 433.112(b) (providing the conditions for CMS approval of such systems for 90-percent FFP payments for system design, development, installation, or enhancement); *id.* § 433.116 (providing the conditions for CMS approval of 75-percent FFP payments for the operation of such systems).

devise the criteria and formalize the review process. *Id.* at 4. The degree of care, the formality of the process, the thoroughness of the investigation, and the expertise that the federal agency brought to bear on the decision thus all combine to confer a formidable power to persuade on CMS's certification decision.

Finally, given CMS's thorough review of TEDS, it is difficult to see how the Court could provide meaningful injunctive relief. CMS's certification of TEDS raises the question of what Plaintiffs' proposed injunction could possibly require of TennCare that it is not *already doing*? Plaintiffs' proposed injunction would: (1) prohibit TennCare from "terminating TennCare coverage of Plaintiff Class members unless and until [it] has *considered all potential coverage for which they may be eligible*," and (2) require that TennCare "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 law. Doc. 1 at 115 (emphasis added). But TennCare is currently operating a system that CMS has certified complies with the extensive regulations for mechanized eligibility systems, and TennCare does not know of any person who is entitled to receive relief to whom relief has not already been provided under TennCare's procedures. And while no system is infallible, the State has demonstrated its commitment to fixing mistakes as soon as they are brought to its attention. Plaintiffs' proposed injunctive relief would essentially require the Court to redo CMS's certification evaluation and double check that TEDS does not suffer from systemic flaws that present a significant risk of future error. Because Plaintiffs' alleged injuries have been remedied and there is no reasonable likelihood of recurrence, there is no longer a case or controversy under Article III, and the Court does not have jurisdiction to provide such forward-looking relief.

C. Plaintiffs' Claims Do Not Fit Under Any Mootness Exceptions.

1. Picking-Off

Implicitly conceding that their claims are moot, Plaintiffs have previously invoked 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.[8] 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 State 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* Decl. of Drew Staniewski, Doc. 59-2, ¶ 3 (May 22, 2020) ("Staniewski Decl."). 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 34 Plaintiffs before this lawsuit was filed) is to resolve any eligibility errors promptly whenever such errors are brought to the State's attention from any source of information. *See*

[8] 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).

Staniewski Decl. ¶¶ 2–3. 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 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 (Op. of 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 using a *novel* procedure *after* the lawsuit was filed 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 here.

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 (quotation marks omitted). The picking-off exception is inapplicable.

2. Inherently Transitory

The inherently transitory exception only applies where "it is certain" that "other class members would suffer the *same injury*" as the named plaintiffs. *Wilson*, 822 F.3d at 945 (emphasis added). 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." *Id.* 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), there is no evidence that any other individuals are currently experiencing injuries stemming from the *same* procedural errors that they allege. TennCare's updates to TEDS and CMS's certification of the program demonstrate that it is quite unlikely that the errors alleged by Plaintiffs Barnes and Monroe will occur again in the future. Moreover, the inherently transitory exception does not apply outside the class-action context, and because this Court should deny class certification, it should also reject this exception. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537–40 (2018).

3. Capable Of Repetition, But Evading Review

For essentially the same reasons that TennCare's reinstatement of all of the Plaintiffs, fixes to TEDS, and CMS certification moots their claims—and that Plaintiffs have failed to demonstrate a substantial risk of future injury—the Plaintiffs have failed to show that there is a "reasonable expectation that [they, specifically,] will be subjected to the same action again." *Id.* at 1540.

***

Because the claims of Vivian Barnes 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 before 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, a federal court has no jurisdiction over a would-be class action if the named plaintiffs did not have standing when the complaint was filed. *See, e.g.*, *Lyons*, 461 U.S. at 105–06. 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, including the three individual plaintiffs. *Id.* at 254. Prior to filing suit, however, all three 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 the Sixth Circuit held that "[p]ast 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 34 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 two named Plaintiffs mooted their claims for such relief. Indeed, CMS's certification of TEDS further demonstrates that there is no reasonable likelihood of recurrence of Plaintiffs' alleged injuries and that demonstrates that Plaintiffs' proposed injunctive relief, if granted, would not "make a difference to the legal interests of the parties." *McPherson*, 119 F.3d at 458. 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.

November 12, 2021

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter

Sue A. Sheldon TN BPR #15295
Senior Assistant Attorney General
Meredith Bowen TN BPR #34044
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-1366
meredith.bowen@ag.tn.gov

/s/ Michael W. Kirk
Michael W. Kirk*
Nicole J. Moss*
William V. Bergstrom*

COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
mkirk@cooperkirk.com
nmoss@cooperkirk.com
wbergstrom@cooperkirk.com

*Appearing *pro hac vice*

Counsel for the Defendant

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 12th day of November, 2021.

Gordon Bonnyman, Jr.
Michele M. Johnson
Catherine M. Kaiman
Vanessa Zapata
TENNESSEE JUSTICE CENTER
211 7th Avenue N., Ste. 100
Nashville, TN 37219

Elizabeth Edwards
Sarah Grusin
Jane Perkins
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro St., Ste. D-13
Carrboro, NC 27510

Jennifer M. Selendy
Faith E. Gay
Andrew R. Dunlap
Babak Ghafarzade
Amy Nemetz
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, NY 10104

Gregory Lee Bass
NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
275 Seventh Avenue, Suite 1506
New York, NY 10001

/s/ Michael W. Kirk
Michael W. Kirk