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

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

December 17, 2021

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I. All But Two Plaintiffs Lack Standing To Bring This Lawsuit.

Plaintiffs allege that, in addition to Barnes and Monroe, six plaintiffs have standing because of "continuing adverse effects of past harms" that persisted at the time of the complaint. Doc. 160 at 11. Plaintiffs assert that four Plaintiffs were suffering "denials of timely appeals to restore their coverage for unpaid medical bills that were accruing interest . . .," *id.*, but of the four, only A.M.C. alleged having an outstanding appeal for backdated coverage when the complaint was filed and she lacks standing because her coverage had in fact already been backdated at the time of filing, *see* Doc. 142-2 at ¶¶ 94-95.[1] And although Plaintiffs Vaughn and Hill experienced delayed appeals, both had continuation of benefits at the time of filing and retained those benefits until their appeals were resolved in their favor, so Plaintiffs cannot point to any harm caused by the appeal delay. *See* Doc. 142-1 at ¶¶ 156–57, 200.

More importantly, a delay in processing appeals and the existence of outstanding appeals for backdated coverage do not support standing to bring *this* lawsuit because the only relief requested in the complaint is a prohibition on termination of coverage or prospective restoration of coverage, neither of which would redress these alleged failures. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.") (citation omitted). Plaintiffs' claims must be supported by a *future* injury, and citing to past injuries, *see* Doc. 160 at 12–13, cannot satisfy that burden, *see Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 406 (6th Cir. 2019) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)) ("[T]hat a harm occurred in the past 'does nothing to establish a real and immediate threat that' it will occur

[1] By their own admission, E.I.L. and K.A. had already received backdated coverage to fill any gaps when the complaint was filed, *see* Doc. 1 ¶¶ 175, 346, and J.Z. has not alleged an ongoing gap or having requested backdated coverage.

in the future."). Nor can Plaintiffs demonstrate future injury by claiming their harms are "systemic." *See Lyons*, 461 U.S. at 105 (allegations of "routine[]" violations of law insufficient for standing). Rather, Plaintiffs must show future injury to them is "certainly impending." *WCI, Inc. v. Ohio Dep't of Pub. Safety*, 18 F.4th 509 (6th Cir. 2021) (citation omitted)).

Plaintiffs claim that TennCare uses defective "form notices," has a policy of dismissing appeals for failing to present a valid factual dispute, and lacks policies for accommodating those with disabilities. Doc. 160 at 13. But these allegations, which Defendant vigorously disputes, are not injuries in themselves. There can be no injury without a corresponding loss of coverage; indeed, the remedies Plaintiffs request prove that the injury they seek to redress is the loss or threatened loss of coverage. Doc. 1 at 141–42. And Plaintiffs offer nothing to support the argument that they, *in particular*, face a "certainly impending" injury by either receiving an allegedly defective notice, needing to appeal a decision in which they will be required to present a valid factual dispute, or having difficulty navigating the redetermination process (that they have now successfully navigated) based on their disability, *and* losing coverage as a result.

It is pure speculation that Plaintiffs will be subject to disenrollment as a result of any of the deficiencies they allege. The vast majority of redeterminations are processed correctly, without loss of coverage. Suppl. Decl. of Kimberly Hagan in Support of Def.'s Mot. to Dismiss, ¶ 2(d) (Dec. 17, 2021) ("Hagan Decl.").[2] Plaintiffs earlier admitted that the number disenrolled in error

[2] Plaintiffs assert that "factual averments . . . have no bearing on Defendant's Rule 12(b)(1) motion to dismiss." Doc. 160 at 2. But this Court may take into account declarations in determining whether it has subject-matter jurisdiction over this case. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1364 (3d ed.). There is an alternative line of Sixth Circuit precedent suggesting that the analysis must be "confined to the four corners of the complaint," *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 706 (6th Cir. 2015), but this line of cases post-dates the cases allowing consideration of declarations in determining jurisdiction, *see Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). Regardless, the Court certainly can consider facts outside the

is as low as *two* percent. Doc. 12-1 at 14–15.[3] And since March 19, 2019, the State has successfully automatically renewed eligibility over 2 million times. Hagan Decl. ¶ 2(d).

At most, Plaintiffs have shown the alleged deficiencies in TennCare's redetermination process could hurt some small minority of enrollees, but they have shown no likelihood they will be among that minority, as they must to establish standing. In fact, there are significant reasons to suspect Plaintiffs are particularly unlikely to erroneously lose their coverage. Twelve of the Plaintiffs are currently covered under SSI or an SSI-related category, so they will almost certainly have their eligibility auto-renewed through the redetermination process. Hagan Decl. ¶ 2(b). Further, any individual who has an update to their casefile during the course of the year and has their eligibility "reverified" will not be selected for the annual redetermination process until another year has passed, which as of the filing of this brief, includes 14 of the Plaintiffs. Hagan Decl. ¶ 2(c). Those Plaintiffs who will face redetermination at some point in the future likewise do not have standing because the recurrence of an event that *might* cause injury is insufficient to demonstrate standing. *See Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981–83 (6th Cir. 2020) (per curiam) (allegations of past election-related injuries and a certainty of future elections in which such injuries *might* recur was insufficient to demonstrate standing).[4] At most,

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complaint when assessing mootness, since mootness necessarily entails consideration of facts that arose after the complaint was filed. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 96–98 (2013) (considering affidavits in assessing mootness).

[3] Plaintiffs claim that TennCare "lacks a process for monitoring the accuracy of its eligibility determinations." Doc. 160 at 2. This is incorrect and the document Plaintiffs cite for support merely denotes that CMS does not have a standardized, national metric for checking program accuracy that it requires to be reported. *See* Doc. 142-4 at 3. TennCare has implemented a process that monitors TennCare's eligibility determinations for accuracy on a monthly basis, allowing for real-time identification and correction of errors. Hagan Decl. ¶ 7–8.

[4] Plaintiffs try to distinguish *Shelby Advocates* because the plaintiffs in that case had never experienced the systemic error they alleged, Doc. 160 at 15, but the Sixth Circuit went on to hold

Plaintiffs have shown disparate, idiosyncratic past errors with no reason to suspect those errors are systemic or will affect them again, so they lack standing.[5]

II. Plaintiffs' Claims Are Moot.

In any event, all Plaintiffs' claims are moot because all Plaintiffs are enrolled in TennCare[6] and CMS has certified that TEDS makes correct eligibility determinations and issues timely and appropriate notices. Plaintiffs discuss CMS's certification only briefly and deride it as just "an assessment of information technology system functionality" and not "a comprehensive determination of state compliance or non-compliance with all federal Medicaid policy regulations." Doc. 160 at 20 (quoting Doc. 139-6). But the "information technology system" referenced is the system responsible for the eligibility determinations and processing of cases at issue here. CMS's review of it *was* comprehensive, including a finding that TEDS "[s]upport[s] accurate and timely processing and adjudications/eligibility determinations and effective communications with providers, beneficiaries, and the public." *See* 42 C.F.R. § 433.112(b)(14). CMS's review also involved a review of the very same notice templates to which Plaintiffs object,

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that—even if plaintiffs *had* experienced the systemic error—they still would not have had standing, *see* 947 F.3d at 981–82. Nor does *Blum v. Yaretsky*, 457 U.S. 991 (1982) help Plaintiffs. In that case, the plaintiffs faced a substantial risk that physicians who had previously recommended reducing the level of care provided to Plaintiffs would do the same in the future. *Id.* at 999–1000. Those facts are nothing like this case, where Plaintiffs allege a wide variety of past injuries without any plausible basis for asserting that they will suffer those same injuries again in the future.

[5] The 2,900 individuals—less than two-tenths of 1 percent of the 1.6 million enrollees on the program—briefly terminated by mistake through Defendant's case merge process, Doc. 160 at 2, likewise cannot establish that future injury to any of the Plaintiffs is certainly impending. The errors did not necessarily arise as part of the redetermination process being challenged, each identified loss of coverage was temporary—TennCare reinstated coverage for every affected individual with no gap—and TennCare has implemented both a front-end fix to prevent future errors and a back-end monitoring process to catch and quickly correct errors that do occur as evidenced by each of those 2,900 cases. Hagan Decl. ¶¶ 3–4.

[6] One Plaintiff transitioned her primary coverage to Medicare but is still eligible for TennCare provided MSP coverage that pays her Medicare premiums. Hagan Decl. ¶9.

Hagan Decl. ¶¶ 5–6. The certification decision is entitled to substantial deference, *Rosen v. Goetz*, 410 F.3d 919, 927 (6th Cir. 2005), and confirms that Plaintiffs face no reasonable likelihood that their remedied injuries will recur and therefore moots their claims.

Finally, Plaintiffs fail to demonstrate that any recognized exception to mootness should apply. Regarding "voluntary cessation," although Defendant faces a "heavy burden" to show that "the allegedly wrongful behavior cannot reasonably be expected to recur," *see Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019), that burden has been met here. TennCare has made numerous changes to TEDS and its redetermination process to prevent the precise errors experienced by Plaintiffs. That the State had already redressed the injuries of nearly all the Plaintiffs *before* the complaint was filed attests the genuineness of these fixes. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) ("[S]elf-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine.").[7] Similarly, the "inherently transitory" exception only applies where "it is certain" that "other class members would suffer the *same injury*" as the named Plaintiffs. *Wilson v. Gordon*, 822 F.3d 934, 945 (6th Cir. 2016) (emphasis added). But the named Plaintiffs and declarants they rely on to support this argument experienced a wide variety of disparate alleged errors with a variety of causes, *see* Doc. 160 at 22; Hagan Decl. ¶¶ 2(f)–(g), and the substantial changes TennCare has implemented in TEDS effectively guarantees the same injuries will not recur. Finally, as to the "picking off" exception, though Plaintiffs assert that the State has misrepresented its elements, they offer no alternative test and do not dispute the identified elements do not apply here. Doc. 160 at 24.

CONCLUSION

Defendant respectfully submits that this Court should grant its motion to dismiss.

[7] Plaintiffs' arguments regarding the "capable of repetition yet evading review" exception fail for essentially the same reasons.

December 17, 2021 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via the Court's electronic filing system on this 17th day of December, 2021.

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