**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

# DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

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## INTRODUCTION

Plaintiffs have added nine new proposed class representatives in a third attempt to provide some legitimate basis on which this Court might certify a class of approximately 108,000 people disenrolled from TennCare (the newly proposed "Reinstatement Subclass") and enter an injunction on their behalf.[1] However, the new Plaintiffs do not resolve this Court's concern that *no* named Plaintiff in this action is in the same position as the 108,000 individuals in the Reinstatement Subclass, which is fatal to both the motion for a preliminary injunction and the motion to certify that subclass. Much like the original Plaintiffs, the new Plaintiffs allege individual, idiosyncratic, injuries that cannot be generalized beyond their unique circumstances. For this reason, they have failed to identify a common issue appropriate for class adjudication or demonstrate that the named Plaintiffs would adequately represent a putative class. They have also failed to demonstrate a likelihood of success on any claim broad enough to justify a multi-hundred-million dollar injunction.

## BACKGROUND

Plaintiffs filed their second motions for class certification and preliminary injunction on November 12, 2021. *See* Docs. 140 & 141. The State opposed those motions because, among other problems, the Plaintiffs sought to certify a class including approximately 108,000 individuals disenrolled from TennCare between March 2019 and March 2020 who remain disenrolled today and to obtain on their behalf an injunction placing them back on TennCare even though none of

[1] Following this Court's Order, *see* Doc. 201 (May 5, 2022), the State is submitting this brief as a supplement to its prior briefs opposing class certification and entry of a preliminary injunction and has limited its briefing here to the issues raised by the addition of the new Plaintiffs, most notably how they impact the proposed Reinstatement Subclass and injunctive relief on that subclass's behalf. However, the State stands by its earlier arguments regarding why the broader proposed class of all TennCare enrollees cannot be certified and the addition of the new Plaintiffs do not correct the problems with that proposed class in any way.

the named Plaintiffs would be a member of that class and none would benefit from such injunctive relief. Def.'s Resp. in Opp'n to Pls.' Mot. for a Prelim. Inj. at 2–4, Doc. 165 (Jan. 4, 2022) ("PI Resp."); Defs.' Resp. in Opp'n to Pls.' Mot. for Class Certification at 18, Doc. 164 (Jan. 4, 2022) ("Class Certification Resp."). Furthermore, the Plaintiffs all alleged different errors that resulted in the loss or threatened loss of TennCare coverage, so that none of the alleged injuries could be assumed to have been suffered by the 108,000 individuals. *See, e.g.*, PI Resp. at 10 n.2.

At the hearing on both motions, the Court reserved judgment but offered Plaintiffs an opportunity to correct these deficiencies. Specifically, the Court indicated it was inclined to find language in the Notice of Decision ("NOD") used by TennCare, which the Court believed all 108,000 disenrolled individuals received, misled enrollees regarding their appeal rights. *See* Hearing Tr. 17:24–18:2, 21:2–6, Doc. 179 (filed Mar. 6, 2022) ("Tr."). It further noted, however, that it could not conclude anyone was misled or harmed by this language without a Plaintiff who was one of the 108,000, who received that notice, and who was in fact misled. *Id.* 48:13–15; *see also id.* 57:7–10 ("I need somebody, two or three, that got kicked out before the moratorium and suffered or allege they suffered from the same due process violation.").

Plaintiffs subsequently amended their complaint adding nine new Plaintiffs. Each Plaintiff was disenrolled prior to the moratorium, but only one of the new Plaintiffs received an NOD containing the language about which the Court was concerned prior to being disenrolled,[2] and *none* of the Plaintiffs allege they were confused or misled to their detriment by that language. In other

[2] Contrary to the State's response to the Court's question at the hearing, NODs only contain that language when a new type of coverage is *denied*, not where existing coverage is terminated. Suppl. Decl. of Kimberly Hagan in Opp'n to Pls.' Mots. for Class Cert. and for a Prelim. Inj. ¶ 3, filed herewith ("Hagan Suppl. Decl."); *see also* Def.'s Not. of Filing at 2–4, Doc. 213 (June 9, 2022). We regret any inconvenience to the Court and to Plaintiffs that the error has caused. The State has now confirmed that at most only 5,238 individuals in the proposed Reinstatement Subclass actually received an NOD with this language. Hagan Suppl. Decl. ¶ 6.

words, Plaintiffs have added new individuals to their case but there is still no one before the Court who (1) was among the 108,000 and (2) was misled by language regarding their appeal rights in their NOD. This is fatal to Plaintiffs' motions for preliminary injunction and class certification.

## ARGUMENT

### I. The New Plaintiffs Do Not Justify Entry of a Preliminary Injunction.

#### A. The New Plaintiffs Are Not Likely to Succeed On the Merits Because They Were Properly Disenrolled.

The nine new Plaintiffs—from three families—have alleged three very different types of injuries. They have little in common with each other except that none of them experienced a due process violation that would entitle them to relief.

1. Plaintiff M.P.L. was disenrolled from TennCare on May 23, 2019, because his family did not provide TennCare with necessary information regarding his father's income (hence, TennCare could not verify his ongoing eligibility). Hagan Suppl. Decl. ¶ 21. TennCare sent a notice requesting this information to the address M.P.L.'s mother, K.R.L., had supplied to TennCare and where the family was in fact living, but the notice was returned as undeliverable. *Id.* ¶¶ 18–20. The United States Postal Service ("USPS") provided an expired forwarding address on the label returning the notice to TennCare and TennCare attempted to re-mail the notice to the forwarding address. *Id.* ¶ 20. Unfortunately, this notice was also returned as undeliverable. *Id.* ¶ 22. Over the course of the next two years, K.R.L. repeatedly provided the same address to TennCare and TennCare repeatedly sent mail to that address, but it was never delivered by the USPS. *See, e.g.*, *id.* ¶¶ 17–25; *see* Hagan Suppl. Decl., Ex. 13 at 30:23–31:24 (May 16, 2022) ("K.R.L. Dep. Tr."). On October 27, 2021, following an application for coverage, with M.P.L. living at a new address, TennCare sent a notice requesting necessary proof of income that was, for the first time, not returned as undeliverable. Hagan Suppl. Decl. ¶ 27. Nevertheless, M.P.L.'s

family never responded to this notice or to any of the other mailings TennCare sent to his new address—including a NOD—none of which were returned as undeliverable. *Id.*

Plaintiffs argue that, on these facts, the State deprived M.P.L. of due process by terminating his coverage in May 2019 without notice or opportunity to appeal and further alleges that TennCare improperly calculated the family's income based on documentation submitted by K.R.L. in October 2021. Am. Compl. ¶¶ 361–363, Doc. 202 (May 5, 2022). Taking these in reverse order, despite what the Complaint alleges, TennCare has no record of any submission of income information from K.R.L. in 2021, Indeed, K.R.L. admitted in her deposition that she had never received a single notice from TennCare, and for that reason, had never submitted any documentation to TennCare from which TennCare could have determined M.P.L.'s eligibility. K.R.L. Dep. Tr. at 39:7–41:2.

The claim that TennCare violated M.P.L.'s due process rights by terminating coverage without notice and an opportunity to appeal fails as a matter of law. Due process only requires "notice reasonably calculated, under all the circumstances, to apprise interested parties" of pending adverse action, not "actual notice." *Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 311 (6th Cir. 2021) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* Ultimately, "what constitutes adequate notice under the Due Process Clause depends on the circumstances of each case." *Id.* at 312.

Here, TennCare did everything it was required to do and did not violate M.P.L.'s due process rights when it terminated his coverage. When TennCare received the first notice returned as undeliverable, it attempted to reach M.P.L. through another means—the forwarding address provided by USPS. Every time K.R.L. contacted TennCare, TennCare reconfirmed her address

and mailed notices to the address she repeatedly provided. Although unfortunate, the failure of delivery here was no fault of TennCare's. Instead, as K.R.L. admitted in her deposition, it was part of a wider failure of the USPS to deliver *any* mail addressed to her at that address. K.R.L. Dep. Tr. 43:22–44:1. And by repeatedly reconfirming the address and attempting to mail to an expired forwarding address, TennCare did "something more" to try and effectuate notice. *Jones v. Flowers*, 547 U.S. 220, 227 (2006); *see also id.* at 230 ("[W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so."). TennCare also made all notices available to K.R.L. online through a member portal account, and TennCare informed K.R.L. of this online resource on each call she made to TennCare Connect. Hagan Suppl. Decl. ¶ 22.

The Sixth Circuit and the Supreme Court have "squarely rejected" as unduly burdensome the contention that due process would require the State to engage in an "open-ended search for a new address" when it learns that mailed notice was ineffective. *Keene*, 998 F.3d at 314 (quoting *Jones*, 547 U.S. at 236). While on a percentage basis the amount of returned mail TennCare receives as undeliverable is small, in real numbers, attempting an open-ended search for new addresses would be overwhelming and unduly burdensome. *See* Hagan Suppl. Decl. ¶ 30 (Between June 2019 and May 2022 TennCare sent out over 8.6 million notices through TEDS alone and about 3.6 percent (309,889 notices) were returned as undeliverable). By trying two addresses, reconfirming M.P.L.'s address several times, and making notices available online, TennCare did everything it reasonably could to provide him with notice and thereby satisfied the State's due process obligations.

K.R.L. also alleged (in her deposition, not the Complaint, *compare* Am. Compl. ¶ 362 *with* K.R.L. Dep. Tr. at 39:7–41:2) that TennCare failed to provide notice at M.P.L.'s new address. But

unlike the notice sent to his previous address, TennCare received no indication that delivery to M.P.L.'s new address was not effective (and it still has no record that supports that claim), Hagan Suppl. Decl. ¶ 27. Thus, TennCare was entitled to assume that delivery had been successful. *Jones*, 547 U.S. at 226 ("[T]he government attempted to provide notice and heard nothing back indicating that anything had gone awry . . . [so] the reasonableness and hence the constitutional validity of the chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." (citations and quotation marks omitted)). Because the notice procedures employed by the State complied with due process, TennCare was correct to terminate M.P.L. from the program when it could not verify his eligibility; therefore, M.P.L. is not likely to succeed on the merits of his claim.

2. Plaintiff Allana Person alleges that she was unlawfully terminated from TennCare in 2019 and incorrectly denied for coverage when her mother reapplied on her behalf in 2021. Am. Compl. ¶¶ 386–88, 390. But in both instances, Person and her mother received notices from TennCare informing them that TennCare did not have enough information to confirm their eligibility for coverage and requesting specific types of proof of income, which were never submitted. Hagan Suppl. Decl. ¶¶ 34–35. Regarding the 2021 reapplication, Plaintiffs admit that neither Person nor her mother responded to the request for proof of income, so the denial of her application was unquestionably correct. Am. Compl. ¶ 390; *see* 42 C.F.R. § 435.945(b). Regarding the 2019 eligibility reverification that resulted in Person's disenrollment, Person's mother alleges she did respond to the request for proof of income, but neither she nor TennCare has any record of this alleged response. Person's mother could not remember any details of her alleged response, she could not remember where she allegedly mailed the information, nor could she remember which of her customers provided letters regarding what they paid her for childcare services. Hagan Suppl.

Decl. Ex. 27 at 26–30 (May 16, 2022) ("Person Dep. Tr."). Furthermore, when she called TennCare after receiving a NOD terminating her daughter's coverage, Person's mother was told the NOD had been issued because she had not sent in documentation of her self-employment income. In response, she never said she had submitted such information previously but rather said the loss of coverage was "her fault." Hagan Suppl. Decl. ¶ 35. These facts belie any claim that TennCare incorrectly terminated Person's coverage—the termination was required by Person's failure to provide necessary information to determine eligibility.

Nor is Person likely to succeed on her claim that the notices she received were confusing. First, she had previously received notices with the same allegedly confusing language in 2018, and she and her mother understood and adequately responded to those notices. Demonstrating her understanding of her right to appeal, Person's mother filed an appeal on her daughter's behalf that enabled her to retain TennCare coverage. Hagan Suppl. Decl. ¶¶ 32, 38. Second, Person's mother admitted that she received mailings from TennCare that she never opened, Person Dep. Tr. at 62 71, and she specifically stated she did not open at least one of the notices she alleges contained confusing language, *id.* at 59:17–20. In short, Person's mother's testimony reveals that any alleged confusion arose from her failure to read the notice or from her disagreement that she should be required to submit her or her husband's income information, not from the notice's content. Of course, TennCare does not violate an individual's due process rights if it includes all necessary information in a notice but the notice is ineffective because the recipient does not open her mail. *Cf. Chicago Sweeteners, Inc. v. Kantner Grp., Inc.*, No. 3:08 CV 1928, 2009 WL 1707927, at *2–3 (N.D. Ohio June 17, 2009) (service of complaint was effective where it was delivered to defendant but allegedly lost by the individual who was responsible for picking up his mail). As a result, TennCare was correct to disenroll and to deny coverage to Person for failure to provide

supporting information and she is not likely to succeed on the merits of her claims.

3. Plaintiffs E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R. are members of a single household represented by their mother, J.R. J.R. alleges that her children were improperly terminated from the program after going through annual redetermination in 2019 because she returned the renewal information by mail and phone and was "given to understand" that she did not need to send in any other information, Compl. ¶¶ 406, 408. The gravamen of J.R.'s claim is that coverage was terminated even though "TennCare officials knew that J.R. had not failed to" respond to requests for information. *Id.* ¶ 410. That is demonstrably inaccurate. In her deposition, J.R. admitted she did not recall filling out and returning by mail the 2019 redetermination packet as alleged in the complaint. Hagan Suppl. Decl. ¶ 46. Further, a recording of her call with TennCare Connect, in which she belatedly submitted renewal information, revealed that she told TennCare she had misplaced the renewal packet and did not return it. Hagan Suppl. Decl. ¶ 46, 48. Call recordings also demonstrate she was never told that her oral responses to questions on the phone meant that she would not need to send in proof of income; in fact, she was told just the opposite as she herself admitted at her deposition. *Id.* ¶ 53. Both on the phone and in two written notices, J.R. was told about the specific proof of income she would need to submit and the deadlines for doing so, and yet as J.R. readily acknowledges and Plaintiffs do not dispute no such information was ever provided. *Id.* at ¶¶ 53–54.

J.R. also alleged (in her deposition, not the Complaint, *compare* Am. Compl. ¶ 408 *with* Hagan Suppl. Decl., Ex. 7 at 30:7–23 (June 7, 2022) ("J.R. Dep. Tr.")) that TennCare improperly failed to extend a good cause exception to permit her to submit this information late because of a hospitalization in late February. That claim also fails because the due date to submit the necessary proof was *before* her hospitalization, during a period of time when she was actively working

outside the home. Moreover, J.R. never appealed the termination of benefits or attempted to submit the information late. Hagan Suppl. Decl. ¶ 54–55. In short, J.R. and her children were disenrolled from TennCare because J.R. failed to demonstrate eligibility as required. Her children's claims are therefore unlikely to succeed on the merits.

### B. No New Plaintiff Could Succeed On a Claim That Would Entitle Them to Class-Wide Relief.

Even if the new Plaintiffs could show they were likely to succeed on the merits of their individual claims, that would not entitle them to the sweeping injunctive relief they have requested because they have not pled claims that are common to those of the Reinstatement Subclass on whose behalf they seek an injunction. M.P.L.'s mail issues were the result of USPS's failure to deliver mail and, even if this Court found merit to M.P.L.'s claim for a due process violation, the pool of other individuals possibly affected by similar returned mail issues is minute, quite possibly nonexistent. Hagan Suppl. Decl. ¶ 22–29 ("Typically, if an NOD cannot be delivered and an enrollee subsequently contacts TennCare, the new address that is provided allows future notices to be delivered."); *id.* ¶ 30. There is simply no reason to think, and certainly no proof in the record, that any of the 108,000 putative Reinstatement Subclass members experienced a similar issue to M.P.L. Person, the only Plaintiff to have received an NOD with appeal language the Court suggested might be confusing, does not point to that language as the reason for her disenrollment. Instead, her claims turn on alleged confusion about what proof of income she needed to submit and whether she had in fact submitted that information. J.R.'s family likewise has pled a claim that turns on their unique circumstances—failing to return repeatedly requested and necessary proof of income—which is not an error on the part of TennCare, and regardless is not common to all other putative class members.

Presumably recognizing that the specific allegations of neither the original nor new

Plaintiffs generalize to the whole proposed Reinstatement Subclass, Plaintiffs have argued that an injunction is warranted not based on these allegations but because,

> the State failed to comply with federal regulations requiring that individuals whose benefits will be terminated receive a notice of decision explaining, among other things, the individual's right to request a hearing, the circumstances under which a hearing will be granted, and the circumstances under which coverage is continued if a hearing is requested.

Mem. of Law in Supp. of Pls.' Mot. to Am. Compl. at 6, Doc. 191-1 (Apr. 18, 2022) ("Mot. to Am.") (citing 42 C.F.R. § 431.210(d)–(e)). They argued the State's notices are "misleading on their face by misstating the grounds for obtaining a merits hearing," *id.* at 6, and quoted the Court saying the current notice language "frustrates [Plaintiffs'] due process rights." *Id.* (quoting Tr. 20:11–16).

This argument fails for multiple independent reasons. First, it is not true that all 108,000 putative class members received notices containing this language—in fact, less than 5 percent of them did. *See* Hagan Suppl. Decl. ¶ 6. Second, none of the new Plaintiffs were harmed by the language the Court identified as potentially misleading. M.P.L. alleges he never received any notices at all and his mother stated that she failed to respond or to appeal, not because she was confused by the language TennCare used, but because she simply never received anything to which she could respond. *See, e.g.*, K.R.L. Dep. Tr. 37:11–38:7. J.R.'s family did not receive an NOD with the allegedly confusing language before termination, and J.R. does not allege that anything in any TennCare notice confused her about her appeal rights. Am. Compl. ¶ 412. Indeed, J.R. testified at her deposition that she was not challenging the NOD as confusing. J.R. Dep. Tr. at 8:8–16; 35:3–6. Among the new Plaintiffs, only Person even alleges having received an NOD with the language the Court expressed concern about. Am. Compl. ¶ 385. She does not, however, allege that this language confused her, nor could she. She received another NOD in 2018 with identical language, and she understood it well enough to appeal then. Hagan Suppl. Decl. ¶ 32. Plaintiffs

have also sought to support their claim by noting that "Plaintiff Barnes received multiple notices from TennCare containing the misleading language regarding her right to a pre-deprivation hearing." Mot. to Am. at 7 n.4. But like Person, Barnes does not allege she was confused by the notice or that she did not file an appeal because of this language. *See* Compl. ¶¶ 206–210.

Merely identifying language a Plaintiff received that might mislead *someone* is not enough to state a claim for a due process violation. The Plaintiffs themselves must have been misled by it and misled in such a way that it caused them not to file an appeal. "[I]n order to prevail on a procedural due process challenge, [a plaintiff] must also show prejudice. Indeed, [courts] need not address the merits of a claim if there is no demonstration of prejudice." *Graham v. Mukasey*, 519 F.3d 546, 549 (6th Cir. 2008). "[T]o establish the requisite prejudice, [a plaintiff] must show that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations." *Id.* at 549–50. The failure to "allege[], much less show[], actual prejudice" resulting from the content of a notice is fatal to a due process claim. *Ramos Rafael v. Garland*, 15 F.4th 797, 801 (6th Cir. 2021) (failure to argue that "the absence of time and place in the Notice to Appear" for removal proceedings waived the argument entirely).

Due process claims regarding Medicaid benefits are not immune from this requirement. *See Estate of Ludwig v. Dungery*, No. 1:14 CV 1073, 2014 WL 4852271, at *3 (N.D. Ohio Sept. 29, 2014). In *Estate of Ludwig*, the family of Raymond and Elva Ludwig, former Medicaid beneficiaries, argued that Raymond's due process rights were violated when the state Medicaid program provided notice of Raymond's denial only to his daughter. The Medicaid agency failed to notify Raymond's attorney who was his authorized representative. *Id.* The court found, however, that the family had failed to state a claim because, even though he had not been properly sent a notice, Raymond's attorney had nevertheless "filed an appeal on [his] behalf with the state hearing

board. . . . Plaintiff's assertion that his state and administrative appellate rights were 'placed at risk' by defendants' actions is unavailing in light of the fact that plaintiff successfully exercised those rights." *Id.*

Indeed, the Court has already recognized in this case that showing prejudice is essential, explaining that it needed "somebody, two or three, that got kicked out before the moratorium and suffered or allege they suffered from the same due process violation." Tr. 57:7–10; *see also id.* at 48:11–15. Even after amending their complaint and adding nine new individuals, Plaintiffs have not satisfied the requirement that they present evidence of any individual who received an NOD, was confused by the language about their appeal rights, and as a result of that confusion, failed to appeal.[3]

### C. The New Plaintiffs Underscore that the 108,000 Former Enrollees Do Not Face Irreparable Harm Absent an Injunction.

To warrant an injunction "injury must be both certain and immediate, not speculative or theoretical." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (quotation marks omitted). Plaintiffs allege irreparable harm has been shown by the fact that Person, M.R., and D.J.R. have foregone medical treatments because they were not covered by TennCare. Mot. to Am. at 7. The Sixth Circuit has recognized that reduction or elimination of healthcare benefits can constitute irreparable harm. *See, e.g.*, *City of Pontiac Ret. Emps. Ass'n v. Schimmel*, 751 F.3d 427, 433 (6th Cir. 2014) (en banc). However, Plaintiffs have not been irreparably harmed if they cannot

[3] Plaintiffs' notice of filing and accompanying declaration, *see* Docs. 219 & 220, submitted earlier today, merely underscore that Plaintiffs have failed to identify a class-wide issue that would justify their sweeping injunction. Plaintiffs raise issues regarding delivery of notices and pharmacy benefit cards to TJC for individuals they no longer represent; these claims are irrelevant to Plaintiffs' currently pending motions (indeed, they are irrelevant to any issues in this case at all) as the State has previously explained. *See* Decl. of Drew Staniewski, Doc. 168 at ¶¶ 7–8 (Jan. 4, 2022). There is simply no reason Plaintiffs would be discussing delivery of pharmacy benefit cards if they had identified a real, class-wide due process violation entitling them to injunctive relief.

show they lost healthcare coverage *when they should not have been terminated*. Plaintiffs must demonstrate that (i) they met the eligibility requirements at the time they were terminated or denied, (ii) they provided TennCare with information proving their eligibility, and yet (iii) they were terminated or denied anyway. Here, as explained above, the terminations for all the new Plaintiffs were appropriate—indeed they were required by the regulations because the Plaintiffs failed to provide information regarding their household income—so they cannot form the basis for a finding of irreparable harm.

Plaintiffs' own cases demonstrate that the 108,000 individuals who were terminated between March 2019 and March 2020, and remain off the program today, are not enrolled because they failed to comply with the requirements for eligibility. Of 43 Plaintiffs now in this case, the *only* one who has demonstrated any legitimate difficulty in proving his eligibility for TennCare coverage is M.P.L. But as discussed above, his challenges were the result of an idiosyncratic problem his family had with receiving mail through the USPS, and not something attributable to TennCare. Hagan Suppl. Decl. ¶ 9–10. In every other case, the experiences of the named Plaintiffs prove that individuals who are currently eligible but not covered by TennCare and facing medical expenses, who apply *and* provide TennCare with the information it needs to evaluate their application, do obtain coverage. *See* Decl. of Kimberly Hagan in Opp'n to Pls.' Mots. for Class Certification & for a Prelim. Inj. ¶ 82(c), Doc. 166 (Jan. 4, 2022).[4] Furthermore, contrary to

[4] It is noteworthy that, despite their claims that they were and still remain eligible for TennCare coverage, and their concern about access to medical treatment, none of the new Plaintiffs submitted the information required to determine their current eligibility for TennCare coverage until that information was sought in discovery. *See Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 820 (E.D. Mich. 2013) ("Defendant argues that Plaintiff cannot show irreparable harm because it has not attempted to resolve its current financial predicament through other avenues. . . . These arguments are well-taken.") TennCare has, based on discovery responses, reinstated M.P.L. and his family as well as J.R.'s family. It has still not received sufficient information to determine whether Person is eligible for coverage. Specifically, she has not

Plaintiffs' baseless assertions regarding the current state of the putative class members' health coverage, J.R. and her family, who have had other healthcare coverage consistently since being disenrolled from TennCare, *see* J.R. Dep. Tr. at 10:9–11:22, demonstrate what common sense would suggest—many of the 108,000 have likely acquired health insurance from another source and do not face irreparable harm absent an injunction. In fact, many in the putative Reinstatement Subclass may *be* harmed if re-enrolled by this Court's fiat. *See* Hagan Decl. ¶¶ 85–86, Doc. 166.

**D. The Massive Cost to the State Strongly Weighs Against Imposing an Injunction.**

The public interest and balance of the equities also favor the State. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs blithely wave away concerns about the $435 million price tag for just one year of their requested injunction, *see* Decl. of Zane Seals in Opp'n to Pls.' Mots. for Class Certification & for a Prelim. Inj. ¶ 5, Doc. 167 (Jan. 4, 2022), by stating that the "marginal costs" of complying with the injunction "are mitigated by the hundreds of millions of dollars in additional federal funding that the State has received for the very purpose of providing TennCare coverage during the COVID-19 national health emergency." Mot. to Am. at 8–9. But Plaintiffs have not requested an injunction only as long as enhanced federal funds are available, and more importantly, Plaintiffs have no response for the State's concern that federal funds are actually not available *now* to cover the costs of re-enrolling the 108,000. Federal matching only applies to services "within the scope" of Medicaid *and* made "under a court order," but services for the 108,000 who have not been appropriately deemed eligible fall outside the scope of Medicaid. *See* PI Resp. at 20–22 (discussing 42 C.F.R. § 431.250(b) and *State of Georgia v. Heckler*, 768 F.2d 1293, 1298 (11th Cir. 1985)). Plaintiffs also have no answer for the concern that the additional federal funding has already been allocated to other expenses within the TennCare program and is not available. *See*

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submitted any information about her parent's three income-producing rental properties or her father's income. Hagan Suppl. Decl. ¶¶ 11–13.

Hagan Suppl. Decl. ¶ 56.

## II. The Addition of Nine New Class Representatives and a Proposed Reinstatement Subclass Do Not Remedy the Defects in The Proposed Class.

As the State established in its Opposition to Plaintiffs' Motion for Class Certification, the Plaintiff Class cannot be certified because Plaintiffs' class definition would require the Court to make individualized merits adjudications in order to determine whether an individual is a member of the class entitled to the injunctive relief sought on behalf of the class. Class Certification Resp. at 8–10. The Sixth Circuit recently ruled that class certification is properly denied when "mini-trials" would be "necessary to determine who is in and who is out" of the class. *Tarrify Properties, LLC v. Cuyahoga County*, No. 21-3801, 2022 WL 2128816, at *3 (6th Cir. June 14, 2022). In *Tarrify*, class certification was properly denied because the court would have had to determine whether the fair market value of a putative class member's property exceeded the amount in taxes that she had owed on that property in order to ascertain whether she was a member of the class. *Id.* In this case, the court would have to determine whether every individual member of the proposed Reinstatement Subclass met "the eligibility criteria for TennCare Coverage" at time of their disenrollment and whether that disenrollment was inappropriate in order to ascertain whether that individual is a member of the class. This determination would require the Court to conduct the same sort of "individualized, fact intensive, and adversarial process" that presented an insurmountable obstacle to certification in *Tarrify*. *Id*.

As in *Tarrify*, "the key impediment to certifying the class—identification of proposed members of the class—haunts every consideration" required by Rule 23. *Id.* By making their proposed class definition turn upon a merits adjudication, Plaintiffs have created a prohibited failsafe class. Class Certification Resp. at 10. The elusive and ever-shifting composition of the proposed class renders it impossible for Plaintiffs to establish commonality, *id.* at 11–14,

typicality, *id.* at 14–17, and adequacy of representation, *id.* at 17–19. And, because Plaintiffs have not demonstrated that TennCare acted on grounds applicable to the class as a whole, *id.* at 19; seek individualized and divisible injunctive relief, *id.* at 20–21; and propose certifying a class that would be administratively infeasible, *id.* at 22–24, and that would lack cohesion, *id.* at 24–25, certification under Rule 23(b)(2) would be improper under *Wal-Mart.* As explained in detail below, neither the addition of nine new putative class representatives nor the definition of a Reinstatement Subclass remedies any of these defects.

### A. Plaintiffs Proposed Subclass Does Not Satisfy the Requirements of Rule 23.

Because the Reinstatement Subclass is expressly defined as a subset of "Plaintiff class members," Am. Compl., ¶ 476–79, the flaws in the original class definition, which the State described in detail in the Class Certification Resp. at 7–11, are baked into the subclass definition. Because certification is improper for the proposed class, as a whole, the Court need not even address the Plaintiffs' proposed subclass. *Gonzalez v. OfficeMax North America*, Nos. SACV 07-00452, CV 07-04839, 2012 WL 5473764, at *2 (C.D. Cal. Nov. 5, 2012) (observing that "because the Court finds that certification is improper for the proposed class, as a whole, it does not address the subclasses"). Regardless, Plaintiffs' proposed subclass fares no better when analyzed on its own merits. It also fails to satisfy the adequacy, typicality, and commonality requirements of Rule 23(a), as well as Rule 23(b)(2)'s requirement that the class seek only relief that is both class-wide and indivisible.

#### 1. The Reinstatement Subclass Does Not Satisfy the Commonality Requirement Under Rule 23(a)(2).

Commonality requires that "there are questions of law or fact common to the class." FED R. CIV. P. 23(a)(2). To satisfy Rule 23(a)(2), Plaintiffs must establish that their claims "depend upon a common contention . . . that [is] capable of classwide resolution—which means that

determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Put another way: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class[]wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (omission in original) (citation omitted). Or, as the Sixth Circuit has posed the question, "whether the proposed class action beats the conventional approach of resolving disputes on a case-by-case basis in terms of efficiency and administrability." *Tarrify*, 2022 WL 2128816 at *3.

The State has previously demonstrated that each of the originally named class Plaintiffs alleged unrelated and individualized mistakes, none of which were common to all class members. In an effort to remedy this flaw, Plaintiffs have amended their complaint to add a claim that allegedly defective appeal language contained in TennCare's NODs denied due process to each member of the proposed Reinstatement Subclass. This third effort to identify a common thread uniting the disparate claims of the individual named Plaintiffs fails for two reasons.

First, the allegedly inadequate language about which Plaintiffs now complain, and that the Court suggested may be misleading, was not included in the NODs sent to all of the members of the putative subclass. It was sent to at most 5,238 individuals in that subclass. Hagan Suppl. Decl. ¶ 6. The challenged language was found only in those NODs denying new coverage. *Id.* ¶ 3. It was *not* found in NODs that only terminated existing coverage. *Id.* The one question that Plaintiffs allege is common to the Reinstatement Subclass is thus not common to over 95 percent of its members. *Id.* at ¶¶ 3–4. Indeed, it is not common to the nine new putative subclass representatives. The NOD that the seven Plaintiffs from J.R.'s family received prior to termination from TennCare did not contain the challenged language. M.P.L. did not receiving an NOD at all. Person did receive

an NOD containing the challenged language, but she and her mother have not alleged they were misled by the language. Based on these facts, even if the Court were to definitively conclude that the NOD in question was misleading due to certain appeal language, resolution of that question would not "generate [a] common answer[] apt to drive the resolution of [this] litigation." *Wal-Mart*, 564 U.S. at 350.

Even if each member of the putative subclass had received this notice prior to termination from TennCare (which did not occur), the adequacy of the notice would still not present a common question, the resolution of which would be "central to the validity of each one of the claims in one stroke." *Id*. As a leading treatise explains, commonality is lacking where "the defendant's liability depends on the individualized circumstances of each putative class member, precluding a determination that there exists a central common contention (or common practice by defendant applicable to all putative class members) which, once resolved, answers a common question for all class members." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:7 (18th ed. 2021).

As discussed above, in order to establish a due process claim based upon a constitutionally defective or inadequate notice, an individual must establish that he relied upon that notice to his detriment. *See, e.g.*, *Day v. Shalala*, 23 F.3d 1052, 1065–66 (6th Cir. 1994) ("Although the Title II reconsideration denial notices . . . failed to satisfy the requirements of due process, the only claimants who could have been injured by the inadequacy are those who detrimentally relied on the inadequate denial notice."); *Estate of Ludwig*, 2014 WL 4852271, at *3.[5]

Thus, to resolve Plaintiffs' claim that TennCare's notice denied them due process of law,

[5] *See also Loudermilk v. Barnhart*, 290 F.3d 1265, 1269 (11th Cir. 2002); *Torres v. Shalala*, 48 F.3d 887, 893 (5th Cir.1995); *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995); *Burks–Marshall v. Shalala*, 7 F.3d 1346, 1349–50 (8th Cir. 1993). As we discuss below, the need to establish detrimental reliance renders both Plaintiffs' class and the Reinstatement subclass uncertifiable under Rule 23(b)(2).

it will be necessary for the Court to determine whether each individual class member received, read, and relied upon that allegedly defective language to their detriment. *See supra* Sec. I.A. Commonality is thus lacking because answering the common question that Plaintiffs have identified would still leave the Court "miles from resolving the litigation on a class-wide basis." *Fields v. Dart*, 982 F.3d 511, 517 (7th Cir. 2020). The presence of the "common question" concerning the adequacy of the challenged notice language is simply insufficient to establish commonality because to finally resolve the proposed subclass' claim, the Court would still have to determine which members of the subclass actually read the notice and which members of that subset of the subclass were prejudiced by not filing an appeal based on confusion over that language. *See, e.g., Flecha v. Medicredit, Inc.*, 946 F.3d 762, 767 (5th Cir. 2020) (Reversing grant of certification in FDCPA action: "Every member of the putative class received the same allegedly threatening letter from [defendant]. But the FDCPA penalizes empty threats, not all threats. So the letter alone is insufficient to certify a class.").[6] As demonstrated above, *supra* at Sec. I.A, none of

[6] *See also Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (reversing certification of wage and hour class where proposed common question of whether hourly-paid employees were not compensated for all hours worked "cannot be answered by common evidence about the timekeeping system because a yes or no answer tells us nothing about actual common work habits, if there are any. The plaintiffs will still need to go through the process of proving that each individual employee worked overtime and is thus entitled to additional compensation, regardless of any common evidence about [defendant]'s timekeeping system."); *Thomasson v. GC Servs. Ltd. P'ship*, 539 F. App'x 809, 810 (9th Cir. 2013) (unpublished) (Vacating certification of FDCPA class for lack of commonality where plaintiffs alleged that defendant failed to warn class members that their calls may be monitored, which allegedly caused people to reveal financial information because claim necessitated "individualized inquiry into hundreds of phone calls in order to determine whether and when any warning was given in each call. In the face of the evidence to the contrary submitted by Defendant, Plaintiffs did not and cannot establish that Defendant acted uniformly as to each member of the class by relying on 18 anecdotal reports of individual telephone calls."); *Taylor v. Zucker*, No. 14-CV-05317, 2015 WL 4560739, *12 (S.D.N.Y. 2015) (no commonality in suit challenging reduction and termination of home services for Medicaid recipients: "While each named Plaintiff, and presumably each member of the putative class, has been injured by the alleged violation of the same provision of the law, their common injury is not of such a nature that it is capable of classwide resolution.")

the new named Plaintiffs' can make that showing; and the Court has no way of ascertaining which, if any, of the 5,238 members of the proposed subclass who received an allegedly defective NOD can do so.

**2. The Putative Class Representatives Assert Claims That Are Not Typical of the Claims of the Reinstatement Subclass.**

Plaintiffs' proposed Reinstatement Subclass also cannot be certified because none of the new Plaintiffs assert claims that are "typical of the claims . . . of the class." FED. R. CIV. P. 23(a)(3). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). Typicality is lacking, therefore, when the resolution of the claims of the named Plaintiffs would not resolve the claims of the class. The Court need only look to the many and varied factual and legal grounds upon which each of the new putative class representatives rests their claims for reinstatement to know that the resolution of one new class representative's claims would not resolve even the claims of another class representative, much less the claims of the putative Class or Subclass as a whole. Typicality, therefore, is lacking.

If each new Plaintiff was able to establish their entitlement to relief under the Due Process Clause of the Fourteenth Amendment, Am. Compl, ¶¶ 495–97, and Section 1396a(a)(3) of Title 42, *id.*, ¶¶ 492–94, (and they cannot), it would not resolve the question whether any of the other 108,000 members of the putative subclass are entitled to relief because, as noted above, detrimental reliance is an essential element of Plaintiffs' purportedly-common claims for relief. Even if the new class representatives were to establish that they each detrimentally relied on the allegedly defective notice (and, again, the evidence obtained in discovery establishes that in fact they did not), such a showing tells us nothing about whether the other 5 percent of members of the putative subclass who received a similar notice had detrimentally relied on it. As TennCare has already

voluntarily edited the language in its NODs to remove the language about which the Court expressed concern, *see* Def.'s Not. of Filing, Doc. 213 at 1–3 (June 9, 2022), the claims of the new Plaintiffs cannot be representative or typical of any claim current enrollees of TennCare may have going forward.

The Sixth Circuit has made it abundantly clear that, "[w]here," as here, "a class definition encompasses many individuals who have no claim at all to the relief requested," the "typicality premise is lacking, for—under those circumstances—it cannot be said that a class member who proves his own claim would necessarily prove the claims of other class members." *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009); *In re Refrigerant Compressors Antitrust Litig.*, 2011 WL 2623317, at *2, n.1 (E.D. Mich. June 13, 2011) (typicality is not met where, as "currently defined[,] . . . class includes persons or entities who do not have standing to assert a federal antitrust claim").

Of course, typicality is also lacking where the *failure* of the claims of the class representatives would not dispose of the claims of absent class members. For example, if Person's due process claim were to fail because her mother never opened the allegedly defective notice, and she thus could not establish detrimental reliance and prejudice on that notice, it would not follow that the due process claims of the absent class members would also fail. So too, if M.P.L.'s claim were to fail because his mother never even received notice and therefore could not have relied on it to her detriment, it would not follow that the claims of his fellow class members must fail as well. Rule 23(a)(3) prohibits certifying a class that lacks typicality in order to ensure fairness to the absent members of the class, some of whom might be able to assert a valid individual claim for reinstatement. Plaintiffs ask the Court to certify a class that would tie the resolution of the claims of all class members to the resolution of the atypical claims of the class representatives.

### 3. Lack of Typicality Also Means the Putative Class Representatives Will Not Adequately Represent the Reinstatement Subclass.

Rule 23(a)(4)'s requires that "the representative parties will fairly and adequately protect the interests of the class," FED. R. CIV. P. 23(a)(4), a requirement that "is essential to due process, because a final judgment in a class action is binding on all class members." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). This "requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id*.

Plaintiffs in both the putative Class and the Reinstatement Subclass assert they were denied due process of law in violation of the 14th Amendment and Section 1396a(a)(3) of Title 42. Again, Plaintiffs failure to allege, much less prove, that they relied on defective notice language to their detriment means that they cannot adequately represent the proposed subclass. As the Court made clear during the March 4, 2022 hearing, it "need[ed] somebody, two or three, that got kicked out before the moratorium and suffered or allege they suffered from the same due process violation." Tr. 57:7–10. The Court needed a Plaintiff, in other words, who could testify that "I got this notice and it's misleading." Tr. 48:15. To the Court, it didn't "seem like it would be hard to find a couple." Tr. 48:19–20.

Plaintiffs, however, have found it quite hard indeed. Alanna Person, whose mother cannot remember receiving the NOD at issue, Person Dep. Tr. 42:3–17, and who admits to not always opening mail from TennCare, *id.* at 62:7–10, cannot testify that she "got this notice and it's misleading," cannot adequately represent a class asserting a claim that its members received a constitutionally inadequate notice. Nor can a class representative, like M.P.L., who never received, and therefore never relied upon, the allegedly-defective notice because of a failure of the USPS to deliver the notice, Hagan Suppl. Decl. ¶ 10, adequately represent a class claiming that it received

a constitutionally inadequate notice. And of course, J.R. and her family cannot adequately represent a class challenging this notice because the notices sent to them prior to termination did not contain the allegedly misleading language. *Id*. at ¶ 12. It would be fundamentally unfair to any absent class members who might have relied upon the allegedly defective notice to tie the presentation of their claims to representatives who admit that they did not.

Out of the 108,000 individuals who belong to their putative class, Plaintiffs have been unable to identify even one who claims to have suffered from the same due process violation, and not even one who claims to have suffered a denial of due process as a result of the allegedly defective notice language. Plaintiffs have thus failed to identify an adequate class representative.

**4. The Reinstatement Subclass Does Not Satisfy the Requirements of Rule 23(b) Because It Seeks Individualized and Divisible Relief.**

Plaintiffs argue that "Rule 23(b)(2) certification is appropriate here because the Plaintiff Class, the Disability Subclass, and the Reinstatement Subclass each seek indivisible relief that will apply equally to each class or subclass member." Mot. to Am. at 13. Plaintiffs have confused undivided relief, *i.e.*, relief that could be divided but that Plaintiffs are asking the Court to provide to each member of the class, and indivisible relief, relief that could only be provided to each and every member of the class. The key to the (b)(2) class action is not that it seeks the same injunctive relief for each class member, but that the injunctive relief being sought, if it is to be provided at all, would *have to be* provided to every member. The relief Plaintiffs seek, reinstatement, is inherently divisible; put simply, it is possible to provide coverage to some, while not providing it to others.

Plaintiffs now argue that their putative class action seeks indivisible relief because "[a]s a matter of federal law, if the State terminates coverage without providing the requisite notice, it must reinstate and maintain the individual's coverage until it complies with Medicaid's codified

due process requirements." Mot. to Am. at 14 (citing 42 C.F.R. 431.231(c)). Thus, Plaintiffs claim that, were the court to find that inadequate notice was provided, all 108,000 Reinstatement Subclass members would be entitled, under Section 431.231(c), to have their coverage reinstated. There are three fatal flaws with Plaintiffs' argument.

First, as already explained in detail, the undisputed evidence in the record is clear that the allegedly defective notice was not sent to the vast majority of the putative Reinstatement Subclass.

Second, Section 431.231(c) does not require automatic reinstatement even for those members who did receive an allegedly defective notice. The regulation provides that the State must reinstate coverage if it took action without first providing notice, but only when the beneficiary requests a hearing within 10 days of receiving actual notice of the action that was taken *and* the action taken resulted from other than the application of federal or state law. 42 C.F.R. 431.231(c). A finding that the challenged notice language was inadequate, therefore, would not entitle every class member to indivisible relief. It would entitle only those members of the class who requested a hearing within ten days of learning of their termination, and whose termination, TennCare determines, resulted from other than the application of Federal or State law or policy.

Third, given the need to establish detrimental reliance on an inadequate notice for each disenrolled member of the putative Reinstatement Subclass, *see supra* at Sec. I.B, this claim is simply not amenable to class treatment under Rule 23(b)(2). Even prior to the Court's decision in *Wal-Mart*, courts in this circuit had recognized that "Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 484 (S.D. Ohio 2001), *abrogation on other grounds recognized by, In re Behr Dayton*

*Thermal Prods., LLC*, 2015 WL 13651286, at *4–*5 (S.D. Ohio Feb. 27, 2015). *See also Wotus v. GenCorp., Inc.*, 2003 WL 27382938, at *11 (N.D. Ohio Dec. 2, 2003); *In re Unisys Corp. Retiree Med. Benefits Litig.*, No. 969, 2003 WL 252106, *1 (E.D. Pa. Feb. 4, 2003) (refusing to certify class under Rule 23(b)(2) where need to individually examine each plaintiff to determine whether alleged misrepresentation that health benefits would not change in retirement was material and if they detrimentally relied on the misrepresentation).

After *Wal-Mart*, there can no longer be any question that certification of a Rule 23(b)(2) class constitutes an abuse of discretion when resolution of the class claims would depend on the adjudication of individualized facts; it is now well recognized "that Rule 23(b)(2) classes must be cohesive." *Romberio*, 385 F. App'x at 433 (*citing Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) (explaining that "Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members"); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (noting that "[w]hile 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive")).

In sum, because Plaintiffs do not seek injunctive relief that is indivisible and classwide, but instead ask this court to resolve a claim that would require a case-by-case determination that an individual received, read, and relied to her detriment upon an allegedly defective notice of decision, the proposed Reinstatement Subclass cannot be certified under Rule 23(b)(2).

## CONCLUSION

For these reasons, and those contained in the State's prior briefing on these issues, the Court should deny Plaintiffs' motions for preliminary injunction and class certification.

July 1, 2022

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 1st day of July, 2022.

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