IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

A.M.C., by her next friend, C.D.C., et al.,

Plaintiffs,

v.

STEPHEN SMITH, in his official capacity as Deputy Commissioner of Finance and Administration and Director of the Division of TennCare,

Defendant.

Civil Action No. 3:20-cv-00240

Class Action

Chief Judge Crenshaw
Magistrate Judge Newbern

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

Date: July 1, 2022

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In accordance with the Court's Orders (ECF 201, 212), Plaintiffs respectfully submit this supplemental memorandum of law in support of their motions for preliminary injunction, ECF 141, and for class certification, ECF 140. This memorandum supplements Plaintiffs' earlier memoranda in support of those motions, ECF 141-1 ("P.I. Memo") and ECF 140-1 ("Class Cert. Memo"). For reasons set forth in those memoranda and herein, and because Plaintiffs' Amended Complaint (ECF 202, "Am. Compl.") satisfies the Court's concerns expressed during the March 4, 2022 hearing, Plaintiffs respectfully request that the Court grant their preliminary injunction and class certification motions.

BACKGROUND

The verified Amended Complaint alleges that Defendant's policies and practices for redetermining eligibility for individuals enrolled in Tennessee's Medicaid program ("TennCare") violate Due Process and the Americans with Disabilities Act ("ADA"), resulting in the loss of health coverage without adequate advance notice or opportunity to be heard. *See* Am. Compl. ¶¶ 495–509; ECF 142-2 and ECF-192-2. Plaintiffs seek certification of a Plaintiff Class, a Disability Subclass, and a Reinstatement Subclass. *See* Am. Compl. ¶¶ 477–79. Plaintiffs' move for a preliminary injunction reinstating the TennCare coverage of members of the Reinstatement Subclass, which consists of over 100,000 individuals whom the State involuntarily terminated from TennCare between March 19, 2019 and March 18, 2020 (hereafter the "Terminations Period") for reasons other than death or moving out of state, and who remain without coverage.[1] ECF 141. Plaintiffs ask that the State be preliminarily enjoined to maintain Reinstatement Subclass members' coverage until the State, in accordance with the requirements of Due Process,

[1] Of the TennCare members terminated during that period, 108,175 remained without coverage as of June 8, 2021. ECF 142-3. That total, reduced by the number of any individuals reinstated since June 8, 2021, comprise the Reinstatement Subclass. Am. Compl. ¶ 479.

determines that they are ineligible and affords them prior notice and an opportunity for a fair hearing. ECF 140.

On March 4, 2022, after hearing oral argument, the Court denied the State's Motion to Dismiss, ECF 139, rejecting the State's arguments based on standing and mootness, ECF 178; ECF 179 ("Hrg. Tr.") 36:5–10, 12–14, but held Plaintiffs' preliminary injunction and class certification motions in abeyance, Hrg. Tr. 58:5–15. The Court invited Plaintiffs to identify "a representative plaintiff within the 10[8],000" individuals who were terminated from TennCare during the Terminations Period and who remain disenrolled to support their requested injunctive relief and class certification. *Id.* 52:20–54:7; 57:7–10.

Plaintiffs delivered. On April 18, 2022, Plaintiffs moved for leave to file an Amended Complaint, ECF 191, adding named Plaintiffs Allana Person, M.P.L., E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R., who were disenrolled during the Terminations Period despite their eligibility and who remained without coverage as of the filing of the Amended Complaint. Am. Compl. ¶¶ 353, 361, 380, 385, 395, 404, 410. The Amended Complaint also defined an additional subclass consisting of Plaintiff Class members who were involuntarily disenrolled during the Terminations Period and who still lack TennCare coverage (the "Reinstatement Subclass"), *id.* ¶ 479. Following a status conference, the Court on May 5, 2022 granted Plaintiffs' Motion to Amend their Complaint and directed the parties to submit supplemental briefs concerning the P.I. Motion and Class Certification. ECF 201.

ARGUMENT

With the addition of the new named Plaintiffs and definition of the Reinstatement Subclass, the Amended Complaint satisfies each of the concerns expressed by the Court with respect to the preliminary injunction and class certification motions.

I. Plaintiffs Satisfy All Requirements for a Preliminary Injunction.

Plaintiffs seek a preliminary injunction requiring the State to restore TennCare coverage to members of the Reinstatement Subclass, and to notify them of their reinstatement. P.I. Motion at 1; Am. Compl. ¶ 4 & p. 127. The Motion also asks that the preliminary injunction restrain the State from involuntarily terminating Reinstatement Subclass members' TennCare coverage until they receive notice and an opportunity for a fair hearing that complies with due process. *Id.*

In order to satisfy due process before terminating the restored coverage of the Reinstatement Subclass, the State would be required to consider subclass members' eligibility for all potential categories of TennCare coverage. *See infra* p. 4. The State would also be required to cure the notice defects documented in the record and discussed below, by including "[a] clear statement of the specific reasons supporting the intended action [and] [t]he specific regulations that support" the individual's termination. *See infra* pp. 4–6. The State would be required to inform Subclass members of their right to a fair hearing, including the right at a hearing to demonstrate "good cause" as defined by TennCare rules, and the right to regain their coverage within 90 days of termination by submitting requested information or documentation that establishes their eligibility. *See infra* pp. 6–8. The State would be required to provide a fair hearing to any Subclass member who timely challengers her termination, unless the sole issue raised by her appeal is a federal or state law requiring an automatic change adversely affecting some or all beneficiaries. *See infra* pp. 9–14. Finally, the State would be required to resolve Subclass members' appeals within 90 days, unless the State cannot reach a decision because the appellant requests a delay or fails to take a required action, or because of an administrative or other emergency beyond TennCare's control. *See infra* pp. 14–16.

As explained in the P.I. Memo, and demonstrated by the Amended Complaint, Plaintiffs' requested relief satisfies the criteria for a preliminary injunction. *See Obama for America v.*

Husted, 697 F.3d 423, 428 (6th Cir. 2012).

A. Plaintiffs Are Likely to Succeed on the Merits.

Constitutional due process is indispensable in complex safety net programs like Medicaid, whose enrollees' "brutal need" for assistance makes an opportunity for a *pre*-deprivation hearing imperative. *Goldberg v. Kelly,* 397 U.S. 254, 261 (1970). The need for a procedural safety net was especially urgent during the Terminations Period, when the State was in the process of implementing the TennCare Eligibility Determination System (TEDS) and faced numerous "problems," "issues" and "defect[s]." ECF 142-2, ¶¶ 25, 35. Sadly, during this period when enrollees most needed the ability to identify and challenge TennCare's mistakes, the State's policies and processes denied them the due process safety net guaranteed by the Constitution and federal law.

1. Defendant Systematically Failed to Provide Adequate Notice Before Terminating TennCare Coverage of Reinstatement Subclass Members.

a. Defendant's Notices Inaccurately Represented That the State Had Considered All Bases of Eligibility.

Due process and the Medicaid statutes require TennCare to consider *all* eligibility categories before finding that an enrollee is no longer eligible for coverage. *See, e.g.*, 42 C.F.R. § 435.916(f)(1). But while the State's NODs claimed that TennCare did so (*see* ECF 142-5 at PageID # 4967; # 4984; ECF 192-3 at PageID # 7429), that was untrue throughout the period during which Reinstatement Subclass members were terminated from coverage. Instead, individuals terminated from TennCare during that period lost coverage without TennCare considering their eligibility for seven of the program's 25 categories of eligibility:

- TennCare failed to consider eligibility for four categories related to receipt of Supplemental Security Income (SSI).[2] During the relevant time period, TEDS had not yet been

[2] One such category was current SSI eligibility, which automatically entitles an individual to Medicaid coverage. ECF 142-2, ¶ 35(a), (g), (i); ¶ 52 n.15; ¶ 59(c); ¶ 126; ECF 142-11 at PageID #

modified to identify eligibility in these categories (ECF 166, ¶ 83(a), (d), (h), (i), (j), (k), (l), (m)), and TennCare's notices did not solicit information from enrollees that would have enabled TennCare to manually identify enrollees' eligibility in those categories. *Id.* ¶ 59.

- TennCare failed to consider eligibility for the Institutional Medicaid category, which covers individuals who spend 30 days or more in a medical facility such as a hospital or nursing home. Tenn. Comp. R. & Regs. 1200-13-20.08(5); 42 C.F.R. § 435.1009; 42 CFR § 435.1010; 42 CFR § 435.236; 42 CFR § 435.622. It was not until after the filing of this lawsuit that the State added questions to its pre-termination notice that would elicit information necessary to identify individuals eligible in that category. ECF 166, ¶ 65(a)(11); *cf.* ECF 142-2, ¶ 59(f).

- TennCare failed to identify eligibility based on current receipt of TennCare home and community-based services ("HCBS"). TennCare did not check its own enrollment records to see if a person was already receiving HCBS unless the individual volunteered information suggesting that they were (ECF 166, ¶ 57), nor did it elicit information from enrollees to identify eligibility based on current receipt of HCBS through the CHOICES or ECF CHOICES programs. ECF 142-2, ¶¶ 59(f), 133; Am. Compl. ¶¶ 258–60.

- TennCare systematically failed for 11 months of the Terminations Period to consider children's eligibility for Transitional Medicaid and did not start screening for that category until TEDS was modified on February 23, 2020. ECF 166, ¶ 83(g).

Moreover, the State's terminations without consideration of all bases of eligibility were not limited to the seven categories discussed above that were systematically overlooked. Because the State uses a "household or family case-based system" for redetermining eligibility, TennCare needed to merge contact and eligibility data from disparate sources into the same household cases. ECF 142-2, ¶ 19. From May 2019 to December 2021, during the conversion of eligibility records from older databases, TennCare processed 257,698 individuals—across all categories of eligibility—through "conversion status," in order to merge them with other records of individuals purportedly in the same households. ECF 166, ¶ 23. In doing so, TennCare misclassified eligibility information from some cases as belonging to others. ECF 142-2, ¶¶ 15 n.9, 24; 25(a)–(d); 35. In

5190. The other three overlooked categories related to former eligibility for SSI: Widow/Widower (W/WW), Disabled Adult Child (DAC), and Pickle Amendment. ECF 142-2, ¶¶ 14, n.8.

many cases, that resulted in enrollees being terminated without an assessment of individual eligibility or any notice whatsoever. ECF 166, ¶¶ 19–23, 25–27, 80–81; Am. Compl. ¶¶ 100, 137–63, 251–89, 309–26, 356-58, 415–36, 455-63. In other instances, the process transferred incorrect information about members' categories of eligibility. ECF 142-2, ¶ 25(d); *see also* ECF 166, ¶¶ 19–23, 25–27, 81. In all of these instances the State terminated members' coverage without considering all eligibility categories as required by due process. 42 C.F.R. § 435.916(f)(1).

b. Defendant's Notices Omitted Specific Reasons and Legal Authorities Supporting Ineligibility Determinations.

Constitutional principles of due process require the State to provide a member timely pre-deprivation notice detailing the reasons for a proposed termination. *Goldberg*, 397 U.S. at 267–68. Those reasons must include both "[a] clear statement of the specific reasons supporting the intended action [and] [t]he specific regulations that support, or the change in Federal or State law that requires, the action." 42 C.F.R. § 431.210.[3]

TennCare's NODs provide neither. For example, standard template language in Plaintiff SFA's NOD states, "We received a change in your facts so we checked to make sure you still qualify. We reviewed your facts and decided that you don't qualify anymore." ECF 142-26, at PageID # 5421; *see also*, ECF 192-6, PageID # 7466. Plaintiff SFA's NOD does not state what facts TennCare thinks changed or which facts make SFA ineligible. The notice also states "We sent you a letter asking for more facts, but you didn't send us what we needed. So we did not have

[3] Nearly two-thirds of TennCare members are eligible as children or caretaker relatives in the "MAGI category," *see* ECF 166, at Page ID # 6383, which requires even more stringent notice, including a renewal packet that is prepopulated with the information the State already has that is relevant to the individual's eligibility along with clear instructions on how to complete the form and correct any inaccurate pre-populated information. 42 C.F.R. § 435.916(a)(2)-(3); *see also* Anne Marie Costello, *Medicaid and Children's Health Insurance Program (CHIP) Renewal Requirements*, https://www.medicaid.gov/federal-policy-guidance/downloads/cib120420.pdf. (last visited June 30, 2022).

enough information to decide if you qualify." *Id.* The notice does not state what additional information was needed, or even when the earlier letter was sent.

When TennCare determines that someone is ineligible due to excess income, the NOD unhelpfully states only that, "The monthly income limit for the kind of <coverage> you could get is <$xxx.xx>. Our records show your monthly income is over this limit." ECF 142-7, PageID # 5085. The State claims that it deliberately omits members' income information "for privacy reasons," ECF 142-2, ¶ 59(b), yet the State *does* include such information in its "pre-populated" Renewal Packets, as is required. 42 C.F.R. § 435.916(a)(2)–(3); ECF 142-2, ¶¶ 47–48; *see also* ECF 142-10 at PageID # 5151 (fields to pre-populate available monthly income). Plaintiffs could not obtain the income information relied upon by the State even when they searched for it in their online accounts or requested it by phone. Am. Compl. ¶¶ 110, 302, 318. The State terminated over 13,000 members of the Reinstatement Subclass on the basis of excess income (ECF 166, ¶ 56) while intentionally withholding the income information on which those terminations were based, leaving enrollees without facts essential to determine whether the State was in error.[4]

Furthermore, instead of providing the "specific regulations that support" a member's proposed termination, TennCare NODs simply include an obscure reference, in 9-point font, to "[Tenn.Comp.R&Reg. 1200-13-20]." *See, e.g.*, ECF 142-26 at PageID # 5421. There is nothing in the NOD to alert members that this enigmatic reference is to TennCare eligibility rules, much less where to find a copy. Members who somehow discover the rules will find themselves even more

[4] The State's standard Case Change Notice that precedes some NODs does not disclose the specific change in income either: "We've made a change to your income. To protect your privacy we are not printing this change in this letter. . . . To confirm the change we've made, log in to your <TEDS NAME> account online or by using your mobile app. Or you can call us at <TCC phone>." ECF 142-12 at PageID # 5222–33. As noted above, members who followed those instructions and sought the information online or by phone remained in the dark, unable to learn the factual basis for their loss of coverage.

at a loss to understand why TennCare contends they are ineligible, because the NOD's citation is to a 95-page regulatory compendium,[5] with no indication as to which of the myriad rules purportedly supports the termination of coverage or what they would need to show to prove eligibility in a hearing. The same generic citation is provided regardless of which of 64 different reasons forms the basis for an enrollee's termination. *See* ECF 142-7 (all citing "[Tenn.Comp.R&R 1200-13-20]") for a "Rules Citation.").

c. Defendant's Notices Withhold Information About Members' Rights.

Enrollees are entitled to a hearing to show that they have "good cause," defined as "circumstances outside [their] control and despite [their] reasonable efforts," TennCare Rule § 1200-13-19-.02 (20), for failing to submit information requested by TennCare or to show "why the appeal or request for a hearing could not be filed within the required time limits," *id.* § 1200-13-19-.06(3); *see also id.* § 1200-13-19-.07(3) ("upon evidence presented at a good cause hearing…"). TennCare intentionally withholds information about this important appeal right from members, and it is not reflected in *any* written notice of appeal rights. ECF 142-2, ¶ 53.

Even when a member calls TennCare Connect and describes circumstances clearly beyond their control, they are denied an appeal without being informed of the right to a "good cause" hearing. *Id.* ¶ 71(c); Am. Comp. ¶¶ 146, 209, 245–46, 470–72. State officials treat "good cause" as grace to be dispensed only "in TennCare's discretion," ECF 142-2, ¶ 71(c), rather than as the member's right established by State regulations and thus protected by constitutional due process, which requires notice of the right and how to invoke it. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 565, 577 (1972).

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[5] *See* Rules of the Dep't of Finance and Admin. Div. of TennCare, Chapter 1200-13-20, TennCare Technical and Financial Eligibility, https://publications.tnsosfiles.com/rules/1200/1200-13/1200-13-20.20210518.pdf.

In addition, all of the notices omitted information about an important limitation on TennCare's authority to terminate coverage and members' corresponding right to retain coverage. If termination is based on a member's purported failure to submit requested information, and the member submits the requested information within 90 days of her termination, TennCare must reinstate her retroactively without a break in coverage. 42 C.F.R. § 435.916(a)(3)(iii); Tenn. Comp. R. & Regs. § 1200-13-20-.09(1)(d)(11); *see* ECF 142-5 to -6. None of the NODs received by Plaintiffs included information regarding that right to reinstatement, *see*, *e.g.*, ECF 142-21 to -29; ECF 192-3, because in the exercise of its "considered judgment," TennCare intentionally withholds that information from members. Ms. Hagan explained that, "including such information could be detrimental to [TennCare's] members by deterring them from getting their renewal packets in on time and potentially causing a break in coverage." ECF 166, ¶¶ 53, 58. But that supposed justification is belied by the fact that TennCare continues to withhold notice of that right even *after* enrollees have missed the deadline and are being notified of their termination. *See, e.g.*, ECF 142-26, -28; ECF 192-6. The omission of this vital right is another way in which TennCare notices fail to provide sufficient information to enable the member to protect her coverage and to choose for herself whether to "acquiesce or contest" the State's action. *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950).

d. Defendant's Template Notice Misstated Members' Appeal Rights.

TennCare is required to provide an opportunity for a hearing "to any individual whose claim for medical assistance . . . is denied." 42 U.S.C. § 1396a(a)(3). Instead of informing members of that unambiguous right, TennCare NODs convey a message that the member must be able to explain why she wants a fair hearing, and that only some reasons are acceptable. *See* ECF 142-7 (listing of NOD variable text insertions that provide acceptable reasons, under the heading, "English Fair Hearing," that correspond to "Description" of termination cause). As the Court

recognized during the March 4 hearing, some NODs were even more explicit, stating "If you still think we made a mistake about a fact, you can have a fair hearing. If you don't think we made a mistake about a fact, you can't have a fair hearing. You don't have a right to a fair hearing just because you don't like this decision or think it will cause problems for you." *See* ECF 142-5 to -6, 142-21 to -29; ECF 192-3 at PageID # 7432. This not only misled members and frustrated their hearing rights, as the Court observed, by misstating the scope of their federal rights. *See* Hrg. Tr. 20:11–16; 21:2–6; 21:21–22. The language also materially misstated enrollees' rights under TennCare's own regulations. ECF 166, ¶ 72(f).

At the March 4 hearing, the State represented to the Court that it is "currently using and will continue to use" the language in question "in every case where [an individual] might be dis-enrolled" from TennCare. *Id.* 15:19–18:3. However, the State's June 9 filing, which was not supported by a declaration, attempts to walk away from that representation and instead claims that only *some* members of the Reinstatement Subclass received NODs with the offending language. ECF 213 at 2, 4. That is immaterial, for *all* NODs instructed members that, if they wanted to appeal their termination, it was not sufficient to merely request a fair hearing. Rather, the NODs instructed members that they must state "[t]he reason why you want to appeal - tell us as many facts as you can," and provide "[a]ny proof that shows why you think we made a mistake." ECF 166-3, PageID # 6518; ECF 192-3 PageID # 7433. That demand was likely to deter appeals, since the notices' omission of crucial facts about TennCare's reasons left members ill-equipped to explain, much less submit proof, why TennCare had made a mistake.

Thus, whether or not an individual member of the Reinstatement Class received the specific language that is the subject of the Defendant's June 9 filing, Plaintiffs have demonstrated that all Subclass members have a likelihood of success on the merits of their claim that their coverage was

terminated in violation of statutory and constitutional due process requirements, as a result of the numerous other systemic deficiencies in TennCare's policies and practices catalogued in this memorandum and in the record.[3]

2. Defendant Systematically Denied Reinstatement Subclass Fair Hearings.

a. The State Denied Subclass Members a Fair Hearing Based on its Illegal Requirement That an Appeal Must Present a "Valid Factual Dispute."

As noted above, federal statutes and the Fourteenth Amendment guarantee the right to a hearing to "any individual who requests it." *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220. Federal regulations permit an exception only if "the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all beneficiaries," 42 C.F.R. § 431.220(b), a situation irrelevant to the facts in this case. Pursuant to its own rules and procedures, however, TennCare subjects *every* appeal to a review to determine whether it raises a "valid factual dispute" and closes the appeal without a hearing if the appellant fails to demonstrate that her appeal raises such a dispute. ECF 142-2, ¶ 71(f); TennCare Rules 1200-13-13-.11(3)(d) and 1200-13-19-.05(3).

In a recently filed declaration, William Gavigan, M.D. describes TennCare's use of the "valid factual dispute" policy (which is unchanged since the Terminations Period and therefore applied to all Reinstatement Subclass members) to deny his efforts to appeal the termination of his daughter's coverage as a Disabled Adult Child ("DAC"). *See* ECF 209 through 210-8. TennCare

[3] The State's filing also informed the Court of prospective changes to the misleading NOD language. ECF 213 at 1. The State has refused to provide Plaintiffs a copy of the new notice described in its filing. ECF 220, ¶ 12. From the description, it appears the new notice still reflects the State's policy that appeals are only allowed if members can demonstrate that they are raising a "valid factual dispute," which, as discussed herein, misrepresents the scope of members' rights.

Even if the changes were meaningful, they would be irrelevant to the pending motions. For members of the Reinstatement Subclass, each of whom was terminated pursuant to due process violations documented in the record and discussed herein, prospective changes by the State afford no relief from the ongoing harm caused by the State's past violations.

notified Dr. Gavigan in January 2022 that it had received a report of an undisclosed change in his daughter's income and would no longer cover her Medicare premiums under the Medicare Savings Program. ECF 210, ¶¶ 5–10. Dr. Gavigan filed a timely appeal and requested continuation of benefits, but TennCare failed to provide a continuation of benefits as required. *Id.* ¶¶ 8–9, 13; ECF 218, ¶ 11; *cf.* 42 C.F.R. 431.230. Dr. Gavigan supported the appeal with a detailed explanation of why TennCare's action was in error, and why his daughter remained eligible for TennCare as a DAC, which qualified her to continue to have TennCare cover her Medicare premiums. Dr. Gavigan even submitted a copy of the relevant regulation governing the calculation of her income establishing her continued eligibility. ECF 210 ¶ 9; ECF 210-3. Remarkably, TennCare then sent Dr. Gavigan another notice demanding *more* information in order to establish a valid factual dispute, but without specifying what was needed. Dr. Gavigan had already provided all of the relevant information and was at a loss to know what else to submit. TennCare closed his daughter's appeal without a hearing on the purported grounds that he had not described the mistake that he thought TennCare made. ECF 210, 210-6. Ms. Hagan defends the peremptory denial of Ms. Gavigan's appeal as a completely proper application of the TennCare policy. ECF 218, ¶ 19.[6]

The State in its June 9 notice, *see* ECF 213, argues that TennCare's policy is consistent with *Rosen v. Goetz*, 410 F.3d 919, 923–24 (6th Cir. 2005), and *Grier v. Goetz*, 402 F. Supp. 2d 876, 923 (M.D. Tenn. 2006). But neither ruling provides any support for TennCare's use of the policy in the current context, as both cases involve automatic changes adversely affecting masses

[6] Ms. Hagan concedes that Dr. Gavigan's daughter "is likely eligible for DAC Medicaid coverage," contends that TennCare had moved her to a different category known as ECF CHOICES At Risk, and if reclassified as DAC in order to keep having her Medicare premiums paid, she would lose the services provided by ECF CHOICES. ECF 218, ¶ 5. TennCare's notices contained no hint of any of this, and Dr. Gavigan was afforded no opportunity to learn, much less contest, the basis for TennCare's actions adversely affecting his daughter.

of beneficiaries. *Rosen* involved eligibility appeals by beneficiaries who lost coverage when the TennCare waiver and state law were changed to eliminate three of the seventeen eligibility categories that TennCare then covered and to disenroll 323,000 beneficiaries from the TennCare program who had been eligible under those three eliminated categories. 410 F.3d at 922.[7] *Grier* arose from a different aspect of the same changes to the TennCare waiver and state law, which limited the scope of covered benefits for those who remained on the program. 402 F. Supp. 2d at 888.

None of the members of the Reinstatement Subclass were terminated due to a "Federal or State law requiring an automatic change adversely affecting some or all beneficiaries." 42 C.F.R. § 431.220(b). Every reason was specific to the individual member and his personal circumstances, *see* ECF 142-7, and each termination was the result of an individual eligibility determination made during annual renewal or as a result of a reported change in the enrollee's circumstances affecting eligibility. ECF 142-2, ¶¶ 12–15.

TennCare nonetheless denied 3,643 Subclass members a hearing and peremptorily closed their appeals based on a purported failure to present a valid factual dispute, in accordance with its unlawful policy. ECF 166, ¶ 5. It closed another 3,649 appeals that it classified as "untimely," although those closures also involved a refusal to consider as "valid" any member's factual claims that they had in fact appealed in a timely manner, or that they had good cause for failing to do so. *Id.; cf.* Am. Compl. ¶¶ 305, 358. These numbers include only those who submitted appeals and

[7] Even in the context of a mass change, the TennCare policy as currently applied would not pass muster. The Sixth Circuit in *Rosen* emphasized that, "In implementing this 'valid factual dispute' inquiry, the State has assured us, (1) a recipient will not be required to establish Medicaid eligibility in order to be entitled to a hearing and (2) a recipient will be entitled to all reasonable inferences, in other words the benefit of the doubt, in determining whether a material fact dispute has been established or whether a material dispute about the application of the regulations to a given fact pattern has been established." 410 F.3d at 929. The Plaintiffs' experiences and those of Dr. Gavigan's daughter show those assurances to be a dead letter.

not those who were deterred by TennCare's incorporation of the "valid factual dispute" policy into the NOD's instruction, described above, that would-be appellants must provide facts and submit proof as to why their termination was mistaken. Nor do those numbers include those who attempted to appeal by phoning TennCare Connect, and who after talking with a TennCare agent about what TennCare required to obtain a hearing, were deterred from appealing or were urged to file a new application instead. *See, e.g.*, Am. Compl. ¶¶ 146, 154, 170, 212, 270, 313, 451.

b. Defendant Denied Subclass Members a Hearing to Prove "Good Cause."

As previously noted, State rules entitle members to a hearing to show that they have "good cause," but TennCare intentionally refuses to inform them of that right. Tenn. Comp. R. & Regs. §§ 1200-13-19-.06(3); 1200-13-19-.07(3) ("upon evidence presented at a good cause hearing…"); ECF 166, ¶ 53. When members describe circumstances to TennCare that make clear that their failure to timely respond or to timely appeal was due to "circumstances outside [their] control and despite [their] reasonable efforts," they do not receive the fair hearing promised by the regulations and Due Process. *See* TennCare Rule § 1200-13-19-02(20); Am. Comp. ¶¶ 146, 209, 245–46, 470–72. Instead, an anonymous TennCare worker decides that the enrollee's reasons lack merit and peremptorily denies relief, without any pretext of due process and pursuant to a "good cause" standard far more stringent than the one set in TennCare's rules. ECF 166, ¶ 72(c); *cf.* Tenn. Comp. R. & Regs. § 1200-13-19-.02(20).

c. Defendants Systematically Failed to Provide Subclass Members Timely Hearings.

The most common way in which TennCare denied Reinstatement Subclass members' hearing rights was by simply never providing them a hearing at all, or at least not until long after the time period required by law (and after it was too late to protect them from harm from loss of coverage). The State is required to provide a fair hearing and render a decision within 90 days of

receiving a timely request for an appeal. 42 C.F.R. § 431.244. The State systematically failed to do so, delaying the appeals of multiple Plaintiffs for nearly a year. *See, e.g.*, ECF 142-2, ¶¶ 153–57, 200 (noting 11-month delay in taking final actions on Plaintiffs Hill's and Vaughn's appeals).[8]

TennCare attempts to normalize its noncompliance with the law by prioritizing certain appeals ahead of others, rather than by modifying their procedures so that all appellants receive a timely hearing. Ms. Hagan claimed that "Appeals in which the appellant does not have current eligibility (i.e., where there is no continuation of benefits ("COB") are prioritized over appeals in which the appellant does have current eligibility such that missing the 90-day deadline will not have an adverse impact on that appellant." ECF 166, ¶ 70.

Ms. Hagan's blithe assurance provides no comfort, not only because it is dismissive of TennCare members' due process rights, but also because the claim that there is no "adverse impact" on appellants is an utter fiction. Her assurance that appeal delays were mitigated by the continuation of members' benefits is hollow. Many enrollees did not receive continuation of benefits ("COB") because they did not receive the notice required by law, or because TennCare's failure to accommodate their disabilities prevented them from submitting a timely request. Am. Compl. ¶¶ 243–45, 272, 430–32, 470–72. For others, a programming flaw in TEDS denied them COB despite their timely requests. *Id.* ¶¶ 25, 121, 125, 229, 280, 372; ECF 142-2, ¶¶ 35(c), 123, 125, 154, 185. Moreover, even members whose appeals would have supposedly been "prioritized"

[8] The systematic failure to provide timely hearings is not limited to the turbulent Terminations Period. Ms. Hagan acknowledged in January 2022, nearly two years after the last Subclass members lost coverage, that, "Due to the volume of eligibility appeals TennCare receives, this deadline at times requires TennCare to prioritize certain appeals because it is not possible to schedule all appeals for hearing before the ninety-day deadline." ECF 166, ¶ 70. Indeed, TennCare failed to reliably meet the 90-day deadline even during the period between December 1, 2020 and December 1, 2021, when there were almost no terminations because the pandemic moratorium was in effect. *Id.* ¶¶ 37, 71.

because they were not receiving continuation of benefits were unable to get hearings no matter how dire their medical condition or how desperate the multiple pleas of family members, health care providers, Health Department staff or attorneys. Am. Compl. ¶¶ 181–96.[9]

Not a single one of the named Plaintiffs ever received a fair hearing to contest their termination during the Terminations Period, even though some waited as long as 11 months.[10] *See*, *e.g.*, ECF 142-2, ¶¶ 153–57, 200. If they obtained coverage, it was not because TennCare afforded them hearings and corrective action, but because of legal interventions that resulted in a work-around of the failed appeal process. *See* Am. Compl. ¶¶ 247–48; 261–64; 433–35.

B. Plaintiffs Will Suffer Irreparable Harm Absent A Preliminary Injunction.

Without an injunction, Class members without TennCare coverage face risk to their health and well-being, including from their inability to obtain medication and medical care. P.I. Memo at 21–22. Courts in this district have found irreparable harm in analogous circumstances. *Id.*; *see also, e.g.*, *Wilson v. Gordon*, 2014 WL 4347807, at *4 (M.D. Tenn. Sept. 2, 2014), *aff'd*, 822 F.3d 934, 958 (6th Cir. 2016), *and vacated on other grounds sub nom. Wilson v. Long*, 2019 WL 8810351 (M.D. Tenn. Jan. 23, 2019). The State makes no effort to dispute medical researchers' consensus, quoted in Dr. Butka's declaration, that those without health coverage "live sicker and die sooner." ECF 156-1, ¶ 19.

The State's temporary COVID-19 termination moratorium—under which the State should

[9] Ms. Hagan also states that, "The oldest appeals without COB are also prioritized over newer appeals." ECF 166, ¶ 70. That is telling, because the infant S.F.A.'s July 24, 2019 appeal had been pending over six months by the time the Social Security Administration approved her SSI application, thereby qualifying her for Medicaid and mooting her appeal. Am. Compl. ¶¶ 185-186, 200. No hearing had even been scheduled at that point, so the "oldest appeals" must have been pending substantially longer.

[10] D.R. received a hearing in 2017 on her unsuccessful appeal of the termination of her son, J.Z. but was unable to obtain a hearing during the Terminations Period. Am. Compl. ¶¶ 418–19.

not disenroll anyone from TennCare except in certain limited circumstances—*does not* lessen the irreparable harm to members of the Reinstatement Subclass, who remain without coverage. The State disenrolled them, using its unlawful policies and procedures and flawed safety net, *before* it imposed the moratorium. Those individuals' need for the medical coverage to which they are legally entitled remains as dire as ever, yet they are deterred from reapplying by the State's insistence that, based on TennCare's consideration of all relevant facts and laws, they are not eligible.

C. Equity and Public Interest Favor A Preliminary Injunction.

Equity and public interest favor protecting the health of impoverished Tennesseans and the public health of the state. Any marginal costs to the State of complying with injunctive relief pale in comparison to, and 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. P.I. Memo at 23–24. "Courts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services and the party against whom the injunction is issued claims that the injunction places significant costs on them." *Wilson*, 822 F.3d at 958 (affirming injunction). The injunction also advances the public interest because it comports with expressed federal law. *See infra* Part I.D.

D. Reinstatement Is Appropriate for Procedural Due Process Violations.

Under constitutional, regulatory, and decisional law, reinstatement is an appropriate remedy for procedural due process violations. The State must provide procedural safeguards that "meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and any additional standards specified in [the Medicaid regulations]." 42 C.F.R. § 431.205(d). To that end, "the agency must provide all … beneficiaries with timely *and adequate written notice* of any decision affecting their eligibility." *Id.* § 435.917(a) (emphasis added); *see also id*. § 435.919(a) (requiring

an agency to give "beneficiaries timely *and adequate notice* of proposed action to terminate, discontinue, or suspend their eligibility, or to reduce or discontinue services they may receive under Medicaid.") (emphasis added). Such notice must contain "[a] clear statement of the specific reasons" and "[t]he specific regulations that support" termination, as well as explanations of the individual's hearing rights and the circumstances under which benefits continue if a hearing is requested. 42 U.S.C. § 1396a(a)(3), 42 C.F.R. §§ 431.210, 435.917(b)(2).

Under regulations implementing 42 U.S.C. § 1396a(a)(3) and *Goldberg,* a state Medicaid agency "must reinstate and continue services until a decision is rendered after a hearing" whenever "[a]ction is taken without the advance notice required". 42 C.F.R. § 431.231(c); *see also id.* § 435.916(f)(1) ("Prior to making a determination of ineligibility, the agency must consider all bases of eligibility"); § 435.930(b) (requiring agency to "[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible"); § 435.952(d) (prohibiting termination without "proper notice and hearing rights" including under subpart E of part 431).

As the U.S. Supreme Court, the Sixth Circuit, and federal courts in the Sixth Circuit have recognized, if plaintiffs' procedural due process rights have been violated, then reinstatement or a return to the status quo before the deprivation is the remedy until appropriate due process is provided. *See*, *e.g.*, *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 544 (1984) (directing a public employer to suspend an employee who posed a threat to the workplace, *with pay*, prior to the time the pretermination hearing is held); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 928 (6th Cir. 1988) (recognizing reparative relief for expelled student for due process violation unless *school district* shows student would have been expelled anyway); *Duchesne v. Williams*, 821 F.2d 1234 (6th Cir. 1987), *vacated on other grounds*, 849 F.2d 1004 (6th Cir. 1988) (recognizing reinstatement remedy for procedural due process violation); *Hicks v. Berryhill*, 392

F.Supp.3d 784, 789-90 (E.D. Ky. 2019) (recognizing reinstatement of Social Security benefits); *Irizarry v. Cleveland Pub. Library*, 727 F. Supp. 357, 364 (N.D. Ohio 1989) (finding "[t]he proper remedy is to place the defendant in the position that the Constitution mandates he be in prior to a pretermination hearing—awaiting said hearing while receiving pay.").

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the relief requested in their preliminary injunction motion.

II. Certification of a Rule 23(b)(2) Injunctive Relief Class Is Appropriate.

Plaintiffs seek certification of a Plaintiff Class, a Disability Subclass, and a Reinstatement Subclass. *See* Am. Compl. ¶¶ 477–79. The proposed class and subclasses satisfy each requirement for certification under Rules 23(a) and 23(b)(2), and the Amended Complaint's delineation of the Reinstatement Subclass satisfies the concerns expressed by the Court regarding class certification during the March 4, 2022 hearing.

Commonality.[11] The Sixth Circuit has held that commonality "is satisfied if there is a single factual or legal question common to the entire class." *Powers v. Hamilton Cnty Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). That standard is easily satisfied here. Plaintiffs allege that TennCare's unlawful policies and practices for notices and appeals applied generally to all members of the Plaintiff Class. *See, e.g.*, Class Cert. Memo at 15–17. For example, Plaintiffs allege that pursuant to unlawful and generally applicable rules and procedures, enrollees whose coverage is terminated are granted a hearing only if TennCare determines the appeal raises a "valid factual dispute." *See supra* pp. 11–14. Whether this policy, and the other allegedly unlawful policies applicable to every TennCare enrollee, comply with the Medicaid Act and constitutional due process requirements is a common issue for every member of the proposed class and subclasses. *See, e.g.*,

[11] The State does not contest that numerosity under Rule 23(a) is satisfied here. *See* ECF 164.

Wilson, 2014 WL 4347585, at *2–3 (finding commonality satisfied where plaintiffs alleged systemic deficiencies in TennCare and rejecting argument that class members' individual circumstances undermined commonality).

Typicality. Typicality is satisfied if the proposed class representative's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (quotation omitted). "[T]he test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Kerns v. Caterpillar, Inc.*, 2007 WL 2044092, at *5 (M.D. Tenn. July 12, 2007). The named Plaintiffs easily satisfy typicality for the Class and both proposed subclasses.

During the March 4, 2022 hearing the Court noted that Plaintiffs did not then "have a representative plaintiff within the 10[8],000 who [was] disenrolled" during the Terminations Period and remained disenrolled. Hrg. Tr. 52:20–22.[12] The Court suggested that subclasses other than the Disability Subclass might be appropriate because the Court viewed the issues raised by those seeking preliminary injunctive relief as distinct from the issues raised by the Class as a whole. *See id.* 52:23–53:1. The Amended Complaint resolved both concerns. Plaintiffs Person, M.P.L., E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R. will serve as class representatives for the proposed Reinstatement Subclass, which comprises all of the approximately 108,000 individuals whose TennCare coverage was involuntarily terminated during the Terminations Period and who are not

[12] The Court specifically asked that the Plaintiffs identify a class member who received an NOD with the text stating that they could only appeal if they were able to identify a mistake of fact that TennCare had made. Hrg. Tr. 48:13–15. New Plaintiff Allana Person received such a notice on June 12, 2019 and remains without coverage. Am. Compl. ¶ 385; ECF 192-6; ECF 220-1. In addition, Plaintiff Barnes received multiple notices from TennCare containing the misleading language regarding her right to a pre-deprivation hearing. *See* ECF 142-24 at 7; ECF 142-27 at 6.

currently enrolled. Am. Compl. ¶ 479. Ms. Person, M.P.L., E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R. are typical of the Reinstatement Subclass: Their claims arise from the identical course of conduct and are based on the same legal theories as the claims of all other Reinstatement Subclass members, *i.e.*, the State's unlawful disenrollment of their TennCare coverage without adequate notice and opportunity to be heard.[13] *Id.* ¶¶ 492, 495–500. *See Wilson*, 2014 WL 4347585 at *3 (plaintiffs' "claims ar[o]se from the same practice and course of conduct that g[a]ve rise to the claims of other potential class members and are, therefore, typical of the other purported class members as to that policy or practice").

Typicality is also satisfied for the Class and the Disability Subclass. Named Plaintiffs and each Class member allege uniform, systemic deficiencies in TennCare's notice and hearing practices under the Fourteenth Amendment, the Medicaid Act, and implementing regulations. Class Cert. Memo at 20. The ADA claims of the Disability Subclass class representatives and each member of that subclass stem from TennCare's across-the-board failures to evaluate disability-related eligibility categories and to provide accommodations making the redetermination process navigable for people with disabilities. *Id.* at 20–21. Regardless of any factual differences in the reasons for TennCare's termination of individual class members' benefits, typicality thus is satisfied for the Class and proposed subclasses. *See, e.g.*, *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (a class "representative's claim need not always involve the same facts or law"; instead, typicality is satisfied "provided there is a common element of fact or law").

Adequacy. To satisfy adequacy, a "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 562. As explained in the

[13] The State's reinstatement of coverage for M.P.L., E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R. *after* the filing of the Amended Complaint does nothing to undermine class certification, as discussed herein. *See infra* p. 22.

Class Cert. Memo (at 21, 25), adequacy is satisfied for both the Class and Disability Subclass. Plaintiffs Person, M.P.L., E.R., K.R., M.R., A.R., K.E.R., A.M.R., and D.J.R. are adequate representatives of the Reinstatement Subclass, as they all lost their coverage during the Terminations Period and remained without TennCare at the time of filing the Amended Complaint.

The new Plaintiffs' adequacy to represent the Reinstatement Subclass, and their ability to pursue preliminary injunctive relief on its behalf, is unaffected by the post-filing restoration of their coverage. The State, after conducting discovery of the new Plaintiffs, acknowledged that M.P.L "was eligible at the time of his May 24, 2019 termination from TennCare" and reinstated coverage retroactively for him and his family. ECF 220, ¶ 2-3; ECF 220-1. The State also approved prospective coverage for J.R. and her family but does not concede that they or Allana Person were eligible at the time of their termination. *Id.* The eventual resolution of their individual TennCare eligibility status does not affect their standing, which is determined as of the filing of the Amended Complaint. At that time, they each remained without coverage and therefore undeniably had standing. Am. Compl. ¶¶ 352–63, 379–95, 404–14; *see also* ECF 178; Hrg. Tr. 36:5–10, 12–14 (rejecting State's motion to dismiss arguing, *inter alia*, lack of standing).

Nor have the new Plaintiffs' claims been rendered moot by the State's post-filing restoration of coverage. Allana Person remains without TennCare. The remaining Plaintiffs, like everyone whose coverage is restored, remain vulnerable to the same deprivations without due process that they experienced in the past and that they challenge on behalf of the Class and Subclasses. Upon the expiration of the State's temporary COVID-19 termination moratorium, all TennCare enrollees will face redetermination of their eligibility at least annually—and more often, if TennCare deems necessary—pursuant to the challenged policies and practices that, absent the requested relief, violate individuals' due process rights and ADA requirements. ECF 161, 161-1,

161-2; ECF 166, ¶ 38. Systemic problems and deficiencies continue to undermine TennCare enrollees' ability to reliably receive the notice that is required by law.[14] And the State still uses and defends the same appeals process that, Ms. Hagan maintains, "worked as intended" when it improperly denied Plaintiffs the ability to challenge the wrongful termination of their coverage. ECF 142-2, ¶¶ 132, 136 and 188; *cf.* ECF 202, ¶¶ 238-248, 251-264, 422-435. The named Plaintiffs retain a vital personal stake in the successful prosecution of their claims.

This Court has already rejected the State's arguments that by extending coverage to the original named Plaintiffs, their claims were mooted. ECF 178; Hrg. Tr. 36:5–10, 12–14. That ruling applies equally to the new Plaintiffs whom the State attempted to "pick off" "before the district court could reasonably be expected to rule on the class certification motion" and preliminary injunction motion. *See Wilson v. Gordon*, 822 F.3d 934, 947 (2016). As Judge Todd Campbell held in *Wilson*, the State "cannot 'opt out' of a class action lawsuit by simply providing relief to the named Plaintiffs." *Wilson v. Gordon*, 2014 WL 4347585, at *3 (M.D. Tenn. Sept. 2, 2014) (quoting *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005)). In such circumstances, "for purposes of class certification, to the extent the named Plaintiffs' claims are considered moot, they should be considered as an exception to the mootness doctrine and relate back to the filing of the Complaint," thus meeting the typicality and adequate representation requirements of Rule 23. *Id.* at *4.

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[14] This is underscored by the recurrent termination of named Plaintiff Michael Hill's benefits without advance notice, despite Ms. Hagan's adamant assurance that there was "no likelihood" of that ever happening again. ECF 142-2, ¶ 157; ECF 145; ECF 166, ¶ 83(m); ECF 209. TennCare's inability to direct mail to the correct addresses has persisted to this day even when Plaintiffs' counsel from the Tennessee Justice Center have been involved. ECF 220, ¶¶ 4–7. It is especially striking that TennCare has been unable to reliably send the right notices and cards to one of the new Plaintiffs, M.P.L. *Id.* ¶¶ 8–9; ECF 220-2; ECF 220-3. When addresses have been correct, TennCare has persisted in sending inaccurate or misleading eligibility notices, even when, due to the moratorium, there should have been no changes in enrollees' eligibility. ECF 220, ¶¶ 10–11; ECF 220-4.

In affirming Judge Campbell's grant of a preliminary injunction, the Sixth Circuit held in *Wilson*, "the fact that the State has taken some steps to remedy the problems faced by the class" *does not* "relieve it of its obligation to provide [pre-deprivation due process] that it is likely statutorily and constitutionally obligated to provide." 822 F.3d at 958. That is particularly true where "the steps the State has taken occurred only after litigation commenced." *Id.*

Here, the State has taken *no* steps to remedy the problems faced by the Reinstatement Subclass, all of whom remain without coverage. For two years, the State has known the identity of every single member of the Subclass, including the new Plaintiffs, but has refused any relief until new named Plaintiffs from the Subclass joined the litigation—and then, the State provided relief to the new Plaintiffs and nobody else. Thus, the State's latest attempt to pick off named Plaintiffs does not undermine their standing to seek preliminary injunctive relief.

Rule 23(b)(2). A class is properly certified under Rule 23(b)(2) if the claims are based on a defendant's pattern or practice generally applicable to the class as a whole, "[e]ven if some class members have not been injured by the challenged practice." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012). "The key to the (b)(2) class is the 'indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or to none of them.'" *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)). 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.

In the March 4, 2022 hearing, the Court said that there are, in effect, "two cases here." Hrg. Tr. 51:11. It distinguished between (1) the approximately 108,000 proposed class members who

currently remain without TennCare coverage, and (2) the remaining class members who "lost coverage and have subsequently regained coverage" and "because of the COVID moratorium there's [a] very small chance that they're going to receive a notice of disenrollment." *Id.* 51:11–17.

The Amended Complaint directly addresses the Court's concerns. Reinstatement Subclass members—and they alone—seek reinstatement to remedy their involuntary disenrollment under TennCare's defective notice and appeals policies and practices. *See* Am. Compl. at 127. Contrary to the State's contentions in opposing class certification, *cf., e.g.*, ECF 164 at 22–24, reinstatement for Reinstatement Subclass members would *not* require the Court to rule on any individual class member's substantive eligibility for TennCare. As 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. *See supra* pp. 17–18. Plaintiffs will prove that the State's generally applicable policies and procedures violated due process, and every Subclass member will therefore be entitled to an indivisible injunction requiring reinstatement pursuant to federal law. *See Gooch*, 672 F.3d 428.

For similar reasons, certification of the Plaintiff Class and Disability Subclass under Rule 23(b)(2) is appropriate. If Plaintiffs succeed on their claims, all Class members will be entitled to indivisible declaratory and injunctive relief to remedy the notice and appeals procedures that Plaintiffs allege violate class members' rights. Class Cert. Memo at 24. Similarly, the Disability Subclass alleges a systematic failure by the State to provide accommodations for people with disabilities seeking to maintain TennCare coverage and seeks indivisible relief so all disabled TennCare enrollees can effectively navigate the redetermination and fair hearing process. *Id.* at 25.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their motions for a preliminary injunction and for class certification.

Dated: July 1, 2022

By: /s/ *Brant Harrell*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document is being served via the Court's electronic filing system on this 1st day of July, 2022 on the following counsel for Defendant.

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