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

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: December 10, 2021

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Plaintiffs respectfully submit this memorandum of law in opposition to Defendant's Motion to Dismiss ("Motion" or "Mot.") (ECF No. 139).

PRELIMINARY STATEMENT

Defendant terminated Plaintiffs' TennCare benefits without affording them due process and, in the case of those with disabilities, reasonable accommodation. Plaintiffs seek judicial relief because the same policies that denied them those procedural safeguards in the past remain in effect today and pose an ongoing threat to not only Plaintiffs but also all others who must rely on TennCare for their vitally necessary health care.

Defendant contends that this entire litigation should be dismissed because, purportedly, all but two Plaintiffs lacked standing at the time the Complaint was filed. But Defendant's concession that two Plaintiffs have standing is fatal, for if even a single plaintiff has standing, a case cannot be dismissed on standing grounds. Moreover, there is no merit to Defendant's argument that the other 32 lack standing because they had TennCare coverage at the time of filing. All Plaintiffs had standing at the time of filing because they were either suffering ongoing injuries—such as medical debt or denials of appeals from eligibility decisions Defendant now admits were erroneous—or were facing the certainly impending risk of future injury from Defendant's obligation under federal law to redetermine every TennCare member's eligibility at least annually and Defendant's policies of terminating eligibility without providing due process or reasonable accommodation, and without considering eligibility in any of several disability-related categories of coverage.

Defendant's contention that he effectively mooted the claims of the two Plaintiffs whose standing he concedes by reinstating their TennCare coverage after they filed this lawsuit is foreclosed by binding precedent. That claim should fare no better now than it did when TennCare, through the same counsel, made the same argument in *Wilson v. Gordon*, 822 F.3d 934 (6th Cir.

2016), which was unequivocally rejected by the late Chief Judge Campbell and the Sixth Circuit.[1] The law since *Goldberg v. Kelly*, 397 U.S. 254 (1970), is clear: an ad-hoc, *post*-termination process cannot resolve Plaintiffs' due process claims, which demand sufficient *pre*-termination proceedings. Indeed, the very purpose of providing adequate notice and opportunity for a pre-termination hearing is to enable individuals to bring mistakes to Defendant's attention *before* they lose coverage. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 (1978) (rejecting procedures as inadequate under due process where the "remedies were likely to be too bounded by procedural constraints and too susceptible of delay to provide an effective safeguard against an erroneous deprivation."). Permitting Defendant's *ad hoc*, post-termination reinstatements to dispose of Plaintiffs' claims would turn *Goldberg*'s fundamental rule of pre-termination due process on its head.

Defendant attempts to hide these fatal weaknesses behind a fog of irrelevant factual assertions about the TennCare Eligibility Determination System ("TEDS"). But factual averments—such as Defendant's self-serving claim that every TEDS defect that harmed Plaintiffs has been cured—have no bearing on Defendant's Rule 12(b)(1) motion to dismiss. Even if Defendant's assertions are true—they are not—they are beside the point. The point is that errors are inevitable, as TennCare officials admit, and the State lacks a process for monitoring the accuracy of its eligibility determinations. ECF No. 142-2 ¶¶ 16, 83; ECF No. 142-4. Indeed, despite Defendant's repeated prior assurances that TEDS was fixed and thus terminations of coverage would, and despite

[1] Judge Campbell rejected the Defendant's mootness argument in his order certifying the class. *Wilson v. Gordon*, 2014 WL 4347585, at *3–4 (M.D. Tenn. Sept. 2, 2014). The Sixth Circuit rejected the same mootness arguments on appeal of the contemporaneously issued preliminary injunction. *Wilson*, 822 F.3d at 941–42.

the presence of a moratorium that should have protected nearly everyone from termination, Defendant now admits to erroneously terminating the coverage of at least 2,900 eligible enrollees due to "merge errors" and another 426 due to income-counting errors. *See* ECF 142-2 ¶ 25(e); Ex. 142-14, at 22–23, Ex. 142-15, at 3. When those terminations occurred the Defendant's flawed policies remained in effect, and continue to this day, denying individuals due process and reasonable accommodation. The risk of termination will be dramatically heightened once Defendant fully restarts his machinery of eligibility redeterminations after the pandemic subsides.

Given the inevitable errors in any public-benefits program and the "brutal need" of those entitled to benefits, *Goldberg*, 397 U.S. at 261, federal law has for decades required states to put in place procedural safeguards that enable Medicaid enrollees to remedy erroneous eligibility decisions *before* they result in loss of coverage and the grievous harms that can accompany such loss. *E.g.*, *Hamby v. Neel*, 368 F.3d 549, 559–60 (6th Cir. 2004). Those rights command Defendant's respect, regardless of whether a termination is generated by a computer or is the result of human action. The Complaint alleges that Defendant's policies and practices violated Plaintiffs' rights by failing to provide adequate notice, to provide timely hearings, or to reasonably accommodate persons with disabilities. Defendant's defective policies remain in effect, and therefore Plaintiffs—who Defendant concedes were harmed by those policies—have standing to assert their claims.

FACTUAL BACKGROUND

A. Medicaid Recipients Are Entitled to Adequate Notice and Hearing Rights When a State Redetermines Their Eligibility

Before a state may terminate Medicaid coverage, it must provide affected individuals procedural safeguards that meet both Goldberg's "due process standards" and regulations implementing the Medicaid Act's "additional standards," including "timely and adequate written notice of any decision affecting their eligibility." 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.205(d),

435.917(a). 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. *Id.* §§ 431.210, 435.917(b)(2). If an agency terminates coverage without providing adequate advance notice, it must reinstate the person and maintain their coverage pending notice and the disposition of any appeal. *Id.* § 431.231(c). A state must also give access to a fair hearing before termination of benefits and give a timely decision. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220, 431.244.

B. Defendant's Redetermination Process Lacks Procedural Safeguards

Federal regulations require Defendant, who administers TennCare, to redetermine each beneficiary's eligibility at least annually. *Id*. § 435.916(a)(1), (d). In redetermining eligibility since March 19, 2019, Defendant has disenrolled more than 100,000 members who remain without coverage today. ECF No. 142-3. None received adequate notice or opportunity to be heard.

Defendant issued form notices that do not adequately explain the basis for terminating coverage. Compl., ECF No. 1 ¶¶ 103–06. Those notices falsely represented that Defendant considered all relevant facts and all possible categories of eligibility, *id.* ¶ 107, and misrepresented that enrollees' appeal rights are more restrictive than the scope guaranteed by federal law, *id.* ¶¶ 108–09. Defendant also fails to timely process appeals, *id.* ¶¶ 111–13, and has a policy of dismissing appeals on grounds not permitted by federal law, *id.* ¶¶ 114–21.

Defendant's systemic failure to consider enrollees' eligibility for any of several disability-linked categories of coverage has the effect of screening out individuals with disabilities. *Id.* ¶¶ 3, 91, 132. Defendant did not implement protocols necessary for responding to requests for reasonable accommodation of enrollees with disabilities. *Id.* ¶¶ 122–29.

Defendant's systemic failure to provide Plaintiffs adequate notice and hearing rights before terminating their coverage harmed all Plaintiffs and puts them all at risk of impending future harm the next time Defendant redetermines their eligibility. At the time the Complaint was filed:

- Plaintiffs Barnes, Fultz,[2] and Monroe had been improperly disenrolled from TennCare coverage. *Id.* ¶¶ 200–19, 286–304, 348–62.

- Plaintiffs Hill and Vaughn had temporary coverage pending appeal, but Defendant wrongly maintained they were ineligible due to Defendant's systemic failure to consider the disability-related categories in which they are eligible, and the State denied them a timely appeal hearing. *Id.* ¶¶ 321, 418.

- Plaintiffs A.M.C., E.I.L., J.Z., and K.A. had experienced improper gaps in their TennCare coverage and were suffering ongoing harms in outstanding medical bills incurred during those gaps, and they were unable to obtain relief through the State's flawed hearing process. *Id.* ¶¶ 155, 164, 168, 170–75, 334–42, 344, 377–84, 389.

- Plaintiffs A.M.C.'s and E.I.L.'s unpaid medical bills were sent to collections, which threatened their parents' credit scores. *Id.* ¶¶ 155, 344.

- Plaintiffs Barnes, Caudill, Fultz, Hill, Monroe, Rebeaud, S.F.A., S.L.C., and Walker were further harmed by Defendant's failure to consider disability-linked categories of coverage or to provide reasonable accommodations during the redetermination process. *Id.* ¶¶ 27, 91–92, 129, 434.

Defendant reinstated coverage for Plaintiffs Barnes, Fultz, and Vaughn only after he "learned of [their] allegations" in this litigation. ECF No. 142-2 ¶ 119 (Barnes); *accord id.* ¶ 148 (Fultz), ¶ 200 (Vaughn). Every Plaintiff and similarly situated person faced—and still faces—the risk of losing coverage in their next redetermination without an opportunity to challenge Defendant's decision. Compl. ¶¶ 1, 159, 176, 199, 219, 233, 246, 262, 285, 304, 322, 333, 347, 370, 391–92, 410, 419, 432, 448, 451.

[2] Mr. Fultz died while this litigation was pending. ECF No. 78 (July 8, 2020).

C. Procedural History

Plaintiffs filed their Complaint on March 19, 2020, moved for class certification the next day, and sought a preliminary injunction three weeks later. *See* ECF Nos. 1, 5, 26. Defendant moved to dismiss solely on standing and mootness grounds on May 22, 2020, arguing that the harms Plaintiffs experienced were "aberrations" and would not recur. ECF Nos. 59, 59-1 at 10. All three motions were fully briefed by mid-June 2020, when the parties began discovery. On February 19, 2021, the Court denied all pending motions without prejudice and instructed the parties to re-file their motions after completing further discovery. ECF No. 106. On September 20, 2021, Magistrate Judge Newbern certified the completion of that discovery and set a briefing schedule for the renewed motions. ECF Nos. 136, 138. On November 12, Plaintiffs separately moved for a preliminary injunction and class certification, ECF Nos. 140, 141, and Defendant renewed his motion to dismiss, again solely on standing and mootness grounds, ECF No. 139.

D. Defendant's Moratorium on Terminations During the Pandemic

Due to the COVID-19 pandemic emergency and a corresponding change in federal policy after the Complaint was filed, Defendant "chose[] to place a moratorium on disenrollments" in exchange for increased federal funding under the Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020). ECF No. 142-2 ¶ 41. The moratorium did not restore coverage for more than 100,000 who had been disenrolled and are without coverage today.[3]

Several months later, Defendant modified the scope of the moratorium, *e.g.*, ECF No. 105 (Feb. 17, 2021), and began conducting very limited redeterminations and disenrollments. Defendant assured this Court that "no enrollee will lose their coverage and be transitioned to a different

[3] Plaintiffs' Renewed Motion for a Preliminary Injunction seeks reinstatement of coverage for those members of the Plaintiff Class. ECF No. 141.

form of coverage without first going through a new eligibility reverification process, which will include receiving a notice with appeal rights and the opportunity to appeal the determination of ineligibility for continued coverage in their current eligibility category." *Id.* at 5–6.[4]

Contrary to Defendant's representations, and even with the moratorium in place, Defendant once again erroneously terminated benefits for Plaintiff Hill, this time in October 2021. ECF No. 145. Because Defendant's notice and appeal process are deficient, Plaintiff Hill received no notice from TennCare or opportunity to challenge his October 2021 termination. Denied the protection of due process, he was able to regain benefits only after he had already sustained their loss, and only because he happened to be a Plaintiff in this case and was able to have Plaintiffs' counsel intervene with defense counsel. *Id.* ¶¶ 7–11. Since March 19, 2020, and despite the moratorium, Defendant incorrectly terminated coverage for 426 members whose incomes Defendant mistakenly believed exceeded a categorical coverage limit. *See* ECF 142-15, at 4. And although Defendant represented that errors caused by incorrectly merging cases were "one-time, idiosyncratic mistake[s]" that would be fixed by July 2020, ECF No. 142-2 ¶¶ 140, 101, the same errors resulted in another 2,900 terminations that were "never intended," ECF No. 142-14, at 22–23; ECF 142-15, at 3. Those eligible members lost coverage without being afforded due process because Defendant's policies that deprive enrollees of adequate advance notice and hearing remain in effect.

Defendant estimates that 300,000 members will lose coverage when redeterminations resume in earnest, starting in a few months. *See* ECF No. 142-2 ¶¶ 42, 59.[5] CMS warns that "[t]he

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[4] Despite Defendant's assurances that all notices are being reliably sent to members as required, the mail system flaws described in the Complaint continue to plague TennCare, as evidenced by the fact that TennCare has continued since the filing of the case to misdirect member notices and eligibility card to the offices of Plaintiffs' counsel. These problems have persisted, even after they have been repeatedly brought to the attention of TennCare's General Counsel, Drew Staniewski. ECF No. 151-1 ¶¶ 5–13.

[5] *See* Decl. Catherine M. Kaiman Supp. Pls.' Resp. Opp. Def.'s Mot. Dismiss ¶ 3 (Dec. 10, 2021).

significant volume of pending work that states will need to complete is likely to place a heavy burden on the eligibility and enrollment workforce and could contribute to coverage loss related to procedural errors," including "inappropriate coverage loss among eligible individuals."[6] Researchers emphasize that "states will be faced with processing an unprecedented volume of Medicaid redeterminations and changes in circumstances," which could "overwhelm the capacity of eligibility workers to process paperwork and of call centers . . . to help individuals remain enrolled," ultimately resulting in the disenrollment of eligible individuals.[7] Plaintiffs face a concrete risk Defendant will erroneously disenroll them without adequate notice or opportunity to be heard.

LEGAL STANDARD

In reviewing a motion to dismiss for lack of standing, a court must accept the allegations of the complaint as true and draw all inferences in a plaintiff's favor. *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019). A court's analysis "must be confined to the four corners of the complaint," *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 706 (6th Cir. 2015), and a Rule 12(b)(1) motion should be "denied if facts pleaded in the complaint are sufficient to infer jurisdiction," *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010).[8]

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[6] Ctrs. for Medicare & Medicaid Servs., *Strategies States and the U.S. Territories Can Adopt to Maintain Coverage of Eligible Individuals as They Return to Normal Operations* 1, 3 (Nov. 2021), https://www.medicaid.gov/state-resource-center/downloads/strategies-for-covrg-of-indiv.pdf.

[7] *See* Tricia Brooks, *Loss of Medicaid After the PHE Will Likely Exceed 15 Million*, (Sept. 20, 2021), https://ccf.georgetown.edu/2021/09/20/loss-of-medicaid-after-the-phe-will-likely-exceed-15-million-estimated-by-urban/.

[8] Although Defendant acknowledges that Plaintiffs' factual allegations must be "accepted as true," Mot. 4, he asks the Court to consider the declaration of TennCare Director Kimberly Hagan (ECF No. 139-2). He thus improperly ignores the "crucial distinction" between facial and factual attacks on standing. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (quotation omitted). Because Defendant attacks Plaintiffs' standing only on *facial* grounds, the Court should ignore this declaration. *Parsons*, 801 F.3d at 706.

Article III standing has three elements: injury-in-fact, causation, and redressability. *Price v. Medicaid Dir.*, 838 F.3d 739, 745 (6th Cir. 2016). Defendant contests only the first. *See* Br. Supp. Def.'s Mot. Dismiss ("Mot.") 4–11, ECF No. 139-1 (Nov. 12, 2021).[9] To establish injury, a plaintiff must show "some invasion of her legal interests that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Price*, 838 F.3d at 745 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs seeking injunctive or declaratory relief may show either that a past injury is "ongoing or accompanied by continuing adverse effects at the time the complaint was filed," *Sullivan v. Benningfield*, 920 F.3d 401, 408 (6th Cir. 2019), or that there is a "substantial risk" of impending future harm, *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 405–06, 409–10 (6th Cir. 2019). Past wrongs bear on the threat of future harm. *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982). At the pleading stage, general factual allegations of injury are sufficient. *Mosley*, 942 F.3d at 756; *Parsons*, 801 F.3d at 710.[10]

[9] Defendant does not dispute causation and redressability. Rightly so. Plaintiffs' injuries—including the denial of due process, discrimination on the basis of disability, gaps in coverage, and resulting financial harms—were caused solely by Defendant's policies and practices. *See* Compl. ¶¶ 81–132; *Markva v. Haveman*, 317 F.3d 547, 557 (6th Cir. 2003). Plaintiffs' injuries are redressable because it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (internal quotation marks omitted). A plaintiff need not establish that the court's intervention will remedy every injury she suffered; a showing that she would benefit personally from it in a tangible way is sufficient. *Id.* at 851. Plaintiffs here would personally, tangibly benefit from the declaratory, injunctive, and ancillary relief they seek. *See* Compl. at ¶¶ 114–15; *Price*, 838 F.3d at 747 (injuries redressable by injunction requiring Defendant "to notify class members of the court's injunction and of their right to use [the state's] administrative procedures to obtain any past Medicaid benefits.").

[10] Defendant selectively quotes *White v. United States*, 601 F.3d 545 (6th Cir. 2010), for the proposition that "standing cannot be inferred . . . from averments in the pleadings, but rather must affirmatively appear in the record." Mot. 3–4. But he omits *White*'s preceding sentence: "General factual allegations of injury may suffice to demonstrate standing, 'for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *White*, 601 F.3d at 551 (quoting *Lujan*, 504 U.S. at 561).

Mootness "requires that there be a live case or controversy at the time that a federal court decides the case." *Sullivan*, 920 F.3d at 410.

ARGUMENT

I. All Plaintiffs Have Standing, and Defendant's Concession That At Least Two Plaintiffs Have Standing Precludes Dismissal

Defendant's motion fails because "only one plaintiff needs to have standing in order for the suit to move forward," *Parsons*, 801 F.3d 710, and he concedes that Plaintiffs Barnes and Monroe both had standing when this litigation began, Mot. 7 n.4. This concession defeats Defendant's standing argument, and "there is no need to address the standing of the other plaintiffs." *Am. Civil Liberties Union of Ky. v. Grayson County*, 591 F.3d 837, 843 (6th Cit. 2010); *accord Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cnty.*, 796 F. Supp. 2d 900, 909 (M.D. Tenn. 2011). In any event, at least eight named Plaintiffs had standing based on ongoing injuries or continuing adverse effects from past harms, and all Plaintiffs faced and still face a substantial risk of future harm from Defendant's defective enrollment processes.

Furthermore, Defendant does not challenge any Plaintiffs' standing to seek injunctive relief due to Defendant's continuing actions that threaten to discriminatorily deny them access to coverage in violation of the Americans with Disabilities Act. *See* Compl. ¶ 434. Rightly so. These Plaintiffs have standing regardless of whether they ultimately lose coverage, because they suffered and will likely again suffer concrete harms from struggling to navigate TennCare's system without accommodations. There is no evidence of Defendant fulfilling its obligations under the ADA by implementing a protocol of reliably providing reasonable accommodations for Plaintiffs or methods that will reliably screen for eligibility related disability status. The continuing and imminent threat of future injury in the form of termination of coverage confers standing upon Plaintiffs and the Disability Subclass. *See Mosley,* 942 F.3d at 758–61 (holding plaintiff had standing to seek

injunctive relief under ADA Title III where he plausibly alleged he visited non-compliant facility once before and would visit again).

A. Eight Plaintiffs Were Suffering Ongoing Injuries or Continuing Adverse Effects of Past Harms When the Complaint Was Filed

At least eight named Plaintiffs—Barnes, Monroe, Hill, Vaughn, A.M.C., E.I.L., J.Z., and K.A—had standing when this litigation began due to ongoing harms or the continuing adverse effects of past harms.[11] Defendant admits that Plaintiffs Barnes and Monroe remained improperly excluded from TennCare. Mot. 2–3, 7 n.4; *see* Compl. ¶¶ 217–18, 356–62. Plaintiffs Hill and Vaughn were being denied appeals of Defendant's erroneous determinations of ineligibility. Compl. ¶¶ 321, 418. Plaintiffs A.M.C., E.I.L., J.Z., and K.A. were suffering continuing adverse effects from past harms: denials of timely appeals to restore their coverage for unpaid medical bills that were accruing interest following Defendant's improper terminations without due process.[12] *Id*. ¶¶ 138–57, 164–75, 334–42, 377–84, 389. And Plaintiffs A.M.C.'s and E.I.L.'s unpaid medical bills were sent to collections, threatening their parents' credit scores. *Id.* ¶¶ 155, 344.

Such harms more than suffice to establish standing. *See Hazard v. Shalala*, 44 F.3d 399, 403 (6th Cir. 1995) (finding plaintiffs had standing to challenge policy causing denial of Medicaid benefits); *see also Lambert v. Hartman*, 517 F.3d 433, 437 (6th Cir. 2008) (finding "actual financial injuries are sufficient to meet the injury-in-fact requirement"); *James v. City of Dallas*, 254 F.3d 551, 563–64 (5th Cir. 2001) (finding debts incurring "ongoing interest charges" and affecting

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[11] A ninth Plaintiff who also fits this category, Charles Fultz, sadly passed away during the course of this litigation. *See* ECF No. 78 (July 8, 2020).

[12] In a footnote, Defendant mistakenly contends that A.M.C. lacks standing because the complaint's request for prospective relief would not "redress an alleged failure *to timely process an appeal* relating to *retroactive* coverage," and because "her coverage was backdated to resolve any gaps in coverage *before* the complaint was filed." Mot. 6 n.3. These contentions ignore that A.M.C.'s continuing adverse effects at the time of filing had resulted from Defendant's repeated erroneous terminations of her coverage without due process. Compl. ¶¶ 138–57.

credit ratings established standing), *abrogated on other grounds by M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839–41 (5th Cir. 2012). Defendant incorrectly contends (Mot. 7), without authority, that enrollment status is the only injury that can support Plaintiffs' standing here. Not so. Although "[t]he denial of Medicaid benefits to which an applicant would otherwise be entitled is a cognizable injury for standing purposes," *Markva v. Haveman*, 168 F. Supp. 2d 695, 704 (E.D. Mich. 2001), *aff'd*, 317 F.3d 547 (6th Cir. 2003), "actual financial injuries" like those of A.M.C., E.I.L., J.Z., and K.A. also establish standing to seek injunctive relief. *Lambert*, 517 F.3d at 437.

B. All Plaintiffs Face a Substantial Risk of Future Injury When Defendant Redetermines Their Eligibility Using the Same Defective Policies

In addition to the concrete injuries suffered by at least eight Plaintiffs, the allegations in the Complaint—taken as true at this stage, *Mosley*, 942 F.3d at 756—easily establish that all Plaintiffs faced and continue to face a "substantial risk" of future loss of coverage from systemic defects in Defendant's redetermination processes. *Kanuszewski*, 927 F.3d at 405–06, 409–10. Where "a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517–18 (2007).

The Complaint contains specific allegations of numerous injuries to Plaintiffs that occurred during prior redeterminations, and so will plausibly recur during a future redetermination:

- at least **ten** did not receive redetermination requests and/or termination notices that Defendant purportedly sent them, despite maintaining up-to-date address information and receiving other TennCare information at the updated address, Compl. ¶¶ 93–97;
- at least **three** received inadequate and/or contradictory termination notices that unlawfully failed to explain the basis for Defendant's decision, *id.* ¶¶ 103–10;
- at least **four** suffered erroneous termination for purported failure to provide requested information, although they in fact submitted the requested information, *id.* ¶¶ 98–102;
- at least **seven** were forced to provide duplicative information or face the loss of coverage, despite Defendant's possession of the same information, *id.* ¶¶ 81–83;

- at least **six** suffered erroneous termination for purported ineligibility despite their undisputed qualification for disability-based eligibility categories, *id*. ¶¶ 84–92;
- at least **four** were harmed by Defendant's unlawful failure to maintain procedures to accommodate persons with disabilities, *id*. ¶¶ 122–29;
- at least **seven** were denied appeals despite timely requests, *id*. ¶¶ 111–13; and
- at least **eight** were wrongly denied continuing coverage pending appeal, *id*. ¶¶ 114–21;

The Complaint also details the ordeals each Plaintiff faced while struggling to navigate the Defendant's labyrinthine and defective notice and appeal processes. *See generally id*. ¶¶ 133–432.

These risks are exacerbated by Defendant's flawed processes. Defendant uses facially defective form notices that fail to explain the basis for terminating coverage; misrepresent that Defendant has considered all available facts and eligibility categories before terminating coverage; omit crucial information about the right to appeal and maintain coverage pending appeal; and falsely represent that Defendant has authority to deny appeals guaranteed under federal law. *Id*. ¶¶ 105–09. Defendant rotely applies his "valid factual dispute" policy, preventing beneficiaries from appealing his misapplication of the law to the facts, violating their right to a fair hearing. *Id*. ¶¶ 114–20. And Defendant unlawfully fails to consider disability-based categories of eligibility or maintain any written regulations, policies, protocols, or guidelines for the provision of reasonable accommodations to qualified persons with disabilities. *Id*. ¶¶ 84–92, 122–28.

These risks are further exacerbated because the Medicaid Act requires Defendant to redetermine the eligibility of each TennCare enrollee at least once a year. *Id*. ¶ 56. The Supreme Court has repeatedly held that injuries foreseen in the administration of the decennial census more than a year away are sufficiently imminent for standing purposes. *See Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 327, 332 (1999) (holding plaintiffs had standing to enjoin census plan scheduled to begin implementation 13 months from filing of complaint, with final census date 25 months away); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 528, 607 (S.D.N.Y.

2019) (holding plaintiffs had standing in April 2018 to challenge 2020 census), *aff'd sub nom Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). Defendant's at-least-annual redeterminations make the risks to Plaintiffs even more imminent.

Plaintiffs' standing here is confirmed by *Blum v. Yaretsky*, an analogous Medicaid class action, where the Supreme Court held that the named plaintiffs had standing to seek injunctive protection against future procedural injuries. 457 U.S. at 1000. Although a prior consent judgment enjoined the state from transferring the plaintiffs to different levels of care without advance notice and fair hearings, the Court found that the threat of such future transfers by the plaintiffs' private nursing homes was not "imaginary or speculative" and was "sufficiently substantial" to confer standing. *Id*. (internal quotation marks omitted). The Court reasoned that the plaintiffs had previously experienced such transfers, so their future threat was "quite realistic," even if not certain. *Id*. at 1001.[13] The threat of future recurring harm to Plaintiffs here is even more pronounced: Defendants will redetermine all enrollees' eligibility at least once each year, he will do so using defective systems, and those systems have produced errors that harmed Plaintiffs—showing that they are likely to do so again. *See generally* Compl. ¶¶ 79–132.

Defendant cannot credibly spin the natural consequences of his policy failures as "aberrations." Mot. 9. TennCare officials concede that the redetermination system will inevitably experience errors "each year." ECF No. 142-2 ¶ 83. Moreover, the "merge errors" which Defendant strenuously averred were related only to the initial "start-up" have continued, notwithstanding

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

these representations or the moratorium on terminations. Thus, it is "quite realistic" that Defendant will experience similar future errors that cause similar future harms. *Blum*, 457 U.S. at 1001, discussed *supra*; *see also Kanuszewski*, 927 F.3d at 408–12 (holding plaintiffs had standing to seek injunctive and declaratory relief for on-going storage of blood samples previously drawn without consent and "substantial risk" of future chemical analysis of samples); *Mosley*, 942 F.3d at 760–61 (holding plaintiff had standing to seek injunctive relief under ADA Title III where he plausibly alleged he visited non-compliant facility once before and would visit again).

Contrary to Defendants' assertions (Mot. 9-10), this case is nothing like *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which turned on whether the plaintiff "was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. There, the Supreme Court determined that the city's policy permitting chokeholds did not itself establish that the plaintiff "might be realistically threatened" with another chokehold in the future. *Id*. at 106. Unlike that attenuated set of circumstances, here, it is *certain* that each Plaintiff will face an eligibility redetermination at least once a year, making it inevitable that redetermination errors will harm some enrollees, *see* Compl. ¶¶ 56, 79–132, hence *Lyons* does not apply. *See Honig v. Doe*, 484 U.S. 305, 320–22 (1988) (holding disabled plaintiff faced imminent risk of future injury through exclusion from classroom based on state's past practice of allowing school districts to unlawfully exclude disabled students from classrooms). *Lyons* also concerned a consideration not presented here: "the prudential limitations circumscribing federal court intervention in state law enforcement matters," *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985).

Defendants are also not helped (*see* Mot. 9) by *Shelby Advocates v. Hargett*, 947 F.3d 977 (6th Cir. 2020), which concerned "a variety of election administration problems," including the county's "use of digital voting machines" that were "vulnerable to hacking and cyberattacks." *Id.*

at 979–80. There, the plaintiffs claimed standing to seek injunctive relief based on "their alleged future risk of vote dilution or vote denial stemming from maladministration and technology problems." *Id*. at 981. The Sixth Circuit held that general fears that such "individual mistakes" would recur was insufficient to "create a cognizable imminent risk of harm," especially as the only allegation of systemic error (not individual human error) "[n]ever happened to any of them or in any election in which they were candidates." *Id*. Here, Plaintiffs have alleged systemic mistakes that affected them and other enrollees and have shown that Defendant is likely to repeat those mistakes as he uses the same defective systems and notices in his at-least-annual eligibility determinations of all enrollees. *See* Compl. ¶¶ 79–132. *Shelby Advocates* thus does not support Defendant.[14]

II. None of Plaintiffs' Claims Are Moot

Defendant concedes that Plaintiffs Barnes and Monroe had standing but argues their claims were mooted by his post-filing reinstatement of their coverage and CMS's certification of Defendant's information-technology systems. Mot. 11–19. Neither argument satisfies Defendant's "heavy burden of demonstrating mootness." *Sullivan*, 920 F.3d at 410 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 531 (6th Cir. 2001)). Even if they did, Plaintiffs' claims fall under three well-established mootness exceptions: they are (1) inherently transitory, (2) capable of repetition yet evading review, and (3) protected against strategic picking off.

[14] Defendant also relies (Mot. 23–24) on *Waskul v. Washtenaw County Community Mental Health*, 900 F.3d 250 (6th Cir. 2018), which concerned only a "very narrow" issue of associational standing to seek a preliminary injunction. *Id.* at 256. A subsequent decision found the both the individual and associational plaintiffs had standing to assert their claims on the merits. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 441–42 (6th Cir. 2020).

A. Defendant's Voluntary Reinstatement of Plaintiffs' Coverage Does Not Moot Their Claims Because They Still Face a Substantial Risk of Harm

Defendant argues that his reinstatement of coverage for Plaintiffs Barnes and Monroe after the Complaint and class-certification motion were filed moots their individual and class claims because "their procedural injuries were resolved and are unlikely to recur." Mot. 11–13. *First*, "voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). *Second*, Defendant cannot even claim voluntary cessation here because he has not ceased his unlawful conduct: his flawed notice and appeal policies and systemic failure to accommodate individuals with disabilities. Defendant will continue to use form notices that lack crucial information about the reasons for termination and misrepresent Plaintiffs' appeal rights; still subject all appeals to an unlawful vetting process denying hearings for misapplications of the law to the facts; and routinely deny timely hearings and continuation of benefits. His unilateral, ad hoc reinstatement of coverage does nothing to protect Plaintiffs against recurring harm when he again redetermines eligibility using the same defective processes. *See, e.g.*, *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 14 F.4th 462, 473 (6th Cir. 2021) ("If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019))).

Even if post-termination reinstatement of coverage could constitute voluntary cessation of the unlawful due process and ADA violations Plaintiffs allege, Defendant has not met his "heavy burden" to demonstrate mootness in this context. *Sullivan*, 920 F.3d at 410. Voluntary cessation "moots a case only in the rare instance where subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and interim relief or events

have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (quotation marks omitted); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Defendant has not met this demanding standard. Defendant's decisions to offer post-termination reinstatement are extremely ad-hoc, discretionary and inconsistent. It is not codified in any policy or regulation and depends heavily on the intervention of counsel. Reinstatement is only available to those who know that process exists and have the information needed to believe they were wrongfully terminated such that they try to be reinstated—information the Defendants' notice process fails to provide. In fact, nearly every declarant in this case has been unable to access reinstatement until counsel intervenes, and even then, reinstatement often comes only after repeated follow-up by counsel. *See* ECF Nos. 124, 144, 145, 146, 147. Contrary to Defendant's position (Mot. 13), such grudging, belated, discretionary conduct is not entitled to any presumption of "good faith."

Defendant's repeated claim (Mot. 12–13, 19, 22) that he "fixed" some TEDS processes does not moot Plaintiffs' claims. *See Unan v. Lyon*, 853 F.3d 279, 288–89 (6th Cir. 2017) (holding state "failed to put forward sufficient evidence" proving it was "absolutely clear that a systemic computer problem of the type that caused [the plaintiffs'] injuries could not reasonably be expected to recur," despite "evidence [the state] took significant steps to correct the systemic problem"). Defendant ignores the heart of Plaintiffs' due-process claims: his failure to provide adequate notice and appeal rights before depriving Plaintiffs and similarly situated individuals of their TennCare coverage. And Defendant does not even attempt to address Plaintiffs' claim that he screened out Plaintiffs and similarly situated persons with disabilities by failing to consider disability-linked categories of eligibility or provide reasonable accommodations. Such discriminatory injuries cannot be remedied by the mere restoration of coverage.

Defendant is not helped (*see* Mot. 11–12) by *Ailor v. City of Maynardville*, 368 F.3d 587 (6th Cir. 2004), where a plaintiff filed a citizen suit under the Clean Water Act, alleging a city's sewage treatment plant frequently overflowed and damaged his property located downstream. Id. at 593. There, the city had already been ordered in another case to expand the plant to prevent future overflow, *id*. at 594, making it almost physically impossible for overflows to recur. *Id*. at 599 (affirming that the claim was moot "under the unique facts" of the case). Here, Defendant has not eliminated the risk of future violations—he has perpetuated them, by continuing to use his defective processes—so deeming Plaintiffs' claims moot would improperly free Defendant "to return to [his] old ways." *Laidlaw*, 528 U.S. at 189.

Defendant misreads (Mot. 12) *Speech First* to argue that "the burden in showing mootness is lower" in all instances "when it is the government that has voluntarily ceased its conduct." *Speech First* makes clear that "ad hoc, discretionary, and easily reversible actions" are not entitled to the heightened "solicitude" that attaches to legislation or formal rulemaking, and a state's cessation of offending conduct in response to litigation "raises suspicions that its cessation is not genuine." 939 F.3d at 768–69. *Speech First* reversed a district court's mootness decision because the defendant's discretionary change in the challenged policy could be subsequently reversed in his discretion. *Id*. at 769. Here, likewise, Defendant's reinstatement of coverage for individual Plaintiffs is not entitled to any good-faith presumption the harm will not recur, because the change was based on a discretionary and ad hoc response to this lawsuit. *Id*. at 768–69.

B. CMS Certification of Defendant's "Information Technology System Functionality" Cannot Moot Plaintiffs' Claims Because It Did Not Consider Defendant's Policies at Issue in This Case

Defendant is wrong (Mot. 13–19) that CMS's certification of Defendant's information-technology system functionality for purposes of enhanced federal funding moots Plaintiffs' claims.

CMS's certification is not entitled to deference. As a "threshold" matter, deference to agency interpretation is permissible only where the governing law is ambiguous. *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1044 (6th Cir. 2018); *accord Arangure v. Whitaker*, 911 F.3d 333, 339 (6th Cir. 2018). Defendant does not claim any ambiguity in the governing law here. This is thus not a case like *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (cited Mot. 17–18), where the Sixth Circuit found that the Medicare Act was ambiguous as to whether incontinence products fell within the scope of "medical devices," *id.* at 459, and so deferred to the Department of Health and Human Services' position in an *amicus* brief that it did, *id*. at 465–68.

CMS has also not weighed in on the issues in dispute—it disclaimed doing so. Courts defer to an agency's interpretation only if it bears on "the precise question at issue" in the litigation. *Atrium Med. Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 766 F.3d 560, 566–67 (6th Cir. 2014). Here, in the cover letter to its certification report, CMS stated, "This was an assessment of information technology system functionality and *does not reflect a comprehensive determination of state compliance or non-compliance with all federal Medicaid policy regulations*." ECF No. 139-6 (Nov. 12, 2021) (emphasis added). Contrary to Defendant's suggestion (Mot. 13–14), CMS's report does not say that Defendant's notices and appeals processes comply with 42 U.S.C. § 1396a(a)(3) or its attendant regulations. CMS acknowledges, for instance, that members may "view notices" on Defendant's website and mobile application, but it says nothing about whether the content of those notices comply with due process. ECF No. 139-5, at 6. To the contrary, CMS documented Defendant's inability to allow members to opt in by phone to receiving electronic notices and the fact that "Notice Review" was among the "Most Common Help Desk Calls." *Id.* at 12. And CMS noted Defendant's "limited functionality" to allow members to "check on the status of appeals" or "to submit an appeal for denial of eligibility online in accordance with 42

CFR 431.221(a).” *Id.* at 10–11. This case is thus nothing like *Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005) (cited Mot. 17), where CMS had “reviewed and expressly approved” Tennessee’s compliance with the regulation at issue, including by filing an *amicus* brief. *Id.* at 926–27.[15]

C. Plaintiffs’ Claims Cannot Be Moot Because They Will Encounter the Same Lack of Procedural Safeguards in the Future

Plaintiffs’ claims are further protected by three exceptions to mootness because they are inherently transitory, capable of repetition but evading review, and cannot be strategically “picked off” by Defendant. Each of these exceptions, standing alone, is sufficient to deny the Motion.

1. The “Inherently Transitory” Exception Applies Because Defendant Can Reinstate Coverage Quickly and for Uncertain Durations

The inherently transitory exception to mootness applies when an injury is “so transitory that it would likely evade review by becoming moot before the district court can rule on class certification,” and “it is certain other class members are suffering the injury.” *Wilson*, 822 F.3d at 944–45. “[T]he essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class.” *Id.* at 946 (cleaned up). This exception does “not require that the named plaintiffs show that they personally will be subject to the same practice again.” *Id*. at 944. Both elements are met here. *First*, because “Plaintiffs did not know how long their claims for injunctive relief from delay would remain alive,” and Defendant could “quickly . . . enroll them in TennCare at any point” after the complaint was filed, “as actually occurred in this case,” “[t]he duration of Plaintiffs’ claims was tenuous.” *Wilson*, 822 F.3d at 947. Defendant’s ability to “quickly and unilaterally grant relief” once litigation commences

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[15] Even if CMS had blessed Defendant’s system, the Court may not defer to an interpretation that would violate due process. *See, e.g.*, *Hicks v. Colvin*, 214 F. Supp. 3d 627, 640 (E.D. Ky. 2016) (“[N]o matter how much power [agency] materials have to persuade, the Court must still follow the Constitution.”), *aff’d sub nom. Hicks v. Comm’r of Soc. Sec.*, 909 F.3d 786 (6th Cir. 2018).

warrants applying the exception here. *Unan*, 853 F.3d at 287. *Second*, thousands of class members were disenrolled without adequate notice or hearings. Defendant contends no others suffered "the *same* procedural errors" as Plaintiffs, Mot. 22, but, in fact, Plaintiffs Hill lost his coverage a second time, still without an opportunity to first challenge TennCare's decision, ECF No. 145. And multiple class members have filed sworn declarations proving as much:

- **Whitney Devers**, who experienced a gap in Medicaid coverage until the Tennessee Justice Center identified that TennCare had failed to consider her eligibility under the Disabled Adult Child (DAC) category. ECF No. 124.

- **Brenda Pelletier**, who has multiple physical and mental disabilities, received incorrect and conflicting notices between 2019 and 2020, due to case creation and merger issues, culminating in her loss of coverage. ECF No. 146.

- **D.T.'s** son **K.C.** was disenrolled without notice in the fall of 2019 and suffered a gap in coverage resulting in outstanding hospital bills that were sent to collections. Her appeal to correct the effective date was closed without a hearing. ECF No. 147.

- **Grace Senesac** was disenrolled when Defendant merged her case with her mother's case without notice. ECF No. 149.

- **Lisa Lesnik**'s brother is a DAC whose application was improperly denied. He won an eligibility appeal DAC coverage and according to the Social Security Administration would be enrolled in Buy-In, requiring Defendant to pay his Medicare Part B premiums. However, he received no notice from Defendant, only from the Social Security Administration, notifying him that the Defendant would not be paying these premiums. This caused a reduction in his Social Security benefits. ECF No. 143.

- **M.D.'s** baby daughter, **H.G.C.**, was disenrolled twice without notice for failure to return a renewal packet that she never received. ECF No. 144.

- **Pamela Sullivan**'s family was disenrolled without notice on March 17, 2020. She learned of it only when taking one of her children to a doctor's appointment. She filed a new application for herself and her husband, which was erroneously denied because Defendant failed to properly count the Social Security income of two of their children. ECF No. 150.

- **R.L.B.'s** stepdaughter, **M.R.R.**, was disenrolled while pregnant because she did not respond to notices Defendant sent to incorrect addresses. She was unable to get prenatal care as a result. The baby also missed her one-month doctor's visit because they were without coverage at the time. ECF No. 148.

These facts belie Defendant's false assurance that errors are unlikely to repeat.

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

The capable-of-repetition-but-evading-review exception has two requirements: (1) the challenged action "must be too short in duration to be fully litigated before it ceases;" and (2) "there must be a reasonable expectation that the same parties will be subjected to the same action again." *Wilson*, 822 F.3d at 951. Both elements are met here.

First, once the moratorium lifts, all Plaintiffs will be at risk of losing their coverage within a year or less when Defendant redetermines their eligibility. One-year periods satisfy the first element of this exception to mootness (as do longer time frames). *E.g.*, *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (a year's imprisonment for failure to pay child support was too short to be fully litigated); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) (18-month lag between enactment and submission to voters was too short to obtain complete judicial review of challenge to proposal).

Second, it is more than reasonable to expect that Plaintiffs will be subjected to Defendant's defective notice and appeal procedures again. Plaintiff Hill has already experienced this harm a second time. And when Defendant restarts the redetermination process Defendant must review all Plaintiffs' eligibility at least once a year. Without intervention, Defendant will continue to issue facially defective notices and apply impermissible restrictions on fair hearings.[16] Defendant's voluntary reinstatement of coverage for Barnes and Monroe thus cannot moot their notice claims.

3. Defendant May Not Moot Claims by "Picking Off" Named Plaintiffs

The pick-off exception prevents class-action defendants from mooting a claim by addressing the claims of the named plaintiffs. "Requiring multiple plaintiffs to bring separate actions,

[16] Unlike in *Wilson*, where the state could not be presumed to violate federal law requiring it to maintain enrollees' coverage while redetermination was ongoing (and thus despite any delay in providing fair hearings), 822 F.3d at 951, here federal law requires Defendant to provide adequate notice to enrollees regarding their coverage and the redetermination process.

which effectively could be 'picked off' by a defendant's [actions] before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions" and "would invite waste of judicial resources." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (concerning Rule 68 offers of judgment). The Sixth Circuit applies this exception where a motion for class certification has been filed, as "the defendant is on notice that the named plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists." *Wilson*, 822 F.3d at 947; *accord Unan*, 853 F.3d at 285.[17]

As in *Wilson*, Defendant tried to "pick off" named Plaintiffs by extending coverage to them shortly after the complaint and motion for class certification were filed. *Cf. Wilson*, 822 F.3d at 941, 951. As the district court in *Wilson* explained, Defendant "cannot 'opt out' of a class action lawsuit by simply providing relief to the named Plaintiffs." 2014 WL 4347585, at *3 (quoting *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005)).

Defendant's arguments are baseless. He asserts (Mot. 20-21) that the exception should apply *only* when a defendant (1) has sufficient pre-litigation notice of claims to infer culpable intent in attempting to moot them; *and* (2) resolves those claims based on "a new, ad hoc process."[18] This is not the law. *Wilson* did not set these requirements for the picking-off exception, and it rejected the argument that a plaintiff must prove the defendant acted with motive to prematurely

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

[18] While the State may argue in its motion that Mr. Staniewski's declaration shows an "official" or "standard" practice behind the reinstatement of Barnes and Monroe's coverage, Mot., ECF No. 139-1 at 20–21, the witness repeatedly describes Defendant's pattern of reinstating litigants as "informal," ECF No. 59-2, ¶¶ 2, 3. If the Court is inclined to favor Defendant's interpretation, Plaintiffs respectfully request permission to depose Mr. Staniewski to test Defendant's assertions that it acted without motive or foreknowledge.

terminate the putative class action. 822 F.3d at 950 n.4 (explaining precedent has "focused on the ability and action of the defendant in mooting named plaintiffs' claims, *whatever the reason*." (emphasis added)). Nor is it true (Mot. 21) that "a majority of the same Sixth Circuit panel" that decided *Wilson* "*rejected*" the "picking off" exception in *Unan*. Rather, *Unan*'s concurring judge briefly explained that it was "unnecessary to reach the issue given that the 'inherently transitory' exception applie[d]." 853 F.3d at 294 (White, J., concurring in part). *Unan* thus does not include any majority opinion on the "picking off" exception. As explained above (and unmentioned by Defendant), however, *Unan* squarely ruled that the "inherently transitory" exception to mootness applied to both the individual and class claims.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss.

Dated: December 10, 2021

By: /s/ *Catherine Millas Kaiman*

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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 10th day of December, 2021, on the following counsel for Defendant:

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