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

MELISSA WILSON, *et al.*, individually and on behalf of all others similarly situated,	
Plaintiffs,	**Civil Action No. 3:14-CV-01492**
v.	**Judge William L. Campbell, Jr.** **Magistrate Judge Newbern**
WENDY LONG, *et al.*,	
Defendants.	

DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

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Pursuant to this Court's Order (Oct. 11, 2018), Doc. 251, Defendants respectfully submit these proposed conclusions of law in opposition to Plaintiffs' request for declaratory and permanent injunctive relief, Complaint for Declaratory and Injunctive Relief (July 23, 2014), Doc. 1 ("Complaint"); Plaintiffs' Proposed Declaratory and Injunctive Relief (Oct. 29, 2018), Doc. 255 ("Plaintiffs' Proposed Relief"), and in support of their request that the Court vacate all outstanding injunctive relief and dismiss this case with prejudice, Defendants' Pretrial Brief at 15 (Oct. 3, 2018), Doc. 249.

I. Summary of Conclusions.

1. Plaintiffs have failed to carry their burden of demonstrating that they are entitled to declaratory and injunctive relief.

2. Plaintiffs have failed to show that TennCare applicants today are subjected to unreasonable delays in the processing of their applications, or that such delays are likely in the future.

3. Plaintiffs have admitted that TennCare maintains an effective and working administrative appeals system to address any concerns in individual cases.

4. Plaintiffs' request for new and onerous relief was neither raised before trial nor properly tried—and is thus forfeited.

5. As discussed in detail below, each of Plaintiffs' requests for relief fail on numerous legal and factual grounds. All of their requests for relief fail on at least three bases.

a. First, Plaintiffs' claims fail because the legal provisions that they rely on do not apply to this case.

b. Second, their claims fail because they did not come anywhere close to meeting their burden of proof that Defendants are engaged in ongoing violations of the provisions at issue.

c. Third, the relief they request is not appropriately tailored to the purported issues they have identified.

6. The Court thus appropriately denies all outstanding requests for relief, vacates the preliminary injunction, and dismisses this case with prejudice.

II. Legal Standards.

7. The burden of proof lies with the Plaintiffs to demonstrate that the requirements for injunctive relief have been met. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

8. In order to obtain permanent injunctive relief, the Plaintiffs must (1) actually succeed on the merits (that is, prove an actual violation of the law); (2) prove that they will suffer irreparable harm absent permanent injunctive relief; (3) prove that the balance of equities tips in their favor; and (4) prove an injunction is in the public interest. *Winter*, 555 U.S. at 20, 32; *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

9. "[B]ecause equitable relief is an extraordinary remedy to be cautiously granted, . . . the scope of" injunctive relief must "be strictly tailored to accomplish only that which the situation specifically requires." *Aluminum Workers Int'l Union, AFL-CIO, Local Union No. 215 v. Consolidated Aluminum Corp.*, 696 F.2d 437, 446 (6th Cir. 1982) (reversing a grant of injunctive relief because it was not "strictly tailored to accomplish only that which the situation specifically requires"); *see Williams v. Owens*, 937 F.2d 609 (6th Cir. 1991) (table decision) ("An injunction should be narrowly tailored to give only the relief to which the plaintiff is entitled.").

10. Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Plaintiffs likewise bear the burden of proving that there has been a violation of law and that they are entitled to declaratory relief. *See Angell v. Schram*, 109 F.2d 380, 381 (6th Cir. 1940). In other words, "[t]he plaintiff must establish facts which give rise as a matter of law to an existing or imminent invasion of his rights by the defendant which would result in injury to him." *Id.* Because "[a] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred," *International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Auth.*, 108 F.3d 658, 668 (6th Cir. 1997), if Plaintiffs fail to prove a violation of law, declaratory relief is inappropriate.

11. A case becomes moot—and the court thus loses jurisdiction over it—if there is no longer a live case or controversy. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) ("[A]n actual controversy . . . [must] be extant at all stages of review, not merely at the time the complaint is filed." (quotation marks omitted); *see also infra* Section IV-A.

12. Claims for injunctive relief and declaratory relief are subject to the normal rules governing mootness. *See Forbes v. Board of Dirs. for N.A.A.C.P.*, 65 F. App'x 517, 518 (6th Cir. 2003) (per curiam) (finding that an appeal from the grant of a preliminary injunction had become moot); *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) ("Declaratory judgments . . . must be limited to the resolution of an actual controversy." (quotation marks omitted)).

III. Plaintiffs Are Entitled to No Relief for Violation of 42 U.S.C. § 1396a(a)(8).

13. In their first cause of action, Plaintiffs allege that, by "failing to adhere to their duty to determine Medicaid eligibility with reasonable promptness," Defendants have violated Plaintiffs' "rights under 42 U.S.C. § 1396a(a)(8)." Complaint ¶ 154.

14. Plaintiffs now urge the Court to enter a permanent injunction ordering Defendants to "immediately take all reasonably necessary and prudent steps to identify and address any systemic problems in the acceptance and processing of TennCare applications that result in 'delayed applications.' " Plaintiffs' Proposed Relief at 6.

15. Plaintiffs' proposed injunction would subject the State to a Court-ordered, multiple-step process to purportedly determine whether there are any systemic problems; notify individuals that the State is engaging in this process; and correct any systemic problems identified. Plaintiffs' Proposed Relief at 6–7.

16. Plaintiffs also request a declaration that Defendants are violating Section 1396a(a)(8). Plaintiffs' Proposed Relief at 1.

17. This cause of action fails for four independent reasons, each of which is sufficient standing alone to foreclose Plaintiffs' Section 1396a(a)(8) claim: (1) Section 1396a(a)(8) does not even apply to eligibility determinations; (2) Section 1396a(a)(8) does not convey any right that is enforceable under 42 U.S.C. § 1983; (3) TennCare substantially complies with Section 1396a(a)(8); and (4) both injunctive and declaratory relief are foreclosed because Congress specified the administrative appeal mandated by Section 1396a(a)(3) as the remedy for any violation of the reasonable promptness requirement in Section 1396a(a)(8).

A. Section 1396a(a)(8) Does Not Govern the Timing of Eligibility Determinations.

18. Plaintiffs' Section 1396a(a)(8) claim fails because the reasonable promptness requirement in Section 1396a(a)(8) applies only to the payment of Medicaid healthcare claims and the provision of Medicaid-covered care and services, not to the determination of eligibility for those services. Plaintiffs' requests for declaratory and permanent injunctive relief thus fail,

because Plaintiffs cannot even meet the first requirement for both types of relief: a violation of law.

19. The reasonable promptness requirement of Section 1396a(a)(8) does not apply to the determination of eligibility for Medicaid.

a. Section 1396a(a)(8) provides that a state's Medicaid plan must "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8).

b. The statute defines "medical assistance" as "payment of part or all of the cost of [covered] care and services or the care and services themselves, or both . . . ." 42 U.S.C. § 1396d(a).

c. Section 1396a(a)(8) thus requires the State to pay Medicaid claims submitted by "eligible individuals" or provide them with the covered healthcare services "with reasonable promptness."

d. Section 1396a(a)(8) says nothing about how promptly a state must determine anyone's eligibility.

e. Instead, a different provision—Section 1396a(a)(19)—sets forth the standards governing eligibility determinations, and it does not require "reasonable promptness." *See* 42 U.S.C. § 1396a(a)(19) (State plan must "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined . . . in a manner consistent with simplicity of administration and the best interests of the recipients.").

20. Sixth Circuit case law supports this clear-text reading.

a. The Sixth Circuit has consistently interpreted the "reasonable promptness" requirement by reference to its statutory definition—requiring reasonable promptness *only* for claims that fall within the operative definition of "medical assistance."

b. For example, in *Brown v. Tennessee Department of Finance & Administration*, 561 F.3d 542 (6th Cir. 2009), the Sixth Circuit confronted a case in which a state was placing individuals on a waiting list when applying for waiver services. The *Brown* Court found that, under the then-current definition of "medical assistance," placing individuals on the list did not constitute medical assistance—and thus the reasonable promptness requirement did not apply. *Id.* at 544–45.

c. Applying *Brown*'s logic to the situation at hand produces the same result: the mere act of applying to TennCare does not constitute or create a claim to "medical assistance" because it is not "payment of part or all of the cost of [covered] care and services or the care and services themselves, or both . . . ." 42 U.S.C. § 1396d(a). And because Section § 1396a(a)(8) only requires that "medical assistance" "be furnished with reasonable promptness to all eligible individuals," the application process—and the timing of the State's consideration of an application—falls outside its bounds.

B. <u>Section 1396a(a)(8) Does Not Grant Rights That Are Enforceable Under 42 U.S.C. § 1983</u>.

21. Section 1396a(a)(8) does not confer a private right that is enforceable under Section 1983 for three reasons. *See* Defendants' Brief in Support of Dismissal of Plaintiffs' Section 1396a(a)(8) Claim on the Ground That It Does Not Confer a Right Enforceable Under Section 1983 (Oct. 19, 2018), Doc. 253 ("Defendants' Post Trial Brief").[1]

[1] Defendants incorporate by reference the arguments made in Defendants' Post Trial Brief.

a. Section 1396a(a)(8) does not unambiguously confer private rights.

b. Section 1396a(a)(8) is too vague and ambiguous to confer a right that is enforceable under Section 1983. A vague statutory standard does not become privately enforceable under Section 1983 when a regulator supplies the specifics. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.").

c. The Medicaid statute provides other means to enforce Section 1396a(a)(8).

22. Because Section 1396a(a)(8) is not enforceable under Section 1983, this claim fails as a matter of law, and Plaintiffs are entitled to no declaratory or injunctive relief on the basis of Section 1396a(a)(8).

C. Plaintiffs' Claim Fails on the Merits Because TennCare Substantially Complies with 42 U.S.C. § 1396a(a)(8).

23. Plaintiffs' Section 1396a(a)(8) claim fails on the merits because they have not shown that the State is not in substantial compliance with that provision.

1. Substantial Compliance Is Measured on a System-Wide Basis.

24. Plaintiffs claim that 42 C.F.R. § 435.912 defines reasonable promptness for the purposes of Section 1396a(a)(8), and the State must make eligibility determinations within 45 days after an application was submitted (or within 90 days if eligibility is based on a disability). 42 C.F.R. § 435.912(c)(3).

25. Even assuming that Section 1396a(a)(8) applies to eligibility determinations and that this reading is correct, Section 1396a(a)(8) does not create a zero–tolerance policy that requires *every* application to be processed within this 45- or 90-day timeframe.

26. The Medicaid statute only requires the State to "comply substantially"—not perfectly—with the provisions of Section 1396a—including the requirements of Section 1396a(a)(8)—in administering its plan. 42 U.S.C. § 1396c(2).

27. Courts appropriately evaluate substantial compliance under this provision (and others that are similar to it) by examining systemwide performance.

a. In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Supreme Court interpreted a similar provision in Title IV-D of the Social Security Act, which requires that states "substantially comply" with federal law governing the Title IV-D program, 42 U.S.C. § 609(a)(8)(A)(i)(III). The *Blessing* Court explained that the substantial compliance standard is used "to measure the *systemwide* performance" by "look[ing] to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied." 520 U.S. at 343.

b. The Eighth Circuit has taken a similar approach to the substantial compliance in the Medicaid Statute. That court has explained that "[p]lan conformity issues under [Section 1396c] . . . generally relate to compliance questions that have a broad impact on the overall state program." *Minnesota by Noot v. Heckler*, 718 F.2d 852, 857 (8th Cir. 1983).

c. Substantial compliance is thus measured on the basis of a system-wide evaluation and is not defeated by a small percentage of individual cases of non-compliance. *See Independent Acceptance Co. v. California*, 204 F.3d 1247, 1252 (9th Cir. 2000) ("[S]ubstantial compliance" does not require "absolutely literal compliance."); *see also Christ the King Manor, Inc. v. Secretary U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 316–17 (3d Cir. 2013).

2. TennCare Substantially Complies With Section 1396a(a)(8) Because Over 99 Percent of Applicants Receive Eligibility Determinations Within the Time Periods Specified in 42 C.F.R. § 435.912(c)(3).

28. In the most recent fiscal year, the State adjudicated over 99 percent of TennCare applications within the 45- or 90-day period in Section 435.912(c)(3). Defendants' Proposed Findings of Fact ¶ 159 ("PFOF").

29. Only a *de minimis* percentage—0.87 percent—of applicants experienced delays beyond 45 or 90 days. PFOF ¶¶ 159, 164.

30. The State has thus attained substantial compliance.

a. TennCare's systemwide performance has achieved substantial compliance because the aggregate services that TennCare provides—here, the timely processing of TennCare applications—meet the regulatory standard for timeliness in almost every case. *See Blessing*, 520 U.S. at 343.

b. The tiny handful of the over 40,000 TennCare applications per month that take longer than 45 or 90 days to process clearly do not have "a broad impact on" TennCare which, again, means that the State has achieved substantial compliance. *Heckler*, 718 F.2d at 857.

31. Even if the precise number of delayed applications is slightly higher, as Plaintiffs contend, that does not change the calculus; a slightly higher percentage of delayed applications would not have a broad impact on TennCare or significantly impact systemwide performance. *See* PFOF ¶¶ 164–65.

32. Plaintiffs speculate that the delayed appeals percentage *might* be higher, but they have not carried their burden of proving that it *is* higher.

a. Plaintiffs were unable to provide evidence of any individuals who had a delayed application but chose not to file a delayed application appeal or were unable to do so. *See* PFOF ¶¶ 162–63.

b. Plaintiffs thus failed to carry their burden of proof that the State is not in substantial compliance with Section 1396a(a)(8) and Section 435.912(c)(3).

3. Plaintiffs Have Likewise Failed To Prove That the Small Number of Delayed Applicants Are Not Delayed Due to Unusual Circumstances.

33. Section 435.912 provides that some applications that are pending over 45 or 90 days do not count as delayed under the federal regulation. Applications processed beyond 45 or 90 days are not considered to be delayed if the time lag is the result of "unusual circumstances, for example—(1) When the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action, or (2) When there is an administrative or other emergency beyond the agency's control." 42 C.F.R. § 435.912(e).

34. Plaintiffs have not presented *any* evidence suggesting that the relatively few cases where the eligibility determination extends beyond 45 or 90 days fall outside of this "unusual circumstances" exception.

35. The Court did not make any prior findings that are binding on this issue.

a. Plaintiffs suggested at trial that the Court had already considered and rejected the argument that any applications processed after 45 or 90 days may be the result of "unusual circumstances," and thus not in violation of the "reasonable promptness" mandate of Section 1396a(a)(8) in its 2014 preliminary injunction ruling. *See* Transcript of October 10 Proceedings Volume II at 176:15–177:9 (Nov. 9, 2018), Doc. 257 ("Day 2 Trial Tr.") (closing statement of Plaintiffs' counsel).

b. Plaintiffs are mistaken. The Court rejected only the argument that "the existence of 'unusual circumstances,' under 42 C.F.R. § 435.912(e), excuses the[ ] failure to provide a fair hearing to TennCare applicants with 'reasonable promptness.' " Preliminary Injunction Order at 6 (Sept. 2, 2014), Doc. 91.

c. It is undisputed that the State today provides timely administrative appeals whenever an application takes longer than 45 or 90 days to process. PFOF ¶¶ 63–67, 80, 127.

d. The Court's brief discussion of the "unusual circumstances" issue in 2014 does not shed any light on the factual question now before the Court: whether the *de minimis* percentage of applications that are delayed in 2018 are the result of unusual circumstances unique to each of those few cases.

36. Plaintiffs have thus not provided any proof that the "unusual circumstances" provision in Section 435.912(e) does not apply to most or all of the minuscule percentage of applications that take longer than 45 or 90 days to process. Accordingly, their Section 1396a(a)(8) claim fails on the merits.

D. Declaratory and Injunctive Relief Are Not Available for Any Violation of Section 1396a(a)(8).

1. The Sole Remedy for Any Violation of Section 1396a(a)(8) Is a Fair Hearing Before the Agency, Which All Agree the State Already Provides.

37. The Supreme Court has repeatedly held that " 'it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14–15 (1981) (quoting *Transamerica Morg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 571–74 (1979). "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that

Congress provided precisely the remedies it considered appropriate." *Middlesex County*, 453 U.S. at 15.

38. Here, Congress has instructed the State to provide "an opportunity for a fair hearing *before the State agency*" when an application is not adjudicated with "reasonable promptness." 42 U.S.C. § 1396a(a)(3) (emphasis added).

39. This administrative appeal to the State Medicaid agency was the remedy—and the *only* remedy—that Congress provided. *See* 42 U.S.C. § 1396a(a)(3).[2]

40. There is no doubt that Defendants are providing this remedy; Plaintiffs have conceded that the State's delayed application appeals process is "effective" and "working," Transcript of October 9 Proceedings Volume I at 8:23 (Nov. 9, 2018), Doc. 256, and it is codified in TennCare's regulations, *see* PFOF ¶¶ 127–30.

41. Because the Medicaid Statute itself provides the remedy for any violation of the reasonable promptness requirement, and because the State is complying with the requirement to provide that remedy, the Court may not grant federal judicial equitable or declaratory relief that goes beyond that remedy. *See Middlesex County*, 453 U.S. at 14–15.

2. Plaintiffs' Requested Relief Would Improperly Circumvent the Solution That the State and CMS Have Agreed Upon, Which Is Entitled to Deference.

42. Plaintiffs' requested relief is also inappropriate because it circumvents the expert opinions of State and federal officials regarding the best method of handling the TennCare application process until TEDS becomes operational.

[2] It is telling that, though Plaintiffs sought preliminary injunctive relief addressing their Section 1396a(a)(8) claim, this Court limited the relief to an order requiring "fair hearings." *See* Preliminary Injunction Order at 8.

43. The State and CMS have entered into—and renewed—a carefully-crafted Mitigation Plan to manage the TennCare process in the interim.

a. Both CMS and the State read the applicable statutes and regulations as allowing the Mitigation Plan, *see* DX2 at 2 (April 2017 Memorandum of Agreement), and they agree that the Mitigation Plan was entered into "to minimize the burden on individuals and ensure prompt determinations or assessments (as applicable) of eligibility," *id.* at 1.

b. Plaintiffs have produced no evidence that CMS has expressed any concerns about how the State is implementing the Mitigation Plan.

44. The Court owes deference to the joint determination of CMS and the State about the best way for TennCare to comply with its obligations until TEDS is operational. *See Rosen v. Goetz*, 410 F.3d 919, 927 (6th Cir. 2005) ("CMS, the agency that authored and promulgated the regulations, has approved the State's policies as fully compliant with its regulations, a determination to which we owe 'substantial deference.' ").

a. Deference is particularly appropriate where, as here, the program at issue is highly technical. *Harris v. Olszewski*, 442 F.3d 456, 468 (6th Cir. 2006) ("[R]eliance on [the] Secretary's significant expertise [also is] particularly appropriate in the context of a complex and highly technical regulatory program like Medicaid." (quotation marks omitted) (alterations in original)); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("[B]road deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." (quotations marks omitted)).

b. Piling Plaintiffs' requested relief on top of that adopted by the State and CMS would undermine their joint decision grounded on their mutual and substantial expertise, and would also vitiate their joint policy determination that the Mitigation Plan is in the best interest of applicants.

45. Deference is thus owed to the seasoned judgment of the State and CMS that the Mitigation Plan—and no further requirements—are all that is necessary to best implement the Medicaid statute at this time.

3. Plaintiffs' New Proposed Injunctive Relief for Purported Section 1396a(a)(8) Violations Cannot Be Granted Because Plaintiffs Forfeited This Request by Failing To Raise It Before Trial.

46. As the Supreme Court has explained, "a final pretrial order" can "supersede[] all prior pleadings and 'control[ ] the subsequent course of the action.' " *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 (2007) (citing former FED. R. CIV. P. 16(e)).

47. When a party fails to raise a request for relief before trial—such as in the pretrial order—that party forfeits the request for relief and will not be permitted to raise such a request after trial. *See Rockwell*, 549 U.S. at 474 ("[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived." (citation and internal quotation omitted) (alteration in original)); *Thomas v. Schroer*, 2017 WL 6489144, at *8 (W.D. Tenn. Sept. 20, 2017) (relying on *Rockwell* for the proposition that "if a request for injunctive relief is not included in the final pretrial order, it is ordinarily deemed to be waived"); *United States v. 47 Bottles, More or Less, Jenasol RJ Formula "60"*, 320 F.2d 564, 573 (3d Cir. 1963) ("[W]e nonetheless think it unfair and substantially prejudicial to permit the injection of a new and different prayer for relief after trial at the very end of the case."); *see also United States v. Olano*, 507 U.S. 725, 733 (1993)

(explaining that the term "forfeiture" rather than "waiver" is the correct term to describe the failure to timely assert a right).

48. Plaintiffs' requests for an injunction subjecting Defendants to a number of specific requirements that were not suggested before trial, *compare* Plaintiffs' Proposed Relief at 6–7 *with* Agreed Pretrial Order at 5 (Sept. 17, 2018), Doc. 243, must thus be denied.

a. In the final pretrial order, Plaintiffs included a brief request for injunctive and declaratory relief. *See* Agreed Pretrial Order at 4–5.

b. However, in their post-trial filing, Plaintiffs dramatically expanded their request for relief. Plaintiffs' Proposed Relief at 6–7.

c. Most notably for the purposes of the Section 1396a(a)(8) claim, Plaintiffs never previously raised the possibility of the highly-specific requirements for calculating delays that they now wish to impose on Defendants. *See* Plaintiffs' Proposed Relief at 6.

d. Plaintiffs likewise waited until their post-trial filing to request that Defendants be subjected to notice requirements based on Section 1396a(a)(8); there is no mention of notice in their pretrial request for relief based on Section 1396a(a)(8). *Compare* Plaintiffs' Proposed Relief at 7 *with* Agreed Pretrial Order at 5.

49. Thus even if Plaintiffs had successfully proven some violation of Section 1396a(a)(8), by failing to seek these requests for relief prior to trial, Plaintiffs forfeited them and cannot be allowed to press them at this late juncture. *See Rockwell*, 549 U.S. at 474

50. A ruling to the contrary would be unfair and prejudicial to Defendants, *see 47 Bottles*, 320 F.2d at 573, because they were not on notice of the need to put in evidence at trial to rebut these post-trial requests.[3]

4. Plaintiffs' Requested Injunctive Relief for Their Section 1396a(a)(8) Claim Cannot Be Granted Because It Is Not Tailored to the Purported Violation.

51. Injunctive relief must "be strictly tailored to accomplish only that which the situation specifically requires." *Consolidated Aluminum Corp.*, 696 F.2d at 446.

52. Plaintiffs' request for injunctive relief as to the Section 1396a(a)(8) claim contains essentially three components: (1) require the State to take new steps to identify systemic issues; (2) require the State to engage in additional tracking of delayed applications and calculations of delays; and (3) require the State to post additional notices of the right to file delayed application appeals in physical locations.

53. Because Plaintiffs have failed to prove that these detailed requests for injunctive relief will make any positive change in the administration of TennCare, injunctive relief must be denied.

54. First, Plaintiffs failed to prove at trial that the current systems that Defendants have in place are insufficient to identify systemic issues.

a. Defendants clearly demonstrated that they have multiple programs to identify and solve systemic issues and that those programs have been successful.

[3] The new relief requested in Plaintiffs' Proposed Relief is also the subject of Defendants' Motion to Strike, Or, In the Alternative, Motion to Reopen Evidence, that Defendants have filed the same day as these Proposed Conclusions of Law. If the Court nevertheless decides to consider granting these new requests for relief, Defendants respectfully request a fair opportunity to reopen the record and put in evidence addressing the new forms of relief.

b. Defendants use the following systems to identify and solve systemic issues: (1) TennCare management creates and closely watches management reports to identify systemic problems; (2) Defendants regularly monitor the delayed application appeals data for similar types of appeals that might indicate a systemic problem; and (3) a number of internal and external groups provide TennCare with information about systemic issues. PFOF ¶¶ 81–96.

c. Using these processes, Defendants have successfully identified and resolved numerous systemic issues over the past four years. PFOF ¶¶ 131–52.

d. In the face of all this, Plaintiffs put in *no evidence* that Defendants' systems are insufficient, that Defendants have failed to notice any systemic issues, or that the novel system they propose in their request for injunctive relief will be successful.

e. Plaintiffs' request for new processes to identify systemic issues is thus not "strictly tailored," *Consolidated Aluminum Corp.*, 696 F.2d at 446, and must be rejected.

55. Second, Plaintiffs have failed to prove that the State needs to increase its tracking of delayed applications and alter its calculations of delays.

a. The Court must presume that the Defendants are highly-qualified to determine what tracking systems best serve the goals of the TennCare system. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) ("As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities.").

b. Defendants have already considered the possibility of increased tracking and found that it would not assist the State or applicants in any way, because it would not improve the system or increase the speed at which applications are resolved. PFOF ¶¶ 121–25. Rather, the State has adopted a system that tracks applications from the moment that they are received to the

moment that they are resolved and regularly generates reports based on that system. *Id.* ¶¶ 119–20. Defendants have found that this process best helps the State meet its goals of quickly processing the maximum number of applications possible.

c. Again, Plaintiffs have not met their burden of proof to demonstrate that the additional tracking they propose will help Defendants to comply with their statutory obligations or speed up the application process—which means that their proposed injunctive relief must be rejected. *See Consolidated Aluminum Corp.*, 696 F.2d at 446.

56. Third, Plaintiffs have failed to prove that their requested notice requirements will redress any real-world problems.

a. Plaintiffs insist that Defendants must be required to post additional notices of the right to file delayed application appeals in physical locations.

b. But the State already provides notice of the right to appeal in numerous ways.

c. It already displays the Tennessee Health Connection's phone number prominently on documents, on its website, and in numerous physical locations—and if individuals call that number and raise the possibility that their application may be delayed, employees will counsel them about their rights to a delayed application appeal. PFOF ¶ 205.

d. What is more, Defendants advertise the right to appeal prominently on the TennCare website. PFOF ¶ 206.

e. Plaintiffs have failed to offer any evidence that (1) the current forms of notice are insufficient; (2) there is a single individual who would have appealed if only they had received notice of the right to appeal; or (3) the form of notice Plaintiffs request will in any way help Defendants comply with Section 1396a(a)(8). That last component is particularly telling; it

is unclear how notifying individuals of their right to a delayed application appeal will help Defendants process more appeals *before* they become delayed, which is supposedly the crux of Plaintiffs' Section 1396a(a)(8) claim.

57. Plaintiffs thus have failed to carry their burden of proving that the injunctive relief that they seek will do anything to solve any problems created by a purported violation of the "reasonable promptness" requirement in Section 1396a(a)(8). Because this relief is not "narrowly tailored to give only the relief to which the plaintiff is entitled," *Williams*, 937 F.2d 609, the Court must reject it.

IV. Plaintiffs Are Entitled to No Relief for Violation of 42 U.S.C. § 1396a(a)(3).

58. Plaintiffs also seek relief for violation of 42 U.S.C. § 1396a(a)(3), which provides that a State plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness."

59. This claim must fail for four independent reasons: (1) this request for relief has become moot; (2) further injunctive relief would be improper due to Defendants' longstanding compliance with Section 1396a(a)(3); (3) Section 1396a(a)(3)'s hearing requirement applies only to claims for medical assistance; and (4) the specific, newly-minted forms of relief that Plaintiffs request have no basis in the law or facts of this case.

A. Plaintiffs' Section 1396a(a)(3) Claim Is Moot.

60. The continued availability of an administrative appeals process moots Plaintiffs' Section 1396a(a)(3) claim.

61. Plaintiffs have consistently requested (1) a declaration that Defendants are violating Section 1396a(a)(3), and (2) an injunction that requires Defendants to provide TennCare applicants with a fair hearing. *See* Agreed Pretrial Order at 5.

62. But Plaintiffs have received all that they request on this front.

a. The parties have stipulated that a delayed application appeals process is both codified in the TennCare regulations and available to all class members. *See* Agreed Factual and Evidentiary Stipulations at 7 (Sept. 17, 2018), Doc. 244.

b. Defendants demonstrated at trial that they have no intention of abandoning this process, and Plaintiffs did not provide any proof to the contrary.

63. Under Supreme Court precedent, the continued availability of an administrative appeals process moots Plaintiffs' Section 1396a(a)(3) claim.

a. The judicial power is limited to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1.

b. The Supreme Court has "interpreted this requirement to demand that 'an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.' " *Campbell-Ewald Co.*, 136 S. Ct. at 669 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)).

c. Because TennCare provides the process that Plaintiffs seek (hearings required under Section 1396a(a)(3)), Plaintiffs have no relief left to receive and the case has become moot. *See, e.g.*, *Murphy v. Hunt*, 455 U.S. 478, 481–82 (1982) (per curiam).

64. Plaintiffs argue that the case is not moot because the State might abandon its appeals system once the preliminary injunction is vacated and the case dismissed. *See* Plaintiffs' Pretrial Brief at 11. This argument fails as a matter of law.

a. The Supreme Court has often rejected arguments that moot claims should survive because a defendant may return to its former ways where, as here, there is little if any reason to expect that the Defendant will resume the challenged conduct. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93–94 (2013); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 404–06 (1972).

b. The Sixth Circuit has repeatedly reached the same conclusion in two circumstances, both of which exist here.

i. First, the Court of Appeals presumes good faith on the part of government officials: when they change their conduct, "such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012); *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010) (citing similar cases applying the same presumption).

ii. Second, when government officials codify that change in a regulation, the alleged problem "no longer requires judicial resolution." *Meadows v. Hopkins*, 713 F.2d 206, 208 (6th Cir. 1983). In such cases, "there is no reasonable likelihood 'that the wrong will be repeated.' " *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

65. Plaintiffs' argument that the case is not moot because the State might abandon its appeals system once the preliminary injunction is vacated, *see* Plaintiffs' Pretrial Brief at 11, likewise fails on the facts of this case, because Defendants' change of conduct—embodied in the TennCare appeals process—is "genuine," *Bench Billboard*, 675 F.3d at 981.

a. Plaintiffs argue that Defendants only adopted the administrative appeals process after this suit was filed, but the State could not have adopted the process any sooner because the FFM was not providing the State with any information concerning the TennCare applications it was failing to adjudicate on a timely basis. *See* PFOF ¶¶ 57, 59, 62. Indeed, Defendants failed to provide those hearings in the first place in 2014 only due to a confluence of extraordinary events—the State's ancient ACCENT computer system, the ACA's new MAGI eligibility requirements, the FFM's inability to process inconsistency applications, and the FFM's initial refusal to provide the State with data about those applications—that themselves will not recur. *Id.* ¶¶ 54–59.

b. The evidence at trial proved that Defendants have no intention of abandoning this process, regardless of the outcome of this lawsuit. PFOF ¶ 130.

i. Defendants have found that the appeals process is working well because it both provides a benefit to applicants *and* plays an important role in helping Defendants to identify and solve systemic problems. PFOF ¶ 130-d.

ii. Defendants' good faith efforts to identify and resolve systemic problems facing TennCare applicants is well documented and undisputed.

iii. Plaintiffs, meanwhile, have provided no evidence to the contrary.

c. The delayed application appeals system has been codified in TennCare's regulations, TENN. COMP. R. & REGS. 1200-13-19 *et seq.*; *see also* PFOF ¶¶ 127–30, which further supports the finding that Defendants will not abandon this system.

d. There is thus "no reasonable likelihood" that any Medicaid applicants in Tennessee will lack the opportunity for a delayed application appeal. *Mosley*, 920 F.2d at 415; *see also DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (reiterating the "settled practice . . . fully to

accept representations" that alleged violations will not recur, even when the change in official policy came after the suit).

66. In sum, because Plaintiffs have no outstanding claim for relief under Section 1393(a)(3) both Plaintiffs' claim for declaratory relief and their claim for injunctive relief under Section 1396a(a)(3) must be dismissed as moot. *See Forbes*, 65 F. App'x at 518; *Magaw*, 132 F.3d at 279.

B. <u>Further Declaratory or Injunctive Relief Would Be Unnecessary and Improper Because Defendants Have Been Complying With the Preliminary Injunction for Over Three Years</u>.

67. Even assuming that the case is not moot, because of Defendants' consistent compliance, declaratory or injunctive relief would be both "unnecessary" and "improper" under settled principles of equity and federalism. *See John B. v. Emkes*, 710 F.3d 394, 412 (6th Cir. 2013) (quotation marks omitted).

68. These principles provide that injunctive relief should not continue to burden government officials longer than necessary.

a. Orders that burden government officials "impact on the public's right to the sound and efficient operation of its institutions." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 380–81 (1992) (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

b. The Sixth Circuit has held that "injunctive relief after a period of compliance should not extend beyond the time necessary to remedy the violation." *Gonzales v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998).

c. The Supreme Court likewise has instructed courts to be "flexible" in considering whether prior orders should remain in effect, so that "responsibility for discharging

the State's obligations is returned promptly to the State and its officials." *Horne v. Flores*, 557 U.S. 433, 450 (2009) (quotation marks omitted).

d. This flexible approach involves two questions: "first, whether the state has achieved compliance with the federal-law provisions whose violation the decree sought to remedy; and second, whether the State would continue that compliance in the absence of continued judicial supervision." *John B.*, 710 F.3d at 412.

69. Here, all agree that the State has "achieved compliance" with Section 1396a(a)(3). Those few Medicaid applicants whose applications are not processed within 45 or 90 days may bring an appeal pursuant to the TennCare regulations, and the State has provided this opportunity without fail for over three years.

70. This compliance will continue with or without "continued judicial supervision," as described by TennCare officials and reflected in TennCare regulations.

71. Thus, not only is the existing injunction subject to vacatur, but any further declaratory or injunctive relief would be both "unnecessary" and "improper." *John B.*, 710 F.3d at 412.

C. Section 1396a(a)(3)'s Hearing Requirement Applies Only to Claims for Medical Assistance, So Plaintiffs Are Not Entitled to Hearings on Delayed Eligibility Determinations.

72. Because Section 1396a(a)(3) only provides for hearings related to "claim[s] for medical assistance," and because the statute defines "medical assistance" as "payment of part or all of the cost of [covered] care and services, or the care and services themselves, or both," 42 U.S.C. § 1396d(a), this provision, like Section 1396a(a)(8), does not speak to eligibility-related administrative appeals.

73. Instead, Section 1396a(a)(3) requires only that the State provide a fair hearing to review the denial of or delay in acting upon a healthcare claim. *See supra* Section III-A.

74. Because Section 1396a(a)(3) does not apply to eligibility determinations, all of Plaintiffs' requests for relief for the purported violation of that provision must be denied.

D. The Specific Injunctive Relief That Plaintiffs Request for the Purported Violation of Section 1396a(a)(3) Has No Basis in Law or Fact.

1. The Court Cannot Grant Plaintiffs' New Proposed Injunctive Relief for Purported Section 1396a(a)(3) Violations Because Plaintiffs Forfeited This Request by Failing To Raise It Before Trial.

75. Even assuming that Plaintiffs had proved an ongoing violation of Section 1396a(a)(3), the Court must deny all the forms of injunctive relief that Plaintiffs seek for the first time in their post-trial filing.

76. Before trial, Defendants notified the Court that, as to Section 1396a(a)(3), they were seeking an injunction that "[r]equires the Defendants to provide TennCare applicants an opportunity to contest delays in determining their eligibility for TennCare" and that the hearing "shall comply with the requirements of 42 U.S.C. § 1396a(a)(3) and its implementing regulations, including the provision of timely notice reasonably calculated to inform applicants of their right to appeal." Agreed Pretrial Order at 5.

77. In their post-trial filing, Plaintiffs asked the Court to impose an enormous amount of additional requirements—*four entire pages worth*—for purported violations of Section 1396a(a)(3). *See* Plaintiffs' Proposed Relief at 2–5. These new requests include (1) requiring Defendants to accept an attestation as proof that an individual has filed an application; (2) forcing Defendants to send individualized notices to all individuals whose applications have been pending for 45 or 90 days; and (3) imposing extremely detailed tracking requirements on Defendants. *Id.*

78. Again, as previously discussed, these newly-minted requests are forfeited because they were not made clear before trial. *See Rockwell*, 549 U.S. at 474.

79. Granting Plaintiffs the extensive injunctive relief requested for the first time after trial would unfairly prejudice Defendants, *see 47 Bottles*, 320 F.2d at 573, because they could not have anticipated the need to put in evidence at trial to rebut these requests.[4]

2. Plaintiffs' Insistence That Defendants Must Accept an Attestation as Proof That an Individual Has Filed an Application Has No Basis in Law or Fact.

80. Plaintiffs now insist that Defendants must accept an attestation under penalty of perjury from an applicant stating that she has filed an application that has been delayed as proof an application had in fact been filed. Plaintiffs' Proposed Relief at 2.

a. There Is No Legal Basis for the Attestation Requirement.

81. 42 C.F.R. § 431.220(a) provides that "[t]he State agency must grant an opportunity for a hearing to . . . [a]ny individual who requests it because he or she believes the agency . . . has not acted upon the claim with reasonable promptness."

82. Plaintiffs claim that the "must grant an opportunity" requirement means that a party must be permitted to proceed with a delayed application appeal even absent any proof that the party actually filed an application (other than a statement from that party). This argument fails for a number of reasons.

83. First, Plaintiffs have failed to locate a single court that has adopted their reading of the statute; the lone case that they cited in their pretrial brief says nothing about whether a State may require proof from an individual (beyond a statement from that individual) that a Medicaid

[4] The new relief requested as to Section 1396a(a)(3) is also the subject of Defendants' motion to strike. *See supra* ¶ 50 n.3.

application has actually been filed before proceeding with a delayed application appeal hearing. Indeed, *Grier v. Goetz*, 402 F. Supp. 2d 876, 922–23 (M.D. Tenn. 2005), did not involve Medicaid eligibility applications at all, but instead addressed the procedures for administrative appeals of denials of healthcare claims submitted by eligible individuals.

84. Second, Plaintiffs' argument cannot be adopted because doing so would undermine nearly all hearings and appeals systems as we know them.

a. Plaintiffs' argument, if taken to its logical ends, would completely undermine the federal appellate system. In order to take an appeal as of right from a federal district court to a federal court of appeals, an individual must file a notice of appeal. *See* FED. R. APP. P. 4. And "[t]he notice of appeal must" (among other requirements) "designate the judgment, order, or part thereof being appealed." FED. R. APP. P. 3(c)(1).

b. Under Plaintiffs' logic, because an appeal is "of right," an individual would be entitled to an appeal even if they could not properly point the court of appeals to the judgment being appealed.

c. Plaintiffs would force the Sixth Circuit to accept an attestation under oath from an appellant that a case was filed in the district court and consider an "appeal"—even if the appellant could not provide a case number, case name, or documents related to the district court case.

d. This cannot be; the right to an appeal or hearing is not undermined by a simple requirement that there be some documentation—beyond a mere attestation—for the matter that is the subject of the appeal. Plaintiffs' argument must be rejected, because it would undermine hearings and appeals systems in numerous areas.

85. Third, requiring the State to hold a delayed application hearing for anyone who merely files an attestation saying that they filed an application cannot be squared with *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

a. That case and its progeny stand for the proposition that statutory requirements enacted pursuant to Congress' spending power (such as Medicaid) must be clearly stated before a state may be held liable for failing to comply with them.

i. The *Pennhurst* inquiry is whether the federal program "furnishes clear notice" regarding the requirement; "[s]tates cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.' " *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17); *see Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014) (describing this rule as an "imperative of clarity").

ii. Whether there has been "clear notice" is an inquiry engaged in from the perspective of a state official, asking whether the state official could reasonably anticipate that the state would be subject to the requirement as a condition of accepting federal funding. *Murphy*, 548 U.S. at 296; *School Dist. of Pontiac v. Secretary of U.S. Dep't of Educ.*, 584 F.3d 253, 271 (6th Cir. 2009).

b. Because the proposed self-attestation requirement is not mentioned in either the Medicaid statute or its regulations, the State was never placed on clear notice that it would be required to offer an appeal to individuals who are unable to produce any external verification that they actually applied for TennCare.

c. What is more, no State official would reasonably anticipate this sort of requirement, particularly because other appeals systems do not require appeals to be offered in the absence of documentation of an underlying application.

d. The *Pennhurst* doctrine thus bars Plaintiffs from forcing this requirement on Defendants.

b. The Attestation Requirement Is Unwarranted on the Facts of This Case.

86. Plaintiffs' proposed attestation requirement also is not properly tailored to cure any purported problems with applicants' ability to file an appeal. *See Consolidated Aluminum Corp.*, 696 F.2d at 446.

87. Plaintiffs failed to carry their factual burden at trial to demonstrate that there are any problems with the current methods that the State has adopted for determining whether an application has been filed and whether it has been delayed.

a. When a delayed application appeal is filed, the State first extensively searches multiple databases for proof in its own systems that an individual has filed an application for TennCare. PFOF ¶¶ 212–14. Only after exhausting those systems will Defendants reach out to an applicant and ask her to provide proof, which the individual can provide in one of many different forms. *Id.* ¶¶ 214–16.

b. Plaintiffs have failed to introduce any evidence suggesting that this system is flawed or that any individuals who actually have a delayed application have been unable to take an appeal.

c. Plaintiffs have failed to point to a significant number of individuals—or even a single individual—whose appeal was rejected by the State for lack of acceptable proof, even though she had actually filed a delayed application. PFOF ¶ 219-d.

88. Plaintiffs have no answer to the fact that this proposal will create serious problems—which means both that the attestation requirement is not properly tailored and that it is

not in the public interest. *See Consolidated Aluminum Corp.*, 696 F.2d at 446; *Winter*, 555 U.S. at 20, 32.

a. At trial, Defendants introduced evidence demonstrating that permitting self-attestations would overwhelm the appeals process rather than help the State to process applications more quickly. PFOF ¶ 219-a.

b. Requiring the attestations to occur under penalty of perjury does not change the calculus; without documentation, individuals will often erroneously report whether or when they applied for Medicaid.

c. At trial, Ms. Krouse proved the point: although she was under oath, she mistakenly testified that she had applied for full TennCare coverage three months before she actually did. PFOF ¶ 219-b.

3. Plaintiffs' Insistence on Individualized Notice of the Right To Appeal Is Not Grounded in Law or Fact.

89. Plaintiffs also seek to force the State to change its approach for notifying individuals that they have a right to a delayed application appeal. Specifically, they ask the Court to order the State to send individualized notices to all individuals whose applications have been pending for 45 or 90 days (whether at the State or with the FFM). Plaintiffs' Proposed Relief at 3–4.

a. The Individualized Notice Requirement at 45 or 90 Days Is Not Required by the Medicaid Statute.

90. Plaintiffs insist that, once an application has been pending for 45 or 90 days, Defendants must provide that applicant with individualized notice that they have a right to file a delayed application appeal.

91. Plaintiffs have not pointed to a statutory provision or regulation mandating individualized notice. *See* Plaintiffs' Pretrial Brief at 10–11.

92. Section 1396a(a)(3) does not specify what form of notice is required.

93. Plaintiffs thus have no basis in the Medicaid statute for imposing the individualized notice requirement.

94. And State officials were never put on clear notice that an onerous individualized notice requirement would be read into the statute, requiring Defendants to send such notices anytime an application hit the 45- or 90-day mark. This fact alone separately forecloses Plaintiffs' request for relief. *See Pennhurst*, 451 U.S. at 17; *Murphy*, 548 U.S. at 296.

b. The Individualized Notice Requirement Cannot Be Ordered on the Facts of This Case.

95. Plaintiffs have failed to prove that individualized notice is necessary to provide actual notice, and thus this request is not narrowly tailored to the supposed issue at hand. *See Consolidated Aluminum Corp.*, 696 F.2d at 446.

96. As discussed above, *see supra* ¶ 56-b–d, the State provides notice of the right to appeal in numerous ways—by posting the number for the Tennessee Health Connection ubiquitously and by explaining the right and the process in multiple prominent places on its website. Plaintiffs failed to put on any credible evidence at trial demonstrating that these current forms of notice were insufficient.

97. What is more, Plaintiffs failed to prove that individualized notice would improve the speed for resolving delayed applications or increase actual notice.

a. Defendants' evidence at trial stands in stark contrast to Plaintiffs' lack thereof: Defendants demonstrated that a mandatory, manually-generated notice could actually *delay* TennCare's decision on the underlying application. PFOF ¶ 209-a.

b. Defendants also explained at trial that there would likely be "saturation" problems if TennCare sent additional notices such as those proposed by Plaintiffs—which, again, would be counterproductive because it might result in applicants or enrollees missing crucial information about their application or benefits. PFOF ¶ 209-b.

c. Again, the Court must presume that responsible TennCare officials are highly competent in determining what types of notice best serve the State's purposes. *See Frew*, 540 U.S. at 442.

98. Plaintiffs' requested relief is thus anything but tailored to the purported lack-of-notice, and thus this Court cannot grant it.[5]

4. The State Does Not Have Authority To Implement Plaintiffs' Proposed Requirement That the State Oversee CMS's Notices.

99. States lack the authority to supervise or regulate the activities of the federal government. *See, e.g., Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (Holmes, J.) (noting "the immunity of the instruments of the United States from state control").

100. Courts will not allow reversal of traditional federal-state relations absent an exceedingly clear statement from Congress, *see Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), particularly because such a system would raise profound separation of powers questions, *see, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010) (vesting

[5] The core of Plaintiffs' request for relief under Section 1396a(a)(3) consists of this individualized notice component; however, Plaintiffs also request some additional non-individualized forms of notice, such as the revision of forms and templates and the display of notices in Department of Human Services offices. *See* Plaintiffs' Proposed Relief at 3. These requests fail for the same reasons that all of Plaintiffs' other notice-related requests fail: they are not required by the statute, and Plaintiffs have failed to prove that they are warranted on the facts of this case. *See supra* ¶¶ 56–57.

of federal Executive power in anyone other than the President violates Article II of the Constitution).

101. Here, Plaintiffs ask the Court to order Defendants to enlist the assistance of CMS to create new forms (or revise existing ones) for notifications informing TennCare applicants of their right to a delayed application appeal.

102. This would require the revision of FFM notices—and thus would require the State to supervise CMS, which is not permitted. *See, e.g.*, *Johnson*, 254 U.S. at 57.

103. Unlike the preliminary injunction, which "merely require[d] the State to provide its *own* hearing on delayed applications" and "d[id] not require the State to commandeer or directly supervise CMS," Plaintiffs' newly-proposed injunction would mandate "direct supervision" as "the only way a state can ensure compliance" with it. *Wilson v. Gordon*, 822 F.3d 934, 955 (6th Cir. 2016).

104. There simply is no way for the State to bring FFM's notices up to Plaintiffs' standards without supervising the FFM. That is not permitted under Supreme Court precedent, so the Court must deny this requested relief.

5. Plaintiffs' Proposed Tracking Requirements Are Neither Required By the Law Nor Permissible on the Facts of This Case.

105. Plaintiffs also seek to impose a number of extremely detailed tracking requirements on Defendants. Plaintiffs' Proposed Relief at 4–5. The crux of Plaintiffs' request appears to be forcing Defendants to begin tracking applications the moment that they are filed with the FFM, *id.*, although Plaintiffs also request tracking of TennCare applications submitted directly to the State, *id.* at 4.

a. There Is No Legal Basis for the Tracking Requirements.

106. As an initial matter, Plaintiffs point to no provision in the Medicaid statute that requires a state to track the dates that applications are filed with the State, or that Defendants' tracking as-is fails to comply with any implicit requirements, which standing alone is enough to deny this requested relief.

107. The core of Plaintiffs' request—for tracking of delays related to the FFM's activity—is even more problematic.

a. The Medicaid regulations clearly provide that a state is not responsible for delays caused by another entity.

b. Plaintiffs point to 42 C.F.R. § 435.912(c)(3) as providing that a state should determine whether an individual is eligible for Medicaid within 45 or 90 days.

c. But that regulation explains that the clock only begins to run once the state has the application in-hand. "The timeliness . . . standards," the regulation states, "must cover the period from the date of application or transfer from another insurance affordability program to the date the agency notifies the applicant of its decision or the date the agency transfers the individual to another insurance affordability program." 42 C.F.R. § 435.912(c)(1).

d. Plaintiffs' insistence that Defendants track timeliness beginning with the time that an application is filed with the FFM thus has no basis in the Medicaid statute and regulations, because Defendants are not responsible for the time that an application is pended at the FFM—a different insurance affordability program.

108. This proposed tracking requirement faces additional difficulties because the State cannot supervise or regulate CMS's activities. *See supra* Section IV-D-4. The State likely cannot

obtain massive amounts of information about *all TennCare applications filed with the FFM* without supervising CMS—which the State has no authority to do.

b. The Tracking Requirements Are Not Based on the Facts of This Case.

109. Plaintiffs have failed to prove that the tracking requirements are narrowly tailored to improve the State's delayed application appeals system.

110. To the extent that Plaintiffs want Defendants to "establish a process to track TennCare applications submitted directly to the State," Plaintiffs' Proposed Relief at 4, Defendants have proven that they are already doing so.

a. The State tracks every application through its TennCare systems—from the moment that the application is received to the moment it is resolved. PFOF ¶ 82.

b. Plaintiffs have not submitted any evidence showing how the tracking of in-State applications that they suggest would differ from or improve upon this system.

111. Plaintiffs' request that Defendants be ordered to gather data and track delays related to applications pending with the FFM likewise is not narrowly tailored to address any violation of law.

a. At trial, Plaintiffs failed to carry their burden that such tracking would be possible or help Defendants to comply with their statutory obligations. Instead, the evidence at trial demonstrated that the State has found that additional tracking would not improve its systems or speed up the resolution of applications. PFOF ¶¶ 121–25.

b. Likewise, the State is not informed when an individual files an application with the FFM, which makes such tracking impossible for the State to do unilaterally, and CMS has expressed reticence when it comes to sharing information with the State. *See* PFOF ¶ 124.

V. Plaintiffs' Due Process Claim Fails With Their Section 1396a(a)(3) Claim; They Have Forfeited Any Separate Theory of Relief Based on Due Process Alone.

112. Because Plaintiffs' Section 1396a(a)(3) claim fails, so too must their Due Process Clause claim.

113. Plaintiffs have never separated out either the requirements for stating a claim under these two theories or the relief that they request based on these two theories.

114. Instead, Plaintiffs have treated the Section 1396a(a)(3) and Due Process Clause theories and requests for relief as one and the same. *See* Plaintiffs' Pretrial Brief at 8 ("Defendants Violate Plaintiffs' Rights Under 42 U.S.C. § 1396a(a)(3) and the Due Process Clause by Failing to Provide a Meaningful Opportunity for Fair Hearings."); *see also* Day 2 Trial Tr. at 165:13–18 (counsel for Plaintiffs) ("The (a)(3) [claim] . . . maps onto our third claim, which is, of course, under the due process clause itself. And I think all the parties recognize those two are relatively indistinguishable. I suppose there are some distinctions around the margins.").

115. Because Plaintiffs have treated these two claims as involving the same burden of proof throughout this litigation, and because Plaintiffs failed to meet their burden of proof on the Section 1396a(a)(3) claim, their Due Process Claim fails as a matter of course.

116. What is more, Plaintiffs failed to even request *any* injunctive relief based on purported Due Process Clause violations in their pretrial request for relief, *see* Agreed Pretrial Order at 5.

117. Plaintiffs have thus forfeited any claim that the Due Process Clause imposes more onerous obligations on the State than Section 1396a(a)(3) or requires different injunctive relief. *See Rockwell*, 549 U.S. at 474. Any such claim must be rejected as too late and prejudicial.

VI. Conclusion.

118. Defendants have operated the TennCare program in full compliance with all applicable provisions of the Medicaid Statute for at least the last three years, and Plaintiffs are not entitled to any relief on either of their claims.

119. The preliminary injunction is appropriately vacated, and judgment is appropriately entered in favor of the State dismissing this case with prejudice.

December 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' Proposed Conclusions of Law was served upon the following counsel of record on this 14th day of December, 2018, via the Court's Electronic Case Filing system:

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