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**OPINION**

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KAREN NELSON MOORE, Circuit Judge. Eleven named plaintiffs, residents of Tennessee who applied for Medicaid ("Plaintiffs"), filed a class action complaint for declaratory and injunctive relief against Darin Gordon, the Director of the Bureau of TennCare, Larry Martin, the Commissioner of the Department of Finance and Administration, and Dr. Raquel Hatter, the Commissioner of Human Services (collectively "the State"), alleging that the delays Plaintiffs have experienced in receiving eligibility determinations on their Medicaid applications violate 42 U.S.C. § 1396a(a)(8) of the Medicaid statute, and that the State's failure to provide a fair hearing on their delayed applications violates § 1396a(a)(3) and the Due Process Clause of the United States Constitution. The district court certified a class and granted Plaintiffs' motion for a preliminary injunction, which requires the State to grant a fair hearing on delayed applications to class members who request one. The State now appeals the grant of the preliminary injunction, but has not appealed the class certification order. For the reasons set forth below, we **AFFIRM** the district court's grant of a preliminary injunction.

## I. BACKGROUND

### A. Factual Background

The Medicaid statute requires that states electing to participate in Medicaid "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). Regulations implementing the statute provide that "the determination of eligibility for any applicant may not exceed" 90 days for those "who apply for Medicaid on the basis of disability" and 45 days for all other applicants. 42 C.F.R. § 435.912(c)(3). The Medicaid statute additionally requires that states 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." 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220(a)(1) ("The State agency must grant an

opportunity for a hearing to . . . [a]ny applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness."). Where a hearing concerns a delayed application, "[t]he hearing must cover . . . [a]gency action or failure to act with reasonable promptness on a claim for services, including both initial and subsequent decisions regarding eligibility." 42 C.F.R. § 431.241(a). Moreover, a state is required to designate a "single State agency to administer or to supervise the administration of the plan." 42 U.S.C. § 1396a(a)(5). Tennessee's Medicaid program is known as TennCare and is administered by the Bureau of TennCare, which is within the Department of Finance and Administration. R. 52 (Gordon Decl. ¶ 1) (Page ID #660).

The Affordable Care Act ("ACA") introduced several changes to federal law that affected Medicaid. First, the ACA required the creation of Exchanges, state-specific health insurance marketplaces where individuals can compare and purchase private insurance plans. 42 U.S.C. § 18031. States were required either to create their own Exchange by January 1, 2014, or to allow the federal Centers for Medicare and Medicaid Services ("CMS") to operate an Exchange in the state. *Id.* §§ 18031(b)(1); 18041(b) & (c); 18083(a). Second, states must now use a standard methodology to calculate income eligibility for most categories of Medicaid, called "modified adjusted gross income" ("MAGI").[1] *Id.* § 1396a(e)(14).

Third, states must use a single, streamlined application for state health insurance and subsidy programs, including Medicaid and Children's Health Insurance Program ("CHIP"). *Id.* § 18083(b)(1)(A); § 1396w-3(b)(3). Fourth, states are required to develop an electronic system for data exchange that enables information on the application to be checked against data available electronically from federal agencies like the Internal Revenue Service ("IRS") and the Social Security Administration ("SSA"). *Id.* § 18083(c). CMS has established the Federal Data Services Hub as "a single repository for all federal data that may be useful in verifying Medicaid eligibility." R. 55 (Purcell Decl. ¶ 4) (Page ID #708).

[1]

http://news.tn.gov/node/13420. Thus, Tennessee continues to refer all MAGI-based applicants to the Exchange. R. 4-1 (Tennessee Mitigation Plan at 1) (Page ID #274). Tennessee continues to

> opportunity for a "fair hearing" by the State Defendants after these time periods have run.

R. 90 (Order re: Class Cert. at 8) (Page ID #1278). The State has not appealed this order. The district court granted the following preliminary injunction:

> The Defendants are enjoined from continuing to refuse to provide "fair hearings" on delayed adjudications, as required by 42 U.S.C. §§ 1396a(a)(3), (8) and 42 C.F.R. § 435.912(c)(3). More specifically, based on these provisions, and the Fourteenth Amendment Due Process Clause, the Defendants are ordered to provide the Plaintiff Class with an opportunity for a fair hearing on any delayed adjudication. Any fair hearing shall be held within 45 days after the Class Member requests a hearing and provides the Defendants with proof that an application for medical assistance was filed (or the hearing shall be held within 90 days after that date, if the application was based on disability).
>
> "Delayed adjudication," for purposes of this injunction, means an adjudication that has not occurred within 90 days after the filing of an application for Medicaid on the basis of disability, and within 45 days after the filing of all other Medicaid applications.

R. 91 (Order re: Prelim. Inj. at 8–9) (Page ID #1287–88) (footnote omitted). The State filed a timely notice of appeal of this order. R. 97 (Notice of Appeal) (Page ID #1481).

## II. JURISDICTION: This Case Is Not Moot.

A core tenet of Article III is that "federal courts may adjudicate only actual, ongoing cases or controversies." *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (internal quotation marks omitted). The Supreme Court has explained that a case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," sometimes referred to as "the personal stake requirement." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410 (1980) (internal quotation marks omitted). When class actions are involved, however, the Supreme Court has explained that "the Art. III mootness doctrine" is "flexible." *Id.* at 400. And unlike plaintiffs proceeding individually, "[a] class representative has two legally cognizable interests: 'One is the claim on the merits; the other is the claim that he is entitled to represent a class.'" *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 528 (D.C. Cir. 2006) (quoting *Geraghty*, 445 U.S. at 402).

The parties do not dispute that all eleven named plaintiffs' individual claims became moot before the district court certified the class. The general rule is that "[*o*]*nce a class is certified*, the mooting of the named plaintiff's claim does not moot the action, the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists." *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993) (emphasis in original). This is because once a class is certified, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by" the named plaintiff. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). "Where, on the other hand, the named plaintiff's claim becomes moot *before* certification," the ordinary rule is that "dismissal of the action is required." *Brunet*, 1 F.3d at 399 (emphasis in original). However, there are exceptions to the general rule.

In its class certification order (again, not appealed by the State), the district court addressed this issue as part of its consideration of whether Plaintiffs would be adequate representatives of the class. R. 90 (Order re: Class Cert. at 5) (Page ID #1275). The district court held that three exceptions to the mootness doctrine applied—the "capable of repetition, yet evading review" exception, the "inherently transitory" exception, and the "picking off" exception. *Id.* at 6–7 (Page ID #1276–77).

The State argues that the district court erred in applying these exceptions to mootness, and adds an additional reason for finding this case moot: that Plaintiffs voluntarily released their claims. We evaluate these arguments below, and ultimately conclude that this case is not moot.

**A. The Parties' Joint Motion Did Not Render This Action Moot.**

The State argues that by agreeing to withdraw their motion for expedited briefing on the class certification and preliminary injunction motions in exchange for the State's promise "to specially process the TennCare applications of the named plaintiffs and up to 100 total applications identified by Plaintiffs' counsel as having been delayed," Appellant Br. at 19–20, Plaintiffs "voluntarily relinquished" their claims, *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 705 (6th Cir. 2009), thereby mooting the case. We do not think that Plaintiffs voluntarily

relinquished their claims by agreeing to this process, even though Plaintiffs' received relief as a consequence.

On July 28, 2014, the parties submitted a "Joint Motion to Enter a Scheduling Order on Plaintiffs' Motions for a Preliminary Injunction and for Class Certification." R. 24 (Jt. Mot.) (Page ID #370–72). Plaintiffs had previously filed a motion for an expedited hearing on these motions on July 23, 2014. R. 6 (Mot. to Expedite Hr'g) (Page ID #330–37). The Joint Motion states that "[b]ased on the State's agreement to take certain actions to alleviate the immediate concerns of the Plaintiffs, Plaintiffs respectfully withdraw their motion for an expedited hearing . . . and along with the State, respectfully request that the Court grant the State until August 14, 2014 to file its responses to the motion for class certification and a preliminary injunction." R. 24 (Jt. Mot. ¶ 2) (Page ID #370–71). The Joint Motion concludes, however, that "[t]he Plaintiffs continue to request an oral argument on the motions for preliminary injunction and class certification as promptly as possible after the 14th." *Id.* ¶ 4 (Page ID #371).

Declarations submitted by both parties further flesh out what actions the State agreed to take. Kim Hagan, the Eligibility Policy Administrator for the TennCare Division of Member Services, explained that "the State . . . agree[d] to provide individualized help for the named Plaintiffs and up to 100 total applications that Plaintiffs' counsel would bring to the State's attention to see if the State could resolve their applications." R. 53 (Hagan Decl. ¶¶ 1, 12) (Page ID #667, 672). Specifically, the State agreed to take two actions. "[F]or those named Plaintiffs who were newborn children of non-TennCare mothers, the State agreed to immediately provide Plaintiffs' counsel with an application for a new presumptive eligibility program for newborns the State is working with CMS to get approved and that the State has decided to implement in anticipation of that approval. Upon return of that application, the State agreed to enroll any newborn found eligible." *Id.* ¶ 12 (Page ID #672). "The State also agreed to ask CMS to provide [it] with the individual case files of the ot

The plain terms of the Joint Motion did not settle the case. Contrary to the dissent's assertion, the State did not *guarantee* eligibility determinations or even fair hearings for all of the named plaintiffs and the 100 other class members identified. *See*

"inherently transitory" exception and the "picking off" exception apply. However, the district court erred in holding that the "capable of repetition yet evading review" exception applies.

**1. "Inherently transitory" exception**

In *Sosna*, the Supreme Court first hinted at what would become the "inherently transitory" exception to normal mootness rules when the named plaintiff's claims become moot prior to class certification:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

419 U.S. at 402 n.11; *see also Geraghty*, 445 U.S. at 399 (describing this as the "inherently transitory" exception).

The Supreme Court applied this exception in *Gerstein v. Pugh*, 420 U.S. 103 (1975). The named plaintiffs in that case filed a class action composed of pretrial detainees alleging that Florida violated their constitutional rights by not providing a prompt judicial hearing on probable cause. *Id.* at 105–07. "[T]he record d[id] not indicate whether any of [the named plaintiffs] were still in custody awaiting trial when the District Court certified the class." *Id.* at 111 n.11. The Supreme Court nevertheless held that the case was not moot. *Id.* The Court explained that "[t]he length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial." *Id.* Thus, the Court continued, "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Id.* Unlike the "capable of repetition but evading review" exception, the Court did not require that the named plaintiffs show that they personally will be subject to the same practice again. *Geraghty*, 445 U.S. at 399 ("There was no indication that the particular named plaintiffs [in *Gerstein*] might again be subject to pretrial detention."). Rather, the Court required only that other class members would suffer the same injury: "in this case the constant existence of a class of persons suffering the deprivation is certain." *Gerstein*, 420 U.S. at 111 n.11. The

delays in processing various public assistance applications was not moot even though the named plaintiffs received their benefits before the class could be certified on remand. 987 F.2d 931, 939 (2d Cir. 1993). The court explained that "[a]ppellants' claims are inherently transitory since the Department will almost always be able to process a delayed application before a plaintiff can obtain relief through litigation." *Id.* The court did not consider average delays in processing those applications. *Id. See also Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013) (holding that the "inherently transitory" exception applied to claims of nursing home inhabitants as "[t]he length of any individual's stay in a nursing facility is impossible to predict, so even though there are certainly individuals whose claims will not expire within the time it would take to litigate their claims, there is no way for plaintiffs to ensure that the Named Plaintiffs will be those individuals").

It is true, as the State argues, that the Supreme Court's recent decision in *Genesis Healthcare* described this doctrine as "focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy" and emphasized that it has been applied when "no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." 133 S. Ct. at 1531. However, this discussion does not foreclose application of the inherently transitory exception to clai wae

plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists.

Even before *Roper*, we recognized an exception to mootness to address a similar concern of defendants strategically mooting named plaintiffs' claims in an attempt to avoid a class action. In *Blankenship v. Secretary of HEW*, we held that a class action to challenge delays by the Social Security Administration in scheduling administrative hearings was not moot even though "[a]ll of the named plaintiffs received disability hearings before the District Court granted class certification." 587 F.2d 329, 331–33 (6th Cir. 1978). We explained that:

> [t]he claims of delay which the plaintiffs advance, however, epitomize the type of claim which continually evades review if it is declared moot merely because the defendants have voluntarily ceased the illegal practice complained of in the particular instance. Thus, the defendants may expedite processing for any plaintiffs named in a suit while continuing to allow long delays with respect to all other applicants. . . . [R]efusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses.

*Id.* at 333. Thus, we concluded that "the class members retain a live interest in this case" and that "the class certification should 'relate back' to the date of the filing of the complaint." *Id.*

Since *Roper*, we have recognized this line of reasoning under analogous circumstances. In *Carroll v. United Compucred Collections, Inc.*, we held that a class action was not moot even though the named plaintiffs had been tendered a Rule 68 offer of judgment because a motion for class certification was then pending.[3] 399 F.3d 620, 625 (6th Cir. 2005). The *Carroll* court cited our decision in *Brunet* as support, and articulated a concern about defendants strategically picking off named plaintiffs to avoid class actions. *Carroll*, 399 F.3d at 625 ("'If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.'" (quoting *Brunet*, 1 F.3d at

[3]Although the magistrate judge had issued a Report and Recommendation recommending that a class be certified when the defendant had made the Rule 68 offer, we did not limit our holding to that factual scenario. Carroll

400)). In *Brunet*, we recognized that some courts had applied a "picking off" exception. *Brunet*, 1 F.3d at 400 ("Some courts have held that a case does not become moot where a defendant 'picks off' the claims of named plaintiffs with settlement offers in an attempt to avoid a class action . . . where 'a motion for class certification has been pursued with reasonable diligence and is then pending before the district court.'" (quoting

of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached. A series of individual suits, each brought by a new named plaintiff, could individually be 'picked off' before class certification."); *see also Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704–05 (11th Cir. 2014) (affirming that *Zeidman*, "a Fifth Circuit decision issued before October 1, 1981," is also binding law in the Eleventh Circuit).

Although the Supreme Court's decision in *Genesis Healthcare* may be read as casting doubt on the continued vitality of this excep

exception, the Court did observe that allowing an unaccepted offer to moot a case would place defendants like Campbell-Ewald "in the driver's seat," enabling them to avoid significant class-based liability. *Id.* at 672. As the Court explained, "Campbell sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept." *Id.*

The State next argues that there is insufficient evidence that it was actually attempting strategically to moot Plaintiffs' claims, and it cites three out-of-circuit cases declining to find that the "picking off" exception applies without evidence of such a motive. Appellant Br. at 26–28; *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) (declining to apply this exception where the INS ruled on delayed petitions for visas and permanent residence, thus mooting the plaintiffs' claims related to that delay, because "[o]ne swallow does not a summer make, and we have no acceptable basis to conclude, without a more substantial factual predicate, that the INS has devised a scurrilous pattern and practice of thwarting judicial review"); *Sze v. I.N.S.*, 153 F.3d 1005, 1008 (9th Cir. 1998) (declining to apply the exception where the INS ruled on the plaintiffs' applications for naturalization that the plaintiffs argued were illegally delayed because "[p]laintiffs have demonstrated no more than correlation; they have not shown causation"); *Rocky v. King*, 900 F.2d 864, 870–71 (5th Cir. 1990) ("There is no indication that Angola officials will remove . . . inmates from field work before a district court rules on class certification in order to render [a] claim [relating to conditions for field workers] moot.").

To the extent that evidence of a defendant's actual motive to avoid a class action is necessary,[4] the evidence could support such a finding

of the class action by convening an offer of judgment or settlement with the named plaintiffs *before or immediately after a class certification motion is filed*" (emphasis added)). The exact timing of when the last claim of a class member identified by Plaintiffs was mooted—on the eve of the hearing on the preliminary injunction and class certifica

**3. "Capable of repetition yet evading review" exception**

Finally, the district court erred in holding that the "capable of repetition yet evading review" exception to mootness applies to this case. For this exception to apply, "a challenged action must satisfy two requirements. First, it must be too short in duration to be fully litigated before it ceases. Second, there must be a *reasonable* expectation that the *same parties* will be subjected to the same action again." *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 430 (6th Cir. 2013) (citation omitted) (emphases added). Plaintiffs cannot meet the second requirement. Medicaid recipients' eligibility must be reassessed every twelve months. 42 C.F.R. § 435.916(a)(1). However, federal regulations implementing Medicaid require that states continue to provide Medicaid to applicants while their applications for renewal are considered. *Id.* § 435.930(b) ("The agency must . . . [c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible"). The State has not yet created a post-ACA redetermination process. Appellant Br. at 33. Plaintiffs have not presented any evidence that the State will not comply with this federal requirement. Speculation based only on problems with initial enrollment in Medicaid does not give Plaintiffs a *reasonable* expectation that they will be subject to delays that will result in the loss of Medicaid coverage while the redetermination process is ongoing. *Cf. Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) ("Similarly we do not believe that here plaintiffs have offered any evidence which would create a reasonable expectation that the U.S. Labor Party will be subjected to the same actions again."); *see also Gawry*, 395 F. App'x at 158 ("Carr has failed to present evidence showing a 'reasonable expectation' or a 'demonstrated probability' that she will be subject to the type of Countrywide loan at issue in the future.").

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How the defendant is actually successful—whether through unilateral action or settlement with the named plaintiffs—does not affect the policy rationales underlying this exception, such as thwarting defendants' efforts to "frustrate the objectives of class actions" or preventing "waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Roper*, 445 U.S. at 339. We also note that here, the importance of the voluntary–

## III. ANALYSIS: The District Court Properly Issued a Preliminary Injunction.

### A. Standard of Review

We must balance four factors in deciding whether to issue a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (internal quotation marks omitted). "Whether the movant is likely to succeed on the merits is a question of law we review de novo." *Id.* We review the overall determination of whether a preliminary injunction is warranted, however, for an abuse of discretion. *Id.* "This standard is deferential, but [we] may reverse the district court if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact." *Id.*

### B. The District Court Did Not Abuse its Discretion in Granting the Preliminary Injunction.

#### 1. Plaintiffs are likely to succeed on the merits because Tennessee retains ultimate responsibility for administering Medicaid despite the passage of the ACA.

The district court held that Plaintiffs are likely to succeed on the merits because "the State can[not] delegate its responsibilities under the Medicaid program to some other entity—whether that entity is a private party or the Federal Government." R. 91 (Order re: Prelim. Inj. at 5) (Page ID #1284). The district court found that "this principle is longstanding and was not altered by the [ACA]." *Id.* The district court also gave weight to the United States' amicus curiae brief setting forth the same position. *Id.*

The crux of the State's argument is that, by authorizing federal Exchanges in the states, the ACA altered the prior rule that the state Medicaid agency is ultimately responsible for administering Medicaid and ensuring it complies with federal law. Appellant Br. at 34–35. The State claims that CMS is solely responsible for the delays in making benefits-eligibility determinations. *Id.* at 8. Those delays, the State argues, arise because CMS "has not developed

a process for reviewing the supplemental verification documentation submitted by applicants" when there are data inconsistencies between information on the applicant's Medicaid application and information in the Federal Data Services Hub. *Id.* at 9–10; United States Amicus Br. at 7. Additionally, the State argues that "the Federal Exchange has not provided the State with the basic information it needs to process . . . [delayed] applications itself."[6] Appellant Br. at 10. Holding Tennessee responsible in this case, the State argues, would require Tennessee to supervise federal officials at CMS, violating long-standing federalism principles, and the State asserts that nothing in the ACA grants states such authority. *Id.* at 35–36. Rather, the State

"persuasive reasoning" that "it is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity" (internal quotation marks omitted)); *McCartney ex rel. McCartney v. Cansler*, 608 F. Supp. 2d 694, 701 (E.D.N.C. 2009) (holding that the state Medicaid agency "may not disclaim its responsibilities under federal law by simply contracting away its duties"), *aff'd sub nom. D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010); *Carr v. Wilson-Coker*, 203 F.R.D. 66, 75 (D. Conn. 2001) (holding that the state Medicaid agency's "duties relative to ensuring that the plaintiffs receive medical services with reasonable promptness are non-delegable"); *J.K. ex rel. R.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993) ("The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures conforming to bona fide standards of medical necessity."); *see also Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 565 (6th Cir. 2001) (holding that private entities that had contracted with TennCare are bound by a consent decree to which TennCare is a party because they "are acting on behalf of the State, since the State, by statute, is the 'single State agency' responsible for administration of the TennCare program" and citing 42 U.S.C. § 1396a(a)(5)).

Nothing in the ACA modifies this long-standing principle. In fact, 42 U.S.C. § 18118(d) provides that "[n]othing in this title (or an amendment made by this title, *unless specified by direct statutory reference*) shall be construed to modify any existing Federal requirement concerning the State agency responsible for determining eligibility for programs identified in section 18083 of this title," which includes Medicaid. 42 U.S.C. § 18118(d) (emphasis added). Tennessee cannot point to any direct statutory reference relieving states from their general obligation to ensure their Medicaid programs comply with federal law or relieving states from their obligation to provide "a fair hearing *before the State agency*" on delayed applications, *see* 42 U.S.C. § 1396a(a)(3) (emphasis added)—the limited command of the preliminary injunction. Instead, the State points to 42 U.S.C. § 18041(c)(1), which directs "the Secretary [to] . . . establish and operate such Exchange[s] within the State" and to "take such actions as are necessary to implement such other requirements" that apply to state Exchanges, *see* 42 U.S.C. § 18041(c)(1), which the State argues includes promptly adjudicating claims and providing fair hearings, Reply Br. at 17.

The ACA does require the federal government to provide fair hearings on eligibility determinations made by the Exchange. 42 U.S.C. § 18081(f)(1). However, the better reading of the ACA is that it imposes a *parallel* obligation on the federal government to provide fair hearings on eligibility determinations made by the Exchange, which does not displace the state Medicaid agency's general obligation to ensure fair hearings on all Medicaid eligibility determinations. *Exchanges: Eligibility and Enrollment*, 78 Fed. Reg. 42160-01, 42164 (July 15, 2013) (explaining that "section 1902(a)(3) of the Act . . . requires" that individuals have "an opportunity for a fair hearing before the Medicaid agency" even if the state elects to have the federal government operate its Exchange); *id.* at 42165 ("[B]oth state Medicaid agencies and the Exchange have distinct responsibilities to provide for such hearings, and we do not have authority to eliminate individuals' statutory rights, or a Medicaid agency's or Exchange's statutory responsibility.").

Nor does the creation of the "determination" option for federal Exchange states provide the "direct statutory reference" for the State's ar

§ 1396a(a)(5) requires states to designate a single state agency "to administer or *to supervise*" its Medicaid plan, it necessarily follows that the state Medicaid agency must always directly supervise any agency—be it another state agency, private entity, or the federal government—to ensure that its program is complying with federal law. Reply Br. at 15–17. However, direct supervision is not the only way a state can ensure compliance with federal law, as the preliminary injunction here illustrates. The pr

("[Appellants'] argument misses the point, which is not that the State should supervise a federal agency directly, but that the State Medicaid agency retains ultimate responsibility to ensure that the State Medicaid program is administered in accordance with the requirements of the Medicaid statute."). The State argues that the United States' position should not be given deference because it is "wholly unsupported by regulations, rulings, or administrative practices," and is "nothing more than [the] agency's convenient litigating position." Appellant Br. at 38 (quoting *Smiley v. Citibank (South Dakota), NA*, 517 U.S. 735, 741 (1996), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

The United States' position should be given deference. As the above discussion demonstrates, the United States' position is not "wholly unsupported." Two additional factors present or cited in *Bowen*—that the agency was itself a party and that the agency's position espoused in litigation contradicted prior interpretations of a statute, 488 U.S. at 212–13—are not present here. *See, e.g.*, *Eligibility Changes Under the Affordable Care Act of 2010*, 77 Fed. Reg. 17144-01, 17188 (Mar. 23, 2012) (stating that "[a]s is true whenever a single State agency delegates authority to another entity to make eligibility determinations, we continue to require that the single State agency must supervise the administration of the plan, is responsible for making the rules and regulations for administering the plan, and is accountable for the proper administration of the program," while acknowledging in the same paragraph that "delegation authority also applies to any Exchange operated by the Federal government"). Moreover, "[u]nder *Auer v. Robbins*, 519 U.S. 452 (1997), [a court must] defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (quoting *Auer*, 519 U.S. at 461). Nor is the United States' position a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.* at 209 (quoting *Auer*, 519 U.S. at 462) (alteration in original); *see also N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 742 (6th Cir. 2012) ("[L]itigating positions [of federal agencies] are entitled to deference when they are not '*post hoc* rationalization[s]' of previous agency actions." (internal quotation marks omitted) (alteration in original)).

**2. The federal government is not a required party.**

The State also argues that the federal government is a required party in this case. Appellant Br. at 42. Federal Rule of Civil Procedure 19(a)(1) states that a party "must be joined" if "in that person's absence, the court cannot accord complete relief among existing parties" or "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the

determinations, the Supreme Court has held that joint tortfeasors are not required parties under Rule 19(a). *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990).[7]

Nor does the district court's failure to join CMS subject the State to inconsistent legal obligations. Specifically, the State argues that it cannot comply with the preliminary injunction without violating 42 C.F.R. § 431.242 and 42 U.S.C. § 18083(b)(2). Appellant Br. at 44–47; Reply Br. at 27–30.

Section 431.242 requires that, "before the date of [a] hearing," an applicant "must be given an opportunity to . . . [e]xamine at a reasonable time . . . [t]he content of the applicant's . . . case file; and [a]ll documents and records to be used by the State . . . at the hearing." 42 C.F.R. § 431.242. The State argues that it cannot comply with this provision because it does not have an applicant's "complete case file." Appellant Br. at 45.

Plaintiffs and the United States have the better argument that the plain text of § 431.242 does not provide that a state can comply with its requirements *only* by providing an applicant the *complete* case file. Rather, it says only that a state must provide the applicant access to the "case file." 42 C.F.R. § 431.242(a)(1); *see also id.* § 431.958 (defining "[c]ase record" as "either a hardcopy or electronic file that contains information on a beneficiary regarding program eligibility"). A "straightforward construction" of this provision is that "the State must simply provide all the evidence related to the applicant that it possesses." Appellee Br. at 40. The United States has similarly interpreted this regulation to mean that "the agency complies with the regulation by making available the relevant information it has" because "[t]he purpose of the requirement is to ensure that an applicant has access to the material the State Medicaid agency will consider in conducting a hearing." United States Amicus Br. at 14. This interpretation—which does not contradict the unambiguous text of the regulation as the State argues, Reply Br. at 28—is similarly entitled to *Auer* deference, for the reasons discussed above in Section V.B.1. Nor do the regulations require that a hearing officer have access to a complete case file to determine the reason for the delay, as the State suggests. Appellant Br. at 45. Rather, the

[7]Although the State is correct that the district court in *Temple* labeled the "joint tortfeasors as indispensable parties under Rule 19(b)," Reply Br. at 27, the Supreme Court held that "no inquiry under Rule 19(b) is necessary[] because the threshold requirements of Rule 19(a) have not been satisfied." 498 U.S. at 8.

regulations require that "[h]earing recommendations or decisions must be based exclusively on evidence introduced at the hearing." 42 C.F.R. § 431.244(a). Even if the State's interpretation of the regulation is accepted, the district court's conclusion that the State could acquire information about an applicant's complete case file is not clearly erroneous for the reasons discussed above in Section V.B.2.

42 U.S.C. § 18083(b)(2) states that "an applicant filing" the streamlined application for health coverage "shall receive notice of eligibility for an applicable State health subsidy program without any need to provide additional information or paperwork unless such information or paperwork is specifically required by law when information provided on the form is inconsistent with data used for the electronic verification . . . or is otherwise insufficient to determine eligibility." The State argues that the preliminary injunction may force them to violate this provision because "if the State wishes to actually adjudicate the Medicaid application submitted to the Federal Exchange, . . . the State has no choice but to ask applicants about their income and when they first applied to TennCare—information the Federal Exchange already has but refuses

whom the injunction is issued claims that the injunction places significant costs on them. *See, e.g.*, *Blum v. Caldwell*, 446 U.S. 1311, 1315–16 (1980) (declining to stay an injunction even though "counsel for petitioner estimated that the

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**DISSENT**

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SUTTON, Circuit Judge, dissenting. This injunction action is moot by any conventional measure. The eleven plaintiffs filed this class action in order to obtain determinations about whether they are eligible to obtain Medicaid benefits. Before the court certified the proposed class, the plaintiffs obtained a commitment from the State, through a bargained-for agreement between the parties, that the State would provide each of the named plaintiffs and 100 others of the plaintiffs' choosing with an eligibility determination. The State delivered on its promise. All eleven named plaintiffs received that determination and now all eleven are obtaining Medicaid benefits. The 100 other individuals obtained the sought-after determinations, and the vast majority of them now are receiving Medicaid benefits. (The others were not fully processed because the State had not received the proper documentation.) The plaintiffs asked and now have received. Because the plaintiffs received all of their requested injunctive relief before class certification, the case is moot. *Alvarez v. Smith*, 558 U.S. 87, 92–94 (2009); *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 703 (6th Cir. 2009).

Neither the court nor "[t]he parties . . . dispute that all eleven named plaintiffs' individual claims became moot before the district court certified the class." *Supra* at 7. The court offers two alternative grounds for nonetheless saving the case. With respect, I am not persuaded.

What makes these claims inherently transitory, the court responds, is *uncertainty* over whether the claims will remain pending through class certification—uncertainty sparked by the possibility in this case (and in any other) that the defendant will grant the relief requested. Yet that is not what makes a claim "inherently," as opposed to potentially, transitory. To inhere in

once made whole, be adequate, to say nothing of good and productive, representatives of a class of individuals who have not received their hearings? Labels do not answer these questions in the context of a mootness inquiry that arises before the district court rules on a class-certification motion.

"Picking off" is an especially unhelpful label in this case. The State did not limit its offer and provision of relief to the eleven named plaintiffs. It offered relief to those plaintiffs *and 100 others* of the plaintiffs' choosing. If that is evidence of the State's "actual motive" in the case, *supra* at 18, it would seem to be evidence of a *good* motive, not a bad one.

The court overstates in maintaining that our circuit has already established a "picking off" exception that saves this kind of case and others like it from mootness. *Brunet v. City of Columbus*, 1 F.3d 390, 400 (6th Cir. 1993), says that "[s]ome courts" in other circuits have adopted this exception but that, even if such an exception did exist, it would not apply on the facts at issue there. *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005), holds only that a Rule 68 offer of judgment does not moot a class action after a "Report and Recommendation ha[s] been issued by the magistrate judge recommending that a class be certified." No such ruling occurred here. Nor did *Blankenship v. Secretary of Health, Education, and Welfare*, 587 F.2d 329 (6th Cir. 1978), a case that predates *Roper* and *Genesis*, establish a broad picking-off exception in its one-paragraph analysis, as our later cases reveal.

I agree with the majority that class action issues like these present "considerable complexit[ies]." *Supra* at 9 n.2. For that reason, I would prefer to stick closely to our precedent and wait for further guidance from the Supreme Court before adding new mootness exceptions in this area.

The majority seeing things differently, I respectfully dissent.