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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Aita Darjee on her own behalf and on behalf of her minor child N. D.; and Alma Sanchez Haro on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Thomas Betlach, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

No. CV 16-00489 TUC-RM (DTF)

PLAINTIFFS' UNIFIED MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ON NOTICE CLAIM) AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs are qualified immigrants who are entitled to full Medicaid benefits. Starting in 2015 Defendant improperly reduced their and thousands of other immigrants' medical benefits to emergency or federal emergency services ("FES") only benefits. Plaintiffs' Statement of Facts ("Pls' SOF") ¶¶ 108, 126, 134, 138-40, 153, 160, 164, 169, 218-223, 294-322. These improper reductions are caused by the Arizona Health Care Cost Containment System's ("AHCCCS") computer system, Health-e Arizona Plus

("HEAPlus"), policies and practices the agency uses to review and process renewal applications for immigrants and violate the reasonable promptness requirement in the Medicaid Act, 42 U.S.C. § 1396a(a)(8), and the requirement that AHCCCS continue to furnish Medicaid until a person is properly found ineligible. 42 C.F.R. § 435.930 (Count I). Moreover, the notice Defendant sends to immigrants when their medical benefits are being reduced violates the due process requirements in the Medicaid Act and the U.S. Constitution (Count II). Plaintiffs have filed a response in opposition to Defendant's Motion for Summary Judgment on both claims, a Motion for Summary Judgment on the notice claim (Count II), Plaintiffs' Statement of Facts ("Pls'SOF") and the Ninth Declaration of Ellen Katz, with Plaintiffs' Exhibits attached to the declaration.

ARGUMENT

I. Plaintiffs Have Standing and Their Claims Are Not Moot

A. The District Court Previously Found Plaintiffs have Standing

Defendant asserts that Plaintiffs both lack standing and their claims are moot. But standing is determined at the time the complaint was filed. *Am. Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006). In denying Defendant's Motion to Dismiss, the District Court already concluded that both Plaintiffs have standing for the reasonable promptness claim (Count I), Plaintiff Sanchez Haro has standing for Count II and their claims were not moot. *See* Doc. 85 at 10 ("Given that Darjee's benefits were reduced twice within a single year, and the second reduction came months after Defendant acknowledged errors were occurring, Darjee has alleged a sufficient threat of impending injury."); *id.* at 12.

B. Defendant Has Not Met His Heavy Burden to Show Mootness

At this stage of the litigation, Defendant's remaining argument is mootness. The difference is critical because Defendant's motion ignores the different, and decidedly higher burden that Defendant faces to establish mootness at this stage of the litigation. In contrast to the showing that Plaintiffs must make to establish standing at the outset of the case, once the Plaintiffs' personal stake in the litigation has been established, "[t]he party

alleging mootness bears a 'heavy burden' in seeking dismissal. It must show that it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit is dismissed." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (internal citations omitted). Defendant "cannot meet this burden solely by claiming that [plaintiffs] ha[ve] not done enough to show the likelihood of further delays." *Id. See also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999) (noting that the assertion that the plaintiff "did not offer any admissible evidence that the [defendants] were likely to repeat any wrongful conduct . . . is not sufficient to satisfy the [defendants'] burden" to show mootness). Moreover, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotes omitted).

Thus, the burden Defendant bears is significantly greater than a preponderance of the evidence standard. *Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016). Lowering or reversing the burden of proof at this stage is reversible error. *Id.* (reversing district court decision that applied analysis which "impermissibly attempts to shift the burden to the Plaintiffs to defeat mootness, when it is the Defendants "that bear the 'heavy burden' in this case.") (internal alterations omitted). Defendant has failed to meet his burden.

1. Defendant's Remedial Efforts Have Been Inadequate and Unsuccessful

Defendant simply cannot meet his burden. Rather than present evidence, Defendant merely asserts that the benefit reductions will not happen again. Doc. 228 at 10 (asserting without citation that "They are in no danger of future errors."). But Defendant's bare assertions are legally inadequate. *See Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("The bare assertion . . . in its mootness motion that this situation will not recur . . . [is not] sufficient to deprive this Court of its constitutional power to adjudicate this case.") (cited approvingly in *Rosemere*, 581 F.3d at 1174).

Moreover, those assertions ring especially hollow here, as Defendant has repeatedly, and insistently promised that the issue was fixed and errors would not recur. *See* Doc. 39-1 ¶ 14 ("AHCCCS identified the HEAPlus system error and corrected it on November 19, 2015"); Doc. 123 at 3 ("[T]here are no new computer problems. The remaining errors are caused by applicants and eligibility workers, and these errors are caught and corrected."); *id.* (But "[i]f there is an error, it is caught and corrected. . . . DES's process works and that ***all*** errors have been corrected." *Id.* at 4 (emphasis in original)). By relying on such thin claims, Defendant has ignored substantial portions of the record in this case. Accordingly, Plaintiffs have described the facts in some detail in their Statement of Material Facts.

Notwithstanding Defendant's insistence that he had solved the problem, Plaintiffs benefits have been repeatedly reduced long after the purported fixes. Pls' SOF ¶¶ 129-90, 294-97. In June 2016, Plaintiff Darjee experienced the *same* error that was supposed to be fixed in November 2015: namely the HEAPlus computer replaced her verified refugee status with her newer status as a Legal Permanent Resident ("LPR"). Pls' SOF ¶¶ 294-97. Other individuals with refugee status also continue to appear on the daily log of incorrect benefit reductions that the Arizona Department of Economic Security ("DES") now maintains. Pls' SOF ¶ 293. And long before November 2015, DES employees reported cases where the computer system screened refugees for only emergency services. Pls' SOF ¶¶ 290-92.

Plaintiff Sanchez Haro has likewise had her benefits repeatedly reduced due to the way the computer system processes immigration information. Her benefits were reduced in April 2016, March 2017, and October 2017. Pls' SOF ¶¶ 129-90. In each case, the computer system did what it was programmed to do, and retrieved her current immigration status—Legal Permanent Resident—and the date she was granted that status—January 13, 2015 from Systemic Alien Verification for Entitlements ("SAVE") and Verify Lawful Presence ("VLP") SAVE and VLP. Pls' SOF ¶¶ 94-96, 100-04, 107, 131, 142-46, 184. Indeed, all four of the 2017 HEAPlus's SAVE and VLP summaries for

Sanchez Haro show the same January 13, 2015 date. Pls' SOF ¶ 184. It then populated that information into her application and calculated whether she had met the five-year status requirement. Pls' SOF ¶¶ 94-96, 100-04, 107, 131, 142-46, 184. Of course, because 5 years have not passed since 2015, the computer concluded that she had not met the requirement and was eligible only for emergency services. Pls' SOF ¶¶ 100-08, 144-45, 148, 184. But Sanchez Haro has a prior qualified status, as a battered immigrant, that also qualifies for full benefits. Pls' SOF ¶¶ 12, 21. And she has held that status since 2003, well over five years. Pls' SOF ¶ 130. The problem is HEAPlus simply has no place to store that information and no way to calculate her eligibility using that earlier, and more accurate, date. Pls' SOF ¶¶ 103, 142-44.

Defendant's newest assertions in his motion for summary judgment are no more persuasive than his previous ones. Defendant has not changed the computer's programming and, as a result, the evidence shows that incorrect benefit reductions have continued into June 2018, both with and without any caseworker intervention, including error rates as high as 52% in February 2018. Pls' SOF ¶¶ 218-223, 284-85, 300-12. In fact, the logs identify the computer's automatic process as participating in the disposition of the renewal 187 times between December 5, 2016 and June 14, 2018. Pls' SOF ¶¶ 300-308 (totaling the amounts).

The computer creates these errors because it automatically seeks to re-verify immigration status at every renewal, contrary to AHCCCS's policy, Pls' SOF ¶¶ 26, 38-42, 91-94. It does this, because there is currently no way for AHCCCS to account for individuals who have held two qualifying immigration statuses, *id.* ¶¶ 24, 42, 77, 94-108, the computer does not "lock down" immigration information once it is verified, *id.* ¶¶ 112-14, 123, 127-28, 175, 286, 296, 335, and AHCCCS's procedures require caseworkers to go into HEAPlus to find and correct the ongoing computer errors.[1] *Id.* ¶¶ 65-76, 108, 146. Thus, the same causes of the incorrect benefit reductions persist.

[1] Indeed, Deborah Bailey explained that when she reviews Plaintiffs' cases, she still has to go into Ms. Sanchez Haro's case and correct the computer's inaccurate eligibility

Indeed, Plaintiff Sanchez Haro is a prime example of several of these problems. Her immigration status has been repeatedly verified by AHCCCS. She is eligible for full benefits for two distinct reasons. First, as explained above, she has held a qualifying status since 2003. But because HEAPlus requests information from SAVE and VLP at *every* renewal or change application, it continues to populate the January 13, 2015 LPR status date into each application. Pls' SOF ¶¶ 39-42, 66, 68. That date, then, cannot be edited by the caseworker. Pls' SOF ¶¶ 42, 77, 105, 147-48, 168. Thus, until five years have passed, or the Defendant changes the computer's code, the computer will produce the same result—emergency services—every time her case comes up for renewal. Pls' SOF ¶ 144.

Second, Sanchez Haro also is eligible for full benefits because she entered the country before 1996, and is therefore actually exempt from the five year bar. Pls' SOF ¶¶ 13, 15, 130. Accordingly, the only way to get HEAPlus to produce the right answer is to change the answer to the 1996 question from "no" to "yes." Pls' SOF ¶¶ 144, 146-48, 165, 167-68. If Sanchez Haro did not have this second reason for being eligible for full benefits, there would be no way to override HEAPlus's conclusion. But, even with a second pathway to eligibility, the computer continues to cause errors because it cannot lock down the correct answer to the 1996 question, and it has repeatedly changed the answer to "no." Pls' SOF ¶112, 175, 185. Thus, every time her case is processed, the computer produces the wrong result, and a caseworker must go in to correct it. Pls' SOF ¶¶ 146, 168.

But the caseworkers who review her case—even those on DES's specialized review team—have been repeatedly misled by the computer. DES's review process

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determination (by changing the answer to the question about when Ms. Sanchez Haro entered the U.S.) which continues to automatically screen Ms. Sanchez Haro for emergency benefits. *See* Pls' SOF ¶¶ 168 (citing Ex. 5, Bailey Dep. at 114:8-116:4), 175-77, 182-84, 190. Thus, contrary to Defendant's unsupported assertion that "both [Plaintiffs] have been found permanently eligible for full benefits, Doc. 228 at 11, there is simply no way within HEAPlus for the computer to make a "permanent" finding, and caseworkers must continue to correct the computer's erroneous determination at each renewal. *id.* ¶¶ 112-14, 123, 127-28, 175, 286, 296, 335.

actually *confirmed* Ms. Sanchez Haro's benefit reduction two separate times: first in March 2017 and again in October 2017. Pls.' SOF ¶¶ 233-34, 277. In both instances, the reviewers looked at the information provided by SAVE and VLP, and specifically her LPR grant date of January, 13, 2015 and concluded that she was only eligible for emergency benefits because she had not met the five year bar. *Id*. In other words, it is a reasonable inference that the computer's failure to store and present Ms. Sanchez Haro's *prior* immigrant status and *prior* grant date not only creates computer errors, it creates caseworker errors.

In fact, even AHCCCS has failed to adequately correct these computer errors, although it is giving Sanchez Haro's case additional attention. AHCCCS did not even attempt to correct the March 28, 2017 error until April 20, 2017. Pls.' SOF ¶¶ 164, 235. But even that belated effort was unsuccessful, and Plaintiff was denied benefits at a pharmacy in May 2017. Pls' SOF ¶¶ 160-161. More troubling is that Defendant was unaware that Ms. Sanchez Haro's benefits were still cut off in May 2017, and it was not until Plaintiffs' counsel brought the issue to AHCCCS's attention that it was resolved. Pls' SOF ¶¶ 162-63, 169-770, 233-39. In other words, neither DES nor AHCCCS's special review process caught or corrected the error, despite multiple layers of review. Finally, with respect to the Plaintiffs' "locked" files, Deborah Bailey explained that despite the moniker "locked," other employees can still edit the cases, Pls.' SOF ¶ 280, directly contradicting Defendant's assertion that "their cases may be reviewed by only one person, Deborah Bailey."[2] Doc. 228 at 10.

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[2] Nor has Defendant shown that any of these review processes are irrevocable. Indeed, AHCCCS is not even aware of the details of DES's review process, and DES has changed that process over time. Such impermanent measures do not moot the case. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1068 n. 12 (9th Cir. 2015) ("When a defendant has voluntarily ceased allegedly improper behavior in response to a suit, but is free to return to it at any time, a challenge to the defendant's behavior is generally not considered moot unless there is no reasonable expectation that the illegal action will recur." (citation omitted)); *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) ("[A] case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision." (citation omitted)); *Bell v. City*

These problems are not unique to the Plaintiffs. In fact, AHCCCS's November 2017 letter describes additional ongoing errors that have resulted in inaccurate notices being sent and benefits being terminated, notwithstanding DES's review. Pls.' SOF ¶¶ 238-39. Plaintiff Sanchez Haro is one example. but she is not the only one. And in fact, Defendant concedes that he knows of five individuals that have had their benefits terminated notwithstanding the review process. Doc. 228 at 10; D.'s SOF ¶ 18. Thus it is not "absolutely clear" that the harm will not happen again. *Unan v. Lyon*, 853 F.3d 279, 286, 288 (6th Cir. 2017) (evidence of substantial compliance does not moot claims).

Furthermore, while the five examples of benefit terminations are sufficient to overcome Defendant's mootness challenge, a reasonable fact-finder might not credit Defendant's calculation and instead conclude that the number is likely higher, because Defendant has failed to accurately track all the individuals harmed by its eligibility processing errors. Beginning around December 2016, AHCCCS has relied solely on a daily log produced by the DES to identify the individuals whose cases have been incorrectly reduced to emergency-only benefits. Pls' SOF ¶¶ 241-52. But AHCCCS has not undertaken any systematic quality control or review efforts itself, despite knowing that the review process is inaccurate and under inclusive and *twice* incorrectly concluded that Ms. Sanchez Haro was ineligible for full benefits. Pls' SOF ¶¶ 253-58. AHCCCS's dedicated quality control unit has not engaged in any audits or analysis of the problem. Pls' SOF ¶¶ 240-43, 254. The only AHCCCS employee who even reviews the daily log regularly is Dareth Cox. Pls' SOF ¶¶. 253-54. But she reviews only three "randomly selected" cases a week, despite the fact that the logs show that there are dozens of cases that are incorrectly reduced each week. Pls' SOF ¶¶ 219-23, 255-61. Moreover, Ms. Cox keeps no documentation of her weekly review, so there is no record of her conclusions. *Id*; *see also* Pls' SOF ¶¶ 269-70. In short, it is a reasonable inference that AHCCCS has

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of Boise, 709 F.3d 890, 901 (9th Cir. 2013) (declining to find mootness when defendant's voluntary enactment of a new policy "could be easily abandoned or altered in the future").

no process in place to identify errors where DES's review process incorrectly confirms the benefit reduction.

Because DES's review process is inadequate, the findings on the daily log will be as well. Given the multiple examples in which DES's review has missed cases, and incorrectly affirmed the benefit reductions, DES's list of cases where "corrections are needed," is likely incomplete.[3] Nonetheless, when Dareth Cox conducted her analysis of the number of people who were "impacted" by the ongoing eligibility errors, she simply assumed the accuracy of DES's conclusions on the daily log. Pls' SOF ¶¶ 263-67. Thus, anyone who DES identified as being correctly reduced to emergency benefits was excluded from Cox's potential list of "impacted" individuals. *Id*. In fact, Cox could not remember whether she identified Sanchez Haro through her review of the daily log. Pls' SOF ¶¶ 269-71. A reasonable inference is that Ms. Cox's analysis of the number of people "impacted" actually missed cases—like Sanchez Haro's—where DES improperly approved the benefits.[4]

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[3] The list is under inclusive in other ways as well. For instance, the current process only looks at cases where the immigrant is currently going from full to emergency only benefits. Pls' SOF ¶¶ 230. Thus, if a person is already limited to emergency benefits, but the prior decision was incorrect and not caught, the case will not show up on the daily log or query to review. *Id.* Given that DES has mistakenly approved emergency benefits to Sanchez Haro multiple times, a fact finder could reasonably conclude that there are individuals who were inaccurately put in emergency benefits, and have stayed in the wrong category, who are not showing up on the log.

[4] To the extent the Court believes that Plaintiffs must present additional evidence of the experiences of other immigrants to create a dispute of fact on this point, Plaintiffs renew their Rule 56.3 motion to stay summary judgment until the pending discovery disputes have been resolved. Doc. 231. Plaintiffs have repeatedly sought evidence concerning the experiences of non-Plaintiffs, in part to challenge Defendant's assertions that only five individuals have been harmed, and have argued that evidence regarding other applicants would provide relevant evidence to Plaintiffs' *individual* claims on the merits, and with respect to mootness, *see* Docs. 173, 185, and 231. Indeed, the Ninth Circuit has explained that a "pattern of delay as shown by the experiences of other parties before an agency can be relevant to the mootness analysis, and helps convince us that this action should go forward." *Rosemere*, 581 F.3d at 1175 (internal citations omitted). But Plaintiffs have not yet been permitted to conduct discovery to investigate the "experiences of other parties before [the] agency." While Plaintiffs have presented ample

Finally, Defendant's recitation of the facts completely ignores the harm that receiving the inaccurate notice causes. Ms. Sanchez Haro, for instance, immediately stopped attending doctors' appointments following the receipt of her April 2016 letter, even though her benefits were not scheduled to end until May 1. Pls.' SOF ¶ 140. It is a more than reasonable inference that many of the hundreds of immigrants who have received an inaccurate notice have likewise delayed seeking care and medications or skipped appointments—even if their benefits were eventually corrected.[5] *See* Exs. 13-16 (showing incorrect notices still sent under "FES Notice Mailed to Client"); C*f. Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016) ("the plaintiffs were injured *at the time* the agency denied or terminated their food benefits and provided inadequate notice."). It is, thus, far from "absolutely clear" that the harms will not recur.

In sum, a reasonable fact-finder looking at the history of benefit reductions experienced by Plaintiffs, and other immigrants, notwithstanding Defendant's remedial efforts and past assurances, could reasonably conclude that the harms may happen again. *See Barry*, 834 F.3d at 715 (finding that although plaintiff had his food stamp benefits restored at the time of oral argument, plaintiff could reasonably expect to encounter additional difficulties with his benefits, based on the repeated problems he had faced in the past); *see also Rosemere*, 581 F.3d at 1175 (agency's pattern of improper

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evidence of systemic harms from the limited discovery they have been permitted to conduct, if the Court nonetheless determines that Plaintiffs have not presented sufficient evidence of the experiences of non-Plaintiffs, the Court should stay the decision on summary judgment until Plaintiffs have had the opportunity to conduct the relevant discovery.

[5] The fact that AHCCCS might be "unaware" of these examples is not decisive on this question. AHCCCS admits that it is not tracking cases where customers contract DES or AHCCCS to report that their benefits have been erroneously reduced to emergency benefits, and Tara Lockner admitted at her deposition that she did not know whether any of the 336 people who received incorrect notices had contacted DES to complain. All she knew was that they had not complained to AHCCCS's legal department. Pls.' SOF ¶ 248. But Ms. Lockner further admitted that she did not count Ms. Sanchez Haro as one of the 336 people who received an incorrect notice, or regard her as an individual who had complained. Plaintiff had, through counsel, contacted AHCCCS in May 2017 to complain that she could not access medications at her pharmacy. *Id.*

determinations is relevant to the mootness analysis). Thus, summary judgment is not appropriate even if the defendant "has apparently undertaken significant efforts to remedy this problem, [because] the effect of these fixes on the prospect of future violations is a factual dispute that remains open." *Unan,* 853 F.3d at 289.[6]

2. Voluntary Efforts Do Not Moot a Case

As discussed above, Plaintiffs dispute that Defendant's review procedures and the "locked files" actually qualify as "cessation" of the harmful conduct.[7] But even if they did, those actions were taken solely in response to this litigation. Pls' SOF ¶¶ 161-62, 218, 253, 272-82. And voluntary remedial actions fall within a long-standing exception to mootness. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 864 (9th Cir. 2014); *Rosemere*, 581 F.3d at 1173.

The voluntary cessation exception applies even in situations where the voluntary action takes the form of a new policy or procedure. *See Haro v. Sebelius*, 747 F.3d 1099, 1110 n.7 (9th Cir. 2014) ("To the extent a current policy *could* have mooted the beneficiaries' claim, the voluntary cessation exception applies."). Thus, Defendant's vague reference to the possibility that, at some point in the future, "computer enhancements [may] serve to end the problem," Doc. 228 at 11, does not moot the case. Defendant's reference to "enhancements" refers to the System Request ("SR") 392. Pls'

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[6] While the evidentiary burden remains on Defendant, Plaintiffs have nonetheless presented evidence that supports the conclusion that the harms are likely to continue. The same improper computer programing is still in place, and in fact Julie Swenson testified that even if implemented the SR 392 will continue to screen Sanchez Haro for FES benefits. Pls' SOF ¶ 334. Moreover, none of the drafts of the SR 392 have proposed to actually lock down the immigration status, as is the case with citizenship data. *id.* ¶ 335. Accordingly, the Court could issue an injunction requiring Defendant to alter the manner the computer system processes renewal applications, and there remains a present controversy as to which effective relief can be granted. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) (a case is moot only when it is "impossible" for the court to grant any effectual relief).

[7] As described above, the systemic errors in eligibility determinations continue and the same computer programming problems remain in place, and therefore the conduct has not "ceased."

SOF ¶ 324. But "efforts at reform, while laudable, would not automatically moot the case, because 'announcement of an intention to change or adoption of a plan to work toward lawful behavior'" is generally insufficient to defeat an exception to mootness. *Rosemere*, 581 F.3d at 1173 (quoting 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.7, at 351–52 (3d ed.2008)). And despite promises that the SR 392 would be promptly implemented, it has been repeatedly delayed. Pls' SOF ¶¶ 327, 336-41. "Until the [ ] Defendants have finished the process of financing and implementing," the SR 392, and the changes are in effect and actually resulting in correct renewal decisions, Defendant cannot meet this burden. "Initiation of a reform process cannot, standing alone, make it 'absolutely clear' that the reformation will last." *Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1105 (9th Cir. 2016); *see also Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 994 (D. Minn. 2016) ("The evolving implementation of Minnesota's *Olmstead* Plan . . . does not resolve Plaintiffs' claims against the Defendants."). In fact, the court in *M.K.B. v. Eggleston*, concluded that the case was not moot, even though the state agency had *already* taken "extensive and commendable ameliorative measures," including that the state had already altered their computer eligibility system "so that the original date of qualified status for a benefits recipient cannot be overwritten ('lock') when changing to new qualified status such as Legal Permanent Resident." 445 F. Supp. 2d 400, 425, 438 (S.D.N.Y. 2006). Defendant has not made the same efforts here, and the limited remedial measures do not deprive the court of jurisdiction. Defendant has fallen far short of showing that it is "absolutely clear" that the harm will not happen again, and that Plaintiffs' claims are moot.

3. Plaintiffs' Claims Are Not Moot Because Defendant's Special Treatment of Plaintiffs Is an Effort to Evade Judicial Review Under the "Picking Off" Exception

Although Defendant has not shown that the harms will not reoccur, it also bears emphasizing that Defendant has given Plaintiffs (and the one putative class declarant) special attention and protections not available to Arizona's Medicaid beneficiaries at

large. Pls' SOF ¶¶ 161-62, 218, 253, 272-82. This special effort directed solely at the individuals associated with this litigation cannot be permitted to moot the case. The Ninth Circuit has cautioned that it is "intent on ensuring that the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff." *Rosemere*, 581 F.3d at 1175 (internal quotation omitted). The picking off exception has been applied when the defendant creates a new ad hoc process for Medicaid recipients that supports the inference that the state is attempting to avoid a class action. *See Wilson v. Gordon*, 822 F.3d 934, 950–51 (6th Cir. 2016) ("the State in this case did not moot Plaintiffs' claims through an established, standard procedure . . . Instead, the State created a new, ad hoc process to address Plaintiffs' claims."); *Unan v. Lyon*, 853 F.3d 279, 286 (6th Cir. 2017) (picking off exception applied where defendant could not "demonstrate that plaintiffs' claims became moot through an established, standardized procedure.").

It is undisputed that Plaintiff Sanchez Haro's case has repeatedly received special review by AHCCCS above and beyond DES's own review. Pls' SOF ¶¶ 161-62, 218, 253, 272-82. It is clear that absent the intervention on the part of Plaintiffs' counsel in May 2017, her benefits simply would have been reduced to emergency only benefits, without proper notice, and without correction. *Id.* ¶¶ 153-62, 164, 169-70. Moreover, Defendant has put the two Plaintiffs' and one putative class member's cases in a "locked file" and assigned one high-level caseworker to their cases. *Id.* ¶ 278. But the only three immigrant cases that are "locked" and receive "monthly review" by the purportedly expert caseworker are the three cases associated with this litigation. *Id.* ¶¶ 279-82. Defendant readily acknowledges that this is a special review above and beyond even the ad hoc review process DES implemented in response to this litigation. *Id.* ¶¶ 272-277. And multiple witnesses have testified that this special treatment is provided precisely because of Plaintiffs' status as plaintiffs in this case. *Id.* ¶¶ 282. By putting the Plaintiffs' and putative class member Stephania Nyirnadekeyaho's cases in a "locked file" status,

Defendant has essentially pulled them out of the ad hoc procedure used for everyone else. *Id.* ¶¶ 279, 281. This special treatment is a blatant effort to evade judicial review.

Courts have recognized exceptions to mootness for situations like this. The Ninth Circuit has explained that a case is not moot where the harm is "capable of repetition, yet evading review." A harm can qualify as evading review under this exception *either* "by its very nature," *or* by "virtue of the defendant's litigation strategy." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011). Specifically, the *Pitts* court explained that, even when a claim is not inherently transitory because it persists only for a short time, the claim can nevertheless become inherently transitory if the harm is "'acutely susceptible to mootness' in light of [the defendant's] tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action." *Id. See also Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142–43 (9th Cir. 2016) ("[t]o the extent that defendants may avoid a class action by 'picking off' the named plaintiffs, the class claims are 'inherently transitory' and evade review, making an exception to the mootness rule appropriate.") (quoting 5 James Wm. Moore, *Moore's Federal Practice* § 23.64[1][b] (3d ed. 2016)). Thus, courts have acknowledged a "picking off" exception to mootness in circumstances where the Defendant gives special attention or relief to named plaintiffs, or potential named plaintiffs in a class action. *See e.g.*, *Wilson v. Gordon,* 822 F.3d 934, 947, 950 (6th Cir. 2016) (ad hoc process supports inference that state was attempting to avoid a class action); *Unan,* 853 F.3d at 286; *Valenzuela v. Ducey*, 2017 WL 373013, at *4–5 (D. Ariz. Jan. 26, 2017).

The picking off exception is especially applicable here. Although Defendant "claims to have implemented a systemic fix . . . the relief granted to the individual named plaintiffs was granted on an *ad hoc* basis, and in the case of [the putative class member] was directed *only* at those individuals identified as potential class representatives." *Unan*, 853 F.3d at 286 n.4. Defendant, here, instituted the "locked file" for Plaintiffs Sanchez Haro and Darjee, and putative class member Stephania Nyirandekeyaho "only once it was put on notice that a particular individual could represent the class, which

raises 'the concern that the defendant therefore might strategically seek to avoid' the possibility of a lawsuit." *Id.* (quoting *Wilson*, 822 F.3d at 947).

These exceptions apply here because Plaintiffs seek to represent a class, even though the class has not yet been certified. As the Ninth Circuit explained in *Pitts*, "even if the district court has not yet addressed the class certification issue, mooting the putative class representative's claims will not necessarily moot the class action." *Id*. at 1089-90 (emphasis added). Moreover, even "if the district court denies class certification . . . the plaintiff may still pursue a limited appeal of the class certification issue. Only once the denial of class certification is final does the defendant's offer—if still available—moot the merits of the case because the plaintiff has been offered all that he can possibly recover through litigation. *Pitt*, 653 F.3d at 1092. *See also Unan*, 853 F.3d at 285 ("when the named plaintiff's claim becomes moot *before* certification, we have recognized some exceptions to this general rule," and applying the "picking off" and "inherently transitory exception."). Accordingly, even if the Court concluded that the Plaintiffs' individual claims were moot—which they are not—Defendant's special treatment of Plaintiffs, combined with the pending motion for class certification requires applying the "picking off" exception in this case.

II. Defendant Is Not Entitled to Summary Judgment on Plaintiffs' Reasonable Promptness claim

A. Standard of Review

Summary judgment is only appropriate "when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact." *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017). A disputed fact is material if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 247, 248 (1986). The inquiry is whether there exists a material fact that requires the trier of fact to resolve the differing versions of the truth at trial. *Id.* at 248-49. This means that the "where evidence is genuinely disputed on a particular issue—such as by conflicting testimony—that 'issue is inappropriate for

resolution on summary judgment.'" *Zetwick.* 850 F.3d at 441 (quoting *Direct Techs., LLC v. Elec. Arts, Inc.*, 836 F.3d 1059, 1067 (9th Cir. 2016)). In short, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

B. The District Court Previously Concluded that Immigrant Benefit Reductions at Renewal Is A Cognizable Claim Under the Reasonable Promptness Requirements

Defendant starts his memorandum by re-hashing the arguments raised in his Motion to Dismiss, namely that reasonable promptness does not include a requirement to make correct determinations. *Compare* Doc. 228 at 5 with Doc 35 at 4 and Doc. 71 at 8. The District Court already squarely rejected these arguments, finding that Defendant's inaccurate decisions at renewal are cognizable as violations of (a)(8) and that Plaintiffs' stated a claim for relief. Doc. 85, at 14-19.

> First, Defendant ignores the obvious inference arising from an incorrect eligibility determination: Defendant cannot promptly provide the services for which a beneficiary is eligible if he incorrectly determines the beneficiary is not eligible for those services. Second, Defendant provides no direct citation for his argument. This is not surprising; the assertion that inaccuracy is acceptable, so long as it is prompt, is an odd one.

Doc. 85 at 15. Under the "law of the case" doctrine, a court is generally precluded from reconsidering an issue that has been decided by a higher court in the same case. *U.S. v Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). Although there are some exceptions to the doctrine, Defendant has not raised any of them. As the District Court already concluded, the statute prohibits Defendant "from denying benefits even temporarily, to a person who has been found fully qualified for aid." Doc. 85 at 15-16 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 544–45 (1972)). The District Court's decision was correct. Indeed, other courts have held that similar challenges to inaccurate Medicaid decisions by state

agencies are proper claims under Section 1396a(a)(8). *See Unan,* 853 F.3d at 283-84 (state failure to provide full Medicaid benefits to immigrants at renewal pursued under reasonable promptness); *M.K.B. et al. v. Eggleston*, 445 F.Supp.2d 400, 428 (S.D.N.Y 2006) (immigrants' challenge to inaccurate decisions under reasonable promptness enforceable under § 1983).

The District Court's holding is likewise supported by the federal regulations. Under those regulations Defendant must "(a) furnish Medicaid promptly to beneficiaries without *any* delay caused by the agency's administrative procedures; [and] (b) continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930 (emphasis added); *see also Crawley v. Ahmed*, No. 08-14040, 2009 WL 1384147, at *20 (E.D. Mich. May 14, 2009) (finding that § 435.930(b) "supplements and defines the broad mandate of §§ 1396a(a)(8) and (a)(10)—*i.e.* to furnish medical assistance with reasonable promptness—by further defining the duration and scope of the promised medical assistance."); *Lewis v. New Mexico Dep't of Health*, 94 F. Supp. 2d 1217, 1235 (D.N.M. 2000), *aff'd*, 261 F.3d 970 (10th Cir. 2001) (noting that 42 C.F.R. § 435.930(a) "give[s] courts some guidance about what is meant by 'reasonable promptness.'").

Moreover, federal law imposes additional requirements on states to avoid improper reductions, delays, or denials, specifically when evaluating an applicant's immigration status. When an applicant attests to a status that qualifies the individual for full medical benefits, but the State requires additional documentation to verify that qualified status, the state "shall provide a reasonable opportunity to submit to the State evidence indicating a satisfactory immigration status," and, critically, the state "may not delay, deny, reduce, or terminate the individual's eligibility for benefits under the program on the basis of the immigration status until such a reasonable opportunity has been provided." 42 U.S.C. § 1320b-7(d)(4)(A). These requirements further underscore the requirement embodied in § 1396a(a)(8) that benefits may not be terminated or reduced until an individual is *properly* found *in*eligible.

The proper legal question, therefore, is whether Plaintiffs have established that Defendant continues to make incorrect eligibility determinations that delay, deny, or reduce—even temporarily—Plaintiffs' benefits on the basis of immigration status. As described below, the answer to that question is plainly "yes."

C. Plaintiffs Present Substantial Evidence that Defendant's Computer System, Policies and Practices Cause Plaintiffs' Incorrect Eligibility Determinations

1. Evidence of Systemic Errors

First, the evidence demonstrates that the eligibility errors Plaintiffs have experienced are far from "occasional," but are instead systemic. Both Plaintiffs have had their benefits reduced on multiple occasions. Pls' SOF ¶¶ 129-90, 294-97. Indeed, both Darjee and Sanchez Haro have at various times been unable to obtain medical care and prescriptions. *Id.* For these two Plaintiffs, these errors can hardly be considered isolated occurrences, and a reasonable inference from this pattern of past harms is that future harms are likely. *See, e.g.*, *Rosemere*, 581 F.3d at 1175 (noting that plaintiffs' "'litigation history' is probative of the likelihood of future delays."); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002). Moreover, Sanchez Haro testified she was unable to get benefits and stopped going to the doctor in April 2016, and was again denied medications at a pharmacy in May 2017. Pls' SOF ¶¶ 140, 160. Defendant has admitted that AHCCCS was unaware Ms. Sanchez Haro's benefits were still cut off in May 2017, until Plaintiffs' counsel raised the issue with Defendant. Pls' SOF ¶¶ 161-62, 169-70. It is more than reasonable to infer that, absent the intervention of Plaintiffs' counsel the benefits would have been cut off for even longer. Thus, it is genuinely disputed that: "neither Plaintiffs' assistance was terminated," Doc. 228 at 5; "[t]heir benefits have not been reduced since," 2016, *id.* at 10; and that errors in Sanchez Haro's cases "were quickly corrected and her eligibility for full benefits continued unaffected," *id.* at 6. The Court may not resolve this factual dispute, and accordingly summary judgment must be denied.

Defendant asks the Court to ignore the pattern of evidence experienced by the two individual Plaintiffs and instead conclude—according to Defendant's reading of the evidence—that Defendant catches enough errors in processing *other* applications to defeat Plaintiffs' claims. According to Defendant, his (questionable) assertions that only five individuals have had their benefits reduced, while the rest have been caught before the reduction went into effect entitles him to summary judgment on Plaintiffs' individual claims. Doc. 228 at 6-7. That is not so. First, while Plaintiffs have elsewhere argued that there are systemic issues that warrant class certification, to succeed on their individual claims, Plaintiffs need only show that their *individual* rights are violated, regardless of the experiences of any other applicants. While many of the reasonable promptness cases are class actions, an individual plaintiff can sue under section a(a)(8) on her own claim and seek declaratory and injunctive relief. *See e.g.*, *Romano*, 2012 WL 1745526(E.D. La. 2012), *aff'd* 721 F.3d 373 (5th Cir. 2013). In short, Plaintiffs are entitled a reasonable inference from the evidence of Plaintiffs' *own* experiences that Defendant has, and will continue to, incorrectly determine *their* eligibility and reduce *their* benefits to emergency benefits only. *See Barry*, 834 F.3d at 715-16 (evaluating mootness in light of individual Plaintiffs' experience).

Additionally, Defendant has offered conflicting assertions about whether Plaintiffs are among the five individuals whose errors have not been caught, and whose benefits are reduced. Defendant asserts, without citation, that "[n]either plaintiff was among those five." Doc. 228 at 6. If a fact finder were to credit that unsupported assertion, the fact finder might reasonably conclude that Defendant's failure to include Sanchez Haro in that count bolsters the finding that Defendant's efforts to identify individuals who have been harmed are inadequate, and that far more than the five he admits to have been harmed. *See supra* at 6-8.

More likely, however, is that a fact finder would infer that Sanchez Haro *is* among the five people that have been impacted, and that she is likely to experience additional benefit reductions. Dareth Cox testified that Plaintiff Sanchez Haro *is* one of the five. Pls'

SOF ¶ 270-71. And Defendant's own November 2017 letter describes that "one of the plaintiffs in litigation initiated by the advocates has been incorrectly transitioned to FES four times since October 2015, most recently in March and October of 2017." *Id.* ¶¶ 238-39. It is reasonable to infer that Plaintiff Sanchez Haro is likely to experience benefit reductions again, even if Defendant could show that other immigrants might not. *See Barry*, 834 F.3d 706 ("the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness. Instead, it is sufficient that [the plaintiff] *possibly* could have found herself once again in the same situation she faced when this suit was filed.").

But, while not necessary to prove their individual claims, Plaintiffs have shown that Defendant is not, in fact, correctly processing the applications of other immigrants. The daily log prepared by DES shows ongoing errors, continuing through at least mid-June 2018. Pls' SOF ¶¶ DES's reporting likewise shows that the error rates for these applications was 52.94% in February 2018 and was still 24.42% as of mid-March.[8] Pls' SOF ¶¶ 284-85. Many of those individuals have received incorrect notices, and as the November 2017 letter acknowledges, some continue to have their benefits cut off. Pls' SOF ¶¶ 238-39, 248, Ex. 19, November 13, 2017 Letter; Exs. 13-16 (showing incorrect notices still sent under "FES Notice Mailed to Client"). In other words, Plaintiffs have established that the incorrect eligibility determinations *are* systemic and impacting large numbers of individuals, including Plaintiffs.

[8] These error rates also rebut Defendant's argument that the errors are excusable because they fall under the 3% threshold. Not only is the actual error rate substantially higher than 3%, the 3% threshold is entirely irrelevant. First, it has no bearing on whether Plaintiffs have established an individual violation of their own rights: if Plaintiffs are denied reasonable promptness and due process, it is no defense to identify other individuals who were provided with prompt benefits and adequate notices. Moreover, the 3% threshold Defendant references actually refers to the federal government's threshold for withholding federal funds from a state Medicaid agency if the state's *excess* payment error rate hits 3%. *See* 81 FR 40596-01, 2016 WL 3402966. Errors that incorrectly *reduce* benefits, and therefore decrease payments, would not contribute to the 3% rate for *excess* payments.

2. AHCCCS's Policy and Practice of Utilizing HEAPlus Causes the Systemic Errors

Defendant presents a one-sided and inaccurate portrayal of the evidence in this case. Defendant uses the HEAPlus computer system to process initial and renewal applications for medical assistance. Pls' SOF ¶¶ 29-30. There is substantial evidence that the computer system is both independently causing errors and contributing to caseworker errors.

a. Evidence Comparing HEAPlus and AZTECS Creates Inference that HEAPlus Causes Errors

First, as the District Court previously concluded, evidence that "beneficiaries whose benefits were improperly reduced under the HEAPlus computer system were properly found eligible for food stamps under the AZTECS computer system . . . may support the existence of a continuing problem in the former system." Doc. 85 at 18. That has proven to be the case. Prior to 2014, food stamp and Medicaid cases were both processed in the AZTECS computer system. Pls' SOF ¶¶ 30, 115-16. Starting in 2014, AHCCCS required that DES use HEAPlus to process Medicaid cases, while food stamp cases remained in AZTECS. Pls' SOF ¶ 30, 117. The bulk of Medicaid cases were transitioned to HEAPlus in 2015, *id,*. which is when the medical renewal problems for immigrants started. Pls' SOF ¶ 240.

While Plaintiffs and other qualified immigrants have lost their full medical benefits at renewal, they have continued to receive food stamps. Pls' SOF ¶¶ 118. Although the same information is collected via the HEAPlus system, the AZTECS system applies different logic to process that information.[9] Pls' SOF ¶¶ 96, 115, 120-27

[9] The record reveals numerous ways in which AZTECS processes information differently: (1) AZTECS uses a unique identifier for each person that remains the same, while HEAPlus gives each person a new application ID for each renewal (SOF ¶ 120); (2) immigration information only has to be verified once in AZTECS and is "locked down," so that if there is no change the caseworker does not even touch the screen, while in HEAPlus immigration status is not locked down and is reverified at each renewal even if no change in immigration status is noted (SOF ¶¶ 121-22); (3) in HEAPlus

As a result of the different programming, the two different computer programs produce different results—in some instances even when they are being used by the same caseworker, as in the case of Sanchez Haro's October 2017 benefit reduction. Pls' SOF ¶¶ 119, 125-27, 133, 150, 171-73. This discrepancy in how the two computer systems process the same information could easily support the reasonable inference that HEAPlus's programming is causing the inaccurate eligibility decisions.

b. Evidence of Automatic Errors Creates Inference that HEAPlus is Causing Errors

Second, evidence of errors made solely by the computer refutes Defendant's argument that all of the remaining errors are simple human error, and bolsters the conclusion that HEAPlus is creating errors. The record provides an ample basis for concluding that the automatic errors continue. Most direct is the fact that DES's daily log shows that many of the improper decisions are dispositioned by the "auto-job" or "AAA_PROCESS," which means there is no caseworker involvement. Pls' SOF ¶¶ 43-50, 224, 226, 232, 298-08. DES staff have also sent emails referencing error created by the auto-jobs, and submitted reports documenting the number of automatic errors that have taken place. Pls' SOF ¶¶ 309-10.

Where there is no evidence of caseworker involvement at all, the only reasonable inference is that the computer system caused the error. Moreover, SIS's representative testified that even where caseworkers are working on a case, the automatic process can nonetheless disposition the case once the caseworker selects the "run eligibility" button. Pls' SOF ¶ 64. Although Defendant asserts that the automatic disposition process has been stopped, a fact finder might reasonably discount Defendant's assertion that the auto-jobs have supposedly been halted, given the substantial evidence that cases continue

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immigration questions are asked at each renewal even when there is no reason to ask the question (SOF ¶¶ 123-25); and (4) HEAPlus is automated to talk to the SAVE and VLP databases, whereas AZTECS is not (SOF ¶ 96), but HEAPlus does not always return the right information, or any information, from SAVE or VLP, even when it is available when SAVE is accessed outside of HEAPlus (SOF ¶¶97-99). Defendant ignores this probative evidence.

to be dispositioned into emergency benefits, without any record of a caseworker being involved.[10] In short, there is conflicting evidence on the question of whether the computer is automatically reducing benefits, and that dispute cannot be resolved at summary judgment.

One explanation for how the computer creates these errors is the fact that, currently, HEAPlus is programmed to request information from SAVE and VLP as part of the "hub check" at the start of every renewal. Pls' SOF ¶¶ 37-42. It is also programmed to request information from SAVE and VLP, at every report a change, even when there is no change in immigration status reports. Pls' SOF ¶¶ 89-90. But AHCCCS knows that this programming conflicts with its policy, which states that ""Non-Citizen Status . . . [d]oes not need to be verified again at renewal unless there has been a change in the customer's immigration status." Pls' SOF ¶ 26 (quoting Ex. 22); *id.* ¶ 93. AHCCCS has further admitted that this programming "is causing a lot more trouble than it's solving. We aren't seeing people getting picked up to correctly change their immigration status. We're seeing problems with immigration status." Pls' SOF ¶ 92 (quoting Ex. 4, Swenson Dep. at 215:2-18). A fact-finder could easily conclude that the automatic process, which starts every renewal, is creating errors.[11]

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[10] A reasonable fact-finder might also discount Defendant's explanation that all of the references to the "auto job" cases on the daily log refer to "conditional approvals," where AHCCCS did not receive the required documentation. First of all, Brenda Rackley flatly contradicted that assertion. Response to D's SOF ¶ 7 (citing Ex. 6, Rackley Dep. at 152:20-153:7). Moreover, the log identifies automatic errors that were incorrect and require correction, and is a separate report from the report tracking conditional approvals. Pls' SOF ¶ 231 (citing Bailey Dep. at 9:13-23). Given the conflicting testimony, this question cannot be resolved at summary judgment.

[11] Defendant's assertion that "[u]p to half of immigrants have changes during a year that may affect their eligibility" does not permit dismissing this evidence. First, the Court may not weigh evidence at this stage, and must draw inference in plaintiffs favor. Moreover, the statement is inaccurate and misleading. The correct citation to this proposition is 76 Fed. Reg. 51180, and the statistic of "33-50%" refers to an estimate for the *entire* Medicaid population (not just immigrants) who may experience any change that would impact eligibility, including a variety of factors such as income and address changes, not just immigration status. There is no reason that frequent changes in *income*

Furthermore, the record supports an inference that the Defendant's purported "fix" to the computer system in November 2015 did not actually work. Defendant concedes he identified a computer problem in the fall of 2015 but claims the problem was fixed. Pls' SOF ¶ 286. The issue identified was specific to immigrants who entered the U.S. in a category such as a refugee, but later change status to become an LPR. Pls' SOF ¶ 287 Those individuals remain eligible once they become an LPR. They are not subject to the 5-year bar. Pls' SOF ¶ 14. But, the computer was allowing the LPR status to override the prior refugee status, and thus subjecting individuals to the five year bar who should be exempt. Pls' SOF ¶¶ 286-87. The changes in November 2015 were supposed to prevent this "override." *Id.*

It is reasonable to conclude that the fix did not work as intended. While AHCCCS understood the goal of the changes it asked SIS to make, Defendant did not know precisely what changes were made to the underlying code. Pls' SOF ¶ 288. Moreover, two experienced DES employees were unaware of the purported fix and testified that they knew of instances where LPR status did override the prior refugee status, and caused errors. Pls' SOF ¶¶ 289-92. Refugees are still listed on the daily logs of incorrect benefit reductions. Pls' SOF ¶ 293. And in reviewing Plaintiff Darjee's June 2016 applications, a reasonable inference is that the purported computer fix did not work for her, and her refugee status was replaced by the computer with "LPR" status. Pls' SOF ¶¶ 294-97.

c. HEAPlus Contributes to Caseworker Error

It is also reasonable to infer that the computer system actually contributes to and creates caseworker errors. Every renewal starts with an automatic process, even if a caseworker ultimately dispositions the case. Pls' SOF ¶¶ 34-42. That automatic process identifies what information has already been verified and what information is still "pending," and caseworkers are not supposed to re-verify information that has already been verified. Pls' SOF ¶¶ 51-62. In Sanchez Haro's case, for instance, the computer did

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would necessitate that Defendant send a query to SAVE and VLP to re-verify immigration status. Nor does counsel's inaccurate citation to statistics negate Defendant's written policy or the testimony of its 30(b)(6) witness.

not request any additional immigration information when it sent the request for information in March 2017, meaning the computer had already verified her immigration status. *See* Pls' SOF ¶ 151 (Citing Ex. 24). While the caseworker updated her income, he did not ask any questions about immigration status, and her immigration status was not changed in the file. Pls SOF ¶¶ 158-59, 173-74. He told her that she would receive the same benefits, and the system did not alert him that her eligibility was changing. Pls' SOF ¶¶ 173, 67. In other words, even though the caseworker ultimately resolved the case, the automatic process was responsible for retrieving and analyzing the immigration status. This is how "the system is leading [caseworkers] to an FES decision when it should be a full service," because "it's not evaluating the immigration information correctly," and "the system should be leading us to the correct determination, which it is not." Pls' SOF ¶¶ 108, 126 (quoting Hamman Dep. at 42:11-24; 91:25-92:21).

The system also permits qualified statuses to be overridden in other ways. For instance, at renewal, when a qualified immigrant answers the immigration status question as "Do not want to give" or "Other" this answer overrides the prior qualified immigration status. Pls' SOF ¶¶ 113-14. A review of the daily logs shows that many of the immigrant renewal cases that were improperly reduced had these responses as the reason for the reduction. *See* Exs. 13-16 (listing "Do not Want to Give" or "Other" in description columns). If the person had an already verified qualified status, they should not be asked for their immigration status unless it had changed. AHCCCS continues to ask the question unnecessarily, *see id*. ¶ 124 (citing Ex. 10, Greenfield Dep. at 38:9-39:13), and has failed to take any action to address the improper reductions that result. Pls' SOF ¶¶ 121-128.

HEAPlus's programming contributes to caseworker errors in other ways. It currently permits caseworkers to disposition a case without responding to the three questions that govern exemptions to the five-year status requirement. Pls' SOF ¶¶ 109-110. Those questions include whether the immigrant entered the U.S. prior to August 1996, whether the individual has a military connection, and whether the individual

entered with a certain prior immigration status. *Id.* But when those questions are left unanswered, HEAPlus treats the lack of an answer to one of the five-year bar exemption questions as a "no." Pls' SOF ¶ 110. Similarly, HEAPlus cannot lock down the answers to these questions, and sometimes switches the answer to "no" although they had been previously answered "yes." Pls' SOF ¶ 112, 175. But defaulting to a "no" answer causes the computer to subject an immigrant to the five year bar, when they should be exempt. Pls' SOF ¶¶ 109-110. This "can cause people to wind up getting emergency services," even if the immigration status was verified by the federal databases. Pls' SOF 111 (quoting Ex. 8, Farquhar Dep. at 106:21-107:14).

Caseworkers are now responsible for identifying and fixing the computer's errors. Because DES workers "can't trust that the [HEAPlus] system is saying that FES is the correct determination," they "have to double-check in all these different places to make sure that we have uncovered any possibility of eligibility." Pls' SOF ¶ 72 (quoting Ex. 9, Hamman Dep. at 52:2-6). This process is inefficient and error-prone. Pls' SOF ¶76. Moreover, caseworkers will often rely on the computer's determination, which was the intention of HEAPlus's design. Pls' SOF ¶¶ 75, 95-96. It is especially problematic because "some of our newer workers don't have all the knowledge and skill behind eligibility" and if the computer does not lead them "down the path," the worker can "wind up doing some harm by reducing" the level of service. Pls' SOF ¶¶ 75, 111. Moreover, the computer system does not alert the worker if the benefits are changing, nor does it give them an easy option to switch back to the correct eligibility category. Pls' SOF ¶¶ 67-71. A reasonable fact-finder could conclude that AHCCCS's policy and procedures requiring caseworkers to double check and correct known computer errors contributes to the continuing stream of incorrect benefit reductions. Pls' SOF ¶ 76.

Even when caseworkers can identify the errors, the record reveals that they cannot always figure out how to override the computer's erroneous determination. Pls' SOF ¶ 73. Caseworkers cannot simply select the right eligibility from a drop down, instead they have to go back and change the data in the application to force HEAPlus to produce

the right outcome. Pls' SOF ¶¶ 68-71. Mr. Farquhar explained that he has personally encountered a case where he "could not find the cause for HEAPlus giving me emergency services," and had to submit a ticket to SIS. Pls' SOF ¶ 74 (citing Farquhar Dep. at 26:6-28:17). These tickets are generated when caseworkers cannot figure out how to operate HEAPlus to produce the correct outcome, and is a way for caseworkers to report problems with the computer. Pls' SOF ¶¶ 313-15, 317.

One reason caseworkers cannot effectively override the computer's conclusion is that HEAPlus relies solely on the date provided by SAVE and VLP to calculate whether an individual has met the five year bar. Pls' SOF ¶¶ 77, 94-96, 100-101. But AHCCCS knows that SAVE an VLP data is insufficient because it only provides the grant date associated with an individual's most recent immigration status. Pls' SOF ¶¶ 102-103. Nonetheless, HEAPlus is programmed so that the "grant date," "status change date" and "date of entry" fields in HEAPlus are all automatically populated by SAVE and VLP, and subsequently cannot be edited by a caseworker. Pls' SOF ¶¶ 42, 77, 105, 147-48, 168. There is no separate field for a prior grant date. Pls.' SOF ¶ 103, 106-08. Thus, a reasonable inference is that there is simply no way for a caseworker to fix an incorrect grant date imported by SAVE and VLP, and that HEAPlus will *always* rely on the more recent date, even when that produces an incorrect outcome. Pls' SOF ¶¶ 141-49, 158, 167-68; *See M.K.B.*, 445 F. Supp. 2d at 425 (describing "the problem that the single date field causes for people who attain Qualified Alien status prior to attaining lawful permanent residency.").

The System Request 392 acknowledges and underscores that changes to the computer system could reduce or prevent caseworker errors. Pls' SOF ¶¶ 146, 323. In fact, that proposal highlights many of the ways the current HEAPlus system contributes to caseworker errors. For instance, currently, immigration information is not tied to a person's unique identifier, but is associated only with the individual application. Pls' SOF ¶¶ 120, 127-28. As a result, it cannot be "locked down," even when it has been previously verified. Pls' SOF ¶¶ 123. This allows the immigration status to change, at a

renewal, or during a report a change application, even when there is no reported change in status, and the policy does not require re-verification. *See* Pls' SOF ¶¶ 89-90, 91-94, 111-114, 127. DES staff have submitted similar requests and suggestions for fixing HEAPlus to reduce errors, underscoring the ways that the computer contributes to the errors. Pls' SOF ¶¶ 318-22.

3. Defendant's Policies and Practices Contribute to the Errors

Compounding the HEAPlus computer problems, AHCCCS has failed to develop policies and practices that address individuals like Plaintiffs who have held multiple immigration statuses. Multiple witnesses testified that the computer program has only one field for immigration status and is not programmed to store or analyze whether an individual has held multiple qualifying statuses. Pls' SOF ¶¶ 94-108. AHCCCS's written policy and notices also fail to account for individuals who have met the five year bar by holding two statuses. Pls' SOF ¶ 24. Taking this evidence together, a reasonable inference is that AHCCCS's policies surrounding immigrant renewal application fail to accurately account for individuals, like the Plaintiffs, who have held multiple statuses.

4. AHCCCS's Policies and Procedures Cause Plaintiffs Repeat Reductions

The record supports an inference that AHCCCS's policies and procedures have caused Plaintiffs' repeated benefit reductions. As described above, by including only one grant date, and always relying on the most recent one, HEAPlus will *inevitably* screen Sanchez Haro eligible for emergency-only benefits, until she has also held her LPR status for five years. There is simply no dispute that HEAPlus imports and relies solely on the most recent grant date. Indeed, each summary of SAVE and VLP information that HEAPlus presents for Sanchez Haro shows the January 13, 2015 date. Pls' SOF ¶¶ 184. And that same date is listed in each of Ms. Sanchez Haro's eligibility application summaries—even after the applications were "corrected" by AHCCCS staff. Pls' SOF ¶¶ 142-143, 158, 167, 184. Multiple witnesses testified that there is no way to write in a prior grant date once it is populated by SAVE or VLP. Pls' SOF ¶¶ 42, 77, 105, 141-49,

158, 167-68. Further, every witness, and DES caseworker, who reviewed this information agreed that the way HEAPlus presents this information suggests she is eligible only for emergency benefits. Pls' SOF ¶¶ 182-83.[12]

As a result, a caseworker must intervene to identify and manually override the computer's incorrect conclusion each time Ms. Sanchez Haro comes up for benefits. Pls' SOF ¶ 71-73, 146. The only way that Defendant has been able to force the computer to reach a "full benefits" conclusion for Ms. Sanchez Haro is that the caseworker must go into the file and change the answer to the 1996 residency question from "no" to "yes." Pls' SOF ¶¶ 165-68, 175-181, 190. Changing that answer tells the computer she is exempt from the five year bar. Pls' SOF ¶¶ 109-10, 177, 182. But even after that answer is changed, it is not locked down, and therefore, must be corrected each time. Pls' SOF ¶¶ 112, 146, 175-77. Finally, AHCCCS's own witnesses disagree about whether this documentation is even consistent with AHCCCS's policy. Pls' SOF ¶¶ 165-66, 185-90 Certainly, a reasonable inference is that there is simply no authorized way for the computer—or a caseworker using the computer—to reach the right conclusion on Ms. Sanchez Haro's case and that this computer programing increases the risk of errors, and is directly causing Ms. Sanchez Haro's case to be incorrectly determined.

The inability to lock down immigration status and prevent SAVE and VLP from overwriting the prior, verified information also explains Ms. Darjee's benefit reductions.

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[12] Defendant has claimed that errors in Ms. Sanchez Haro's case were due to some "inconsistencies" in her file, D. SOF ¶ 23 (citing Tara Lockner Decl,, 229-1 ¶ 29). The evidence flatly contradicts that assertion. First of all, Defendant admitted that those purported inconsistencies played no role in the improper reduction. Pls' SOF ¶¶ 141. This makes sense given that HEAPlus should only look back to the most recent application, and not copy forward information from prior applications. Pls' SOF ¶ 36. Moreover, if AHCCCS did need to obtain additional information from Sanchez Haro in 2016 to verify her status (which it did not since her status had already been verified), it was required to provide her with a "reasonable opportunity" to provide that additional documentation, and was not permitted to "delay, deny, reduce, or terminate the individual's eligibility for benefits under the program on the basis of the immigration status until such a reasonable opportunity has been provided." 42 U.S.C. § 1320b-7(d)(4)(A). AHCCCS's practice to terminate benefits while seeking additional verification violates these federal requirements.

Indeed, this is what happened to Plaintiff Darjee's case in June 2016. Although their refugee status had been previously, and repeatedly verified, on the June 8, 2016, application that caused their benefit reduction, her status showed as "LPR" not "refugee." Pls' SOF ¶¶294-97. And because the LPR status shows up on the submitted application summary, that represents what the *computer* input in the automatic renewal, not the caseworker. Pls' SOF ¶¶ 79, 82, 159 174. That is, the computer's hub check resulted in the more recent immigration status, LPR, overwriting the prior refugee status, and to correct the error, her immigration status had to be updated from LPR back to refugee. Pls' SOF ¶¶ 37-42, 294-97.

In sum, there is substantial evidence that AHCCCS systemically reaches inaccurate eligibility determinations for immigrants at renewals, including the Plaintiffs. While Defendant may dispute the credibility of Plaintiffs' evidence at trial, at this stage of proceedings, the Court may not weigh competing evidence, may not make credibility determinations, and must draw inferences in Plaintiffs' favor. *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1161 (9th Cir. 2017). Whether the errors in this case are caused by the computer, caseworkers, or a combination of both, the benefit reductions that result *are* the Medicaid Act violation.[13] Indeed, cases have repeatedly found Medicaid Act violations due to a pattern of caseworker error, or a combination of caseworker and computer error. *See e.g.*, *M.K.B*, 445 F. Supp. 2d at 406-10 (describing series of worker

[13] These allegations are sufficient to survive summary judgment on Plaintiffs' reasonable promptness claim. Defendant challenges other allegations raised in the complaint, but at summary judgment Plaintiffs do not need to follow the specific theories of the complaint precisely. *See e.g., Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 890 (N.D. Cal. 2011). Plaintiffs' evidence is that Defendant's practices and the computer programming lead to systemic errors in processing renewal applications for immigrants, causing them to lose access to full medical benefits. Defendant's arguments concerning the sufficiency of *other* written regulations and policies, *see* Doc. 228 at 3-4, are not relevant and do not negate the evidence of these harmful practices and computer programming. *Cf. Crawley v. Ahmed*, No. 08-14040, 2009 WL 1384147, at *23 (E.D. Mich. May 14, 2009) (enjoining defendant's "pattern and practice" of terminating Medicaid eligibility in violation of Medicaid Act requirements, notwithstanding that written policy directed caseworkers to comply with federal requirements.).

errors). And because a reasonable inference is these errors are systemic, the inference is Plaintiffs have and will continue to experience benefit reductions. Summary judgment must be denied. *See Unan*, 853 F.3d at 290 (where plaintiffs "have put forth some evidence that a systemic issue persists," summary judgment is inappropriate).

II. Plaintiffs, not Defendant, Are Entitled to Summary Judgment on the Notice Claim

States are prohibited from terminating or reducing a Medicaid recipient's benefits without first providing adequate notice and a hearing. *See Goldberg v. Kelly*, 397 U.S. 254 (1970); *Perry v. Chen*, 985 F. Supp. 1197 (D. Ariz. 1996); 42 C.F.R. § 431.210. Among other requirements, the notice must include a "clear statement of the specific reasons supporting the intended action[.]" 42 C.F.R. § 431.210(b).

The parties dispute the content of the notices that are being sent to immigrants whose benefits are reduced from full to emergency only. Defendant in his motion asserts that AHCCCS now sends the Notice attached as Exhibit P to Defendant's Statement of Facts to immigrants. Plaintiffs dispute that claim, as neither Plaintiff has received the "new" notice. *See* Pls' SOF ¶¶ 206-07. Indeed, Defendant did not produce a copy of Exhibit P sent to either Plaintiff. That evidence alone is sufficient to defeat Defendant's motion for summary judgment.

Moreover, while Defendant attached a template copy of this "new" notice, Defendant offers no evidence that these notices were actually sent to Plaintiffs or that they are now being sent to individuals in Plaintiffs' position. In fact, the only testimony on this question refutes Defendant's claim. AHCCCS employee Tara Lockner stated that a notice like Exhibit P is *not* sent when individuals change benefits from full to emergency services, but is instead used when emergency benefits an immigrant is already receiving are renewed. Pls' SOF ¶ 207. And Julie Swenson explained that all of the notices that are sent are identical to the October 12, 2017 notice because they are computer generated. Pls' SOF ¶¶ 196. Defendant offers no evidence to rebut this testimony, and those notices are simply not part of this case. Plaintiffs, accordingly, seek

summary judgment on the notice that Defendant did send Ms. Sanchez Haro dated October 12, 2017 and the nearly identical notices sent to her and Ms. Darjee throughout 2016. Pls' SOF ¶¶ 134-37, 153-57, 191-200, 297.

But even if the Court finds that these "new" notices are being sent to individuals in Plaintiffs' position, those notices still do not satisfy the requirements of due process as explained below. Accordingly, even resolving the factual dispute in Defendant's favor, the new notice does not satisfy due process and Plaintiffs are entitled to summary judgment on that claim as well.

1. The Notice Defendant Sent Plaintiff Sanchez Haro dated October 12, 2017 Violates Due Process and Statutory Notice Requirements

The October 12, 2017 notice AHCCCS sent Ms. Sanchez Haro violates due process and statutory notice requirements because the notices fail to adequately explain the agency action or the reasons for that action. The notice informs Plaintiff that "This person's medical assistance coverage changed from full medical services to emergency services only." Pls' SOF ¶¶ 191-93 (citing Ex. 36). The only reason provided for the change is that: "We took this action because your immigration status does not let you get full medical services." Pls' SOF ¶¶ 194 (citing Ex. 36).

As the District Court already noted, this evidence:

> supports an inference that 'your immigration status does not let you get full medical services" is not a "clear statement of the specific reason" for reducing Sanchez Haro's benefits. 42 C.F.R. § 431.210(b). As Plaintiffs point out, the proffered reason could have a number of meanings, e.g., Sanchez Haro's immigration status changed unbeknownst to her, or Defendant changed which immigration statuses are eligible for full benefits.

Doc. 85 at 19. Furthermore, the notice fails to explain the immigration status AHCCCS relied on to evaluate Plaintiff's eligibility for benefits, what immigration status AHCCCS thinks the Plaintiffs had before the change and what immigration status AHCCCS think

they have now. Pls' SOF ¶¶ 195-97. Thus, the notice fails to provide sufficient and meaningful information to test the accuracy of the decision and does not allow the recipient to determine if the agency made a mistake. Pls' SOF ¶¶ 198. Plaintiff Sanchez Haro has stated that the notice did not explain: the reason her benefits were reduced; what immigration status AHCCCS thinks she has; if AHCCCS thought her status had changed; or if there was a change in the law. Pls' SOF ¶ 199. Because the language of these notices remains unchanged, the notices continue to violate due process. [14]

In fact, the AHCCCS notice is precisely the type of notice courts have repeatedly found unlawful. Federal law and constitutional protections place the obligation on AHCCCS to provide notices that protect the claimants' property interests in their medical benefits. Due process requires a meaningful explanation of the reasons for the agency action so the recipient can both understand what has happened and make an informed decision whether to challenge the agency decision. In *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992), the Ninth Circuit examined what information was necessary to explain why child support payments the state collected were not given to the custodial parent. The court concluded that the conclusory statement that "any money that was collected was not current support" did not provide meaningful notice of why that child support was

[14] Plaintiffs also claim that the notice is unlawfully deficient because it fails to clearly: (1) tell the person that they can review their whole case file pursuant to 42 C.F.R. § 431.18(d); (2) explain the option to continue to get benefits pursuant to 42 C.F.R. § 431.210(e); and (3) when the right the appeal must be filed to continue to get benefits pursuant to 42 C.F.R. § 431.206 (b)(1) and (2). Plaintiff Sanchez Haro stated that if she had a right to look at her whole case file, the notice should tell her that clearly. When she read the current wording, she thought she could only look at certain parts or pages of her file. She did not understand the words "necessary for the proper presentation of your case." Pls' SOF ¶ 200. She also did not understand the part on page 10 about the option to continue to get benefits when an appeal was filed because she does not know what premium or share of cost meant, and she did not understand the deadlines for filing an appeal because she could not tell if her benefits were changing or ending. Pls' SOF ¶¶ 201-203. AHCCCS has acknowledged that these notices could be clearer, and stated that AHCCCS intended to change the language "to clarify that customers can ask for a copy of their entire file," and "updating the hearings page so information about premiums is excluded when not applicable." Pls' SOF ¶ 204. These changes have not been made, and the persisting deficiencies also violate due process.

not sent to the parent. *Id.* Due process required the state provide the parents with sufficient and specific information to determine if they were receiving the support they were entitled to receive. Namely, the court required the state to provide the date of each child support collection, the amount collected, and a specific reason for denial of each pass through, all of which the agency maintained in its system and could add to the notice. *Id.* at 577-579.

It also is insufficient to list in general those changed circumstances that may have affected the claimant's eligibility. Due process requires individualized facts. *K.W. v. Armstrong*, 298 F.R.D. 479, 489-491 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015). The agency must provide meaningful information "detailing" the reason for the action so the claimant can determine the correctness of the decision and whether to appeal. *Rodriguez v. Chen*, 985 F. Supp. 1189, 1193-94 (D. Ariz. 1996). In *Rodriquez*, the court held statements that claimant "is now in a new category for his age and no longer eligible due to household excess income" and "net income exceeds maximum allowable" were vague and failed to provide "any basis upon which to test the accuracy of the decision." *Id.* at 1194.

The same reasoning applies here. The notice does *not* state what immigration status it has on file for the individual applicant receiving the notice. Pls' SOF ¶¶ 194-99. That information, like the child support payment information, is maintained in the system and could be added to the notice. *See* Pls' SOF 53. Indeed, AHCCCS already provides individualized explanations of its income calculations. Pls' SOF ¶ 197. But it has not programmed the notices to include the required individualized explanation of immigration status. Pls' SOF ¶ 196. This failure violates due process.

There can be no dispute that the October 12, 2017 notice, and the preceding notices which contain the same language, do not satisfy due process and Plaintiff is entitled to summary judgment on the notice claim in Count II of the complaint.

2. Defendant's Exhibit P Notice Violates Due Process and Statutory Notice Requirements

The AHCCCS notice attached as Exhibit P likewise violates due process and statutory notice requirements. The notice tells the immigrant that "You can get emergency services coverage only. You cannot get full medical services because of your immigration status." Then the notice informs the person that the person is not in one of over 20 immigration categories.[15] The notice still does not explain what immigration status AHCCCS relied on to evaluate the applicant's eligibility for benefits, and continues to improperly list generalized facts rather than individualized analysis. Pls' SOF ¶ 210. Indeed, when shown this notice, Plaintiff Sanchez Haro stated she did not understand it, and she did not know what all the immigration categories were. Pls' SOF ¶¶ 213. Thus, the notice still fails to provide sufficient and meaningful information to test the accuracy of the agency decision and does not allow the recipient to determine if the agency made a mistake. Accordingly, this notice is also unlawfully deficient under due process and the statutory requirements and dispositive authority of *Barnes*, 980 F.2d at 579, *K.W. v. Armstrong*, 298 F.R.D. 479, 489-491 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015); *Rodriguez*, 985 F. Supp. at 1193-94 (D. Ariz. 1996).[16]

Conclusion

Defendant is not entitled to summary judgment on either claim and Plaintiffs are entitled to summary judgment on the notice claim.

Respectfully submitted this 13th day of July 2018.

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[15] Moreover, even this generalized explanation is inaccurate: the notice does not explain that an individual may satisfy the five-year bar by holding two different qualifying statuses for a total of five years. Thus, it does not even provide an accurate description of the general categories of immigration status that qualify for full benefits.

[16] Like the October 12, 2017 notice, Plaintiffs also claim that the notice is unlawfully deficient because it, like the notice sent to Ms. Sanchez Haro, fails to clearly (1) tell the person that they can review their whole case file pursuant to 42 C.F.R. § 431.18(d); (2) explain the option to continue to get benefits pursuant to 42 C.F.R. § 431.210(e) ; and (3) when the right the appeal must be filed to continue to get benefits pursuant to 42 C.F.R. § 431.206 (b)(1) and (2). Pls' SOF ¶¶ 210-216. These deficiencies also violate due process.

NATIONAL HEALTH LAW PROGRAM

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July 2018, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to the following CM/ECF Registrants:

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