UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONNIE MAURICE STEWART, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:18-cv-152 (JEB)
	)	
	)	
ALEX M. AZAR II, *et al.*,	)	
	)	
Defendants.	)	

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF KENTUCKY, *EX REL.* MATTHEW G. BEVIN, GOVERNOR, IN SUPPORT OF THE DEFENDANTS' MOTION TO TRANSFER

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Under LCvR 7(o),[1] the Commonwealth of Kentucky, *ex rel.* Matthew G. Bevin, Governor, files this *amicus curiae* brief in support of the federal government's motion to transfer this case to the Eastern District of Kentucky (ECF No. 6).

INTEREST OF *AMICUS CURIAE*

Governor Bevin, who files this *amicus curiae* brief on behalf of the Commonwealth of Kentucky, has a substantial interest in this case and, more specifically, in where it is heard. This lawsuit challenges Kentucky's Section 1115 Medicaid waiver, known as Kentucky HEALTH, which Kentucky has spent thousands of hours developing and which, in short order, will be applied solely in Kentucky. Like the federal government, the Commonwealth believes that, in light of Kentucky's paramount interest in this case, a Kentucky federal court should decide whether Kentucky HEALTH is consistent with the Administrative Procedure Act and the United States Constitution.

INTRODUCTION

Kentucky is ground zero for this case. The Plaintiffs, who are *Kentucky* residents, filed this lawsuit on behalf of a putative class of *Kentuckians*. Their goal is to invalidate *Kentucky* HEALTH, which was developed in *Kentucky*, is currently being implemented in *Kentucky*, and soon will be enforced in *Kentucky* by *Kentucky* officials. This lawsuit's connections to Kentucky are undeniable and overwhelming. Its connections to the District of Columbia, by comparison, are attenuated, thus justifying transfer to a Kentucky federal court.

[1] This local rule allows the Commonwealth to file an *amicus curiae* brief without leave of court or consent of the parties.

In addition, the Commonwealth of Kentucky and two of its officials recently filed a lawsuit in the United States District Court for the Eastern District of Kentucky seeking to uphold Kentucky HEALTH. The Kentucky Association of Health Plans has already sought to join that suit as a plaintiff and, upon information and belief, the Kentucky Hospital Association soon will seek to join as well. The pendency of a lawsuit in Kentucky in which the Commonwealth and other legitimate stakeholders are parties or soon will be parties provides a further reason to transfer this matter to Kentucky, where the legality of Kentucky HEALTH can be decided once and for all.

ARGUMENT

I. Kentucky's interests in this case far surpass those of the District of Columbia.

Although the parties' briefing about whether transfer is proper touches many issues, the heart of the parties' dispute is the degree to which this action is connected to Kentucky. The Defendants, the federal government and its officials, argue that Kentucky "has meaningful ties both to Plaintiffs and the controversy that is the subject of Plaintiffs' complaint." (ECF No. 6 at 17). The Plaintiffs, by contrast, admit that Kentucky has "clear interests" in this case, but nevertheless describe this lawsuit as challenging "nationally important decisions made in the Capital by high-ranking Executive Branch officials . . . ." (ECF No. 15 at 7, 20).

The federal government has the better argument. Although federal officials approved Kentucky HEALTH, they did so only after sending a team of CMS officials to Kentucky. And the Plaintiffs' attempt to focus on federal decision making to the exclusion of everything else overlooks that, first, Kentucky HEALTH was developed to respond to

the unique situation in Kentucky and, second, Kentucky HEALTH will directly affect only Kentuckians.

A. Kentucky HEALTH responds to particular issues faced by Kentucky.

Section 1115 of the Social Security Act recognizes that Medicaid is not a one-size-fits-all program. A Section 1115 waiver permits a state to pursue the objectives of the Medicaid statute while confronting the unique situation facing the state. *See generally* 42 U.S.C. § 1315(a). As the Centers for Medicare and Medicaid Services ("CMS") put it in approving Kentucky HEALTH, demonstration projects "offer a way to give states more freedom to test and evaluate innovative solutions . . . provided that, in the judgment of the Secretary, the demonstrations are likely to assist in promoting the objectives of Medicaid." (ECF No. 1-3 at 4). Simply put, a Section 1115 waiver is a state-initiated and state-led project that responds to the particular situation on the ground in the state.

This is especially true with respect to Kentucky HEALTH. As explained in Kentucky's August 24, 2016 waiver application, "Kentucky HEALTH is uniquely designed for the specific challenges facing Kentucky . . . ." (ECF No. 1-2 at 7). Kentucky's pressing need for a Section 1115 waiver, Governor Bevin explained, was driven by, among other things, the facts that "[a]lmost twenty percent of our residents live in poverty, we are 47th in the nation for median household income, nearly one-third of Kentuckians are on Medicaid, and our workforce participation is among the worst in the nation at less than 60 percent." (*Id.* at 2). According to Kentucky's waiver application, maintaining the status quo on Medicaid expansion is not an option for Kentucky:

> [T]he cost of [the Medicaid expansion] to Kentucky taxpayers is estimated to increase from $74 million in 2017 to approximately $363 million by 2021, for a total of approximately $1.2 billion over the next five years. These costs have the potential to change the overall state budget and could create funding issues for other programs, such as education, pensions, and infrastructure, as well as also jeopardize funding for the traditional Medicaid program that covers the aged, blind, disabled, pregnant women and children.

(*Id.* at 9). More to the point, problems unique to Kentucky—workforce participation rates, poverty, and budgetary realities, to name a few—drove Kentucky to pursue a Section 1115 waiver tailored to its needs. Importantly, CMS recognized as much in approving Kentucky's waiver application, finding that "Kentucky HEALTH is designed to address the unique challenges the Commonwealth is facing as it endeavors to maintain coverage and promote better health outcomes among its residents." (ECF No. 1-3 at 5). In short, Kentucky HEALTH exists because of circumstances in Kentucky, not because of circumstances in the District of Columbia or nationwide.

The Kentucky-centric nature of Kentucky HEALTH is a function of the Social Security Act. Before a state can even submit a Section 1115 waiver application to CMS, the Act requires the state to conduct a comment period—*i.e.*, the state must directly solicit the input of its citizens who will be affected by the waiver. *See* 42 U.S.C. § 1315(d)(2); 42 C.F.R. § 431.408(a). And there can be consequences for a state that altogether ignores its citizens: it is something that courts in this judicial circuit might consider in judging the legality of a Section 1115 waiver. *See Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (holding that a state must "respond to 'relevant' and 'significant' public comments" but that the requirement is not "particularly demanding"). By requiring a

comment period in the state *before* a Section 1115 waiver application can be submitted, the Social Security Act ensures that waiver applications focus on the particular situation facing the state.

The robust state comment process preceding Kentucky's submission of its waiver application to CMS underscores how attuned Kentucky HEALTH is to Kentucky's problems. Before submitting Kentucky HEALTH, the Commonwealth held three public hearings. These hearings were not held in the District of Columbia or anywhere near it, but instead in Bowling Green, Frankfort, and Hazard—locations in western, central, and eastern Kentucky—to ensure the participation of citizens in every part of the Commonwealth. (ECF No. 1-2 at 45). The comment period was supposed to last for 30 days, but due to the volume of comments received, the Commonwealth extended the state comment period by several weeks. (*Id.*). All told, the Commonwealth received almost 1,350 comments during its comment period. (*Id.* at 3). Importantly, these comments helped shape Kentucky HEALTH. The Commonwealth's resulting waiver application lists *almost 50 changes* to the waiver application that were made after the state comment period. (*Id.* at 57–59).

That the Commonwealth and its citizens are the architects of Kentucky HEALTH fatally undermines the Plaintiffs' contention that this case solely or even largely concerns federal decision making. Federal officials, it is true, approved Kentucky HEALTH, but they did so only after sending a team to Kentucky to see how the Commonwealth planned to operationalize Kentucky HEALTH and to understand how Kentucky HEALTH would work. In addition, federal officials spent significant time discussing the

unique approach that the Commonwealth would take in Kentucky to implement its waiver if approved. In sum, as the Social Security Act envisions, Kentucky HEALTH is, above all, a program that addresses problems in Kentucky faced exclusively by Kentuckians.

B. Kentucky HEALTH directly affects only Kentuckians.

In addition to being designed to address Kentuckians' problems and concerns, Kentucky HEALTH will only directly affect Kentucky Medicaid recipients. This point is not subject to dispute. The named Plaintiffs in this action are all residents of Kentucky, and they purport to represent not a nationwide class, but a putative class of Kentucky Medicaid recipients. (ECF No. 1 ¶¶ 12–26, 33 ("The class consists of all residents of Kentucky who are enrolled in the Kentucky Medicaid program on or after January 12, 2018.")). The Plaintiffs' complaint could not be clearer about the localized effects of Kentucky HEALTH. They allege that Kentucky HEALTH "will harm *Kentuckians across the state* – housekeepers and custodians, ministers and morticians, car repairmen, retired workers, students, church administrators, bank tellers, caregivers, and musicians." (ECF No. 1 ¶ 8 (emphasis added)). In short, the Plaintiffs concede that this lawsuit will predominantly, if not exclusively, affect Kentucky Medicaid recipients.

The Plaintiffs' response to the federal government's motion to transfer also omits mention of Governor Bevin's executive order regarding Kentucky HEALTH, which demonstrates just how localized the effects of this lawsuit will be. On January 12, 2018, the same day that CMS approved Kentucky HEALTH, Governor Bevin issued an executive order, stating:

> [G]iven all of the other financial obligations and commitments imposed upon the Commonwealth under Kentucky's Constitution, federal and Kentucky statutes, regulations and case law, the Commonwealth will not be able to afford to continue to operate its Medicaid expansion program as currently designed in the event any one or more of the components of Kentucky's Section 1115 Waiver and the accompanying Special Terms and Conditions are prevented by judicial action from being implemented within the demonstration period set forth in the Special Terms and Conditions.

(Exhibit 1 at 4 (attached)). As a result, Governor Bevin ordered that if any aspect of Kentucky HEALTH is ultimately enjoined by a court of competent jurisdiction, the applicable state officials "are hereby directed to take the necessary actions *to terminate Kentucky's Medicaid expansion program . . . .*" (*Id.* (emphasis added)). Thus, this lawsuit could lead not only to Kentucky HEALTH being enjoined, which directly affects only Kentucky Medicaid recipients, but also to Kentucky removing itself from expanded Medicaid, which even more directly affects only Kentucky Medicaid recipients. Expanded Medicaid was adopted in Kentucky by executive action by Kentucky's prior Governor, and it can be undone by executive action under Governor Bevin. Consequently, the fate of expanded Medicaid in Kentucky for over 400,000 Kentuckians will be decided far from their homes, if transfer is not granted. This point alone warrants transfer to a federal court in Kentucky.

The Plaintiffs' primary rebuttal to the argument that this lawsuit only affects Kentuckians is to point to Count 1 of their complaint, which challenges the January 11, 2018 letter from CMS to state Medicaid directors. (ECF No. 1 ¶¶ 339–45). The federal government, however, correctly notes that the January 11 letter did not injure the Plaintiffs and, in any event, is not subject to an APA challenge because it is not a "final

agency action" as to the Plaintiffs. (ECF No. 6 at 28 n.7). The Plaintiffs respond by arguing, without citing anything, that the federal government's arguments regarding Count 1 are "strongly contested." (ECF No. 15 at 8, 19). Even accepting that self-serving and empty assurance, the inclusion of Count 1 in the Plaintiffs' complaint cannot change the fact that the gravamen of the Plaintiffs' complaint—the topic of 8 of 9 counts and the focus of the vast majority of its allegations—is Kentucky HEALTH.

II. The pending action in the Eastern District of Kentucky provides a further reason for transfer.

On February 19, 2018, the Commonwealth of Kentucky and two of its officials filed a lawsuit in the Eastern District of Kentucky seeking to uphold Kentucky HEALTH. (3:18-cv-8, ECF No. 1). Since then, the Kentucky Association of Health Plans has moved to join that suit as a plaintiff. (3:18-cv-8, ECF No. 4). As a Kentucky non-profit organization that represents various health plans that administer Medicaid benefits, the Kentucky Association of Health Plans has much to add to the Kentucky litigation. In addition, upon information and belief, the Kentucky Hospital Association, an organization representing Kentucky hospitals, related health care organizations, and integrated health care systems, soon will move to join the Kentucky lawsuit. The still-growing presence of Kentucky stakeholders in the Kentucky lawsuit provides a further reason to transfer this matter to Kentucky, so that the two matters can be consolidated and all interested parties can litigate the legality of Kentucky HEALTH in one forum.

The Plaintiffs have criticized the Kentucky lawsuit, calling it "disgraceful" and a "sideshow." (ECF No. 15 at 32). But Kentucky must be heard regarding its own program,

and the Plaintiffs intentionally chose *not* to sue Kentucky or any of its officials in this lawsuit. That was their choice. They made this choice even though the Plaintiffs now acknowledge that states usually participate in Medicaid waiver lawsuits and that, typically, those lawsuits are brought in the home state. (*See id.* at 11 (trying to distinguish the federal government's case law on the basis that "the plaintiffs in those cases all brought claims against *state* officials located in the states where the plaintiffs sued, or, in one case, a regional federal official based in the forum where the plaintiffs filed suit")). Reading between the lines, the Plaintiffs' admissions that states normally participate in Medicaid waiver lawsuits and that those lawsuits typically are not litigated in the District of Columbia strongly suggest that the Plaintiffs' decision not to sue Kentucky was a forum-shopping tactic (what they now accuse Kentucky and the federal government of).

CONCLUSION

This case is about a Kentucky program developed in Kentucky by Kentucky officials using comments from Kentucky citizens that will predominantly—perhaps exclusively— affect the citizens and state government of Kentucky. The Court should grant the federal government's motion to transfer this case to the Eastern District of Kentucky, the forum most connected to this lawsuit and the forum where interested parties are ready to participate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 5, 2018 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the following:

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