UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *ex rel.* MATTHEW G. BEVIN, GOVERNOR, *et al.*,	)	
PLAINTIFFS,	)	
	)	Civil Action No. 3:18-00008-GFVT
v.	)	
RONNIE MAURICE STEWART, *et al.*,	)	
DEFENDANTS.	)	

* * * * * *

THE KENTUCKY HOSPITAL ASSOCIATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE

The Kentucky Hospital Association (the "KHA"), by and through counsel, and in support of its motion to intervene in the above-styled action pursuant to Federal Rule of Civil Procedure 24(a), or alternatively, under Federal Rule 24(b), submits the following:

The instant declaratory judgment action requests this Court to rule on the application of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, (commonly known as the Medicaid statute); Section 1115 of the Social Security Act, 42 U.S.C. § 1315; and the Administrative Procedures Act (APA), 5 U.S.C. §§ 702 *et seq.*, to various legal issues underlying the development and implementation of Section 1115 Medicaid waiver demonstration project called Kentucky Helping to Engage and Achieve Long Term Health (commonly known as Kentucky HEALTH). The Court's resolution of these issues will have a profound impact on Kentucky's health care providers.

As Kentucky's non-profit state association of hospitals, related health care organizations, and integrated health care systems, the KHA offers a unique and weighty perspective on health law matters affecting a substantial number of health care providers in Kentucky. The KHA has the

distinction of claiming every hospital and health system in Kentucky as a member of the association. With a mission to develop and implement health policies that enhance its members' ability to deliver health care services to their communities, the KHA engages in advocacy and representation efforts that promote improvements to health care delivery in Kentucky. As further explained below, in light of the significant impact this case will have on Kentucky's health care providers, those providers should not be excluded from this debate. Accordingly, the KHA respectfully requests to intervene so that Kentucky's health care providers can have a voice in this litigation.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 24(a), "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute," or who "(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). In applying this Rule, the Sixth Circuit requires proposed intervenors to establish the following four elements:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest.

Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)); *see also Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (stating and citing the same).

Even if a proposed intervenor does not establish the required elements to intervene as a matter of right, the court has discretion under Rule 24(b) to "permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact," as long as

the motion is "timely," and the court considers "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. 23(b); *Clarke v. Baptist Mem'l Healthcare Corp.*, 641 F. App'x 520, 523 (6th Cir. 2016) (quoting Fed. R. Civ. P. 24(b)).

"Essentially, [Rule 24] allows non-parties to insert themselves into lawsuits where their interests may be affected." *Franklin Cty. v. Am. Int'l S. Ins. Co.*, No. 3:08-cv-39, 2008 U.S. Dist. LEXIS 88063, *6 (E.D. Ky. Oct. 29, 2008) (discussing purpose of intervention). In general, "Rule 24 should be 'broadly construed in favor of potential intervenors.'" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)); *see also Chandler v. Huddleston*, No. 5:14-360-KKC, 2015 U.S. Dist. LEXIS 55098, *2-3 (E.D. Ky. April 28, 2015) (citing *Purnell*, 925 F.2d at 950).

ARGUMENT

I. The KHA's motion to intervene is timely.

As a threshold requirement "[u]nder both subsections of Rule 24, an individual seeking relief must make a timely motion to intervene." *Clarke*, 641 F. App'x at 523 (citation omitted). The Sixth Circuit "has delineated" the following five factors "for determining whether a motion to intervene was timely filed":

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Noble v. Krizman Enters., 692 F. App'x 256, 268 (6th Cir. 2017) (quoting *United States v. Tennessee*, 260 F.3d 587, 591-92 (6th Cir. 2001)); *see also Stupak-Thrall*, 226 F.3d at 473 (stating the same). In considering timeliness, "[n]o one factor is dispositive, but rather the 'determination … should be evaluated in the context of all relevant circumstances.'" *Blount-Hill*, 636 F.3d at 284 (quoting *Stupak-*

Thrall, 226 F.3d at 472-73). As explained below, the KHA's motion is timely, and it meets the requirements for intervention under either Rule 24(a) or (b).

Considering the context of this case, the KHA's motion to intervene is timely filed. First, this case has not progressed at all; rather, it has only just begun. The Commonwealth commenced this action on February 19, 2018. The KHA is filing the instant motion only a few weeks later, before the Defendants have filed an Answer and before the deadline for them to do so. *See, e.g., Ball v. Kasich*, No. 2:16-cv-282, 2017 U.S. Dist. LEXIS 116145, *31 (S.D. Ohio July 24, 2017) (finding motion to intervene was timely filed when discovery had not yet begun and no deadlines for dispositive motions had been scheduled); *Pride v. Allstate Ins. Co.*, No. 10-13988, 2011 U.S. Dist. LEXIS 16515, *6-7 (E.D. Mich. Feb. 18, 2011) (finding motion to intervene was timely when filed soon after defendants filed an answer and less than two months from the commencement of the case, as the case "has not made major progression").

Second, the KHA is seeking to intervene for the purpose of supporting the claims of the Commonwealth, and because its motion has been filed in advance of the Defendants' deadline for any responsive pleading, the Defendants will have ample time to consider the KHA's claims and position before their responsive pleading is due. Given the short time frame between the instant motion and the commencement of this action, the third factor of how long the proposed intervenor knew of its interest before moving to intervene is either satisfied or rendered moot. As this case is in the earliest stages of litigation, long before any discovery has commenced or other actions have been taken, the KHA has promptly moved to intervene, and neither the amount of time that has passed nor their intervention itself would cause prejudice or undue delay to the other parties. *See, e.g., Ball*, 2017 U.S. Dist. LEXIS 116145, at *32-33 (finding prejudice to original parties was "minimal, if existent at all" where motion for intervention was filed "before any factual or legal issues have been litigated" and therefore will not "delay the proceedings in any significant way").

Moreover, rather than delaying proceedings or prejudicing existing parties, the KHA's intervention will promote judicial economy by including health care providers in this litigation, thereby disposing of related issues in a single lawsuit. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 339-41 (6th Cir. 1990) (finding "the original parties' interests are better served by having *all* relevant interests represented prior to [disposition of summary judgment motions] because piecemeal litigation is likely to be avoided," and therefore intervention would promote the court's interest in "judicial economy" by "disposi[ng] of related issues in a single lawsuit") (emphasis in original), *rev'd on other grounds*, 977 F.2d 238 (6th Cir. 1992).

Finally, as will be further explained below, if "unusual circumstances" exist in this case, at least in part they consist of the unique nature of administering Medicaid programs by which the KHA members provide health care services to beneficiaries. State Medicaid programs are often described as a "three-legged stool" in which the interests of the government, Medicaid beneficiaries, and health care providers work together for a common end. The unique role that health care providers play in this tripartite arrangement "militat[es] … in favor of intervention." *Stupak-Thrall*, 226 F.3d at 473 (quoting *Jansen*, 904 F.2d at 340). Conversely, the absence of health care providers in this legal dispute would omit a principal party that actually provides the necessary "health care" services for a government health care program. The presence of health care provider interests in this case is further underscored by the potential of this case being one of first impression concerning the application of the Medicaid community engagement waiver. As the Court is aware, at least eight other states have similar waiver applications approved by CMS or awaiting approval, and the ultimate decisions made by CMS, and by federal courts should further litigation result, will have a significant impact on health care providers around the country. Accordingly, allowing Kentucky's health care providers to participate here weighs in favor of intervention.

II. The KHA should be allowed to intervene as of right under Federal Rule 24(a).

In determining whether a proposed intervenor satisfies the test for intervention as of right, "the factual circumstances considered under Rule 24(a) should be 'broadly construed in favor of potential intervenors.'" *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 489-90 (6th Cir. 2014) (quoting *Purnell*, 925 F.2d at 950); *see also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007) (noting that within the Sixth Circuit "rules governing intervention are 'construed broadly in favor of the applicants.'") (quoting *Mich. State v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)); *Stupak-Thrall*, 226 F.3d at 471 (finding the same). Here, as explained above, the KHA's motion is timely, and therefore satisfies the basic requirement for intervention. As explained below, the KHA also meets the other three elements for intervention as of right.

A. Significant Legal Interest

Concerning the second requirement, the Sixth Circuit "ha[s] adopted 'a rather expansive notion of the interest sufficient to invoke intervention of right.'" *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005) (quoting *Miller*, 103 F.3d at 1245); *see also Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (quoting *Miller*, 103 F.3d at 1245). For purposes of Rule 24, "a proposed intervenor need only claim an interest 'relating' to the property or transaction that is the subject of the action," and the Sixth Circuit "generally construes that interest liberally." *Liberte Capital Grp., LLC v. Capwill*, 126 F. App'x 214, 218 (6th Cir. 2005) (citing Fed. R. Civ. P. 24(a)(2) and *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)); *see also Chandler v. Huddleston*, No. 5:14-360-KKC, 2015 U.S. Dist. LEXIS 55098, *3 (E.D. Ky. Apr. 28, 2015) (explaining the Sixth Circuit "subscribes to a 'rather expansive notion of the interest sufficient'" for intervention and "has instructed lower courts to construe the term 'liberally'") (quoting *Grutter*, 188 F.3d at 398; *Bradley*, 828 F.2d at 1192); *Pride*, 2011 U.S. Dist. LEXIS 16515, at *7 ("the Sixth Circuit interprets the concept of legal interest liberally") (citing *Miller*, 103 F.3d at 1245; *Bradley*, 828 F.2d at 1192).

The Sixth Circuit has noted, for instance, that "an intervenor need not have the same standing necessary to initiate a lawsuit," and in doing so has "cited with approval decisions of other courts 'rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245 (quoting *Purnell*, 925 F.2d at 948) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39 (1972)); *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 495 (6th Cir. 2014) (stating "[t]his Circuit rejects the requirement of a 'specific legal or equitable interest,'" and holding that proposed intervenor "is not required to show constitutional standing to intervene") (quoting *Miller,* 103 F.3d at 1245); *see also Providence Baptist Church,* 425 F.3d at 315 ("an intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing") (citation omitted); *Chandler*, 2015 U.S. Dist. LEXIS 55098, at *3 (citing *Miller* and *Purnell* as support for the same).

Although the Supreme Court has found that "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff seeks," the KHA does not seek any relief that is different from what the Commonwealth is seeking. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651-52 (2017) (finding that intervenor seeking a separate money judgment from that of the plaintiff needed Article III standing to do so but implying Article III standing was not necessarily a prerequisite for intervenors seeking the *same* relief as existing plaintiff). Notably, the Court in *Town of Chester* did not say that a proposed intervenor must have Article III standing regardless of the relief sought, and therefore did not question the Sixth Circuit's more lenient standard for intervention in situations such as this where the intervenor seeks the identical relief as an existing party.[1] Here, none of the parties are seeking monetary damages, and

[1] The Court in *Town of Chester* discussed at length whether the proposed intervenor was in fact seeking different relief from the existing plaintiff and remanded the case for a determination on that very question, with the strong implication that Article III standing would not be required if the requested relief were the same.

while the KHA's *interest* is markedly different from that of the Commonwealth, the KHA does not seek any additional relief.

This more lenient standard, however, "does not mean that any articulated interest will do." *Granholm*, 501 F.3d at 782-83 (citations omitted) (denying motion to intervene where proposed intervenors were not "directly affected by the outcome of the litigation"). "Although the intervenor need not have the same standing necessary to initiate a lawsuit … he must have a direct and substantial interest in the litigation." *Noble v. Krizman Enters.*, 692 F. App'x 256, 269 (6th Cir. 2017) (quoting *Providence Baptist Church*, 425 F.3d at 315; *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989)) (internal quotation marks omitted). "The inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Grutter*, 188 F.3d at 398 (quoting *Miller*, 103 F.3d at 1245); *Granholm*, 501 F.3d at 780 (quoting the same). In conducting such analysis, the Sixth Circuit "construe[s] Rule 24 'interests' expansively and ha[s] stated that 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" *Blount-Hill v. Bd. of Educ.*, 195 F. App'x 482, 485 (6th Cir. 2006) (quoting *Miller,* 103 F.3d at 1247); *see also Grutter*, 188 F.3d 394 at 399 ("Even if it could be said that the question raised is a close one, 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'") (quoting *Miller*, 103 F.3d at 1247).

Here, the basis of the litigation centers on whether the implementation and effect of Kentucky HEALTH violates the Social Security Act, the Administrative Procedures Act, the Medicaid Act, and the so-called "Take Care Clause" of the United States Constitution. The Commonwealth's complaint in this Court generally represents the inverse of the putative class action pursued by the Defendants in *Stewart et al. v. Hargan et al.*, in the United States District Court for the District of Columbia, Case No. 1:18-cv-00152 (the "D.C. Action"). (D.E. 1, Exh. E.) The claims at issue focus upon whether the effect of Kentucky HEALTH on the Plaintiffs amounts to a violation of law. (D.E. 1, Exh. E, Section G, "The Kentucky HEALTH Approval's Effect on the Plaintiffs,"

¶¶ 166-338.) The KHA's member hospitals and health systems will play a substantial and meaningful role in the implementation of Kentucky HEALTH, and the effects of the waiver demonstration program will impact health care operations. If the implementation of Kentucky HEALTH is found to violate the statutes listed above, or the Constitution, its invalidation will have a state-wide impact on Kentucky health care providers. Conversely, if Kentucky HEALTH is upheld, its enforcement also will affect the day-to-day operations of Kentucky health care providers.

Specifically, the KHA's position is that the implementation and effect of Kentucky HEALTH does not violate the statutes discussed above. The KHA was consulted frequently by the Commonwealth while Kentucky HEALTH was being developed. The KHA agrees that Kentucky HEALTH is designed in a manner that balances the fiscal realities of managing Medicaid services, assures reasonable access to care for participants in Kentucky's Medicaid program, and that community engagement provides substantial health and wellness benefits to Medicaid beneficiaries. The latter two points are of particular interest to the KHA's hospital and health system members, and they are also topics upon which the KHA is uniquely suited to provide context and necessary perspective on the effects of Kentucky HEALTH on the citizens of the Commonwealth.

Moreover, although the KHA's position is that Kentucky HEALTH was validly implemented, the KHA's reasons for that position are based on the perspective of Kentucky's health care providers rather than that of the state government. In other words, the KHA's claims are similar to those of the Plaintiffs in this case, but for different reasons because KHA members will be affected by the outcome of this litigation in a different way than the existing parties. For instance, there are at least three parties involved in any dispute concerning Medicaid: 1) the federal and state governments (state government so far is involved by filing the suit) who regulate and enforce the provision of health care to certain qualifying individuals, 2) the beneficiaries who receive the services (represented as a putative class by Defendants in this case), and 3) the health care providers who

actually deliver the health services to the beneficiaries in the manner regulated by the government. Each of these entities has a legal interest in the outcome of litigation affecting the process by which Medicaid is implemented and enforced, and in how health services are provided to Medicaid beneficiaries, and each of these perspectives is needed for full resolution of the issues in this case.

It would be an incomplete legal analysis to evaluate the validity of Kentucky HEALTH solely in the context of a government entitlement program in which beneficiaries and the government debate the scope of the program without the participation of the entities who provide the program's services. Such a focus would overlook an obvious fact – that the government does not actually provide the health care services covered by the Kentucky HEALTH program. Instead, Kentucky HEALTH offers health care services to Medicaid beneficiaries through myriad public and private health care providers who agree to participate in the Medicaid program, and who are mostly the hospitals and health systems represented by the KHA.[2] The Medicaid statute directs the state and federal governments to "provide … for making medical assistance available" to Medicaid beneficiaries. 42 U.S.C. § 1396a(10)(A). In Kentucky, as well as in all other states, the government "mak[es] … available" such health care services to Medicaid beneficiaries by engaging health care providers to provide those services. Litigating the legal issues surrounding the effects of health policy while omitting the participation of health care providers invites a debate lacking context and perspective inherent in health care operations, the result of which will have a direct impact on entities who were not parties to the underlying litigation.

The KHA's interest in this litigation is exemplified convincingly in Kentucky HEALTH's cost-sharing program for non-emergency use of emergency rooms. (D.E. 1, Count One, ¶ 74; D.E. 1, Exh. E, Count Four, ¶¶ 360-365.) Kentucky regulations require all licensed hospitals to provide emergency services and maintain an emergency room. 902 KAR 20:016 Section 4 (8). In fact, only

[2] Upon information and belief all hospital and health system members of the KHA participate in the Medicaid program.

hospitals may provide emergency care in Kentucky in accordance with current certificate of need regulations and licensure requirements that prohibit free-standing emergency departments. Although Medicaid currently covers approximately one quarter (1/4) of Kentucky's citizenry, a recent study found that Medicaid beneficiaries were involved in nearly one-half (1/2) of approximately 1.65 million emergency room visits counted in only three quarters of 2016. *See* Foundation for a Healthy Kentucky, "*Emergency Department Utilization in Kentucky*," (March 9, 2017).[3] In short, no matter the ruling on the substantive issues of the Commonwealth's complaint, the impact of this case will directly and substantially affect Kentucky hospitals.

The KHA agrees with the Commonwealth that Kentucky HEALTH's cost-sharing plan will promote fiscal stewardship by helping Medicaid beneficiaries better appreciate the value of appropriate hospital emergency rooms utilization and the options available for non-emergency medical services. Yet the fiscal concerns are only part of the story. The KHA's interest in this litigation includes operational concerns directly affected by the appropriate utilization of emergency services, such as access to care and resource management. Hospital emergency room usage presents a prime example of the tension between finite health care resources and access to care. Kentucky hospitals accept the legal[4] responsibility of receiving all patients seeking emergency care without considering the patient's ability to pay for the emergency services. Yet, health policies that ineffectively manage inappropriate or unnecessary utilization of emergency services cause hospitals to divert substantial human and physical resources to provide emergency services in accordance with

[3] The report is discussed in a news release, "The Affordable Care Act and ER Use in Kentucky," found at: https://www.healthy-ky.org/newsroom/news-releases/article/79/the-affordable-care-act-and-er-use-in-kentucky (last accessed March 21, 2018).

[4] Since all Kentucky hospitals participate in the Medicaid program, all Kentucky hospitals agree to comply with the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, that, generally, obligates hospitals to provide medical screening and stabilizing treatments to any person that comes to the hospital's emergency department regardless of the person's ability to pay.

licensure requirements, while such services often go substantially under-reimbursed and ultimately affect other hospital services.

Although the government may speak to the fiscal impact of Kentucky HEALTH, the KHA possesses the perspective and experience to address the operational realities anticipated by implementing Kentucky HEALTH and is well-suited to defend its validity. The impact of Kentucky HEALTH on the use of emergency services is only one example of the unique and substantial interest Kentucky's health care providers have in this litigation. Because the members of the KHA include every hospital and health system in Kentucky, the outcome of this litigation will directly affect the operations of KHA members, and the KHA is uniquely positioned to offer a state-wide perspective on the application of Kentucky HEALTH and the impact on the health care community across the Commonwealth should it be invalidated.

As noted above, while the KHA "need not have the same standing necessary to initiate a lawsuit," *Miller*, 103 F.3d at 1245, it must have more than "only a general ideological interest in the lawsuit." *Granholm*, 501 F.3d at 782. For instance, in *Northland Family Planning*, the Sixth Circuit denied a public interest group's motion to intervene as of right, explaining that the organization's involvement in the political process that led to the adoption of a particular statute, "without more," did not constitute a substantial legal interest in a lawsuit challenging the statute's enforcement. 487 F.3d at 345-46. Rather, as the Sixth Circuit later explained in *Granholm*, the proposed intervenors in *Northland Family Planning* consisted of an organization whose members could only articulate "a general ideological interest in" the state's subsequent enforcement of a duly enacted statute – which "amounts to only a generic interest shared by the entire Michigan citizenry." 501 F.3d at 782.

In contrast, the Sixth Circuit explained that "where a group is regulated by the new law, or, similarly, whose members are affected by the law, [the group] may likely have an ongoing legal interest in its enforcement after it is enacted." *Granholm*, 501 F.3d at 782 (quoting *Northland Family*

Planning, 487 F.3d at 345). The *Granholm* court then extended the analogy beyond only legislation by contrasting the situation in *Northland* to the one in *Grutter v. Bollinger*. There, the Sixth Circuit found that an organization seeking to intervene in a lawsuit challenging the University of Michigan's race-conscious admissions policy not only "had a general ideological aversion" to eliminating the policy, but *also* had a substantial legal interest in the litigation because its individual members were minorities who had applied or intended to apply to the University, and therefore would be "directly affected by the challenged policy." *Id.* at 783 (discussing *Grutter*, 188 F.3d at 399).

Here, the subject matter of the instant litigation concerns the implementation of Kentucky HEALTH and its related effects on Medicaid benefits in Kentucky. Because KHA members are the entities who provide the health care services covered by the program, the KHA has far more than "a general ideological interest" in the enforcement of Kentucky HEALTH, *Granholm*, 501 F.3d at 782, or in simply "vindicating legislation that it had previously supported." *Grutter*, at 188 F.3d at 399. Rather, as in *Grutter*, KHA members will be "directly affected by" Kentucky HEALTH and will "have an ongoing legal interest in its enforcement." *Granholm*, 501 F.3d at 782.

Importantly, KHA members will be "directly affected by the outcome of th[is] litigation" because whether Kentucky HEALTH is implemented or invalidated will directly impact how health care providers deliver health services to Medicaid patients. *Id.* at 783. Additionally, KHA members are regulated by the Medicaid statute, the interpretation of which is at issue in this lawsuit, and how that statute is interpreted here in relation to Kentucky HEALTH will affect how KHA members conduct their businesses and provide health care on a daily basis.[5] *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Glisson*, No. 3:17-CV-00189-GNS, 2017 U.S. Dist. LEXIS 97076, at *15-16 (W.D. Ky.

[5] Because KHA members generally have "a statutory obligation to provide" the health services at issue, they have a clear legal interest in providing health services to Medicaid beneficiaries that will be substantially affected if Kentucky HEALTH "is found invalid." *Ctr. for Biological Diversity v. Rural Utils. Serv.*, 2008 U.S. Dist. LEXIS 69639, *8 (E.D. Ky. Sep. 10, 2008) (finding it was "clear" that proposed intervenor had "a substantial legal interest" in a lawsuit concerning the validity of a funding project where the intervenor had "a statutory obligation to provide electric power" and would be "substantially affected by the [defendant's] inability to provide" the funding if the project was "found invalid").

June 22, 2017) (emphasizing that "if the statute at issue did regulate the group or its members, the group 'would likely have a legal interest, much like the intervenors in *Grutter*.'") (quoting *Northland Family Planning*, 487 F.3d at 345).[6]

Therefore, the KHA's interest does not merely amount to some "generalized grievance" that is too abstract for federal courts to adjudicate. *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 423 (E.D. Ky. 2015) (finding that interests "'of a general character, not particular to certain persons,' but potentially shared by all Kentucky taxpayers" are too generalized to allow intervention) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1444 (2011)). Rather, because health care providers are directly implicated within the construct of Kentucky HEALTH – indeed the Medicaid program cannot be implemented without them –KHA members have a direct and substantial interest in the subject matter and ultimate outcome of this declaratory judgment action.[7]

B. Associational Standing

The KHA's present and substantial interest in the subject matter of this declaratory judgment action is further bolstered when viewed in conjunction with the standard for associational standing. To the extent that the KHA must also demonstrate associational standing, such standing "is met when: 1) the organization's members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the

[6] As this case is currently on appeal, it is only being cited for its discussion of the Sixth Circuit's reasoning in other cases.

[7] Additionally, the KHA's interest in this litigation is not contingent upon speculative outcomes of separate future lawsuits. Unlike situations where courts found proposed intervenors' interests too attenuated because their interest in the litigation was contingent on prevailing in a separate lawsuit, KHA members will "gain or lose by the direct legal operation of *this* Court's final judgment on the complaint." *Chandler*, 2015 U.S. Dist. LEXIS 55098, at *4 (emphasis added) (denying intervention as of right where "none of the claims raised … bear on an interest, economic or otherwise, possessed by [proposed intervenor]," and therefore would not be affected by the court's judgment in the underlying suit) (internal citations and quotation marks omitted); *see also Energy Coal Res. Inc. v. Paonia Res. LLC*, 2008 U.S. Dist. LEXIS 104278, *9 (E.D. Ky. Dec. 24, 2008) (finding third party's interest in insurance declaratory judgment action too attenuated because it depended on the outcome of separate future litigation).

lawsuit." *Friends of Tims Ford v. TVA*, 585 F.3d 955, 967 (6th Cir. 2009) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (internal quotation marks omitted).

Here, as entities who are integral to carrying out the requirements of the Kentucky HEALTH program, the individual members of the KHA would have a strong and persuasive argument for standing to bring their own declaratory judgment actions. KHA members have a specific interest in providing high quality care (indeed their existence depends upon it), and as a group the KHA's mission includes developing and implementing health policies that enhance the ability of its members to deliver quality health services. The implementation of Kentucky HEALTH also directly affects how the individual members of the KHA conduct their daily operations, as well as the organization's primary mission. Accordingly, the KHA's members have "a specific interest in the subject matter of the case" sufficient for intervention. *See Granholm,* 501 F.3d at 783; *Grutter*, 188 F.3d at 399. Certainly, the KHA's intervention would promote efficiency and fair representation among a class of health care providers who will be impacted by this litigation.

Moreover, "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

> If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

United States v. Mich. Dep't of Cmty. Health, 2011 U.S. Dist. LEXIS 59445, at *24-25 (W.D. Mich. June 3, 2011) (quoting *Warth*, 422 U.S. at 515) (concluding that because association could not adequately link its members to the consequences resulting from the administrative subpoena it sought to contest, any harm it asserted was purely hypothetical). Here, the Commonwealth seeks a declaratory judgment concerning the validity of a program that, as explained above, directly affects the interests

of the individual members of KHA. Conversely, because KHA members are health care providers, they each will be directly and substantially affected by the invalidation of the Kentucky HEALTH program, and therefore the declaration Plaintiffs seek "will inure to the benefit" of the members of the association. *Warth*, 422 U.S. at 515. Accordingly, the type of relief sought is consistent with that of other cases where courts found associational standing was appropriate.

C. Impairment of Interest

To satisfy the third element for intervention, the proposed intervenor's burden of showing that its interest may be impaired in the absence of intervention is "minimal" – the proposed intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948) (explaining that proposed intervenors "need not show that substantial impairment of their interest will result, … nor from the language of Rule 24(a), that impairment will inevitably ensue from an unfavorable disposition," but only that it *may* result); *see also Ctr. for Biological Diversity*, 2008 U.S. Dist. LEXIS 69639, at *7-8 (quoting *Miller*, 103 F.3d at 1247). "Rule 24(a) does not require the intervenor to show that the interest will be impaired; it only has to demonstrate that [impairment] is *possible*." *Pride*, 2011 U.S. Dist. LEXIS 16515, at *7-8 (citing *Purnell*, 925 F.2d at 948) (emphasis in original).

The Sixth Circuit "has recognized that the time-sensitive nature of a case may be a factor" in this analysis, and that "potential *stare decisis* effects can be a sufficient basis for finding an impairment of interest." *NE Ohio Coal. of the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (citing *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992); *Ams. United for Sep. of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990)). Here, implementation of Kentucky HEALTH is a time-sensitive issue, and the validity of the process by which CMS approved Kentucky HEALTH will be determined by this case. For the reasons explained above, the KHA has a substantial interest in upholding the validity of Kentucky HEALTH. A ruling invalidating

Kentucky HEALTH will "as a practical matter impair or impede" KHA's ability to defend that interest because KHA members likely will have no other recourse apart from this litigation in which to do so. *Lemaster v. Taylor Indus.*, LLC, No. 11-cv-30-ART, 2011 U.S. Dist. LEXIS 44964, *3 (E.D. Ky. Apr. 26, 2011) (allowing proposed intervenor to intervene as a plaintiff in a subrogation suit because a ruling in favor of defendants would "potentially taint separate litigation," and "intervening in this case might be [proposed intervenor's] only shot at recovery").

Importantly, failing to allow the KHA's intervention in this litigation will substantially inhibit any hospital or health system from protecting its interest in the construct and application of Kentucky HEALTH should it be invalidated. *See, e.g.*, *EMW Women's Surgical Ctr.*, 2017 U.S. Dist. LEXIS 97076, at *17 (finding proposed intervenor "met its minimal burden" of establishing impairment because "an adverse ruling for [the plaintiff] has the potential to adversely affect subsequent challenges to the constitutionality of" the statute at issue)[8]; *see also NE Ohio Coal. of the Homeless*, 467 F.3d at 1007-08 (finding proposed intervenor sufficiently established the impairment factor where "an adverse ruling could hinder [its] ability to litigate" a law's validity in the future). In short, KHA members will be bound by this Court's decision with no way to bring a subsequent suit, and therefore intervention is appropriate. *See Miller*, 103 F.3d at 1247; *Linton*, 973 F.2d at 1319; *Jansen*, 904 F.2d at 342.

D. Inadequate Representation

The proposed intervenor's burden of showing inadequacy of representation is also "minimal." *Davis*, 560 F. App'x at 495 (quoting *Trbovich*, 404 U.S. at 538 n. 10). The proposed intervenor is "not required to show that the representation will in fact be inadequate," *Miller*, 103 F.3d at 1247, but "only that there is a *potential* for inadequate representation." *Grutter*, 188 F.3d at 400 (emphasis in original); *see also Ne. Ohio Coal. for the Homeless*, 467 F.3d at 1008 (stating the same);

[8] As this case is currently on appeal, it is only being cited for its cogent explanation of how to apply this factor.

Ctr. for Biological Diversity, 2008 U.S. Dist. LEXIS 69639, at *8 ("[T]his burden is minimal because it is sufficient that the movant prove that representation *may* be inadequate.") (quoting *Miller*, 103 F.3d at 1247) (emphasis added in *Ctr. for Biological Diversity*). Although "a presumption" of adequate representation may arise "when the proposed intervenor and a party to the suit . . . have the same ultimate objective," *Purnell*, 925 F.2d at 950 (quoting *Bradley*, 828 F.2d at 1192), "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Davis*, 560 F. App'x at 495 (quoting *Grutter*, 188 F.3d at 400).

"Some of the factors to be considered in determining whether representation is adequate" include: "(1) if there is collusion between the representative and an opposing party; (2) if the representative fails in the fulfillment of his duty; and (3) if the representative has an interest adverse to the proposed intervenor." *Purnell*, 925 F.2d at 949-50 (citation omitted). However, "[i]nterests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Id.* (quoting *Jansen*, 904 F.2d at 343); *Lemaster*, 2011 U.S. Dist. LEXIS 44964, at *4 (quoting *Purnell*, 925 F.2d at 950); *see also Miller*, 103 F.3d at 1247 (finding that "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.").

Here, as explained above, although the KHA and the Commonwealth have similar interests in defending the validity of the Kentucky HEALTH program, those interests are not identical. The Commonwealth has an obvious interest in defending the program it designed. The KHA, however, is made up of health care providers who naturally have an interest in the practical effects of the program on their daily operations and in the practical consequences of delivering health services if the program is invalidated. *See, e.g., Purnell*, 925 F.2d at 950 (finding inadequacy of representation was possible for purposes of Rule 24(a)(2) where the interests of proposed intervenors and existing parties were "not identical"). Accordingly, the perspective and purpose of the Commonwealth

differ significantly from that of the KHA. While the Commonwealth's burden is to enforce and implement Kentucky HEALTH, the members of KHA have an obligation to provide health services to Medicaid beneficiaries. *See, e.g., Ctr. for Biological Diversity*, 2008 U.S. Dist. LEXIS 69639, at *8 (finding electric cooperative's interest "may not be adequately represented" by state agency (RUS) because while "RUS's obligation is to uphold the administration of the USDA Rural Development program," the electric cooperative's obligation "is to provide electrical service to residents" in the area). Therefore, although both the Commonwealth and the KHA share a similar interest in Kentucky HEALTH being upheld, their underlying reasons for that interest are very different, and the impact they will experience as a result of an adverse ruling also will be distinct.

Moreover, it is well established that "'if the interest of the absent party is not represented at all … then she or he is not adequately represented.'" *Purnell*, 925 F.2d at 950 (quoting *Grubbs*, 870 F.2d at 347 (internal quotation marks omitted). Because the Commonwealth's interest in this litigation is broader than the more specific interest of health care providers, and because the Commonwealth is one of several entities that regulates health care providers, it does not represent the interests of KHA members. The Commonwealth, particularly through the Cabinet for Health and Family Services, regulates the services KHA members provide and how they are provided. The Commonwealth, through the Cabinet, also sets reimbursement rates KHA members receive for those services. These facts alone demonstrate that the interests of the KHA sufficiently diverge from those of the Commonwealth such that the Commonwealth's representation may be inadequate. *See, e.g.*, *Linton*, 973 F.2d at 1319-20 (affirming lower court's decision that "representation of movants' interests may have been inadequate" where the existing party "acted as both a regulator and a purchaser of movants' services thereby creating inherent inconsistencies between [their] interests" sufficient to warrant intervention); *Miller*, 103 F.3d at 1247 (explaining that "[o]ne would expect" that because proposed intervenor was often "a target" of the regulatory

requirements of the legislation at issue, it "would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state," and therefore proposed intervenor's "ultimate design" likely "will not be the focus of the state's efforts" in upholding the statute).

Additionally, the KHA does not contend that its constitutional rights have been violated – government entities are generally well able to represent such interests. Because the KHA's interest is unique to that of health care providers, its interest is not "shared generally with the public at large in the proper application of the Constitution and laws," in which case the Commonwealth also could provide sufficient representation. *Ark Encounter, LLC*, 311 F.R.D. at 423 (citations omitted). In fact, apart from such situations, the Sixth Circuit "has declined to endorse a higher standard for inadequacy when a governmental entity is involved" as an existing party, but instead has insisted that "proposed intervenors [are] required only to show that the representation *might* be inadequate." *Grutter*, 188 F.3d at 400 (emphasis in original) (citing *Miller*, 103 F.3d at 1247).

In light of the distinctions between the Commonwealth (and Cabinet) and the health care providers KHA represents, the Commonwealth is "not capable of making all the same arguments," on behalf of KHA members. *Invesco Institutional (N.A.), Inc. v. Paas*, 2008 U.S. Dist. LEXIS 90891, *22 (W.D. Ky. Nov. 6, 2008) (finding inadequate representation where proposed intervenor "has interests at stake that are different and broader than those of [existing parties], and would suffer harms that are different in kind and greater in degree" in the event of an adverse ruling). Particularly because the Commonwealth and Cabinet have certain powers to regulate KHA members, "their interests do not align entirely. Therefore, it is possible that [KHA] may not be adequately represented," and that possibility alone is sufficient to satisfy this requirement. *Id.*, at *23 (finding proposed intervenor "satisfied the minimal burden of proving the potential for inadequate representation" despite ultimately seeking a similar outcome because "their interests do not align entirely" with that of existing parties).

Finally, "Rule 24 is broadly construed in favor of potential intervenors …. 'If an [applicant] would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene....'" *Purnell*, 925 F.2d at 950 (quoting Advisory Committee Note to Rule 24(a)(2)). In sum, the resolution of this matter will significantly impact KHA members, they will not have an adequate remedy apart from intervention if their interests are impaired, and neither the Commonwealth nor the Defendants have the ability, or the same motivation, to represent or protect the rights of health care providers in this matter.

III. Even if the KHA is not allowed to intervene as of right, the Court should exercise its discretion to permit the KHA to intervene under Federal Rule 24(b).

In the alternative, even if the Court does not agree that KHA can intervene as of right, the KHA meets the standard for the Court to exercise its discretion in permitting the KHA to intervene under Federal Rule 24(b) as well. Permissive intervention may be granted to "anyone … who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). If these requirements are met, "the district court must then balance [potential] undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (citing *Miller*, 103 F.3d at 1248).

As explained above, the KHA's motion is timely – it is filed before the deadline for Defendants' responsive pleading and before any discovery has commenced. Also as explained above, the KHA's claim that the Kentucky HEALTH program was validly implemented clearly shares in common the same questions of law and fact raised in the Plaintiffs' request for a declaratory judgment that the program does not violate the APA, the Social Security Act, or the Medicaid Act. Even more specifically, as noted above, the KHA's interest in the question of Kentucky HEALTH's cost-sharing program for non-emergency use of emergency rooms constitutes

"at least one common question of law or fact," thus satisfying the requirements of Rule 23(b). *Michigan*, 424 F.3d at 445.

Moreover, because the suit has only just been filed, KHA's intervention will not result in "undue delay or excessive prejudice to the original parties." *See, e.g., Liberte Capital Grp.*, 126 F. App'x at 220-21 (reversing lower court's denial of permissive intervention where proposed intervenors' arguments shared common questions of law and fact with underlying dispute and lower court failed to "sufficiently explain" why intervention would cause delay or prejudice). On the contrary, the KHA's involvement in the instant suit will further the interests of judicial economy by resolving common claims together in the same litigation. *See, e.g*, *Jansen*, 904 F.2d at 340 ("The need to settle claims among a disparate group of affected persons militates in favor of intervention.").

Other considerations also weigh in favor of permissive intervention. The KHA is uniquely positioned to offer a state-wide perspective on the effects the Medicaid waiver, and its potential invalidation, will have on health care providers around Kentucky, and therefore the KHA is well-suited to defend the decision of CMS. *Cf. Penn-Star Ins. Co. v. Paradise, Inc.*, No. 5:14-306-KKC, 2015 U.S. Dist. LEXIS 120996, *8-9 (E.D. Ky. Sep. 11, 2015) (denying intervention where proposed intervenor did "not indicate[] how he will offer any additional insight into" the underlying issues and instead "may bring in unrelated issues," thereby "only serv[ing] to complicate and delay [the] litigation."). The KHA's ability to provide the practical perspective of health care providers in this case will help achieve a fuller and more efficient resolution of these important issues.

Finally, the Court could also allow the KHA to intervene with certain limitations as the Court deems appropriate. *See United States v. City of Detroit*, 712 F.3d 925, 931-32 (6th Cir. 2013) (finding district court abused its discretion in "denying intervention outright" because "courts are not faced with an all-or-nothing choice between grant or denial [of intervention]: Rule 24 also provides for limited-in-scope intervention," which is "particularly appropriate in fact-specific

situations" that "implicate[] the public interest," and where "getting all interested parties to the table promotes an effective and fair solution, but preventing an expansion of the scope is necessary to keep control of the case.").

CONCLUSION

Plaintiffs have brought their declaratory judgment action in response to Defendants' attempts to invalidate Kentucky HEALTH state-wide, which will impact health care providers across Kentucky. Because KHA members provide the health services covered by Kentucky HEALTH, the KHA should have a voice in determining whether Kentucky HEALTH will be implemented, and can provide a much-needed perspective on how invalidating it will affect health care costs and services across Kentucky. For all the reasons discussed above, KHA members will be directly affected by the outcome of this litigation and should not be excluded from this debate. Accordingly, the KHA requests that this Court allow it to intervene in support of the Plaintiffs in this litigation.

Respectfully submitted,

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