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

COMMONWEALTH OF KENTUCKY, *ex rel.* MATTHEW G. BEVIN, GOVERNOR, SCOTT W. BRINKMAN, in his official capacity as Acting Secretary of the CABINET FOR HEALTH AND FAMILY SERVICES, STEPHEN P. MILLER, in his official capacity as Commissioner of the DEPARTMENT FOR MEDICAID SERVICES, Plaintiffs, v. RONNIE MAURICE STEWART, GLASSIE MAE KASEY, LAKIN BRANHAM, SHANNA BALLINGER, DAVE KOBERSMITH, WILLIAM BENNETT, SHAWNA NICOLE McCOMAS, ALEXA HATCHER, MICHAEL WOODS, SARA WOODS, KIMBERLY WITHERS, KATELYN ALLEN, AMANDA SPEARS, DAVID ROODE, SHEILA MARLENE PENNEY, and QUENTON RADFORD, Defendants.	)	Civil Action No. 3:18-00008-GFVT

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO DISMISS

This case presents an unprecedented attack by a State on its own residents who are exercising their constitutionally protected right to challenge federal agency action in a federal court. Worse, it attacks them for challenging *federal* governmental action, rather than an action taken by the State itself. Given its extraordinary nature, it is unsurprising that the plaintiff here, the Commonwealth of Kentucky, lacks Article III standing to sue its own citizens because those citizens first sued a federal agency under the Administrative Procedure Act ("APA"). Nor is it surprising that there is no federal cause of action—and certainly not the Declaratory Judgment

Act—that allows the Commonwealth to act with such aggression and hostility towards its own residents. Moreover, even if the Commonwealth had Article III standing and could identify a viable cause of action, it also is not surprising that the First Amendment still would bar its unprecedented assault on the right of its residents to access the courts.

What the Commonwealth proposes to do is sue sixteen of its own residents—all of whom are Medicaid recipients—because those individuals have argued in another federal forum that the federal government lacked the legal authority to waive provisions of the Medicaid program in response to the Commonwealth's request to fundamentally alter the Medicaid program. To be sure, those sixteen private individuals acknowledge that the Commonwealth may have an interest in the resolution of that matter—indeed, they did not oppose Kentucky's motion to intervene in that matter, which has been granted. But the fact that these Defendants filed a federal lawsuit in another court against different defendants does not mean that they have harmed the Commonwealth or that the Commonwealth has any type of federal claim *against* these sixteen private individuals.

At best, the Commonwealth's lawsuit amounts to forum shopping. At worst, it represents an attempt to intimidate private individuals for their decisions to engage in protected First Amendment conduct. Either way, this Court should not bless this effort to misuse federal judicial power. For the reasons set forth herein, the Commonwealth's case should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PROCEDURAL AND FACTUAL BACKGROUND

On January 24, 2018, Defendants—sixteen private individuals enrolled in Kentucky's Medicaid program—filed a complaint in the United States District Court for the District of Columbia challenging the decision by the U.S. Secretary of Health and Human Services, and other

federal officials, to "waive" certain requirements of the Medicaid program pursuant to Section 1115 of the Social Security Act. Complaint, *Stewart v. Hargan*, 1:18-cv-00152 (D.D.C. Jan. 24, 2018), ECF No. 1. The waiver would allow the Commonwealth of Kentucky to implement "Kentucky HEALTH," Kentucky's plan to comprehensively change the Medicaid program and reduce its Medicaid enrollment ("D.C. Action"). *See id*. The D.C. Action alleges that the Secretary violated the APA and the United States Constitution by establishing a new nationwide policy favoring work requirements through a letter to all state Medicaid directors and, the next day, by issuing a Section 1115 waiver to the Commonwealth of Kentucky to permit the Commonwealth to impose work requirements and other harmful burdens on Kentucky Medicaid recipients. *Id.*

Within weeks, defendants in the D.C. Action (all federal government agencies or officials) moved to transfer that case to this Court. Motion to Transfer Case to the Eastern District of Kentucky, *Stewart*, 1:18-cv-00152 (D.D.C. Feb. 9, 2018), ECF No. 6. Days later, the Commonwealth, by and through its Governor, its Acting Secretary of the Cabinet for Health and Family Services, and its Commissioner of the Department for Medicaid Services, filed the instant Complaint in this Court, naming the sixteen plaintiffs in the D.C. Action as Defendants. Compl. ¶¶ 1, 10-25. The Complaint does not allege that Defendants have violated, infringed upon, or otherwise affected the rights or interests of the Commonwealth. It asserts only that the Commonwealth has a "substantial controversy" with Defendants because the Defendants "have asked a court to declare Kentucky HEALTH null and void and enjoin it." *Id.* ¶ 63.

The Commonwealth thus contends it is entitled to a declaratory judgment because it "ha[s] a substantial controversy with, and legal interests that are adverse to, the named Kentucky residents who brought the D.C. Action." *Id.* It seeks a declaration that Kentucky HEALTH "does not violate the Social Security Act and the Administrative Procedure Act and is within the scope of the HHS

Secretary's Section 1115 waiver authority," *id.* ¶¶ 70, 78-81, that "any claim by the Defendants under the Take Care Clause of the United States Constitution is not justiciable," *id.* ¶ 85, and, in the alternative, that the Secretary's approval of Kentucky HEALTH "does not violate the Take Care Clause," *id.* In essence, therefore, the Commonwealth seeks three declarations that the Secretary of the federal Department of Health and Human Services should prevail in the D.C. Action on the merits.

On March 29, 2018, the Commonwealth filed an unopposed motion to intervene in the D.C. Action. *Stewart*, 1:18-cv-00152 (D.D.C. Mar. 29, 2018), ECF No. 30. The motion was granted the following day. Minute Order, *Stewart*, 1:18-cv-00152 (D.D.C. Mar. 30, 2018).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a lawsuit any time there is a "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion can facially challenge the sufficiency of the pleadings to establish federal court jurisdiction. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing a facial attack, the court takes all allegations in the complaint as true. *Id.* But when reviewing a factual attack, no presumption of truthfulness applies, and the court has "wide discretion" to consider evidence to resolve disputed jurisdictional facts. *Id.* Plaintiffs have the burden of proving jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Rule 12(b)(6) separately provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a 12(b)(6) motion, a complaint must plead facts that, when taken as true, are sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations in the complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. If the pleadings "do not permit the court to infer more than the mere possibility of misconduct," the complaint fails to state a claim. *Iqbal*, 556 U.S. at 679.

ARGUMENT

The Commonwealth's lawsuit against sixteen of its own residents who are Medicaid recipients is rife with basic jurisdictional and legal defects. First, and most fundamentally, the Commonwealth plainly lacks Article III standing to assert claims against these Defendants because they have not caused the Commonwealth a cognizable harm. At most, they have sued various *federal* officials and, if they prevail, the federal waiver will be vacated and the Commonwealth will need to continue—as it had prior to the waiver grant—to fully comply with the terms of the Medicaid statute. The Commonwealth's desire to ensure that its citizens not stand up to the federal government is far from a "case" or "controversy" under Article III. Second, the Commonwealth's invocation of the Declaratory Judgment Act fails because that statute, standing alone, does not confer a cause of action against a defendant when the defendant has not otherwise violated federal law. Finally, even if the Commonwealth had standing to sue and even if it had a viable cause of action to proceed against these Defendants, the Commonwealth's action *still* would fail because it is prohibited by the First Amendment.

At every turn in its lawsuit, the Commonwealth has overreached. The Commonwealth can and has identified the appropriate way for it to make its views heard regarding the waiver granted by the Secretary of HHS—it has intervened in the D.C. Action and, indeed, it did so without objection from Defendants. This vexatious and frivolous lawsuit thus should be cast aside as the politically-motivated theater that it is.

I. This Court Lacks Jurisdiction Over Plaintiffs' Action.

A. Plaintiffs Lack Article III Standing Because Their Alleged Injuries Are Not Caused By Defendants And Cannot Be Redressed In This Action.

The Constitution limits the jurisdiction of the federal courts to cases that present a "case" or "controvers[y]." U.S. Const. art. III, § 2. That means the federal courts "are courts of limited jurisdiction and the law 'presumes that a cause lies outside this limited jurisdiction.'" *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1064 (6th Cir. 2014) (quoting *Kokkonen*, 511 U.S. at 377). "The doctrine of standing aids … in defining these limits." *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017). Accordingly, "the party invoking federal subject matter jurisdiction … has the burden of demonstrating that he satisfies each element of Article III standing." *Stalley v. Methodist Healthcare*, 517 F.3d 911, 916 (6th Cir. 2008).

To establish Article III standing, a plaintiff first "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and *not the result of the independent action of some third party not before the court*." *Id.* (internal quotation marks and alterations omitted) (emphasis added). Third, redressability is demonstrated if it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and citations omitted). "When causation hinges on independent third parties, the plaintiff has the burden of showing that the third parties' choices 'have been or will be made in such a manner as to produce causation and permit redressability of injury.'" *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 666-67 (6th Cir. 2007) (quoting *Defenders of Wildlife*, 504 U.S. at 562). As the party invoking

federal jurisdiction, the Commonwealth bears the burden of establishing that all three elements are met, "with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561.

These constitutionally mandated elements are not to be taken lightly. They are "built on separation-of-powers principles" and "serve[ ] to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). They derive directly from the express "case or controversy" requirement of Article III of the Constitution, which in turn "prohibits all advisory opinions, not just some advisory opinions and not just advisory opinions that hold little interest to the parties or the public." *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 715 (6th Cir. 2011).

1. The Commonwealth Cannot Sustain Its Burden To Prove Article III Standing.

Initially, although the Commonwealth claims to have "interests . . . adverse to" Defendants, (Compl. ¶ 63), it does not actually identify those interests. Because "[a] mere disagreement about the law is not enough, even if the parties are passionate in their positions," *Oldham v. ACLU Found. of Tenn., Inc.*, 849 F. Supp. 611, 614 (M.D. Tenn. 1994) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982)), the Commonwealth's mere disagreement with Defendants' arguments in the D.C. Action cannot establish a constitutionally protectable interest. At most, the Commonwealth seems to allege that it might suffer an injury if the court in the D.C. Action sides against the Secretary of Health and Human Services.[1] But the Commonwealth cannot claim to have a *legally protected* interest in

[1] The Commonwealth can best protect any interests it may have in the continuance of Kentucky HEALTH by intervening in the D.C. Action, as they already have done. *See* Minute Order, *Stewart*, 1:18-cv-00152 (D.D.C. Mar. 30, 2018) (granting Commonwealth of Kentucky's unopposed motion to intervene). Accordingly, its decision to simultaneously sue Defendants on the same matters as those presently being adjudicated in the D.C. Action can be explained only as

insulating the Secretary's grant of a federal waiver for Kentucky HEALTH from judicial review under the Constitution or the APA. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) ("At least since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Further, "allegations of *possible* future injury," like those found in the Complaint are "too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Amnesty Int'l*, 568 U.S. at 401, 409 (internal quotation marks omitted). The only injury the Complaint can allege is the possible invalidation of the federal waiver by the District of Columbia court in the D.C. Action. But "[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Id.* at 413-14 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990) (internal quotation marks omitted)). At most, Plaintiffs can assert that courts sometimes overturn Section 1115 waivers—but sometimes, they do not. Plaintiffs, then, cannot predict with any certainty that the vacatur of the Secretary's waiver (which would prohibit the Commonwealth from implementing Kentucky HEALTH) will actually occur. When the potential outcome of a case is the only arguable source of injury, "there is no amount of evidence that potentially c[an] establish that [the plaintiff's] asserted future injury is 'real and immediate.'" *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (citation omitted); *Clapper*, 568 U.S. at 413 (noting that courts are "reluctant to endorse standing theories that require

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an attempt to forum-shop, to coerce Defendants into abandoning the D.C. Action, or to retaliate against them for bringing it.

guesswork as to how independent decisionmakers"—like other courts—"will exercise their judgment.").

Second, even assuming *arguendo* that the possible future invalidation of the Section 1115 waiver were a sufficient injury to the Commonwealth for purposes of Article III, the Commonwealth cannot establish that this injury is "fairly traceable" to the supposedly unlawful conduct of these Defendants.[2] "[F]ederal plaintiffs must allege some threatened or actual injury *resulting from the putatively illegal action* before a federal court may assume jurisdiction. . . . [A] federal court [can] act only to redress injury that fairly can be traced to *the challenged action of the defendant*." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976) (emphasis added). Should the Section 1115 waiver be invalidated, the District of Columbia court will be the actor that invalidates it, not the Medicaid recipients the Commonwealth has named as Defendants. It is fundamental that the causation requirement of Article III standing is not met when the prospective future harm will be "the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (internal quotation marks and alterations omitted). Courts are thus "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers"—like other courts—"will exercise their judgment." *Amnesty Int'l*, 568 U.S. at 413 (finding no standing where plaintiffs could "only speculate as to whether [a] court [would] authorize" allegedly injurious surveillance); *see Whitmore*, 495 U.S. at 159-60 (finding no standing where alleged injury could only be caused by outcome of judicial process that plaintiff could not predict); *Michigan v. Meese*, 853 F.2d 395, 398 (6th Cir. 1988) (affirming dismissal of declaratory

[2] The Commonwealth does allege that Kentucky cannot afford to continue to implement its existing Medicaid program, Compl. ¶ 43 & Exh. D (making recitation in WHEREAS clause), but its conclusory statement falls far short of the particularized allegations required to establish a facially plausible claim that the Defendants are liable for the misconduct alleged. *Iqbal*, 556 U.S. at 676 (citation omitted).

judgment lawsuit brought by Michigan against U.S. Attorney General where injury traced to state trial judge enforcing federal statute, not the Attorney General); *Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 518 B.R. 307, 325 (W.D. Pa. 2014) (finding that plaintiff's "fear about how a court might interpret" a challenged bankruptcy plan "in the future is neither a concrete injury, actual or imminent, nor fairly traceable to the plan.").

For similar reasons, prevailing against these Defendants will not redress the Commonwealth's supposed potential injury, because that injury, if it occurs at all, will not be caused by Defendants. *See Kardules v. City of Columbus*, 95 F.3d 1335, 1352 (6th Cir. 1996) ("Causation and redressability are related elements of standing that frequently have been treated as one. Generally, if a plaintiff can demonstrate that his injuries were caused by the defendant, the courts are in a position to redress the situation."). The Commonwealth is not seeking an order requiring Defendants to dismiss the D.C. Action. That means the federal court in the District of Columbia will rule on the merits of that lawsuit regardless of this Court's resolution of this case. Consequently, prevailing here will not head off the result the Commonwealth fears: invalidation of the Section 1115 waiver.

2. A Well-Defined Body Of Precedent Establishes That The Commonwealth Lacks Article III Standing.

The Commonwealth is not the first party to have tried to end-run Article III's jurisdictional requirements by seeking an "APA" declaratory judgment against a private party when the sole issue is the action of a federal agency. In *Plum Creek Timber Co. v. Trout Unlimited*, 255 F. Supp. 2d 1159 (D. Idaho 2003), for example, a timber company sued environmental groups and federal agencies seeking a declaratory judgment that the federal agencies had acted consistently with the APA when approving a land management plan. Like the Commonwealth here, the timber company had no dispute with the federal government—and thus could not establish standing or

entitlement to any relief under the APA. *Id.* at 1166. In response to the timber company's argument that it had a concrete controversy against the environmental groups who had threatened to challenge the federal approval of the land management plan, the district court found that it was without jurisdiction:

> [T]he notices of intent to sue and media notices indicate [the environmental groups'] intent to sue [the federal agencies]. Thus, [the timber company] has not been threatened with an impending litigation and failed to show the existence of a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment. *See Scott*, 306 F.3d at 657. While the Court does not dispute that [the timber company] has a significant interest in any litigation between [the environmental groups] and [the federal agencies], there does not exist evidence of a threat of impeding litigation towards [the timber company].

Id.

Similarly, in *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632 (9th Cir. 2014), an oil company sued environmental groups, seeking a declaratory judgment that the Department of the Interior had acted consistent with the APA in approving the company's oil spill response plan. Shell argued that it had concrete legal disputes with the environmental groups and needed a quick decision from a court to justify the investments it intended to make in drilling. But the Ninth Circuit upheld dismissal of the case, finding that the parties did not have "adverse legal interests." *Id.* at 636. The court explained that where, as here, the underlying law derives from the APA, "the relevant adverse legal interests are held by a federal agency and a person aggrieved by that agency's action." *Id.* Accordingly, the sole aggrieved parties were the environmental groups, who had a claim against the federal agency, and not Shell, which agreed with the federal agency. *Id.* The court then noted two further oddities about the claim pleaded in *Shell Gulf of Mexico* that are present here. First, just like this case, the court would have had to review the actions of a federal agency without having the federal agency as a party to the suit. *Id.*

at 637. Second, also like this case, if the court concluded that the federal agency had violated the law, it could not enter any meaningful relief. *Id*.

And in *Collin County v. Homeowners Ass'n for Values Essential to Neighborhoods (HAVEN)*, the Fifth Circuit held that a local government lacked standing under the Declaratory Judgment Act to sue a private party to preclude a lawsuit brought by that private party against a federal agency. 915 F.2d 167, 172 (5th Cir. 1990). There, a local homeowners association had made public statements indicating that it would challenge a federal agency's decision to construct a new highway that a local government wanted to see constructed. *Id*. at 169. When the local government sued the homeowners association for a declaratory judgment that the highway had been appropriately permitted, the Fifth Circuit was forced to address whether "a local government, which will benefit from a federally funded highway, [may] use the Declaratory Judgment Act to forestall potential litigation by a citizen's group that might delay construction of the highway when the citizen's group has no cause of action against the local government[.]" *Id*. at 170. In holding that the local government could not proceed, the court explained that the Declaratory Judgment Act "does not allow a stranger to intended litigation to use a declaratory judgment action as a vehicle to create a cause of action for which it has no legal liability." *Id*. at 172; *see also Kyle v. Tex. ex rel. Tex. Dep't of Transp.*, No. SA-06-CV-0566-RF, 2006 WL 3691204, at *3-5 (W.D. Tex. Oct. 31, 2006) (discussing and applying *Collin County*).

Here, as in *Plum Creek*, *Shell Gulf of Mexico*, and *Collin County*, the Commonwealth has no adverse legal interest to the federal government under the APA; it could not sue the Secretary or any federal agency seeking affirmance of the waiver grant because that would be an advisory opinion and there would be no adversity sufficient to satisfy Article III. And it cannot sue Defendants—individual Medicaid recipients—against whom it has no claim and no

constitutionally relevant "adverse legal interest," and against whom it can get no meaningful redress.

Finally, the Commonwealth gets no special treatment because it is a State. In *Texas v. Travis County*, 272 F. Supp. 3d 973 (W.D. Tex. 2017), the State of Texas attempted to sue a county for a declaratory judgment that a state law was constitutional. The district court held that the state lacked standing and that it was improperly seeking an advisory opinion:

> [T]he State faces the same potential threat every government agency at every level faces when it enacts a new law—the threat that someone may challenge the constitutional validity of the law. That is not a justiciable injury. To hold otherwise would be to "open a Pandora's box and invite every local government to seek a court's judicial blessing" on a law prior to it taking effect.

Id. at 980 (citation omitted).

In sum, the Commonwealth cannot meet a single element of Article III standing to pursue this case against these Defendants. This Court need go no further in dismissing the case.

B. Plaintiffs Seek Only Relief Under The Declaratory Judgment Act, Which Does Not Independently Confer Jurisdiction On This Court.

This Court lacks jurisdiction over Plaintiffs' Complaint. The Commonwealth asserts that there is federal court jurisdiction over this case because it "arises under the Constitution and laws of the United States." Compl. ¶ 3. But the Commonwealth notably does not allege (nor could it) that these Defendants have violated any constitutional provision or federal law. Nor does it allege that Defendants have engaged in *any* actionable misconduct or otherwise affected rights or interests that the Commonwealth possesses under federal law. Instead, the Commonwealth seeks only a declaratory judgment that Kentucky HEALTH is lawful and constitutional, *see id.* ¶¶ 70-77, 81, 85—in other words, a resolution by this court of the D.C. Action.

The Declaratory Judgment Act does not create federal subject matter jurisdiction. Rather, it expands the range of remedies a federal court may provide. 28 U.S.C. § 2201(a) ("In a case of

actual controversy within its jurisdiction . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."). The Declaratory Judgment Act's purpose thus is only "to create a remedy for a preexisting right enforceable in federal court." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 902 (6th Cir. 2014). So although the Act "enlarge[s] the range of remedies available in the federal courts," it "*do[es] not extend their jurisdiction*." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (emphasis added). Mere invocation of the Act, therefore, cannot and does not independently confer federal subject matter jurisdiction. *Id.* at 671-72; *Mich. Corr. Org.*, 774 F.3d at 902.

Here, the Commonwealth's complaint fails as a jurisdictional matter because it cannot show that this Court has '"jurisdiction already' under some *other* federal statute," separate and apart from the Declaratory Judgment Act. *See Toledo v. Jackson*, 485 F.3d 836, 839 (6th Cir. 2007) (citation omitted) (emphasis added). First, the Commonwealth does not allege that Defendants have violated any substantive right it possess under any federal law—it alleges only that Defendants have filed a lawsuit against the Secretary of Health and Human Services and other federal officials claiming those individuals have violated federal law and the U.S. Constitution by approving the Section 1115 waiver. The Commonwealth cannot seriously believe it has a federally-protected interest in ensuring that a Cabinet secretary is not sued for an allegedly *ultra vires* act. That is particularly true in light of the fact that filing that lawsuit is itself a constitutionally protected act. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972); *see also John L. ex rel. Kozlowski v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992).

Second, the Commonwealth cannot show that its declaratory judgment claims amount to defenses to a properly pleaded federal action that Defendants could assert in an action against the

Commonwealth. When a declaratory judgment plaintiff asserts a claim that is effectively a defense to a threatened or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014). The test thus is whether "the declaratory judgment defendant could bring a coercive action" against the declaratory judgment plaintiff "that would necessarily present a federal question." *Bell & Beckwith v. United States*, 766 F.2d 910, 913 (6th Cir. 1985); *see Pressl v. Appalachian Power Co.*, 842 F.3d 299, 302 (4th Cir. 2016). Here, the Commonwealth cannot show that Defendants could have brought a coercive lawsuit against *the Commonwealth* in federal court to prevent the issuance of the Section 1115 waiver. There is a straightforward reason for that: the Commonwealth did not and could not issue the waiver. The only proper defendants to a lawsuit contesting the Section 1115 waiver are the defendants named in the D.C. Action—the federal officials that approved the waiver.

Because the Commonwealth does not seek relief pursuant to any cause of action independent of the Declaratory Judgment Act, this Court has no preexisting subject-matter jurisdiction over their Complaint. Accordingly, the Complaint must be dismissed.

C. This Court Should Decline To Exercise Its Jurisdiction Over Plaintiffs' Request For Declaratory Judgment.

Even if the Commonwealth had standing to pursue their claim, and even if their claim properly raised a federal question, this Court should nonetheless decline to exercise jurisdiction over Plaintiffs' request for declaratory relief. "[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). To guide the exercise of that discretion, the Sixth Circuit has established a five-factor balancing test: (1) whether a declaratory judgment "would settle the controversy"; (2)

"whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue"; (3) whether the declaratory action "is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata'"; (4) whether the action "would increase friction between our federal and state courts and improperly encroach on state jurisdiction"; and (5) whether there is an "alternative remedy which is better or more effective." *AmSouth Bank (03-5517) v. Dale*, 386 F.3d 763, 785 (6th Cir. 2004). These factors—in particular factors 2, 3, and 5—weigh strongly against the Commonwealth's action.

Through its lawsuit, the Commonwealth seeks nothing more than to adjudicate the D.C. Action before this Court. That is clear from the fact that Kentucky filed this Complaint weeks after the D.C. Action commenced, and did so in tandem with the D.C. Action Defendants' motion to transfer the D.C. Action to this Court. *See* Motion to Transfer Case to the Eastern District of Kentucky, *Stewart*, 1:18-cv-00152 (D.D.C. Feb. 9, 2018), ECF No. 6. Accordingly, this action amounts to naked forum shopping. Worse, Kentucky's subsequent intervention in the D.C. Action—which Plaintiffs in that case, who are the Defendants here, did not oppose—confirms that intervention in the already-pending D.C. Action is a better and more effective remedy for Plaintiffs than litigating the exact same issues simultaneously in two different forums and risking conflicting decisions from two different courts.

"[W]here a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff her choice of forum—a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act." *AmSouth Bank*, 386 F.3d at 788. This is all the more true when, as here, a plaintiff files a declaratory judgment action *after* the named defendant has filed a suit raising the same facts and controversy as the declaratory

judgment. Indeed, "[w]here a pending coercive action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified." *Ford Motor Co. v. U.S. Dep't of Homeland Sec.*, No. 05-73860, 2006 WL 2457521, at *7 (E.D. Mich. Aug. 23, 2006) (quoting *AmSouth Bank*, 386 F.3d at 787).

Accordingly, it is well recognized that "the misuse of the Declaratory Judgment Act to gain a procedural advantage and preempt the forum choice of the plaintiff in a coercive action militates in favor of dismissing the declaratory judgment action." *Encore Furniture Thifts & More, LLC v. Doubletap, Inc.*, 281 F. Supp. 3d 665, 668 (M.D. Tenn. 2017). Because that is precisely what the Commonwealth seeks to do here, the Court should refuse to hear its declaratory judgment action.

II. The Commonwealth Fails To State A Claim Upon Which Relief Can Be Granted.

A. The Commonwealth's Claim Is Barred By The First Amendment.

The First Amendment of the Constitution states: "Congress shall make no law respecting ... the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I. "The right of access to the courts is indeed but one aspect of the right of petition," meaning that when a plaintiff files a complaint in a court, that plaintiff is exercising his or her First Amendment right to petition. *Cal. Motor*, 404 U.S. at 510. It is axiomatic that this right "protect[s] [F]irst [A]mendment petitioning of the government from claims brought under federal and state laws…." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988).

Here, the gravamen of the Commonwealth's complaint is that it has been unlawfully harmed because Defendants filed a legal challenge to the Section 1115 waiver. But the First Amendment makes Defendants immune from claims for relief premised upon the exercise of their

First Amendment petition right. *Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985) (holding that right to petition protected individual in filing complaints with school board), *judgment rev'd on other grounds sub nom. Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986); *see also E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326-27 (3d Cir. 1999). Consequently, the Commonwealth's attempt to justify seeking relief from these Defendants solely because Defendants previously chose to exercise their First Amendment rights to seek relief from the federal judiciary fails as a matter of law.

B. The Bare Existence Of The D.C. Action Does Not Vest The Commonwealth With A Legally Cognizable Claim Against Defendants.

As explained above, the Complaint fails jurisdictionally because it does not raise any cause of action that exists independent of the Declaratory Judgment Act. To the extent the Commonwealth argues it may proceed here because these Defendants have raised federally cognizable claims in the D.C. Action, it is wrong. Just because Defendants have viable federal claims against the U.S. Secretary of Health and Human Services and other federal officials does not mean the Commonwealth has viable federal claims against these Defendants.

In the D.C. Action, Defendants have proceeded chiefly under the APA. The APA creates a cause of action for "[a] person suffering legal wrong because of *agency* action, or adversely affected or aggrieved by *agency* action." 5 U.S.C. § 702 (emphasis added); *see also Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("The APA sets forth the procedures by which *federal agencies* are accountable to the public and *their actions* subject to review by the courts." (emphasis added)). An APA action, then, must be brought against "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. Private individuals like Defendants—who have engaged in no agency action, and who have instead exercised their right under the APA

to seek review of agency action that has harmed them—are not proper defendants for an APA action. *See, e.g., Mwabira-Simera v. Howard Univ.*, 692 F. Supp. 2d 65, 70 (D.D.C. 2010) (finding that private institutions and individuals were not subject to suit under the APA); *Ndiaye v. CVS Pharmacy 6081*, 547 F. Supp. 2d 807, 815 (S.D. Ohio 2008) (finding that private company not responsible for rendering agency decision was not proper defendant in APA suit). Accordingly, the Commonwealth cannot proceed against these Defendants pursuant to the APA, just as these Defendants could not proceed against the Commonwealth under the APA.

Similarly, Defendants also are not subject to suit under 42 U.S.C. § 1983 or any substantive provision of the Constitution. In the D.C. Action, the Defendants have sought to enjoin unlawful Executive action pursuant to the Take Care Clause of the Constitution. But that provision unambiguously concerns the duties of the President, *see* U.S. Const., art. II, § 3, so it does not enable the Commonwealth to respond with a claim of its own under the Take Care Clause against sixteen private individuals. Indeed, with few exceptions that do not apply here, the "rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978), and private parties only "can be held to constitutional standards when [their] actions so approximate state action that they may be fairly attributed to the state." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). Of course, the Commonwealth has not alleged that these sixteen private-party Defendants have engaged in any conduct that might arguably "approximate state action," thereby defeating any claim it might assert pursuant to Section 1983.

To be sure, Defendants have asserted viable causes of action in the D.C. Action. But the law is clear that the Commonwealth cannot turn those claims around against Defendants. To the extent the Commonwealth seeks to do so, it gets nowhere.

C. The Court Should Dismiss The Commonwealth's Claim Pursuant To The First To File Rule.

Finally, even if the Commonwealth had asserted a viable claim against Defendants, the Court still should dismiss its complaint pursuant to the first-to file rule. The first-to-file rule is a principle of federal court comity that permits a federal district court to dismiss a complaint involving substantially similar parties and issues has already been filed in another federal district court. *E.g., Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001); *see Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("As between federal district courts, ... the general principle is to avoid duplicative litigation."). The rule exists to "conserve[] judicial resources by minimizing duplicative or piecemeal litigation, and protects the parties and the courts from the possibility of conflicting results." *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789 (6th Cir. 2016) (citing *EEOC v. Univ. of Pa.*, 850 F.2d 969, 977 (3d Cir. 1988); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728–29 (5th Cir. 1985)).

When called upon to apply the first-to-file rule, courts "generally evaluate three factors: (1) the chronology of events, (2) the similarity of the parties involved, and (3) the similarity of the issues or claims at stake." *Baatz*, 814 F.3d at 789 (citing *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991)). In this case, each factor favors application of the first-to-file rule. The D.C. Action was the first-filed action, which means it the D.C. Action is the one that "should generally proceed to judgment." *Zide Sport Shop of Ohio*, 16 F. App'x at 437 (quoting *In re Burley*, 738 F.2d 981, 988 (9th Cir. 1984)). Additionally, the requisite "substantial overlap" between the parties exists here, as the plaintiffs in the D.C. Action are the identical to the defendants in this case and one of the defendants in the D.C. Action, now that the Commonwealth has intervened in the D.C. Action, is the plaintiff in this case. *See Baatz*, 814 F.3d at 790-91.

Finally, the issues at stake in the two litigations are one and the same, as the Commonwealth in this Court seeks nothing more than a declaration that its position should carry the day in the D.C. Action. *See id.* at 791-92.

Because all factors are present, the Court should apply the doctrine absent a showing by the Commonwealth that its application would be inequitable. *Id*. at 792. But the Commonwealth cannot make any such showing. First, the first-filed action is a direct action under the APA, not one seeking purely declaratory relief as part of a forum-shopping gambit that courts sometimes view with skepticism. *See id*. Second, requiring the Commonwealth to make its arguments in the other federal forum will be more efficient, as the parties in that Court already have commenced summary judgment briefing on the merits. That, of course, stands in contrast to the status of this case, where the Court has not yet had occasion to take up the merits. Third, the Commonwealth cannot credibly claim to be inconvenienced by having to litigate an issue regarding the action of a federal agency action in the District of Columbia.

In sum, there is no reason to depart from the general rule that a later-filed action should be dismissed in favor of the earlier-filed case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss Plaintiffs' Complaint.

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Respectfully submitted,

/s/ Anne Marie Regan

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CERTIFICATE OF SERVICE

I certify that on April 9, 2018, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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