UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CASE NO. 3:18-cv-00008

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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs—three state officials who administer Kentucky's Medicaid program—have sued 16 Kentucky residents (the "Kentucky Defendants") seeking a declaratory judgment that Kentucky's Section 1115 waiver, known as Kentucky HEALTH, is valid and enforceable. The Kentucky Defendants have moved to dismiss this action, primarily arguing that Plaintiffs lack standing and cannot initiate

litigation of their own to protect Kentucky HEALTH. The Kentucky Defendants conveniently posit that Plaintiffs' sole way to defend Kentucky HEALTH—a Kentucky-created, Kentucky-implemented, and soon-to-be Kentucky-enforced program—is to intervene into litigation that the Kentucky Defendants filed in Washington, D.C.

The Kentucky Defendants' motion to dismiss should be denied. It is nothing more than a transparent attempt to avoid a court in the Commonwealth of Kentucky deciding the legality of Kentucky HEALTH. Even putting aside the forum shopping that pervades the Kentucky Defendants' motion to dismiss, their motion is self-defeating. The Kentucky Defendants have admitted—as they must—that the Commonwealth is a proper party to a case challenging Kentucky HEALTH. That concession largely forecloses the arguments made in their motion to dismiss.

BACKGROUND

This case concerns the options available to the Commonwealth of Kentucky in deciding whether and how to administer Obamacare's expansion of Medicaid. Passed in 2010, Obamacare amended the Social Security Act to enable states, if they so choose, to expand their Medicaid programs to include a new class of individuals. R. Doc. 1 ¶ 28. The Medicaid program historically served four categorically needy populations: "the disabled, the blind, the elderly, and needy families." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) ("*NFIB*"). Obamacare changed that, creating a "new health care program" designed "to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *Id.*

at 583–84. As construed in *NFIB*, Obamacare gives states the option to expand Medicaid to encompass individuals with incomes below a certain mark. *Id.* at 588. It also gives states the option *not* to participate in expanded Medicaid. *See id.* at 587 ("Some states may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligation, or because they are unwilling to commit the administrative resources necessary to support the expansion.").

Starting in 2014, at the unilateral direction of then-Governor Beshear, Kentucky began participating in expanded Medicaid. R. Doc. 1 ¶ 29. Under Obamacare, the federal government initially paid the entire cost of expanded Medicaid in Kentucky, with the Commonwealth eventually contributing an increasing percentage of the cost (up to 10 percent by 2020). 42 U.S.C. § 1396d(y)(1). This is a significant expense for the Commonwealth. *E.g.*, R. Doc. 1 ¶ 43. Kentucky's share of the bill for expanded Medicaid is expected to reach *$1.2 billion* by 2021. R. Doc. 1-1 at 2.

In June 2016, Governor Bevin announced that the Commonwealth would pursue what is known as a Section 1115 waiver so that it could alter the terms under which the Commonwealth serves those participating in expanded Medicaid. R. Doc. 1 ¶ 34. Section 1115 of the Social Security Act allows the Secretary of the Department of Health and Human Services to "waive compliance with any of the requirements of section . . . 1396a" for "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of Medicaid.

42 U.S.C. § 1315(a)(1). Section 1115 grants "broad power to the Secretary to authorize projects which do not fit within the normal [Medicaid] guidelines." *Cal. Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 493 (N.D. Cal. 1972).

On August 24, 2016, Governor Bevin submitted Kentucky's Section 1115 waiver application for Kentucky HEALTH to the Secretary. R. Doc. 1 ¶ 36. His cover letter gave two primary reasons for seeking a Section 1115 waiver. First:

> The need for change [in Kentucky] is urgent. Almost twenty percent of our residents live in poverty, we are 47th in the nation for median household income, nearly one-third of Kentuckians are on Medicaid, and our workforce participation is among the worst in the nation at less than 60 percent. Kentucky also ranks third in the nation for drug related fatalities.

R. Doc. 1-1 at 2. Second, Governor Bevin explained that the financial realities of expanded Medicaid drove the Commonwealth's need for a Section 1115 waiver. The Commonwealth, Governor Bevin underscored, cannot afford the status quo of expanded Medicaid going forward: "This is an expense Kentucky cannot afford without jeopardizing funding for education, pension obligations, public safety and the traditional Medicaid program for our most vulnerable citizens." *Id.*

On January 12, 2018, the Secretary approved Kentucky HEALTH. R. Doc. 1 ¶ 41. In so doing, CMS concluded that "Kentucky HEALTH is designed to address the unique challenges the Commonwealth is facing as it endeavors to maintain coverage and promote better health outcomes among its residents." R. Doc. 1-3 at 5. To that end, the Secretary approved, among other things, (i) a community-engagement program for able-bodied enrollees, which will get enrollees engaged in their communities in a variety of ways, (ii) a premium requirement, which will encourage

personal responsibility by participants and mirror commercial coverage by requiring enrollees to invest modest amounts in their health care, and (iii) a *My Rewards* account for each enrollee, which will incentivize healthy behaviors to unlock enhanced benefits like dental and eye care. *See id.* at 3–11 (summarizing Kentucky HEALTH).

On the same day that the Secretary approved Kentucky HEALTH, Governor Bevin issued an executive order on the subject, explaining:

> [T]he Commonwealth will not be able to afford to continue to operate its Medicaid expansion program as currently designed in the event any one or more of the components of Kentucky's Section 1115 Waiver and the accompanying Special Terms and Conditions are prevented by judicial action from being implemented within the demonstration period set forth in the Special Terms and Conditions.

R. Doc. 1-4 at 4. Governor Bevin thus ordered that if any aspect of Kentucky HEALTH is ultimately enjoined by a court, the responsible state officials are "directed to take the necessary actions to terminate Kentucky Medicaid expansion program." *Id.*

Nevertheless, on January 24, 2018, the Kentucky Defendants sued the federal government in federal district court in Washington, D.C., seeking to invalidate and enjoin Kentucky HEALTH (the "D.C. Action"). 1:18-cv-152, R. Doc. 1. Important for present purposes, the Kentucky Defendants *did not name* the Commonwealth or any of its officials as defendants in the D.C. Action, even though the Commonwealth developed Kentucky HEALTH, is currently implementing it, and soon will be enforcing it. The federal government promptly moved to transfer the D.C. Action to this Court, explaining that "nearly every other case for the past fifty years challenging a state-initiated Section 1115 demonstration project was originally filed

in the state in which the project was to be implemented." 1:18-cv-152, R. Doc. 6 at 12 n.4.

The Kentucky Defendants' decision not to name the Commonwealth as a defendant in the D.C. Action put the Commonwealth in a difficult position. Should the Commonwealth promptly intervene in the D.C. Action? Should it support the federal government's motion to transfer through an *amicus curiae* brief? Should it file suit on its own? Or should it do nothing? Initially, the Commonwealth chose a middle course designed to fully protect its program: It supported the federal government's motion to transfer through an *amicus curiae* brief (1:18-cv-152, R. Doc. 25) and filed this suit on February 19, 2018, seeking a "judicial declaration—this time in Kentucky and with the Commonwealth as a party—that Kentucky HEALTH is consistent with the Social Security Act, the Administrative Procedure Act, and the United States Constitution." R. Doc. 1 ¶ 2 (emphasis omitted).

Shortly thereafter, the federal government and the Kentucky Defendants unexpectedly agreed to an expedited briefing schedule in the D.C. Action without consulting the Commonwealth. 1:18-cv-152, Minute Order 3/8/18. This forced the Commonwealth's hand. So that it could participate in merits briefing, the Commonwealth moved to intervene in the D.C. Action just before the Kentucky Defendants' merits brief was due. 1:18-cv-152, R. Doc. 30. Importantly, the Kentucky Defendants did not object to the Commonwealth's motion to intervene, which the D.C. Court granted. *Id.* at 1; 1:18-cv-152, 3/30/18 Minute Order. The D.C. Court

subsequently denied the federal government's motion to transfer the D.C. Action to this Court. 1:18-cv-152, R. Doc. 42.

Relying mostly on the Commonwealth' unopposed intervention into the D.C. Action, the Kentucky Defendants have now moved to dismiss this action. R. Doc. 25. For the following reasons, the Kentucky Defendants' motion should be denied, and this action should be put on an expedited track so that the Commonwealth can either enforce Kentucky HEALTH or, out of necessity, withdraw from expanded Medicaid.

ARGUMENT

The Kentucky Defendants have moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). R. Doc. 25-1 at 4–5. As relevant here, a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction requires the Court to take the allegations in the complaint as true and construe them in the light most favorable to Plaintiffs. *See United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (discussing a facial challenge under Rule 12(b)(1)). As for the Kentucky Defendants' Rule 12(b)(6) motion, the Court must ask whether the complaint alleged "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This does not require "detailed factual allegations," *id.* (citation omitted), and the Court must construe the complaint in the light most favorable to Plaintiffs, *see Reilly v. Vadlamudi*, 680 F.3d 617, 622 (6th Cir. 2012).

I. Plaintiffs have standing, as the Kentucky Defendants have conceded.

The Kentucky Defendants' lead argument for dismissal is that Plaintiffs lack standing. R. Doc. 25-1 at 6–13. According to the Kentucky Defendants, there is nothing that Plaintiffs can do to protect Kentucky HEALTH, other than intervene in the action that the Kentucky Defendants filed in their preferred forum. That argument, if adopted, would turn Article III standing on its head.

The Kentucky Defendants' standing argument fails for the simplest of reasons: they have necessarily conceded that the Commonwealth has Article III standing to protect Kentucky HEALTH. By way of background, the Commonwealth intervened in the D.C. Action on March 30, 2018. 1:18-cv-152, 3/30/18 Minute Order. The Commonwealth did so only after it became clear that the merits of Kentucky HEALTH were going to be briefed in the D.C. Action. 1:18-cv-152, R. Doc. 30-1 at 4. As the Commonwealth explained in its intervention papers, a prerequisite for intervening under Rule 24(a)(2) in the D.C. Circuit is the intervenor possessing Article III standing. *Id.* at 5 n.2. The Kentucky Defendants *did not oppose* the Commonwealth's motion to intervene in the D.C. Action. 1:18-cv-152, R. Doc. 30 at 1. Thus, in the D.C. Action, the Kentucky Defendants essentially acknowledged that the Commonwealth has Article III standing to defend Kentucky HEALTH. Here, by contrast, the Kentucky Defendants have reversed course, claiming that the Commonwealth's officials somehow lack standing to do the very thing that the Commonwealth is doing in the D.C. Action. The Court should reject the Kentucky Defendants' internally inconsistent positions for what they are: contrived attempts to

make sure the legality of Kentucky HEALTH is decided only in their preferred forum—a court far from where the effects of Kentucky HEALTH will be felt. Kentucky and its officials either have standing to defend Kentucky HEALTH or they do not.

In any event, Plaintiffs possess standing to file this declaratory-judgment action. Although the three well-known elements of standing (injury-in-fact, causation, and redressability) guide the standing analysis in cases brought under the Declaratory Judgment Act, the standing inquiry in such cases reduces to whether "the parties have 'adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment' even though the injury-in-fact has yet to be completed." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (citation omitted); *see also Grand Trunk W. R.R. Inc. v. Brotherhood of Maint. of Way Emps. Div.*, 643 F. Supp. 2d 941, 948–49 (N.D. Oh. 2009) (applying this standard); *St. Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 68 F. Supp. 3d 744, 756–57 (E.D. Mich. 2014) (same).

Plaintiffs are the state officials charged with enforcing Kentucky's Medicaid program, including Kentucky HEALTH. R. Doc. 1 ¶¶ 7–9, 64–65. Applicable law reinforces Plaintiffs' central—indeed, indispensable—role in enforcing Kentucky's Medicaid program. *See, e.g.*, 42 U.S.C. § 1396(a)(5); KRS 194A.03(2); Ky. Const. §§ 69, 81. More specifically, Plaintiffs have a significant interest in seeing that Kentucky HEALTH is enforced. Not only have the Commonwealth and its officials spent "thousands of hours" developing Kentucky HEALTH, but the program is *the only way*

that the Commonwealth can afford to continue participating in expanded Medicaid. R. Doc. 1 ¶¶ 5, 42–44. As Governor Bevin's executive order makes clear, without Kentucky HEALTH, the Commonwealth will be forced, due to budgetary constraints, to "un-expand" from expanded Medicaid. R. Doc. 1-4 at 4. Impairment of economic interests such as these is more than sufficient to confer standing. *See Magaw*, 132 F.3d at 282 ("[T]his court has held that 'an economic injury which is traceable to the challenged action' satisfies the requirements of Article III standing." (citation omitted)).

The Kentucky Defendants vigorously oppose the Commonwealth's efforts to enforce Kentucky HEALTH, as evidenced by their filing of the D.C. Action. Their complaint in the D.C. Action is a broadside challenge to Kentucky HEALTH, seeking invalidation of Kentucky HEALTH in whole and an injunction against its enforcement. 1:18-cv-152, R. Doc. 1 Prayer for Relief ¶¶ 3–4. The Kentucky Defendants' suit, brought in a forum far from Kentucky, initially excluded the Commonwealth—a fact that prompted this lawsuit. R. Doc. 1 ¶¶ 1–2. In short, the Kentucky Defendants' opposition to Kentucky HEALTH as evidenced by their filing of the D.C. Action more than suffices to create "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Magaw*, 132 F.3d at 280 (citation omitted).

The Kentucky Defendants counter that they and Plaintiffs have a "mere disagreement about the law," which they say is insufficient to confer Article III standing. R. Doc. 25-1 at 7. That assertion radically understates the 408-allegation

complaint that the Kentucky Defendants filed in the D.C. Action, which has the potential to affect, and in Plaintiffs' view harm, the Commonwealth and the more-than 400,000 Kentuckians who currently participate in expanded Medicaid.[1] Under no circumstances can the concrete dispute between Plaintiffs and the Kentucky Defendants, which carries real-life consequences for so many, be characterized as a "mere disagreement about the law."

Perhaps the best evidence of why this is so is the district court decision that the Kentucky Defendants cite for this point. In *Oldham v. ACLU Foundation of Tennessee, Inc.*, 849 F. Supp. 611 (M.D. Tenn. 1994), the Court found a "mere disagreement about the law" in the following circumstances:

> Here, the ACLU has made a vague threat to 'pursue legal action' if it learns that a school system has sponsored prayers at a graduation ceremony. Would the ACLU file a lawsuit? What would the allegations be? Who would the parties be? The Court can only speculate as to the answers. However, Article III of the Constitution forbids it from rendering a decision on hypothetical facts.

Id. at 614 (footnote omitted). The facts in *Oldham*, of course, are far afield from those here.

[1] In a footnote, the Kentucky Defendants more or less concede the obvious point that being forced to opt out of expanded Medicaid is sufficient to confer standing. R. Doc. 25-1 at 9 n.2. The Kentucky Defendants nevertheless claim that Plaintiffs failed to make "particularized allegations" on this point. To the contrary, Plaintiffs clearly alleged that the Commonwealth will have to withdraw from expanded Medicaid (R. Doc. 1 ¶¶ 42–45) and incorporated by reference Kentucky's waiver application, which mentions the fiscal unsustainability of expanded Medicaid (R. Doc. 1-1 at 2), as well as Governor Bevin's executive order, which gives the circumstances of Kentucky's withdrawal from expanded Medicaid the force of law (R. Doc. 1-4).

The Kentucky Defendants also argue that the injury-in-fact alleged by the Commonwealth is too speculative to support standing. R. Doc. 25-1 at 8–9. When seeking declaratory relief, "a plaintiff must show actual present harm or a significant possibility of future harm . . . ." *Magaw*, 132 F.3d at 279. The Kentucky Defendants argue that Plaintiffs have not made this showing because their alleged injury, in the Kentucky Defendants' view, depends entirely on the outcome of the D.C. Action. For this proposition, the Kentucky Defendants cite *Whitmore v. Arkansas*, 495 U.S. 149, 159–60 (1990), and *Clapper v. Amnesty International USA*, 568 U.S. 398, 413–14 (2013), both of which stated that "[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." Those statements were made in factual circumstances far removed from those present here.

In any event, Plaintiffs' injury is not tied to the outcome of the D.C. Action. The injury alleged by Plaintiffs is not that the D.C. Action could undo Kentucky HEALTH, although that certainly would injure the Commonwealth and its citizens. Rather, Plaintiffs' injury-in-fact is that the Kentucky Defendants have taken concrete steps to invalidate and enjoin Kentucky HEALTH, a program that the Commonwealth developed, is currently implementing, and soon will be enforcing. That suffices to create an injury-in-fact for purposes of the Declaratory Judgment Act. Indeed, Defendants' motion acknowledges that a potential litigant *need not wait for an anticipated lawsuit to be filed* in order to suffer an injury-in-fact sufficient to confer standing to bring a declaratory-judgment action. R. Doc. 25-1 at 15 (citing, e.g., *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014)).

Rather, an injury-in-fact sufficient to file a declaratory-injunction action can be created *before* the opposing party sues. *See, e.g.*, *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002) ("The declaratory judgment plaintiff must be able to show that the feared lawsuit from the other party is immediate and real, rather than merely speculative."). If the mere threat of litigation can create a sufficient injury-in-fact, as the Kentucky Defendants acknowledge, it follows that an injury-in-fact exists where a party has already sued to invalidate and enjoin a program that the Commonwealth has an overwhelming interest in enforcing.

Lastly, the Kentucky Defendants claim that the Commonwealth lacks standing because its injury is not fairly traceable to them or redressable by this Court. R. Doc. 25-1 at 9–10. For this point, the Kentucky Defendants reference the principle that an injury is not actionable if it results from "the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). That third party, the Kentucky Defendants argue, is the United States District Court in Washington, D.C. before which the D.C. Action is pending. But the success of this lawsuit in protecting Kentucky HEALTH does not depend upon what occurs in the D.C. Action. This action and the D.C. action stand on equal footing. One is not subordinate to the other at this stage.

The Kentucky Defendants also cite several, non-binding decisions to argue that a "well-defined body" of case law establishes that the Commonwealth lacks Article III standing. R. Doc. 25-1 at 10–13. These cases, however, are easily distinguished. The Kentucky Defendants' lead case is *Plum Creek Timber Co., Inc. v. Trout Unlimited*,

255 F. Supp. 2d 1159 (D. Idaho 2003), in which a private timber company sued the federal government and environmental groups, seeking a declaratory judgment that a conservation plan complied with federal law. *Id.* at 1161. The Idaho district court determined that the timber company lacked standing because there was no threat of litigation against it. *Id.* at 1165–66. Merely reciting the facts of *Plum Creek Timber Co.* demonstrates just how distinguishable it is. The plaintiff there was a private timber company, not a sovereign state charged with enforcing its Medicaid program consistent with the Social Security Act. The Kentucky Defendants' actions are not merely a threat to optional commercial activity, as in *Plum Creek Timber Co.*, but to the Commonwealth's ability to continue participating in expanded Medicaid.[2]

One of the Kentucky Defendants' other favored cases makes this point rather clearly. In *Collin County v. Homeowners Association for Values Essential to Neighborhoods*, 915 F.2d 167 (5th Cir. 1990), a local government brought a declaratory-judgment action against a citizen's group that was threatening to challenge in court a federally funded highway that would benefit the local government. *Id.* at 169–70. The Fifth Circuit found that the local government lacked standing to pursue such a suit for two primary reasons. First, the local government bore no responsibility for preparing the environmental impact statement ("EIS") that was at the heart of the matter. *Id.* at 171 ("[I]t is the responsibility of the federal

[2] For these same reasons, the Kentucky Defendants' reliance on *Shell Gulf of Mexico, Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632 (9th Cir. 2014)—a case brought by petroleum companies seeking a declaratory judgment so that they could develop oil and gas resources in a "bountiful ecosystem that supports a wide array of life," *id.* at 633–35—is unavailing.

agency involved in the proposed action to prepare the EIS. This responsibility is primary and non-delegable." (internal citation omitted)). The same cannot be said here. It was Kentucky, not the federal government, that developed and proposed Kentucky HEALTH. *See* R. Docs. 1-1, 1-2; *see also Phoenix Baptist Hosp. & Med. Center v. United States*, 728 F. Supp. 1423, 1428 (D. Ariz. 1989), *aff'd* 937 F.2d 452 (9th Cir. 1991) (holding that Section 1115 "allow[s] *a state* the opportunity to develop its own alternative to traditional medicaid programs" (emphasis added)). Kentucky's indispensable role under Section 1115—*i.e.*, there would be no Kentucky HEALTH without the Commonwealth undertaking to create, implement, and enforce it—demonstrates why *Collin County* actually reinforces Plaintiffs' standing.

Second, *Collin County* held that the local government lacked standing because it could not intervene as of right in an action brought by the citizens' group against the federal government. 915 F.2d at 171. On this point, the Fifth Circuit explained that "[i]t would be anomalous to allow a party who would not be a proper defendant nor able to intervene of right . . . to precipitate a judgment in such a suit between others by filing an action pursuant to the Declaratory Judgment Act." *Id.* The Commonwealth, as explained above, has already intervened in the D.C. Action *without objection*. 1:18-cv-152, 3/30/18 Minute Order. In its motion to intervene, the Commonwealth cited a wealth of case law allowing a sovereign state to intervene as of right into litigation challenging federal action or decision making that affects the state intervenor. 1-18-cv-152, R. Doc. 30-1 at 5–12. The Kentucky Defendants' motion to dismiss makes no attempt to challenge this case law. Nor have they done so in the

D.C. Action. Consequently, on this point as well, *Collin County*'s rationale conveys that the Commonwealth's officials have standing to prosecute this matter.

II. This action is appropriate for a declaratory judgment.

The Kentucky Defendants offer two reasons why a declaratory judgment is inappropriate: (i) the Court lacks jurisdiction; and (ii) even if the Court possesses jurisdiction, the Court should decline to exercise it. For the following reasons, these arguments should be rejected.

A. The Court possesses jurisdiction.

The Kentucky Defendants contend that the Court lacks jurisdiction over this matter because the Declaratory Judgment Act does not create jurisdiction. R. Doc. 25-1 at 13–15. That statement is true insofar as the Declaratory Judgment Act is not a jurisdiction-conferring statute. *See, e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (holding that the Declaratory Judgment Act does not "extend" a federal court's jurisdiction). However, for the reasons discussed below, the Court has jurisdiction over this matter independent of the Declaratory Judgment Act.

The Kentucky Defendants' argument to the contrary rests largely on the principle that a declaratory-judgment plaintiff must establish that the declaratory-judgment defendant could have brought "a coercive action" that "would necessarily present a federal question." *See Medtronic*, 134 S. Ct. at 848 (citation omitted). Relying on this notion, the Kentucky Defendants urge that "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." R. Doc. 25-1 at 15 (emphasis in original).

This argument fails for the straightforward reason that the Kentucky Defendants have admitted that the Commonwealth is a proper party to the D.C. Action, which is a coercive action. As outlined above, after filing this action, the Commonwealth sought to intervene in the D.C. Action as a defendant to the Kentucky Defendants' claims, and the Kentucky Defendants did not oppose that motion. 1:18-cv-152, R. Doc. 30 at 1. Kentucky's intervention in the D.C. Action is not a limited appearance; rather, the Commonwealth intervened to "fully participate as a defendant" (*id.* at 1–2) and has filed a 57-page answer to the Kentucky Defendants' claims (1:18-cv-152, R. Doc. 32) and a 45-page motion for summary judgment (1:18-cv-152, R. Doc. 50-1). If the Commonwealth is a proper defendant in the coercive D.C. Action, it follows that the Court has jurisdiction over this declaratory-judgment matter instituted by the Commonwealth's officials. *See Medtronic*, 134 S. Ct. at 848.

Moreover, the Kentucky Defendants' motion neglects to mention that state officials regularly are parties in coercive actions challenging Section 1115 waivers. For example, a state defendant was sued in connection with its Section 1115 waiver in *Crane v. Mathews*, 417 F. Supp. 532, 535 (N.D. Ga. 1976), under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)–(4). In *Crane*, the state defended its waiver on the basis that "Congress has granted the Secretary broad discretion under 42 U.S.C. § 1315"—something Plaintiffs seek to argue here. *Id.* Moreover, state defendants were parties to coercive lawsuits concerning Section 1115 waivers in New Jersey and Arizona. *C.K.*

v. Shalala, 883 F. Supp. 991, 997 (D.N.J. 1995), *aff'd* 92 F.3d 171 (3d Cir. 1996); *Wood v. Betlach*, 922 F. Supp. 2d 836, 838 (D. Ariz. 2013).

More to the point, Medicaid recipients regularly challenge states' implementation of their Medicaid programs as contrary to applicable Medicaid provisions under 42 U.S.C. § 1983. *See, e.g.*, *Michelle P. ex rel. Deisenroth v. Holsinger*, 356 F. Supp. 2d 763, 765 & n.1 (E.D. Ky. 2005) (collecting cases for the proposition that "in some circumstances, federal Medicaid provisions can create a right privately enforceable against state officers through § 1983"). In fact, the Sixth Circuit has at least twice upheld a Medicaid recipient's ability to challenge the state's implementation of its Medicaid program under Section 1983. *See Wheaton v. McCarthy*, 800 F.3d 282, 285–86 (6th Cir. 2015) (holding that a recipient can use Section 1983 to challenge a state's implementation of Medicaid's provision that a "State plan for medical assistance . . . must . . . provide [] for making medical assistance available for medical cost sharing . . . for qualified Medicaid beneficiaries"); *Harris v. Olszewski*, 442 F.3d 456, 460–65 (6th Cir. 2006) (holding that a recipient can use Section 1983 to challenge a state's implementation of Medicaid's provision that a "State plan for medical assistance . . . must . . . provide that [] any individual eligible for medical assistance (including drugs) may obtain such assistance from any" medical provider).

Several of the Medicaid provisions that the Secretary waived in approving Kentucky HEALTH are quite similar to the Medicaid provisions that the Sixth Circuit has found to be enforceable through a private right of action against a state

under Section 1983. R. Doc. 1-3 at 14–16 (listing the provisions waived by the Secretary). By way of example, the Secretary has waived compliance with 42 U.S.C. § 1396a(a)(8), which provides that a "State plan for medical assistance must . . . provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." The Secretary also has waived compliance with 42 U.S.C. § 1396(a)(34), which provides that a "State plan for medical assistance must . . . provide that in the case of any individual who has been determined to be eligible for medical assistance under the plan, such assistance will be made available to him" retroactively under specified circumstances.

In light of the Medicaid provisions waived by the Secretary, the takeaway is clear: many of the Medicaid provisions at the heart of the D.C. Action are similar in numerous respects to Medicaid provisions that the Sixth Circuit has held to be enforceable by Medicaid recipients through Section 1983. At a minimum, under *Wheaton* and *Harris*, the Kentucky Defendants have a good-faith basis to bring certain coercive Section 1983 claims against the Commonwealth based upon its enforcement of Kentucky HEALTH. This brings this declaratory-judgment action within the ambit of the coercive-action rule relied upon by the Kentucky Defendants.

The Kentucky Defendants' anticipated rejoinder is that they chose not to sue the Commonwealth and its officials under Section 1983 and that it is unlikely that they will do so. "But that is not the relevant question." *Medtronic*, 134 S. Ct. at 848.

Instead, the question is "the nature of the threatened action in the absence of the declaratory judgment suit." *Id.* Once the Commonwealth begins enforcing Kentucky HEALTH (in or around July 2018), it could be susceptible to a coercive suit under Section 1983. Under *Medtronic*'s coercive-action rule, that suffices to confer jurisdiction for the Commonwealth's officials to bring this declaratory-judgment action. *See id.*

B. The Court should exercise its jurisdiction.

The Kentucky Defendants also argue that the Court should decline to exercise its jurisdiction over this matter. R. Doc. 25-1 at 15–17. The Court possesses "unique and substantial discretion" in determining whether to exercise jurisdiction under the Declaratory Judgment Act. *W. World Ins. Co. v. Hoey*, 773 F.3d 755, 758 (6th Cir. 2014) (citation omitted). In fact, the Sixth Circuit has affirmed a district court's decision to assume jurisdiction over a declaratory-judgment action even though "[a]nother court might have made a different choice—some judges regularly decline jurisdiction in cases like this." *Id.* at 760.

The Sixth Circuit instructs district courts to weigh five non-exclusive factors in exercising their discretion in this regard:

> (1) Whether the declaratory action 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 remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for res judicata;' (4) whether the use of a declaratory judgment action would increase the friction between our federal and state courts and improperly encroach upon state jurisdiction; . . . and (5) whether there is an alternative remedy which is better or more effective.

Id. at 759 (citation omitted). The Sixth Circuit has "never assigned weights to [these factors] when considered in the abstract." *Id.*

Here, the Kentucky Defendants argue that only three of the five factors—two, three, and five—weigh in favor of declining jurisdiction. *See* R. Doc. 25-1 at 16. That is to say, the Kentucky Defendants implicitly acknowledge that factors one and four weigh in favor of this Court making a judicial declaration. With good reason. The Kentucky Defendants cannot dispute that this Court's issuance of a declaratory judgment would settle the parties' controversy (factor one). More to the point, the Kentucky Defendants are asking the Court to decline jurisdiction even though—*by their own admission*—the Court could settle this controversy. The Kentucky Defendants also acknowledge that the fourth factor weighs against their argument—*i.e.*, adjudicating this case will not cause friction between state and federal courts.

The Kentucky Defendants' memorandum focuses most heavily on factor three, claiming that this action "amounts to naked forum shopping." R. Doc. 25-1 at 16. They also place significant weight on factor five, arguing that the D.C. Action is a "better or more effective" place to resolve this controversy. *Id.* However, as the federal government pointed out in briefing in the D.C. Action, "nearly every other case for the past fifty years challenging a state-initiated Section 1115 demonstration project was originally filed in the state in which the project was to be implemented." 1:18-cv-152, R. Doc. 6 at 12 n.4 (collecting cases). In fact, "[c]ases challenging the approval of State plan amendments under the Medicaid Act likewise are exclusively litigated in the local forum." *Id.* (collecting cases). Thus, if any party has engaged in forum

shopping, it is the Kentucky Defendants, not the Commonwealth and its officials. And if any court is best suited to adjudge Kentucky HEALTH's legality, it is a federal court in the state where every one of the Kentucky Defendants lives and where the impact of Kentucky HEALTH will be felt.

The Kentucky Defendants' arguments are further undermined by the fact that they initially chose not to sue the Commonwealth in the D.C. Action. As originally framed, the D.C. Action sought to invalidate and enjoin a Kentucky-initiated program that affects only Kentuckians and sought to do so in a distant courtroom without the Commonwealth as a party. By filing this suit to protect Kentucky HEALTH, it cannot be argued that the Commonwealth—then a non-party in the D.C. Action—somehow engaged in forum shopping, especially given that it filed suit in the Kentucky Defendants' home state and in the only locale where Kentucky HEALTH will be enforced. The Kentucky Defendants' argument that Plaintiffs had the option to intervene in the D.C. Action rather than file this suit in no way undermines this point. *See Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 454 (6th Cir. 2003) ("Stewart argues that Northland could have intervened in the state court action. However, intervening in the state court action would not necessarily have provided a better or more effective alternative remedy. *Northland chose for reasons of its own to have its dispute settled in federal court rather than state court.*" (emphasis added)).

The Kentucky Defendants make much of the fact that the Commonwealth has now intervened in the D.C. Action. However, the Commonwealth intervened only

after it became apparent that the merits of Kentucky HEALTH were going to be briefed in the D.C. Action. As the Commonwealth explained in its intervention motion in the D.C. Action, "the expedited briefing schedule in [the D.C. Action] necessitates that Kentucky intervene now to ensure that, if this case remains here, the Commonwealth's defense of its Section 1115 waiver is fully considered." 1:18-cv-152, R. Doc. 30-1 at 1. The Commonwealth's intervention into the D.C. Action, which was compelled by circumstances beyond its control, takes little to nothing away from the necessity of this suit.

III. Defendants' First Amendment argument is legally insupportable.

In two brief paragraphs, the Kentucky Defendants invoke the First Amendment. R. Doc. 25-1 at 17–18. Although the Kentucky Defendants do not say so, it appears that they are relying on what is known as the *Noerr-Pennington* doctrine, which, generally speaking, protects citizens' rights to petition their government without fear that they will be subjected to money damages for doing so. *See We, Inc. v. City of Phila.*, 174 F.3d 322, 327 (3d Cir. 1999) (describing this doctrine as holding that "defendants' actions in calling [regulatory] violations to the attention of state and federal authorities and eliciting public interest cannot serve as the basis of tort liability" (citation omitted)).

It would stretch the *Noerr-Pennington* doctrine beyond recognition to apply it here. Plaintiffs have not sued the Kentucky Defendants for money damages. R. Doc. 1, Demand for Relief. Nor have Plaintiffs sought to recover attorneys' fees or costs. *Id.* The only relief sought is a declaratory judgment as to the legality of Kentucky

HEALTH. *Id.* It cannot violate the First Amendment simply to seek a judicial declaration about the very topic on which the Kentucky Defendants have petitioned the government through filing the D.C. Action. If anything, this lawsuit *furthers* the Kentucky Defendants' right to petition by seeking a conclusive answer on the issues about which they have petitioned.

The Kentucky Defendants have cited no case law that has applied the *Noerr-Pennington* doctrine in a case that is remotely like this one. All of the Kentucky Defendants' favored cases deal with situations in which money damages—as opposed to solely declaratory relief—were sought against a party who had petitioned the government. *See Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985) (noting that the jury had imposed $18,250 in damages); *We, Inc.*, 174 F.3d at 327 (holding that "the *Noerr-Pennington* doctrine protected individuals from tort liability for their actions"); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 130–32 (1961) (noting that the complaint and counterclaim sought treble damages as well as injunctive relief); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 659 (1965) (noting that money damages were sought). This simple fact conclusively distinguishes the *Noerr-Pennington* doctrine and shows that the First Amendment is not a relevant—much less valid—defense here.

IV. The first-to-file rule should not be applied.

At the very end of their memorandum, the Kentucky Defendants ask the Court to dismiss this action in favor of the D.C. Action under the discretionary "first-to-file"

rule. R. Doc. 25-1 at 20–21. The Kentucky Defendants ordered this argument last for a reason.

In the Sixth Circuit, courts applying the first-to-file rule "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 v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789 (6th Cir. 2016). However, even if all three factors are met, "[i]t is within the discretion of the district court to decline to apply the first-to-file rule." *Id.* at 793. This is because courts have "repeatedly warned" that the first-to-file doctrine "is not a mandate directing wooden application of the rule without regard to extraordinary circumstances, inequitable conduct, bad faith, or forum shopping." *Id.* at 792 (citation omitted).

Applying the first-to-file rule here is plainly inequitable. *See id.* As summarized above, the Kentucky Defendants are all Kentucky residents who receive Medicaid through Kentucky's Medicaid program. R. Doc. 1 ¶¶ 10–25; 1:18-cv-152, R. Doc. 1 ¶¶ 12–26. In addition, in the D.C. Action, the Kentucky Defendants seek to represent not a nationwide class, but a class of only Kentucky Medicaid recipients. *Id.* ¶ 33. Clearly, the effect of any lawsuit challenging Kentucky HEALTH is going to be felt predominantly, if not exclusively, in the Commonwealth. Notwithstanding this fact, the Kentucky Defendants opted to sue in the District of Columbia. Not only that, but the Kentucky Defendants initially excluded the Commonwealth from that lawsuit. The Kentucky Defendants did all of this even though, as the federal government has pointed out, "nearly every other case for the past fifty years

challenging a state-initiated Section 1115 demonstration project was originally filed in the state in which the project was to be implemented." 1:18-cv-152, R. Doc. 6 at 12 n.4 (collecting cases). All of these facts, taken together, demonstrate that the Kentucky Defendants' filing of the D.C. Action was forum shopping intended to keep a Kentucky federal court from passing on the legality of Kentucky HEALTH. *See Baatz*, 814 F.3d at 792 (specifically listing "forum shopping" as something that can overcome the first-to-file rule).

One further point on the equitable considerations governing the first-to-file rule: As Governor Bevin explained in Kentucky's Section 1115 waiver application, Kentucky is in dire need of systemic changes to its Medicaid program:

> The need for change is urgent. Almost twenty percent of our residents live in poverty, we are 47th in the nation for median household income, nearly one-third of Kentuckians are on Medicaid, and our workforce participation is among the worst in the nation at less than 60 percent. Kentucky also ranks third in the nation for drug related fatalities.

R. Doc. 1-1 at 2. In addition to these problems, Governor Bevin explained that Kentucky lacks sufficient funds to continue providing expanded Medicaid. *Id.* Governor Bevin gave this conclusion force of law on the same day that Kentucky HEALTH was approved, directing in an executive order that if Kentucky HEALTH is ultimately enjoined—even in part—by a court, the Commonwealth will have no option but to unwind expanded Medicaid in Kentucky. R. Doc. 1-4 at 4. This is a step that will directly affect over 400,000 Kentuckians who currently receive their health care through expanded Medicaid. R. Doc. 1-1 at 3.

The Kentucky-centric nature of this lawsuit weighs heavily in favor of allowing this case to proceed. This Court acutely understands the crushing problems and circumstances facing the Commonwealth and its residents when it comes to health care, workforce participation, drug use, and many other issues. These are problems that are in many respects unique to our Commonwealth and thus need a solution equally unique to our Commonwealth. Kentuckians need, and deserve, a Kentucky federal court to decide the legality of Kentucky HEALTH. Otherwise, the legality of Kentucky HEALTH, which is determinative of whether over 400,000 Kentuckians can keep their health care through expanded Medicaid, may well be decided in a courtroom far from here. That simple fact cuts decidedly in favor of refusing to apply the first-to-file rule.

CONCLUSION

The Court should deny the Kentucky Defendants' motion to dismiss. Kentucky HEALTH was developed in *Kentucky* for *Kentuckians*, and its validity ought to be decided in *Kentucky*. Plaintiffs have stated viable claims under the Declaratory Judgment Act, and this matter should proceed quickly to resolution so that the Commonwealth can move forward with Kentucky HEALTH or withdraw from expanded Medicaid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed this document with the Court's CM/ECF system on May 7, 2018, which will serve notice of electronic filing on counsel of record.

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