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' REPLY BRIEF IN SUPPORT
OF THEIR MOTION TO DISMISS

In their Motion, Defendants demonstrated that the Commonwealth's unprecedented decision to sue its own residents for filing a lawsuit challenging federal agency action is rife with defects. The Commonwealth lacks Article III standing to assert such claims. There is no Article III jurisdiction for its claims. These claims are not actionable under the Declaratory Judgment Act. And the lawsuit is prohibited both by the First Amendment and the first-to-file rule.

The Commonwealth cannot explain away any of those shortcomings. Instead, it devotes the bulk of its response to criticizing Defendants for 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 for the Commonwealth pursuant to Section 1115 of the Social Security Act. The Commonwealth seems to take particular umbrage that Defendants did so in a Washington D.C. federal court, rather than a Kentucky federal court. But for all its bluster, the Commonwealth fails to show that by filing the D.C. Action against the proper federal defendants, Defendants have proceeded in bad faith. Nor does it explain how the D.C. Action is in any way contrary to the straightforward requirements of the Administrative Procedure Act ("APA").

Put simply, for all its complaints about the D.C. Action and any challenge to Kentucky HEALTH, the Commonwealth cannot distract from the issue presently before this Court: whether the Commonwealth has stated a justiciable claim against sixteen Kentucky residents that lies within the jurisdiction of this Court. Because the answer to that question is simple—no—the Court should dismiss the Commonwealth's complaint.

ARGUMENT

I. Plaintiffs Lack Article III Standing.

It is axiomatic that "as the party invoking federal jurisdiction," the Commonwealth "bears the burden of establishing" the three elements of Article III standing—that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Rather than seeking to show how it satisfies these elements, the Commonwealth urges the Court to ignore the three-part test, arguing, first, that Defendants "have conceded" it has standing and, second, that the test does not apply to claims brought under the Declaratory Judgment Act. Resp. Br. at 8–9, ECF No. 35. These arguments are baseless, but predictable. The Commonwealth seeks to avoid the elements of Article III standing for a simple reason: it cannot meet them.

A. The Commonwealth's Attempts to Skirt Article III Standing Have No Merit.

1. Defendants Cannot and Have Not Conceded the Issue of Standing.

The Commonwealth insists that Defendants have "necessarily conceded" that it has standing because Defendants did not oppose the Commonwealth's intervention in the D.C. Action. Resp. Br. at 8–9. Initially, any claim that Defendants "conceded" Article III standing—whatever the basis for this supposed concession might be—violates the bedrock principle that Article III standing "is jurisdictional and not subject to waiver." *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990) (internal quotation marks omitted; alterations in original).

Yet even if it were possible to create jurisdiction via concession, that has not happened here. First, as the parties seeking to intervene in this case have argued, *see* Ky. Hosp. Mem. In Support of Mot. To Intervene at 7–8, ECF No. 7-1, so long as the plaintiff in a lawsuit has Article III standing, an intervenor is not required to separately meet the standing requirements. *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 488 (6th Cir. 2014).[1] Because it was not necessary for the Commonwealth to have standing to intervene in the D.C. Action, whatever position Defendants took on intervention could never concede the issue of standing in that case, let alone in this one.

Further, standing is necessarily a case-specific inquiry, and Kentucky's standing (or lack thereof) to intervene *as a defendant* in the D.C. Action has no bearing on its standing to serve *as a plaintiff* in this action. So the fact that Defendants did not oppose the Commonwealth's

[1] An exception to this rule exists when the intervenor "seeks additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Here, however, the Commonwealth did not seek *any* relief when it intervened in the D.C. Action.

intervention *as a defendant* in the D.C. Action is simply irrelevant to the question of whether the Commonwealth has standing *as a plaintiff* to maintain a separate action for declaratory relief against Defendants—sixteen private residents of the Commonwealth. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (internal quotation marks omitted)).

In all events, when Defendants informed the Commonwealth they would not oppose its intervention in the D.C. Action, Defendants agreed to do so with the understanding that they did "not concede any facts or legal arguments that may be made in the intervention papers and *continue to believe that the litigation filed by the Governor in the Eastern District of Kentucky is improper*." *See* Motion of Commonwealth to Intervene at 1, *Stewart v. Hargan*, No. 1:18-cv-00152 (D.D.C. Mar. 29, 2018), ECF No. 30 (emphasis added). So Defendants explicitly reserved the right to challenge the basis of this action, including the Commonwealth's lack of standing.

2. That This Action Is Brought Under the Declaratory Judgment Act Does Not Alter or Lessen the Commonwealth's Burden to Show Each Element of Article III Standing.

The Commonwealth seeks to evade the three-element test for Article III standing in another way: by arguing that, in a declaratory judgment action, the three elements of standing are merely a "guide," and the "standing inquiry . . . reduces" to the single question of whether the parties have "'adverse legal interests, of sufficient immediacy and reality.'" Resp. Br. at 9 (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997)). The argument is fanciful.

The Supreme Court has explained that "[t]he requirements of case or controversy are of course no less strict under the Declaratory Judgment Act than in case of other suits." *Altvater v. Freeman*, 319 U.S. 359, 363 (1943). Indeed, when the Supreme Court upheld the constitutionality of the Declaratory Judgment Act, the Court specifically affirmed its constitutionality only "so far

as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 240 (1937).

A claim for declaratory relief therefore must satisfy the "three elements" that comprise the "irreducible constitutional minimum" of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). That is confirmed by the very case the Commonwealth cites. In *Magaw*, the Sixth Circuit held that the plaintiffs had standing to pursue their claim under the Declaratory Judgment Act after applying the three-element test. *See Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 282-83 (6th Cir. 1997). So *Magaw* does not hold that a declaratory judgment plaintiff may disregard the test for Article III standing. It says the opposite.

B. The Commonwealth Has Not Carried Its Burden to Prove Article III Standing.

To the limited extent the Commonwealth addresses Article III standing, the lynchpin of its argument is that it has standing because its "economic interests" would be "[i]mpair[ed]" if the federal court in the D.C. Action invalidates the Section 1115 waiver. Resp. Br. at 10.[2] But general assertions of possible downstream "economic interests" simply do not supply Article III standing.

1. The Commonwealth's Assertion of Possible Future Economic Impairment Is Not An Injury For Purposes of Article III Standing.

That the invalidation of the Section 1115 waiver could have an economic impact on the Commonwealth is not a constitutional "injury in fact." To establish a constitutional injury, the

[2] With respect to redressability, the Commonwealth did not respond to Defendants' argument that its supposed potential injury cannot be redressed by a declaratory judgment from this Court, *see* Mot. to Dismiss at 10, ECF No. 25-1, so at a minimum, that argument against standing is conceded.

plaintiff must show, among other things, that it has suffered "an invasion of a *legally protected* interest." *Lujan*, 504 U.S. at 560 (emphasis added). That means the interest must be "created by law." *Allen v. Wright*, 468 U.S. 737, 763 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."). Even if the Commonwealth could show some concrete harm traceable to the D.C. Action (which it cannot), any interest in implementing a waiver that has been declared unlawful is not a legally protected interest. *Allen*, 468 U.S. at 763; *see also Texas v. Travis Cty.*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017) (threat of legal challenge to a state's law is "not a justiciable injury").

The Commonwealth's complaint asserts only that it has a "substantial controversy" with Defendants because they "have asked a court to declare Kentucky HEALTH null and void and enjoin it." Compl. ¶ 63, ECF No. 1. But the fact that Defendants sued a federal agency does not harm any legally protected interest of the Commonwealth. The Commonwealth has not cited a single case to support its view that a state has a legally protected interest in shielding its treasury from the possible downstream consequences of legitimate challenges to federal agency action. Nor could such a legal interest exist. Defendants' filing of the D.C. Action is both protected First Amendment conduct, *see California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509–11 (1972), and a valid exercise of their statutory rights under the APA, 5 U.S.C. § 702.

2. The Commonwealth's Alleged Potential Economic Impairment Is Not Fairly Traceable to Defendants' Conduct.

Even if the Commonwealth's assertion of possible economic harm is a constitutional injury, the potential future effects of the D.C. Action do not satisfy the second element of standing: traceability. The Commonwealth's own assertions make clear that "[t]he links in the chain of

causation between the [Defendants'] conduct and the asserted injury are far too weak for the chain as a whole to sustain [the Commonwealth's] standing." *Allen*, 468 U.S. at 759.

The Commonwealth alleges it will suffer an economic harm because, without Kentucky HEALTH, the Commonwealth will be "forced" to withdraw from the Medicaid expansion. Resp. Br. at 9–11. But Defendants' filing of the D.C. Action has neither repealed Kentucky HEALTH nor "forced" the Commonwealth to do anything. Compl. ¶ 65 ("*[I]f* the named Kentucky residents who brought the D.C. Action *are ultimately successful in permanently enjoining any part of Kentucky HEALTH* in a court of competent jurisdiction, *Governor Bevin has directed* that the Commonwealth will withdraw entirely from participating in the Medicaid expansion.") First, the Commonwealth's asserted concern will only arise if the federal court presiding over the D.C. Action finds that the Section 1115 waiver was unlawful. Second, Kentucky would withdraw from the Medicaid expansion only if Governor Bevin, contrary to the wishes of the people of the Commonwealth, chooses to do so, as the Commonwealth acknowledges in its complaint. This is fatal to the Commonwealth. The traceability requirement is not met when the plaintiff's prospective future harm is "the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quotation marks and alterations omitted).

It is particularly clear that the second intervening cause—the Governor's threat to withdraw from the Medicaid expansion—severs any causal connection between the D.C. Action and a future termination of Medicaid expansion. Withdrawal is a future "policy decision[] [that] might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614–15 (1989) (plurality). The Commonwealth itself acknowledges that withdrawal would be a policy choice "due to budgetary constraints." Resp. Br. at 4, 10. So by its own admission, the Commonwealth's

supposed injury "depends on the unfettered choices" of government officials whose exercise of discretion "the court[] cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (internal quotation marks omitted); *see Allen*, 468 U.S. at 759 (where plaintiff's asserted "causal connection depended on the decisions [a third party] would make in response to withdrawal of tax-exempt status, . . . those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action").

C. Precedent Supports the Conclusion that the Commonwealth Lacks Standing

The Commonwealth fails to distinguish the cases finding that declaratory-judgment plaintiffs have no standing in analogous circumstances. *See* Resp. Br. at 13–15. For instance, the Commonwealth scoffs at *Plum Creek Timber Co. v. Trout Unlimited*, 255 F. Supp. 2d 1159 (D. Idaho 2003), and *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632 (9th Cir. 2014), because the declaratory judgment plaintiffs in those cases were private companies engaged in "optional commercial activity," as opposed to "a sovereign state." Resp. Br. at 14. But the Commonwealth fails to explain why that makes any difference to the standing analysis. The point in *Plum Creek* and *Shell Gulf of Mexico* is that a party's "interest" in seeing federal agency action upheld against an APA challenge does not confer upon it Article III standing to sue the APA-plaintiff for a declaratory judgment that the agency action was lawful. *See Plum Creek*, 255 F. Supp. 2d at 1164-66; *Shell Gulf of Mexico*, 771 F.3d at 636. That principle applies here.

Indeed, in *Collin County v. Homeowners Association for Values Essential to Neighborhoods*, 915 F.2d 167 (5th Cir. 1990), the declaratory-judgment plaintiff was not a private company, but a county government seeking to construct a highway for which its residents had "drastic need." *Id.* at 168–70. That made no difference. The Fifth Circuit held that the county lacked standing to bring the declaratory judgment action. *Id.* at 170, 172. The Commonwealth

argues *Collin County* is distinguishable because the county there "bore no responsibility" for the challenged federal-agency action, whereas the Commonwealth "developed and proposed Kentucky HEALTH." Resp. Br. at 14–15. But Defendants' APA challenge is to the federal government's *approval of* Kentucky HEALTH. So just as in *Collin County*, Defendants challenged the federal agency's exercise of its "non-delegable" "responsibility" to approve a proposal submitted by a state. *See* 915 F.2d at 171. And as the Fifth Circuit concluded, the plaintiff's "interests" might be "adversely affected" if the citizen group prevails against the federal agency, but that does not constitute a "legally cognizable interest" to seek a declaratory judgment against the citizen group. *Id.*

II. This Court Lacks Jurisdiction Because the Commonwealth Seeks Relief Under Only the Declaratory Judgment Act.

The Commonwealth concedes there is no federal jurisdiction over its claims for declaratory relief unless Defendants "could have brought 'a coercive action' that 'would necessarily present a federal question.'" Resp. Br. 16 (quoting *Medtronic, Inc. v. Mirowsk Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014)). But its attempt to show that Defendants could have sued the Commonwealth under the same legal theory it outlines in its complaint fails completely.

Initially, the Commonwealth once more insists that because Defendants did not object to the Commonwealth's intervention in the D.C. Action, they "have admitted that the Commonwealth is a proper party" to a coercive action. Resp. Br. 17. Not so. Not only did Defendants expressly reserve their right to contest the validity of this case in agreeing not to oppose intervention, Defendants could not have sued the Commonwealth under any of its theories in the D.C. Action—violations of the APA and the Take Care Clause. Such claims can only be brought against federal government entities. Kentucky cannot provide Defendants with any effectual relief from those violations based on the federal government's *grant* of Kentucky's waiver application.

None of the cases the Commonwealth cites are to the contrary. In arguing that "state officials regularly are parties in coercive actions challenging Section 1115 waivers," *id.* at 17–18, the Commonwealth cites only cases in which the Secretary of the federal agency that approved the waiver was a defendant. Resp. Br. 17-18 (citing *Crane v. Mathews*, 417 F. Supp. 532 (N.D. Ga. 1976); *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995); *Wood v. Betlach*, 922 F. Supp. 2d 836 (D. Ariz. 2013)). And although state *officials* were additional defendants in those cases, the claims asserted against them did not challenge the Section 1115 waiver under the APA. Rather, plaintiffs in these cases brought claims against state officials under 42 U.S.C. § 1983 alleging that the notice given to beneficiaries affected by the waiver was insufficient in violation of the Due Process Clause. *Id.*

Similarly, it does not matter that private citizens "regularly challenge states' implementation of their Medicaid programs." Resp. Br. 18. That state officials may be sued if a State implements its Medicaid program in a way that violates federal law does not mean a State or its officials may be sued for implementing its Medicaid program consistent with a validly obtained Section 1115 waiver. When a waiver is granted, the citizens' redress is from the federal entity that granted the waiver, not the State that applied for it. So if the Commonwealth had instituted Kentucky HEALTH without first obtaining a waiver from the federal government, Defendants agree they could have sued the Commonwealth—or, more precisely, its officials—pursuant to *Ex parte Young*, 209 U.S. 123 (1908), and/or § 1983. But because the Commonwealth obtained a waiver permitting Kentucky HEALTH to go into effect, Defendants could only proceed against those who granted the waiver authorizing its implementation—the Secretary and the Department.

Even if the Court has jurisdiction over the Commonwealth's claims for declaratory relief, the Commonwealth fails to explain why it should exercise its discretion to exercise that

jurisdiction. Although the Commonwealth correctly identifies the five factors courts consider when deciding whether to exercise jurisdiction, it fails to explain how any of them counsel in favor of having this Court take up this lawsuit, other than the potential for this lawsuit to resolve the controversy. But the Commonwealth is wrong even about that factor, given the current state of the D.C. Action. There, the parties have fully briefed the merits at summary judgment and the court has indicated it will issue a decision no later than June 30. This case, in contrast, remains at a preliminary stage, where no briefing has occurred on the merits. It is in fact highly unlikely that the resolution of this matter will lead to resolution of this controversy.

In stark contrast is the Commonwealth's futile attempt to rebut Defendants' showing both that this action "is being used merely for the purpose of procedural fencing or to provide an arena for res judicata" and that the D.C. Action is the better and more effective avenue for resolving the parties' dispute. Resp. Br. at 20 (quotation marks omitted). All the Commonwealth can muster in response is an argument that Defendants have engaged in forum shopping by suing a federal agency and its Secretary in a federal court located in Washington, D.C. *Id*. at 22. The argument that it is a contrivance to sue the federal government in the nation's capital is absurd on its face.

III. 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 Commonwealth does not deny that its sole and exclusive motivation for suing Defendants is that they are plaintiffs in a lawsuit the Commonwealth opposes. Nor does the Commonwealth deny that Defendants engaged in First Amendment protected activity when they filed their lawsuit. Instead, the Commonwealth maintains that a State may freely retaliate against its citizens for engaging in First Amendment protected activity so long as it does not seek money damages when doing so. Resp. Br. 23–24.

That is not the law. The Commonwealth cites no case holding that the First Amendment only prohibits retaliatory lawsuits that seek damages.[3] To the contrary, "it is clear that the *Noerr-Pennington* doctrine extends beyond claims for civil damages." *Westlands Water Dist. Distribution Dist. v. Nat. Res. Def. Council, Inc.*, 276 F. Supp. 2d 1046, 1054 (E.D. Cal. 2003); *see also Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1066 (W.D. Wis. 2012) (applying *Noerr-Pennington* to claims for injunctive relief). Nor would it make sense to impose such a limit on First Amendment immunity. "[A]n action seeking a declaratory judgment (regardless of whether, as here, fees and costs are also sought), may force a citizen who petitions the government to incur the expense of defending his position in court and may therefore have precisely the sort of chilling effect on protected petitioning activity that the *Noerr-Pennington* doctrine is designed to prevent." *Westlands Water*, 276 F. Supp. 2d at 1054. Further, although the Commonwealth faults Defendants for not citing "case law that has applied the *Noerr-Pennington* doctrine in a case that is remotely like this one," that is only because the Commonwealth's attack on its citizens First Amendment rights is unprecedented. Resp. Br. at 24.

Incredibly, the Commonwealth claims it has actually "further[ed] Kentucky Defendants' right to petition"—by suing them. *Id.* It should go without saying that hauling sixteen Medicaid recipients into a federal court as defendants in a civil lawsuit does them no favors. It should also go without saying that suing a private citizen because that citizen filed a different federal court

[3] Although the Commonwealth labels Defendants' argument as arising under the *Noerr-Pennington* doctrine, "outside of antitrust, it is a bit of a misnomer to refer to it as the *Noerr-Pennington* doctrine. . . . In our view, it is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. In all other contexts . . . such immunity derives from the right to petition." *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889-90 (10th Cir. 2000) (footnote omitted); *accord Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 859-60 (5th Cir. 2000).

lawsuit violates the First Amendment—a black letter rule that not even the Commonwealth dares to dispute. *See, e.g.*, *Benison v. Ross*, 765 F.3d 649, 660–63 (6th Cir. 2014); *Warmus v. Hank*, 48 F.3d 1220, 1995 WL 82061, at *7, *10 (6th Cir. 1995) (unpublished table decision). A lawsuit in such flagrant disregard for the First Amendment simply is not cognizable in a federal court.

B. The Court Should Dismiss This Action Pursuant To The First-To-File Rule.

The Commonwealth does not deny that the three factors courts consider when applying the first-to-file rule—"(1) the chronology of events, (2) the similarity of the parties involved, and (3) the similarity of the issues . . . at stake"—all apply here. Resp. Br. at 25 (quoting *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789 (6th Cir. 2016)). That limits the Commonwealth to arguing that "equitable considerations" counsel against applying the first-to-file rule in this case. But the Commonwealth's "equitable" arguments cannot overcome the first-to-file principle.

Initially, the Sixth Circuit has explained that "declining to apply the first-to-file rule should be done rarely"—only where "the equities . . . clearly support" doing so. *Baatz*, 814 F.3d at 792–93. Relevant equitable concerns are "inequitable conduct, bad faith, anticipatory suits, or forum shopping." *Id.* at 789 (quotation marks and alterations omitted). But the Commonwealth has failed to show any such egregious behavior. For example, the Commonwealth faults Defendants for "initially exclud[ing] the Commonwealth" from the D.C. Action—a supposed affront the Commonwealth mentions repeatedly. *See* Resp. Br. at 5, 10, 22, 25. But the notion that Defendants engaged in "inequitable conduct [or] bad faith" by maliciously "excluding" the Commonwealth from the D.C. Action is absurd. *Id.* at 25 (quotation marks omitted). That lawsuit challenges the *federal* government's waiver of Medicaid requirements. As with any cause of action under the APA, Defendants thus were required to sue "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. Bad faith cannot be inferred from the

fact that Defendants sued the only proper parties to their causes of action. Further, the Commonwealth's insinuation that Defendants have conspired to stop the Commonwealth from being heard on these issues is pure fiction. As the Commonwealth otherwise is quick to point out, it intervened as a defendant in that litigation *without objection* from Defendants.

Similarly baffling is the Commonwealth's claim that the first-to-file rule may be set aside because this case is "Kentucky-centric" and "the effect of any lawsuit challenging Kentucky HEALTH is going to be felt . . . in the Commonwealth." Resp. Br. at 25–27. First, the issues in the Section 1115 litigation are hardly "Kentucky-centric" or "unique to [the] Commonwealth." *Id.* Again, the D.C. Action challenges federal Executive Branch decisions announcing a new national policy endorsing work requirements on Medicaid recipients and approving the first state request to impose those requirements, which happened to be the Commonwealth's. That is why in denying the federal government's motion to transfer the D.C. Action to this court, the district court in the D.C. Action observed that "[w]hile this suit has an undeniable connection to Kentucky and may affect the lives of many people there, it also carries national consequences, particularly in light of CMS's invitation to other states to use Section 1115 waivers in a similar way." Memorandum Opinion at 14, *Stewart v. Azar*, No. 1:18-cv-00152 (D.D.C. Apr. 10, 2018), ECF No. 42.

But even if this case did involve factual or legal issues "unique" to Kentucky, the Commonwealth has provided no support for its suggestion that the District Court for the District of Columbia is somehow incapable of adjudicating those issues. The very principle on which the first-to-file rule rests is that the "federal courts [are] of equal rank." *Baatz*, 814 F.3d at 789 (quotation marks omitted). The Commonwealth's argument is little more than a thinly veiled attempt to malign the District Court for the District of Columbia by suggesting—with no support—that it cannot fairly and competently decide the lawfulness of the Section 1115 waiver. And the

Commonwealth makes no pretense about this dim view of federal courts and the federal judiciary when it claims that "Kentuckians need, and deserve, a Kentucky federal court to decide the legality of Kentucky HEALTH," lest the issue "be decided in a courtroom far from here." Resp. Br. at 27. Of course, "start[ing] a separate action in a (presumably) more hospitable district" is not a legitimate reason to deviate from the first-to-file rule. *See Baatz*, 814 F.3d at 792.

In sum, the Commonwealth has not raised a single valid equitable consideration that suggests this Court should stray from the first-to-file rule. Certainly, then, this is not "one of those rare cases" in which the "equities . . . clearly support" deviating from the rule. *Id.* at 792–93

CONCLUSION

For the foregoing reasons, as well as those identified in their Motion to Dismiss, Defendants respectfully request that this Court dismiss the Commonwealth's complaint.

Dated: May 29, 2018

Respectfully submitted,

/s/ Anne Marie Regan

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CERTIFICATE OF SERVICE

I certify that on May 29, 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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