UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF THE COMMONWEALTH OF KENTUCKY'S UNOPPOSED MOTION TO INTERVENE AS A DEFENDANT

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INTRODUCTION

The Commonwealth of Kentucky, through Governor Matthew G. Bevin, moves to intervene as a defendant to defend its Section 1115 Medicaid waiver, known as Kentucky HEALTH. No party opposes this motion. Although Kentucky believes this case should be heard in a Kentucky federal court, as explained in its *amicus curiae* brief in support of the federal government's motion to transfer, the expedited briefing schedule in this case 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. Kentucky's ability to intervene as a defendant under either Rule 24(a) and (b) cannot be disputed. This case is barely two months' old, no answer or dispositive motion has been filed, and Plaintiffs and Defendants have conceded that Kentucky has clear interests in the outcome of this litigation.

BACKGROUND

Governor Bevin publicly announced that Kentucky would seek a Section 1115 waiver on June 22, 2016. (ECF No. 1-2 at 45). A state comment period immediately followed, which the Commonwealth extended due to the number of comments received. The Commonwealth ultimately received nearly 1,350 comments and held public hearings in Hazard, Frankfort, and Bowling Green—locations in eastern, central, and western Kentucky. (*Id.* at 45–46). Based in large part upon the input of its citizens, Kentucky made almost 50 changes to its Section 1115 waiver application. (*Id.* at 57–59).

On August 24, 2016, Governor Bevin submitted Kentucky's waiver application to the Secretary of the Department of Health and Human Services. (*Id.* at 2). In so doing,

Governor Bevin explained that circumstances unique to Kentucky drove the need for and determined the content of Kentucky HEALTH, stating that "[w]e believe the Commonwealth of Kentucky should be given the same opportunity as others to reform our Medicaid program to meet the unique needs of our Commonwealth. We need a lifeline." (*Id.* at 3).

The Centers for Medicare and Medicaid Services ("CMS") thereafter solicited comments about Kentucky HEALTH and conducted a careful, comprehensive review of it. (ECF No. 15-1 ¶¶ 37, 39). This deliberative process included many months of negotiating with Kentucky over the Special Terms and Conditions that would govern the implementation, operation, and evaluation of Kentucky HEALTH. (*Id.* ¶ 40). CMS even sent a team to Kentucky to understand how Kentucky HEALTH would work and how the Commonwealth planned to operationalize it.

On January 12, 2018, CMS approved Kentucky HEALTH. (ECF No. 1-3 at 2). Among other things, 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." (*Id.* at 5). That same day, Governor Bevin issued an executive order emphasizing the necessity of Kentucky HEALTH to the Commonwealth:

> [G]iven all of the other financial obligations and commitments imposed upon the Commonwealth under Kentucky's Constitution, federal and Kentucky statutes, regulations and case law, the Commonwealth will not be able to afford to continue to operate its Medicaid expansion program as currently designed in the event any one or more of the components of Kentucky's Section 1115 Waiver and the accompanying Special Terms and

> Conditions are prevented by judicial action from being implemented within the demonstration period set forth in the Special Terms and Conditions.

(ECF No. 25-1 at 4). For this reason, Governor Bevin directed that if any aspect of Kentucky HEALTH is permanently enjoined by a court of competent jurisdiction, with all appeals being exhausted, the responsible Kentucky officials are "to take the necessary actions to terminate Kentucky's Medicaid expansion . . . ." (*Id.*). In other words, if this case ultimately is successful—even in part—in invaliding Kentucky HEALTH, expanded Medicaid in Kentucky, which has over 400,000 enrollees, will be promptly terminated.[1] (*See id.*).

Nevertheless, on January 24, Plaintiffs filed this action against the federal government and various federal officials seeking to invalidate and enjoin Kentucky HEALTH. (ECF No. 1). All of the named Plaintiffs allege that they are Kentucky Medicaid recipients, and they purport to represent a class of Kentucky Medicaid recipients. (*Id.* ¶¶ 12–26, 33). Likely for strategic reasons—more specifically, to try to keep this case out of Kentucky—Plaintiffs did not sue Kentucky or any of its officials, even though Kentucky developed Kentucky HEALTH, is currently implementing it, and soon will be enforcing it. Since instituting suit, Plaintiffs have conceded that states normally are parties in lawsuits that challenge a Section 1115 waiver. (ECF No. 15 at 17).

To protect Kentucky HEALTH, on February 19, 2018, the Commonwealth of Kentucky and two of its officials brought suit in a Kentucky federal court. (ECF No. 15-

[1] Because Kentucky adopted expanded Medicaid through executive action, rather than through legislation, Kentucky can terminate expanded Medicaid through executive action.

1). Other Kentucky stakeholders have already joined that suit—namely, the Kentucky Association of Health Plans, Inc. and the Kentucky Hospital Association. In the meantime, the federal government sought to transfer this action to the Eastern District of Kentucky, a request that Kentucky supported through an *amicus curiae* brief. (ECF Nos. 6, 25). That transfer motion is now fully briefed. (ECF No. 26).

On March 8, 2018, Plaintiffs and the federal government agreed to an expedited briefing schedule that is "[w]ithout prejudice to the pending motion to transfer." (ECF No. 27 at 1–2). Plaintiffs' opening brief is due on March 30, and briefing will be complete by May 24. (*Id.* at 2).

ARGUMENT

This case should be decided by a Kentucky federal court. However, the expedited briefing schedule in this case necessitates this motion to intervene to ensure that, if the Court refuses to transfer this action, Kentucky can fully participate as a defendant to protect its Section 1115 waiver. Like the parties' joint motion for a briefing schedule, this motion to intervene is filed without prejudice to the federal government's motion to transfer. More to the point, in moving to intervene, Kentucky in no way suggests that the federal government's motion to transfer lacks merit. To the contrary, Kentucky firmly believes that transfer is proper. *See Intrepid Potash-New Mexico, LLC v. U.S. Dep't or Interior*, 669 F. Supp. 2d 88, 92–93 (D.D.C. 2009) (permitting intervening party to request transfer under 28 U.S.C. § 1404(a)).

As to the present motion, this is an obvious case for intervention by Kentucky, whether as of right or permissive. No party opposes Kentucky's motion to intervene, and

all parties agree that a state in Kentucky's shoes almost always participates in litigation challenging the state's Section 1115 waiver. (*See* ECF No. 6 at 20 n.4; ECF No. 15 at 17). In addition, this Court routinely allows states to intervene in litigation challenging federal action or decision making that affects the states. *See, e.g.*, *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3–5 (D.D.C. 2017); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 5–8 (D.D.C. 2008); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 2012 WL 12870488, at *1–3 (D.D.C. June 7, 2012) (unpublished order). Intervention therefore should be granted.

I. Intervention of right is proper.

Rule 24(a) governs intervention of right, which turns on four factors:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by the parties.[2]

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotation marks omitted) (citation omitted). Here, all four factors weigh strongly in favor of intervention of right.

[2] A party intervening of right also must establish Article III standing, but "[t]he standing inquiry is repetitive in the case of intervention of right because an intervenor who satisfies Rule 24(a) will also have Article III standing." *Akiachak Native Cmty.*, 584 F. Supp. 2d at 7. Regardless, Kentucky has standing because Kentucky and its citizens will suffer a concrete injury if this litigation is successful in undoing the Secretary's approval of Kentucky HEALTH and permanently enjoining Kentucky's Section 1115 waiver. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732–34 (D.C. Cir. 2003).

A. This motion to intervene is timely.

This motion is timely. It comes at the very beginning of this case before anything has been decided, and Kentucky can intervene as a defendant without disrupting any current deadlines.

The timeliness of a motion to intervene is judged "in consideration of all the circumstances." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (citation omitted). This includes "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Id.* (citation omitted). The "critical factor" in the timeliness analysis is whether "delay in moving for intervention will prejudice the existing parties to the case." *Akiachak Native Cmty*, 584 F. Supp. 2d at 5 (citation omitted).

This case is just getting started. It was filed just over two months ago, the federal government is under no obligation to answer, and no dispositive motions have been filed. (ECF No. 27 at 2). The primary pending motion is the federal government's motion to transfer, which Kentucky has already supported through an *amicus curiae* brief. (ECF No. 25). Under these circumstances, Kentucky's motion to intervene, filed before anything has been decided, is timely. *See Fund for Animals, Inc.*, 322 F.3d at 735 (finding intervention timely where the intervenor "moved to intervene less than two months after the plaintiffs filed their complaint and before the defendants filed an answer"); *Cal. Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43, 47 (D.D.C. 2012) (same); *Akiachak Native Cmty.*, 584 F. Supp. 2d

at 5–6 (finding intervention timely in part because no dispositive motion had been filed); *Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012) (same).

Kentucky's participation in this case will not meaningfully delay its resolution. Kentucky seeks to participate as a defendant to protect its Section 1115 waiver, not to allege claims of its own (as it has done in Kentucky federal court). Kentucky, moreover, is willing to follow the expedited briefing schedule agreed to by Plaintiffs and the federal government, which the Court has adopted. Under this schedule, Kentucky's briefing deadlines would be the same as the federal government's, with (i) an opposition to Plaintiffs' motion(s) and a motion for summary judgment due on April 25 and (ii) a reply brief due on May 24. Thus, if Kentucky is allowed to intervene, Plaintiffs' "asserted need for resolution of the issues in advance of July 1, 2018"—the alleged basis for an expedited briefing schedule—will be preserved to the same extent it currently is.

B. Kentucky has clear interests in this matter.

The second factor governing intervention of right requires Kentucky to have a "legally protected interest in the action." *Jewell*, 320 F.R.D. at 3 (citation omitted). Kentucky's legally protected interests in this matter are undeniable.

Plaintiffs have essentially admitted as much, conceding that Kentucky has "clear interests . . . in the Secretary's decision" to approve Kentucky HEALTH—*i.e.*, the decision that Plaintiffs' complaint spends 8 of 9 counts attacking. (ECF No. 15 at 20; ECF No. 1 ¶¶ 346–408). The federal government has likewise recognized that the Commonwealth "has meaningful ties both to Plaintiffs and the controversy that is the subject of Plaintiffs'

complaint." (ECF No. 6 at 17). In short, all parties acknowledge that Kentucky and its citizens have much at stake in this suit.

Kentucky's interests are more than sufficient to grant intervention of right under Rule 24(a). This Court has previously found a sufficient interest for purposes of intervention of right where the state intervenor is involved in administering part of the challenged program. For example, just last year, the Court found a sufficient interest where state agencies of the intervening state had worked with the federal government in developing the applicable "regulatory framework." *Jewell*, 320 F.R.D. at 4. *Jewell* also relied on the state's "interest in 'protecting its comprehensive regulatory scheme' and 'preserving' what it views as successful regulatory results already obtained . . . ." *Id.* In addition, the D.C. Circuit in *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967), reasoned that an "admixture of national and state policies, attaching national legal force to state policy, yields the corollary that a state official directly concerned in effectuating state policy has an 'interest' in a legal controversy involving [a federal official] which concerns the nature and protection of state policy." *See also Akiachak Native Cmty.*, 584 F. Supp. 2d at 6 (finding that "Alaska has an interest in this action for the purpose of upholding the terms of [a settlement agreement], to which it was a party").

Judged by this standard, Kentucky's interests warrant intervention of right. As Kentucky explained in its *amicus curiae* brief, a Section 1115 Medicaid waiver is a state-initiated and state-administered program that responds to the unique situation on the ground in the state. (ECF No. 25 at 6–9). In developing Kentucky HEALTH, Kentucky spent thousands of hours creating and revising its waiver application to ensure that it is

"uniquely designed for the specific challenges facing Kentucky." (*Id.* at 6 (citing ECF No. 1-2 at 7)). And after submitting its waiver application, Kentucky spent months working with CMS, who sent a team of federal officials to Kentucky, to refine Kentucky HEALTH even further before approving it. (*Id.* at 5). Kentucky's work on Kentucky HEALTH continues even now, as Kentucky officials are currently implementing Kentucky HEALTH in advance of its rollout. For all of these reasons, Kentucky has an obvious interest in fully enforcing Kentucky HEALTH and defending it against legal challenge.

This Court also has recognized that financial interests can provide the requisite interest for purposes of intervention of right by a state. *See Jewell*, 320 F.R.D. at 4. Governor Bevin's January 12 executive order establishes just such an interest. As Governor Bevin directed via executive order, the *only* way Kentucky can afford to continue participating in expanded Medicaid is through Kentucky HEALTH. (ECF No. 25-1 at 4). That is to say, Kentucky cannot afford the status quo of simply continuing expanded Medicaid. (ECF No. 1-2 at 2 ("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.")). The budgetary realities of expanded Medicaid establish a sufficient financial interest to justify intervention of right to allow Kentucky to defend the version of expanded Medicaid that it can afford.

C. This action could impair or impede Kentucky's ability to protect its interests.

The third intervention-of-right factor requires Kentucky to be "so situated that the disposition of the action may as a practical matter impair or impede its ability to protect

[its] interest." *Fund for Animals, Inc.*, 322 F.3d at 731 (quoting Fed. R. Civ. P. 24(a)). This factor turns on "the practical consequences of denying intervention, even where the possibility of future challenge . . . remain[s] available." *Id.* at 735 (internal quotation marks omitted) (citation omitted) (recognizing that even if the intervenor could challenge the decision in a subsequent lawsuit, reversing an unfavorable ruling in another case would be "difficult and burdensome").

In this lawsuit, Plaintiffs ask the Court to declare that the Secretary's approval of Kentucky HEALTH "violates the Administrative Procedure Act, the Social Security Act, and the United States Constitution." (ECF No. 1 at Prayer for Relief ¶ 3). They also ask the Court to "[p]reliminarily and permanently enjoin Defendants from implementing . . . the approval of the Kentucky HEALTH waiver application."(*Id.* at Prayer for Relief ¶ 4). If some or all of this relief is granted, Kentucky's ability to enforce Kentucky HEALTH, and thereby protect its interests and those of its citizens, will undoubtedly be impaired and impeded. In fact, in such a circumstance, under Governor Bevin's January 12 executive order, Kentucky will no longer have expanded Medicaid in any form. *See Akiachak*, 584 F. Supp. 2d at 7 (finding this factor satisfied where a lawsuit "would abrogate Alaska's . . . regulatory authority" and "may disturb the rights of the parties under [a settlement agreement]"); *see also Jewell*, 320 F.R.D. at 4 ("[I]f Plaintiffs were successful in this case, the economic and regulatory interests of Wyoming, Colorado, and Utah would likely be impaired. Other courts have found that similar situations justified intervention.").

D. Kentucky's interests are not adequately represented.

The final factor governing intervention of right requires Kentucky to "show that the existing parties do not adequately represent [its] interests." *Id.* Kentucky's burden in this regard is "minimal." *Id.*

Although the federal government is already defending Kentucky HEALTH, the federal government does not adequately represent Kentucky's distinct interests. Generally speaking, "the tactical similarity of the present legal contentions of the parties does not assure adequacy of representation or necessarily preclude the intervenor from the opportunity to appear in its own behalf." *Fund for Animals*, 322 F.3d at 737 (citation omitted). In fact, this Court recently found that "[s]everal previous cases have permitted intervention by states when the federal government was already a party." *Jewell* 320 F.R.D. at 4–5 (collecting cases). This is because while the federal government's "duty runs to the interests of the American people as a whole, the state-intervenors will primarily consider the interests of their own citizens." *Id.* at 5. The Court also has acknowledged that states "may have unique sovereign interests not shared by the federal government." *Id.*

This is true here. As Kentucky explained in its waiver application, Kentucky HEALTH was created with Kentucky's and its citizens' specific needs and problems in mind. (*See* ECF No. 1-2 at 7 ("Kentucky HEALTH is uniquely designed for the specific challenges facing Kentucky . . . .")). According to Governor Bevin, Kentucky needs a Section 1115 waiver because, among other reasons, "[a]lmost twenty percent of our residents live in poverty, we are 47th in the nation for median household income, nearly

one-third of Kentuckians are on Medicaid, and our workforce participation is among the worst in the nation at less than 60 percent." (*Id.* at 2). As explained above, budgetary realities in Kentucky also created Kentucky's need for a Section 1115 waiver. (*Id.*).

Although the federal government is certainly aware of Kentucky's unique problems and needs and took them into account in approving Kentucky HEALTH, only Kentucky can fully present its state-specific defense of Kentucky HEALTH. As the architect, implementer, and soon-to-be enforcer of Kentucky HEALTH, Kentucky naturally approaches this case differently in certain respects than the federal government. While the federal government is of course committed to protecting the interests of all states under Section 1115 of the Social Security Act, the Commonwealth's narrower interests in protecting *only* itself and its citizens—an interest that only Kentucky can fully defend—justifies intervention here.

II. Permissive intervention should be granted.

If the Court determines that intervention of right is improper, the Court should allow Kentucky to intervene permissively under Rule 24(b). "As its name would suggest, permissive intervention is an inherently discretionary enterprise." *E.E.O.C. v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Permissive intervention is appropriate on a showing of "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Id.* Rule 24(b) "provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact," and

intervention is permitted even in "situations where the existence of any nominate 'claim' or 'defense' is difficult to find." *Nuesse*, 385 F.2d at 704 (citation omitted).

Kentucky meets all three requirements for permissive intervention. First, subject matter jurisdiction is proper because Kentucky seeks to intervene to defend Kentucky HEALTH as consistent with federal law. *See, e.g.*, *Int'l Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 347 (1st Cir. 1989) ("When a state government seeks to intervene under this section of Rule 24(b) as a party defendant, independent jurisdiction would exist when the state seeks to defend the statute against a challenge based on federal law."). Second, as set forth above, the Commonwealth's motion to intervene is timely and will not delay this action. And third, Kentucky's defense of Kentucky HEALTH as consistent with the Social Security Act, the Administrative Procedure Act, and the United States Constitution obviously will allege questions of law or fact in common with this case.

In addition, Rule 24(b)(2) specifically permits permissive intervention by "a state or federal governmental official charged with administering a state statute or regulation on which any party relies for his claim or defense." *Nuesse*, 385 F.2d at 704. More to the point, Rule 24(b)(2) "considers the governmental application [for intervention] with a fresh and more hospitable approach." *Id.* Rule 24(b)(2) applies where a "party's claim or defense is based on: (A) a statute or executive order administered by the [intervening] officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." This aspect of Rule 24(b)(2) is implicated here because Plaintiffs challenge Kentucky HEALTH, which is a program authorized by the Social Security Act that will be administered by the Commonwealth of Kentucky. *See*

Nuesse, 385 F.2d at 706 ("While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation.").

CONCLUSION

For the foregoing reasons, the Court should grant the Commonwealth's unopposed motion to intervene as a defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 29, 2018 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the following:

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