COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2023-SC-0196

ARKK PROPERTIES, L.L.C.; B.J. NOVELTY, INC.; THE CUE CLUB, LLC; HOME RUN, LLC; FEDERAL POST NO. 313, THE AMERICAN LEGION, DEPARTMENT OF KENTUCKY, INC.; MFPALMINVESTMENTS, LLC; VINCENT MILANO; TANYA MILANO; and POM OF KENTUCKY, LLC — PETITIONERS

v.

DANIEL CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky; KELLY STEPHENS, in her official capacity as Clerk of the Supreme Court of Kentucky; KATHRYN MARSHALL, in her official capacity as Franklin Circuit Court Clerk; and PHILLIP SHEPHERD, in his official capacity as Judge of the Franklin Circuit Court — RESPONDENTS

ON PETITION FOR SUPERVISORY WRIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, KENTUCKY EQUAL JUSTICE CENTER, & KENTUCKY RESOURCES COUNCIL, INC. FOR LEAVE TO FILE *AMICI CURIAE* BRIEF SUPPORTING PETITIONERS

Submitted by:

COREY M. SHAPIRO
Ky Bar. No. 96897
HEATHER GATNAREK
Ky Bar No. 95113

American Civil Liberties Union of Kentucky Foundation
325 W. Main Street, Suite 2210
Louisville, Kentucky 40202
Telephone: (502) 581-9746

JULIE A. MURRAY*
Pro hac vice, PH31367872

American Civil Liberties Union Foundation, Inc.
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2326

MATTHEW R. SEGAL*
Pro hac vice, PH31368060

American Civil Liberties Union Foundation, Inc.
One Center Plaza, Suite 850
Boston, MA 02108
Telephone: (617) 299-6664

* Motion for admission *pro hac vice* forthcoming

Counsel for Amici Curiae

Pursuant to Kentucky Rule of Appellate Procedure ("RAP") 34(B)(1), the American Civil Liberties Union of Kentucky ("ACLU-KY"), Kentucky Resources Council, Inc., and the Kentucky Equal Justice Center move for leave to file a brief as *amici curiae* in support of the Petition for a Supervisory Writ declaring Kentucky Senate Bill 126 ("SB 126") unconstitutional. In support of their motion, *amici* state the following:

1. *Amici* are non-profit organizations who frequently represent Kentuckians in bringing constitutional challenges in state courts across the Commonwealth. Their clients will be harmed by SB 126's unconstitutional transfer process, and the challenged law will hinder *amici*'s ability to serve Kentuckians in need of legal services.

2. *Amici*'s brief will provide the Court with context and argument that the parties' briefs likely will not. The brief offers a detailed look at how individual Kentuckians, particularly those with low incomes or who face other barriers, will be particularly negatively impacted by SB 126 and provides useful data on access-to-justice barriers that SB 126 will exacerbate. The brief also explains how SB 126 is a viewpoint-based law that burdens the fundamental free-speech rights of Kentuckians, and that for this reason, along with those discussed in the Petition, the Court should apply strict scrutiny when considering Petitioners' equal protection claim.

3. Petitioner's Petition for Supervisory Writ was accepted and docketed on May 8, 2023. Pursuant to RAP 34, *amici* are submitting this motion and their *amicus curiae* brief within 15 days of the filing of the initial brief in this action.

4. *Amici* respectfully submit that granting this motion and accepting for filing the proposed brief will contribute to the Court's overall analysis of the issues in deciding whether to enter a supervisory writ declaring SB 126 unconstitutional.

On these grounds, *amici* respectfully request that this Court grant the motion for leave to file the attached proposed *amici curiae* brief on May 23, 2023.

May 23, 2023

Respectfully submitted,

/s/ Heather Gatnarek
COREY M. SHAPIRO
Ky Bar. No. 96897
HEATHER GATNAREK
Ky Bar No. 95113
American Civil Liberties Union of Kentucky Foundation
325 W. Main Street, Suite 2210
Louisville, Kentucky 40202
Telephone: (502) 581-9746
corey@aclu-ky.org
heather@aclu-ky.org

JULIE A. MURRAY*
Pro hac vice, PH31367872
American Civil Liberties Union Foundation, Inc.
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2326
jmurray@aclu.org

MATTHEW R. SEGAL*
Pro hac vice, PH3136806
American Civil Liberties Union Foundation, Inc.
One Center Plaza, Suite 850
Boston, MA 02108
Telephone: (617) 299-6664
msegal@aclu.org

Counsel for Amici Curiae

**Pro hac vice* motion forthcoming

CERTIFICATE OF SERVICE:

I certify that on May 23, 2023, I caused a true and accurate copy of the foregoing to be filed with the Court and served on the following by email or first-class mail:

J. Guthrie True
Richard M. Guarnieri
124 Clinton Street
Frankfort, KY 40601
gtrue@truelawky.com
rguar@truelawky.com

R. Kenyon Meyer
101 S. Fifth St., Suite 2500
Louisville, KY 40202
kenyon.meyer@dinsmore.com

M. Evan Buckley
100 West Main Street, Suite 900
Lexington, KY 40507
evan.buckley@dinsmore.com

Counsel for Petitioners

Judge Phillip Shepherd
Judge, Franklin Circuit Court
Franklin County Courthouse
222 St. Clair Street
Frankfort, KY 40601

Kelly Stephens
Supreme Court of Kentucky Clerk
State Capitol, Room 235
700 Capital Avenue
Frankfort, KY 40601

Kathryn Marshall
Franklin Circuit Court Clerk
222 St. Clair Street
Frankfort, KY 40601

Respondents

Christopher Thacker
Aaron J. Silleto
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
christopher.thacker@ky.gov
aaron.silleto@ky.gov

Counsel for Respondent Attorney General

/s/Heather Gatnarek
HEATHER GATNAREK
Counsel for Amici Curiae

SUPREME COURT OF KENTUCKY
Case No. 2023-SC-0196

ARKK PROPERTIES, L.L.C.; B.J. NOVELTY, INC.; THE CUE CLUB, LLC; HOME RUN, LLC; FEDERAL POST NO. 313, THE AMERICAN LEGION, DEPARTMENT OF KENTUCKY, INC.; MFPALMINVESTMENTS, LLC; VINCENT MILANO; TANYA MILANO; and POM OF KENTUCKY, LLC, *Petitioners*,

v.

DANIEL CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky; KELLY STEPHENS, in her official capacity as Clerk of the Supreme Court of Kentucky; KATHRYN MARSHALL, in her official capacity as Franklin Circuit Court Clerk; and PHILLIP SHEPHERD, in his official capacity as Judge of the Franklin Circuit Court, *Respondents*.

On Petition for Supervisory Writ

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, KENTUCKY EQUAL JUSTICE CENTER, AND KENTUCKY RESOURCES COUNCIL, INC. IN SUPPORT OF PETITIONERS

COREY M. SHAPIRO
Ky Bar. No. 96897
HEATHER GATNAREK
Ky Bar No. 95113

American Civil Liberties Union of Kentucky Foundation
325 W. Main Street, Suite 2210
Louisville, Kentucky 40202
Telephone: (502) 581-9746

JULIE A. MURRAY*
Pro hac vice, PH31367872

American Civil Liberties Union Foundation, Inc.
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2326

MATTHEW R. SEGAL*
Pro hac vice, PH31368060

American Civil Liberties Union Foundation, Inc.
One Center Plaza, Suite 850
Boston, MA 02108
Telephone: (617) 299-6664

* *Pro hac vice motion forthcoming*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on May 23, 2023, I caused a true and accurate copy of this brief to be filed with the Court and served on the following by email or first-class mail:

J. Guthrie True
Richard M. Guarnieri
124 Clinton Street
Frankfort, KY 40601
gtrue@truelawky.com
rguar@truelawky.com

R. Kenyon Meyer
101 S. Fifth St., Suite 2500
Louisville, KY 40202
kenyon.meyer@dinsmore.com

M. Evan Buckley
100 West Main Street, Suite 900
Lexington, KY 40507
evan.buckley@dinsmore.com

Counsel for Petitioners

Judge Phillip Shepherd
Judge, Franklin Circuit Court
Franklin County Courthouse
222 St. Clair Street
Frankfort, KY 40601

Kelly Stephens
Supreme Court of Kentucky Clerk
State Capitol, Room 235
700 Capital Avenue
Frankfort, KY 40601

Kathryn Marshall
Franklin Circuit Court Clerk
222 St. Clair Street
Frankfort, KY 40601

Respondents

Christopher Thacker
Aaron J. Silleto
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
christopher.thacker@ky.gov
aaron.silleto@ky.gov

Counsel for Respondent Attorney General

/s/ Heather Gatnarek
HEATHER GATNAREK
Counsel for Amici Curiae

CERTIFICATE OF WORD COUNT REQUIRED BY RAP 34(B)(4)

The undersigned certifies that this document complies with the word-limit of RAP 34(b)(4) because, excluding the parts of the document exempted by RAP 15(D), this document contains 3,778 words.

/s/ Heather Gatnarek
HEATHER GATNAREK
Counsel for Amici Curiae

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE

The **ACLU of Kentucky** is a statewide, nonprofit organization dedicated to protecting and advocating for the civil rights and civil liberties of Kentucky residents under the state and federal constitutions and civil rights laws. It has an interest in this case because it represents clients challenging the constitutionality of state laws and state actions. *See, e.g.*, *EMW Women's Surg. Ctr. v. Cameron*, No. 2022-SC-0329-TG (Jefferson Cir. Ct. filed June 27, 2022); *Ky. Dep't of Public Advocacy v. Ky. Dep't of Corrs*, No. 2021-CI-806 (Franklin Cir. Ct. filed Oct. 21, 2021). Its clients include individuals who, due to indigency or other challenges, face litigation barriers that would be exacerbated by having to litigate their claims in random circuits across the Commonwealth due to another litigant's invocation of the challenged statute. *See, e.g.*, *Doe v. Thornbury*, No. 3:23-CV-230-RGJ (W.D. Ky. filed May 3, 2023) (challenging constitutionality of a state law on behalf of seven pseudonymous transgender clients who are minors); *Thurman v. Crews*, No. 5:22-cv-00109-DCR (E.D. Ky. filed Apr. 29, 2022) (representing an incarcerated individual alleging violations of his constitutional rights).

The **Kentucky Equal Justice Center** ("KEJC") is a nonprofit law firm and advocacy organization devoted exclusively to representing Kentuckians in poverty and their interests in Kentucky's communities, courtrooms, and Capitol. KEJC regularly represents people in Franklin Circuit Court in appeals of administrative actions and in challenges to the constitutionality of state action. *See, e.g.*, *Langdon v. Beshear*, No. 21-CI-00443 (Franklin Cir. Ct. filed June 2, 2021) (challenging Governor's decision not to provide notice to people whose applications seeking voting rights restoration he deemed as denied); *Sterne v. Adams*, No. 20-CI-00538 (Franklin Cir. Ct. filed July 7, 2020) (seeking

to preserve "vote by mail" for the November 2020 general election under the constitutional guarantee in Kentucky that our elections "shall be free and equal"). Almost by definition, KEJC's clients are among the most time-constrained and financially-constrained people in Kentucky. As such, allowing state actors to force KEJC's clients to litigate in random and likely far-off courts in Kentucky would pose a significant barrier to vindicating (or even deciding to try to protect and vindicate) their constitutional rights.

The **Kentucky Resources Council, Inc.** (the "Council") is a statewide, nonprofit advocacy organization incorporated under the laws of the Commonwealth of Kentucky and in good standing. The Council has an interest in this case because it represents clients challenging the constitutionality of state laws and other state actions. Since 1984, the Council has provided legal assistance across the Commonwealth on energy and environment matters, including many cases litigating the rights of our residents under the Kentucky Constitution. The Council's clients include individuals and community groups who cannot afford or find representation, and who face litigation barriers that would be exacerbated by having to litigate their claims in random circuits across the Commonwealth.

No other person or entity beyond *amici* paid for or authored any part of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition in this case concerns Kentucky Senate Bill 126 ("SB 126" or the "Act"), a recent law that imposes new litigation burdens only on those Kentuckians who "challenge the constitutionality" of a state statute or similar law, and who seek relief from a state defendant in court. Under SB 126, any party to a covered lawsuit has a unilateral right to force transfer of the case from the circuit court where it was properly filed to a randomly chosen circuit *anywhere* else in the state. That party need not demonstrate cause to justify the transfer, which can occur weeks—or even months or years—after a case is filed. And the Act's transfer process lacks all the guardrails typically applicable to a change-of-venue action, including requirements for a verified motion justifying transfer and an evidentiary hearing. *See* KRS § 452.030; *id.* § 452.050 (requiring that transfer be to the circuit court "of the adjacent county most convenient to the parties, their witnesses and their attorneys, and to which there is no valid objection").

In these ways, SB 126 operates as a ready device for state officials to selectively dissuade and punish Kentuckians who challenge unconstitutional state action, and to deprive those litigants—and only them—of traditional safeguards afforded to all other litigants. The ACLU of Kentucky agrees with petitioners that SB 126 violates numerous provisions of the Kentucky Constitution and is therefore void. It submits this brief to expand on two aspects of SB 126 that underscore its unconstitutionality.

First, while the petition in this case involves numerous corporate and other organizational plaintiffs, many of the litigants affected by SB 126 will be individual Kentuckians fighting for their constitutional rights. For them—many of whom have low incomes or face other barriers to court access—the Act will dramatically increase the cost

and uncertainty involved in litigation. The law will invariably chill Kentuckians from vindicating their constitutional rights, discourage legal representation in constitutional challenges, and further burden courts already struggling to meet the needs of unrepresented parties.

Second, under Kentucky's equal-protection guarantee, Ky. Const. § 3, a law that treats two classes of similarly situated individuals differently is subject to strict scrutiny if it burdens fundamental rights. *Beshear v. Acree*, 615 S.W.3d 780, 815–16 (Ky. 2020). In assessing petitioners' equal-protection claim, the Court should consider not only SB 126's impact on the fundamental rights to due process and to petition the courts (as petitioners argue), but also on rights to free expression under the Kentucky Constitution, §§ 1(4) and 8. Because SB 126 singles out litigants based on the viewpoint they express—specifically, the viewpoint that the state has violated the constitution—and targets those litigants for unfavorable treatment, it unquestionably burdens the free-expression rights of Kentuckians and provides yet another basis for this Court to apply strict scrutiny.

ARGUMENT

I. SB 126 Will Further Impede Access to Justice in Kentucky.

As the Kentucky Access to Justice Commission recently found, civil legal resources are "severely lacking for those in need in Kentucky."[1] Direct civil legal services "operate at overload capacity to serve those who meet limited poverty and case-type eligibility requirements." *Id.* And access to "private counsel remains cost-prohibitive to far more Kentuckians than can be served by legal aid." *Id.*

[1] Kentucky Access to Justice Commission, *Justice in Action: Kentucky's Justice for All Strategic Action Plan* 3 (Mar. 2021) (hereinafter, "*Justice in Action*"), https://kycourts.gov/Legal-Help/Documents/jfa_strategicplan_march2021.pdf.

In numerous ways, SB 126 will exacerbate these barriers to justice for Kentuckians whose constitutional rights are violated by state officials.

First, under SB 126, Kentuckians must now determine whether to bring their constitutional claims without any reliable way of knowing at the outset where their litigation will occur (and hence where they might wish to retain counsel) and at what cost. Faced with the barriers that SB 126 imposes, many Kentuckians may be forced to forgo vindication of their rights altogether, knowing that they cannot possibly navigate a court far from home and arrange the necessary travel, child care, and time off from work that any court appearances would require. Others with both statutory and constitutional claims may be forced to forgo the latter, so as to preserve their ability to litigate close to home.[2]

Second, even if individuals are willing and otherwise able to bring their constitutional claims despite SB 126's application, the Act may make it more difficult, and in many cases, impossible for them to find counsel. Two-thirds of all licensed attorneys in Kentucky reside in only 4 of 120 counties (Kenton, Franklin, Fayette, and Jefferson), all of which are in a compact part of the state with a relatively high population density.[3] It is one thing to find a private attorney to take a case in their community pro bono or for a reduced fee; it is quite another to find an attorney to do so and to travel four or more hours each way for every in-person hearing. With the end of pandemic-related accommodations allowing routine virtual participation, random reassignment of cases potentially hundreds

[2] Individuals with state constitutional claims may not be able to bring their state-law claims in a federal court close to home either, since courts may find that doctrines of sovereign immunity and abstention act to bar or stay these claims. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984).

[3] Calculations based on data published in Am. Bar Ass'n, *ABA Profile of the Legal Profession 2020*, at 14 (July 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.

of miles from where they are filed will impose substantial travel-related costs, and in turn a significant barrier to vindication of Kentuckians' constitutional rights. *See generally* Ky. Ct. of Just., *Remote Court: General Instructions* (2022), https://kycourts.gov/Courts/Pages/Remote-Court-Information.aspx. And even where videoconferencing remains an option for court appearances, studies have found that it can have adverse impacts on fairness and access to justice in court. *See* Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Ctr. for Just. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

SB 126 would also drain the resources of nonprofit organizations around the state, forcing them to devote substantially more time to each transferred case—thereby reducing their overall capacity to assist clients and the availability of legal resources to those in need in Kentucky.

Third, SB 126 will further tax the state court system. Because SB 126 authorizes case transfers to be initiated without cause weeks after filing—or in some cases, months or years—it will lead to sudden disruptions after a court has already invested substantial time overseeing and developing familiarity with a case. And once a transfer is initiated, court staff will need to spend additional time working with unrepresented parties, who already struggle to navigate court access without knowledge of litigation procedures and who could now have their cases transferred to distant areas of the state. *Justice in Action* Report 6.

Moreover, court clerks and judges will have to contend with disputes over the propriety of a transfer, further burdening their resources. For example, SB 126 provides no guidance as to how (or even whether) a court may determine if the Act's terms apply to a

given case. *See, e.g.*, AOC-104, Civil Case Cover Sheet (Mar. 2023), https://kycourts.gov/Legal-Forms/Legal%20Forms/104.pdf (directing litigants to check the type of claim in the case that they "consider most important," only one of which directly mentions constitutional claims). Should there be a dispute over whether, for example, a defendant entity is a state agency, or whether individual defendants whose names have not yet been discovered are state officials, SB 126 will encourage further time-consuming litigation.

These added burdens on the courts will be significant. The organization and staffing of the judicial circuits are adjusted to reflect historical and projected workload, and random imposition of new and often complex cases involving constitutional issues upon circuits other than those in which the actions are filed will disrupt this Court's orderly management of the judicial branch in a manner contrary to Section 116 of the Kentucky Constitution.

For all of these reasons, SB 126 threatens to do the opposite and erect new barriers to civil justice in the Commonwealth.

II. Strict Scrutiny Applies to Petitioners' Equal-Protection Claim for the Additional Reason That SB 126 Burdens Fundamental State Speech Rights.

Under Kentucky's equal-protection guarantee, Ky. Const. § 3, "[s]trict scrutiny applies to a statute challenged on equal protection grounds if the classification used adversely impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Beshear*, 615 S.W.3d at 815–16. As petitioners explain, strict scrutiny applies to an equal protection claim in this context irrespective of "whether the [classification's] burden [on] or interference [with the fundamental right], in and of itself, violates" that right. Pet. 21. In this case, SB 126 burdens not only Kentuckians' rights to due process and to petition the government, as petitioners argue, *see id.* at 28–34, 37–40, but also their "fundamental state . . . constitutional free speech rights," *J.C.J.D. v. R.J.C.R.*,

803 S.W.2d 953, 956 (Ky. 1991) (applying strict scrutiny to a freestanding claim under Section 8 of the Kentucky Constitution); *see also Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009) (describing "right to free speech" as a quintessential fundamental right). Accordingly, strict scrutiny applies to petitioners' equal protection claim.

1. The Kentucky Constitution protects free speech through two separate provisions. Section 1(4) provides that "[a]ll men" have an "inherent and inalienable right[] … [to] freely communicating their thoughts and opinions." Section 8 guarantees that "[e]very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." To date, this Court has left open the question to what extent the state constitution's free-speech guarantee "affords a greater protection independent of" its federal counterpart. *Champion v. Commonwealth*, 520 S.W.3d 331, 334 n.7 (Ky. 2017); *see also, e.g.*, *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 312 (Ky. 2010) (stating that "the unmistakable clarity of Section 8 may compel, in certain instances, greater protection to speech than the First Amendment").

Although Sections 1(4) and 8 (hereinafter, the "expression provisions") are "similar[]" to the First Amendment in some respects, *J.C.J.D.*, 803 S.W.2d at 954, they use distinct language. Whereas the First Amendment speaks in negative terms—the government "shall make no law … abridging the freedom of speech," U.S. Const., amend. I—the Kentucky Constitution lays out a broad, positive right to "communicating [one's] thoughts and opinions," Ky. Const. § 1(4). *See* Jennifer Friesen, *State Constitutional Law* § 5.01 n.8 (4th ed. 2015) (describing provisions like Kentucky's as "affirmative, open-ended declarations" that leave open the possibility of enforcement "against private parties

as well as government"). In addition, by setting out a positive right to speak freely, the Kentucky Constitution makes clear that it covers all manner of regulations that burden or otherwise inhibit free expression, even if those actions do not directly restrict speech. And by guaranteeing a right to free speech "on any subject," Section 8 of the Kentucky Constitution guards against the adoption of wholesale exemptions to its coverage, at least beyond those recognized as historically established exceptions in Kentucky. *See, e.g.*, *Moser v. Frohnmayer*, 845 P.2d 1284, 1285 (Or. 1993) (applying this interpretation of a similar provision of the Oregon Constitution that protects speech on "any subject whatever").

2. Restrictions on speech in anticipation of or during litigation implicate rights to free expression, as interpreted by this Court and as evidenced by analogous U.S. Supreme Court case law.

For example, in *Curd v. Kentucky State Board of Licensure for Professional Engineers & Land Surveyors*, which involved disciplinary action against an expert witness for his speech in court, this Court held that expert witness opinion testimony was entitled to some measure of First Amendment protection. *See* 433 S.W.3d 291, 305–06 & n.44 (Ky. 2014) (collecting cases). While this Court did not address the Kentucky Constitution's expression provisions, it emphasized that a state cannot, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 305 (cleaned up). It also warned that applying "[b]road prophylactic rules in the area of free expression" to testifying experts "could certainly result in a chilling effect on the candor of expert testimony." *Id.* at 305–06.

Likewise, in *Velazquez v. Legal Services Corp.*, the U.S. Supreme Court invalidated a law that restricted the types of advice and argumentation available to attorneys and their indigent clients under a government-funded legal-services program. 531 U.S. 533, 548 (2001). The funding limitation prohibited litigants and their attorneys from raising constitutional and other challenges to existing welfare law. *Id.* at 538–39. The Court concluded that the First Amendment did "not permit the Government to confine litigants and their attorneys" in this way, in effect "exclud[ing] certain vital theories and ideas" available to them in litigation. *Id.* at 548; *see also id.* at 545 (emphasizing that the restriction would limit how an attorney could respond to judicial questioning).

And in numerous other cases, this Court and the U.S. Supreme Court have recognized that state disciplinary actions against attorneys and judges based on their speech in advance of litigation are subject to review for their consistency with free-expression guarantees. *See, e.g.*, *J.C.J.D.*, 803 S.W.2d at 956 (holding that ethics charges against a supreme court justice based on legal and political statements he made during his campaign violated the Kentucky Constitution and the First Amendment); *In re Primus*, 436 U.S. 412, 422, 428 (1978) (invalidating disciplinary action against bar member who communicated "an offer of free assistance by attorneys associated with the ACLU," and emphasizing that for the ACLU, "litigation is … a form of political expression and political association" (internal quotation marks omitted)); *NAACP v. Button*, 371 U.S. 415, 429, 434 (1963) (recognizing that public-interest litigation "is a means for achieving … lawful objectives" that serves as "a form of political expression" and may not be curtailed to "smother[] all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority").

3. In light of the precedent discussed above, SB 126 burdens the protected speech of Kentuckians who bring constitutional challenges, and strict scrutiny is appropriate. SB 126 is, in fact, even more intrusive on Kentuckians' speech because its application depends on the content of a litigant's complaint, and the specific viewpoint expressed therein. *Champion*, 520 S.W.3d at 338; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (describing viewpoint discrimination as "the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker" and emphasizing that it is "a more blatant and egregious form of content discrimination" (internal quotations omitted)).

Under SB 126, for example, plaintiffs who bring non-constitutional claims against state officials are entitled to rely on Kentucky's traditional venue protections. So, too, are litigants in private or public litigation who ask a court to declare that a Kentucky law *is* constitutional under the state and federal constitutions. *See, e.g.*, KRS § 452.505 (permitting the Commonwealth to bring actions in Franklin Circuit Court "to recover any … credit or claim" paid out of the Treasury on the ground that it was illegal, presumably including, but not limited to, illegal under the constitution). *Cf. Bevin ex rel. Kentucky v. Stewart*, No. 3:18-cv-00008-GFVT, 2018 WL 3973409, at *5 (E.D. Ky. Aug. 20, 2018) (lawsuit filed by former Governor against individual Kentuckians to seek a declaration that a state program was constitutional and otherwise consistent with law) (attached hereto as Exhibit 1).

It is only where litigants "challenge the constitutionality" of state legislative enactments or executive branch regulations or actions that they are burdened with the arbitrary procedures and attendant costs that SB 126 imposes, and are concomitantly

deprived of safeguards intended to protect the fairness of their proceedings. In these ways, the roulette game imposed by SB 126 not only impinges on rights of expression; it undermines the Commonwealth's inviolable protection for open courts. Ky. Const. § 14.

As this Court explained in *Champion v. Commonwealth*, which invalidated an anti-panhandling ordinance, "[w]e cannot accept different rules and different procedures for different forms of protected speech without at least subconsciously injecting our own subjective values and without implicitly engaging in censorship." 520 S.W.3d at 338. For this reason, viewpoint-based regulations like SB 126 are "presumptively unconstitutional" and require the application of strict scrutiny when analyzed under free-speech precedent. *Id.*; *cf. S. Bay Rod & Gun Club, Inc. v. Bonta*, _ F. Supp. 3d __, No. 22CV1461-BEN (JLB), 2022 WL 17811113, at *2, *4 (S.D. Cal. Dec. 19, 2022) (invalidating California law that imposed a "lopsided, unorthodox attorney's fee-shifting scheme" only in cases involving challenges to gun restrictions and concluding that the law's purpose and effect were to "discourage the peaceful vindication of an enumerated constitutional right"). For the same reason, this Court should apply strict scrutiny to SB 126 when analyzing petitioners' equal protection claim since the Act so clearly burdens a fundamental right of free expression.

4. SB 126 does not withstand strict scrutiny. Under that standard, it is the State's burden to demonstrate that the law is narrowly tailored to achieve a compelling state interest. *Champion*, 520 S.W.3d at 338 (citing *Reed*, 576 U.S. at 170–71). And as this Court has held, it will "not presume the problem exists." *Id.* Instead, to impose a restriction on an individual's exercise of constitutional rights, "the governing body must prove and justify that the behavior in question actually harms society." *Id.*; *see also, e.g.*, *Martin v. Commonwealth*, 96 S.W.3d 38, 59 (Ky. 2003) (explaining that because freedom of

expression "need[s] breathing space to survive, government may regulate in the area only with narrow specificity").

Although SB 126 is premised on a governmental interest in "provid[ing] litigants access to courts . . . without any concern of bias," SB 126, § 2, it is not remotely tailored to advance that interest, for all the reasons that petitioners explain. Pet. 21–27; *J.C.J.D.*, 803 S.W.2d at 956 (holding that ethics rule violated "state and federal constitutional free speech rights of judicial candidates," where the rule barred "*all* discussion of a judicial candidate's views on disputed legal or political issues").

At bottom, the Commonwealth's justification for SB 126 is pretextual and cannot be sustained. *Champion*, 520 S.W.3d at 339. By permitting any party to force the transfer of a covered case to a randomly selected circuit anywhere in the State, the Act is designed to be as burdensome and harmful to constitutional litigants as possible, forcing them to travel far from their homes to vindicate their rights or to forgo their constitutional claims altogether. *Cf.* Ky. Const. § 112 (requiring that a judicial circuit "composed of more than one county shall be as compact in form as possible and of contiguous counties"). Notably, Representative Jason Nemes introduced a proposed amendment to SB 126 during the legislative process that would have limited the transfer possibilities to "counties that are contiguous to the county of venue from which the change is sought, provided the county randomly selected is not within the same judicial circuit." H.R. Floor Amend. 1 to SB 126, 2023 Regular Sess. (Ky. 2023), https://apps.legislature.ky.gov/recorddocuments/bill/23RS/SB126/HFA1.pdf. Even that modest yet still discriminatory amendment was insufficient for the General Assembly; the amendment was withdrawn without a vote, in favor of the random-selection process ultimately adopted. *See* Ky. Gen. Assembly, *Senate Bill 126:*

Action of Mar. 13, 2023, https://apps.legislature.ky.gov/record/23rs/sb126.html (last updated Apr. 25, 2023).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant the petition for a supervisory writ and, upon consideration of the merits, hold that SB 126 violates the Kentucky Constitution and is void.

May 23, 2023

Respectfully submitted,

/s/ Heather Gatnarek

HEATHER GATNAREK
COREY M. SHAPIRO
American Civil Liberties Union of Kentucky Foundation
325 W. Main Street, Suite 2210
Louisville, Kentucky 40202
Telephone: (502) 581-9746
heather@aclu-ky.org
corey@aclu-ky.org

Counsel for Amici Curiae

JULIE A. MURRAY*
American Civil Liberties Union Foundation, Inc.
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2326
jmurray@aclu.org

MATTHEW R. SEGAL*
American Civil Liberties Union Foundation, Inc.
One Center Plaza, Suite 850
Boston, MA 02108
Telephone: (617) 299-6664
msegal@aclu.org

* *Motion for admission pro hac vice forthcoming*

Exhibit 1

2018 WL 3973409
United States District Court, E.D. Kentucky,
Central Division.
Frankfort.

Matthew G. BEVIN, EX REL. Commonwealth of KENTUCKY, et al., Plaintiffs,

v.

Ronnie Maurice STEWART, et al., Defendants.

Civil No. 3:18-cv-00008-GFVT
|
Signed 08/20/2018

Attorneys and Law Firms

Catherine Elaine York, Johann Frederick Herklotz, Matthew Harold Kleinert, Cabinet for Health & Family Services—Frankfort Office of Legal Services, M. Stephen Pitt, Matthew F. Kuhn, S. Chad Meredith, Office of the Governor, Frankfort, KY, for Plaintiffs.

Anne Marie Regan, Cara L. Stewart, Kentucky Equal Justice Center, Louisville, KY, Samuel Brooke, Southern Poverty Law Center, Montgomery, AL, for Defendants.

MEMORANDUM OPINION & ORDER

Gregory F. Van Tatenhove, United States District Judge

***1** This matter is before the Court on Defendants' Motion to Dismiss. [R. 25.] Defendants, sixteen Kentucky residents who participate in expanded Medicaid, seek dismissal of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that Plaintiffs lack standing to assert the claims set forth in the Complaint. Alternatively, Defendants move to dismiss the Complaint for failure to state a claim for which relief can be granted, pursuant to Rule 12(b)(6). Further, Defendants ask the Court to exercise its discretion and dismiss the Complaint under the first-to-file rule, stating any litigation under this Complaint would be duplicative to an action brought initially in the United States District Court for the District of Columbia. The Court, having reviewed the record and the pleadings therein, will, for the reasons stated below, **GRANT** Defendants' Motion to Dismiss.

I

In 2014, under a previous administration, the Commonwealth of Kentucky opted to participate in expanded Medicaid, which had been authorized by the Patient Protection and Affordable Care Act of 2010. [R. 1 at 6-7.] In June 2016, under the current administration, the Commonwealth announced it would seek a Section 1115 waiver from the United States Secretary of Health and Human Services in order to implement Kentucky HEALTH. [*Id.* at 8.] Plaintiffs claim "Kentucky HEALTH contains numerous innovative provisions, all of which are likely to promote the objectives of Medicaid." [*Id.* at 11.] Kentucky's initial Section 1115 waiver application was submitted to the HHS Secretary on August 24, 2016, and modified in July 2017. [*Id.* at 8-9.] On January 12, 2018, Kentucky received notice that its Section 1115 waiver had been approved. [*Id.* at 9.]

On January 24, 2018, sixteen Kentucky Medicaid recipients brought an action in the United States District Court for the District of Columbia (D.C. Action) challenging the approved Section 1115 waiver. [R. 1 at 13; R. 25-1 at 2-3.] The individuals brought the suit both individually and on behalf of all Kentucky residents enrolled in the Kentucky Medicaid program on or after January

12, 2018. [R. 1-5 at 10.] The Kentucky Medicaid recipients claimed the Secretary's waiver was unconstitutionally granted and that it violated the Administrative Procedure Act, the Social Security Act, and the Medicaid Act. [*See generally* R. 1-5.] Importantly, they did not claim that Kentucky HEALTH or its provisions were unconstitutional. [*See id.*] The Commonwealth of Kentucky initially was not named as a party to the D.C. Action but later intervened as a defendant. [*See* R. 35 at 6.] However, before Kentucky intervened in the D.C. Action, it filed this suit in the Eastern District of Kentucky on February 19, 2018.

In this action for a Declaratory Judgment, the Commonwealth of Kentucky has brought suit against the same sixteen Kentucky Medicaid recipients that initiated the D.C. Action against federal actors. [*See* R. 1.] Count One of the Complaint alleges that "[t]he named Kentucky residents who brought the D.C. Action have alleged that Kentucky HEALTH violates the Social Security Act and the Administrative Procedure Act." [*Id.* at 15.] Count Two states that the same individuals claim, again in the D.C. Action, that "the approval of Kentucky HEALTH otherwise violates the Medicaid Act, was arbitrary and capricious and an abuse of discretion, and ran counter to the evidence in the record." [*Id.* at 17.] Count Three indicates that that the D.C. Plaintiffs "alleged that the approval of Kentucky HEALTH violates the Take Care Clause of the United States Constitution." [*Id.* at 18.] As to each of the counts, the Commonwealth claims an actual case or controversy exists as to the veracity of those claims being litigated in the D.C. Action. [*Id.* at 15-18.]

***2** The D.C. Court determined in the D.C. Action that the Secretary acted arbitrarily and capriciously in granting the Kentucky HEALTH waiver, and the Court remanded the matter to HHS. *See* Memorandum Opinion, *Stewart v. Azar II*, No. 1:18-cv-00152-JEB (D.D.C. June 29, 2018, ECF No. 74). That ruling effectively forces the Secretary to revisit its obligations under the Administrative Procedure Act regarding the Kentucky HEALTH waiver; thus, there remains at least some possibility that the waiver—or some version of it—could still be granted. The result of the D.C. Action, however, does not change this Court's standing analysis, which follows.

The Commonwealth has brought this action seeking declarations that Kentucky HEALTH, and its individual provisions, do not violate the Social Security Act or the Administrative Procedure Act, and that the Kentucky HEALTH waiver is within the HHS Secretary's Section 1115 waiver authority. [*Id.* at 16.] Additionally, The Commonwealth asks this Court to declare "that the HHS Secretary's approval of Kentucky HEATH, and all of its contested provisions," complied with legal mandates. [*Id.* at 15-19.] Defendants now move to dismiss this action for a lack of standing under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6). [R. 25.] Because Plaintiffs lack Article III standing, this case will be dismissed.

II

When a defendant's motion to dismiss raises the question of subject-matter jurisdiction, the plaintiff "bears the burden of proving jurisdiction in order to survive the motion." *Mich. S. R.R. Co. Branch & St. Joseph Counties Rail Users Ass'n*, 287 F.3d 568, 573 (6th Cir. 2002). "Specifically, the plaintiff must show that the complaint 'alleges a claim under federal law, and that the claim is substantial.' " *Id.* (quoting *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996)). A plaintiff may survive the motion "by showing 'any arguable basis in law' for the claims set forth in the complaint." *Id.*

Rule 12(b)(1) motions "generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods., Inc., v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack "questions merely the sufficiency of the pleading." *Id.* When a motion raises a facial attack, the Court must accept all the "allegations in the complaint as true," and "if those allegations establish federal claims, jurisdiction exists." *Id.* On the other hand, a factual attack is "not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). When the 12(b)(1) motion factually attacks subject matter jurisdiction, "no presumptive truthfulness applies to the allegations," and the court "must weigh the conflicting evidence to arrive at the factual predicate that subject-matter does or does not exist." *Gentek Bldg. Prods., Inc.*, 492 F.3d at 330. A challenge to a plaintiff's standing is a facial attack. *See Gaylor v. Hamilton Crossing CMBS*, 582 Fed.Appx. 576, 579 (6th Cir. 2014). Therefore, the Court must accept the allegations of the Commonwealth's Complaint as true. *Gentek Bldg. Prods., Inc.*, 492 F.3d at 330

"Standing is a threshold question in every federal case," *Coal Operators & Assocs., Inc. v. Babbitt*, 291 F.3d 912, 915 (6th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Article III's "irreducible constitutional minimum" of standing has three elements: (1) "the plaintiff must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual an imminent, not conjectural and hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). As to the second prong, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). *See also White v. United States*, 601 F.3d 545, 551 (6th Cir. 2010). "The party invoking federal jurisdiction bears the burden of establishing these three elements." *Lujan*, 504 U.S. at 561.

***3** Here, Defendants effectively challenge Plaintiffs' standing on all three elements. Defendants argue the Commonwealth lacks standing because "Defendants have not caused the Commonwealth any cognizable harm," and because Plaintiffs cannot "establish that any alleged injury it might suffer is fairly traceable to any alleged unlawful conduct by the Defendants." [R. 25 at 1.] Additionally, Defendants opine that any alleged injury suffered by the Plaintiffs cannot be redressed through this action. [R. 25-1 at 6.] The Court will take each element in order.

A

Defendants first argue that Plaintiffs have not suffered an invasion of a legally protected interest and, even if they do allege an injury, that injury is neither concrete and particularized nor actual and imminent. Defendants assert that "the Commonwealth's mere disagreement with Defendants' arguments in the D.C. Action cannot establish a constitutionally protected interest." [*Id.* at 7.] Moreover, Plaintiffs "cannot claim to have a *legally protected* interest in insulating the Secretary's grant of a federal waiver for Kentucky HEALTH from judicial review under the Constitution or the APA." [*Id.* at 7-8.] According to Defendants, the Complaint only alleges a possible future injury, which is "too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." [*Id.* at 8 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013)).] "The only injury the Complaint can allege is the possible invalidation of the federal waiver ... in the D.C. Action." [R. 25-1 at 8.] Defendants cite the United States Supreme Court's opinion in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), to support its argument that, "[w]hen the potential outcome of a case is the only arguable source of injury, 'there is no amount of evidence that potentially c[an] establish that [the plaintiff's] asserted future injury is real and immediate.' " [*Id.* (quoting *Whitmore*, 495 U.S. at 160).]

Plaintiffs respond by stating that, in cases invoking the Declaratory Judgment Act, the three-element standing analysis is "reduce[d] 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.' " [R. 35 at 9 (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997)).] The Commonwealth seems to suggest, without explicitly stating as much, that the injury it has or will sustain would only result if the Commonwealth is prevented from implementing Kentucky HEALTH. [*See* R. 35 at 9-10.] "[W]ithout Kentucky HEALTH, the Commonwealth will be forced, due to budgetary constraints, to 'un-expand' from expanded Medicaid." [*Id.* at 10.] Plaintiffs later argue, though, that,

> [t]he 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.

[*Id.* at 12.] In rebutting Defendants' speculative-harm argument, Plaintiffs state that they need only show "actual present harm or a significant possibility of future harm," because they brought their action under the Declaratory Judgment Act. [*Id.* (quoting *Magaw*, 132 F.3d at 279).]

While it is true that "[d]eclaratory judgments are typically sought before a completed 'injury-in-fact' has occurred," the party claiming harm still must allege some "significant possibility of future harm." *Magaw*, 132 F.3d at 279. Additionally, any declaration sought by a plaintiff "must be limited to the resolution of an 'actual controversy.' " *Id.* Here, Plaintiffs explicitly argue that "the Kentucky Defendants have taken concrete steps to invalidate and enjoin Kentucky Health." [R. 35 at 12.] By "concrete steps," the Court can only presume that the Commonwealth means the Kentucky Medicaid recipients initiated the D.C. Action. In fact, though, the Kentucky Defendants brought the D.C. Action challenging not Kentucky HEALTH or its provisions but the Secretary's conduct in approving the waiver that would allow the Commonwealth to implement Kentucky HEALTH. [*See generally* R. 1-5.] That the Kentucky Defendants brought such an action does not establish a "significant possibility of future harm." And, while the Commonwealth posits that it would be forced to "un-expand" from Medicaid if Kentucky HEALTH is prevented, that conclusory statement implying an economic injury, without more, does not explain how the Commonwealth would be injured.

B

***4** Even assuming that the Commonwealth suitably alleges an injury-in-fact, the Commonwealth's causation argument fails. According to Defendants, "[e]ven if the Commonwealth could show some concrete harm traceable to the D.C. Action ..., any interest in implementing a waiver that [might be] declared unlawful is not a legally protected interest." [R. 36 at 6.] Defendants claim their initiation of the D.C. Action "neither repealed Kentucky HEALTH nor 'forced' the Commonwealth to do anything," and opine that any alleged future harm would be traceable to the entity that might invalidate the Secretary's waiver. [*Id.* at 7; R. 25-1 at 9.] The essence of Defendants argument is that the intervening action of the D.C. District Court, if it ultimately invalidates the Secretary's waiver, would break any chain of causation that existed between the Commonwealth's alleged future economic injury and the Kentucky Medicaid recipients' conduct.

In response to Defendants traceability arguments, Plaintiffs state only that "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. [A]ction stand on equal footing. One is not subordinate to the other at this stage." [R. 35 at 13.] The Commonwealth attempts to distinguish the cases cited for support by the Defendants [*see id.* at 13-15], but offers no authority in support of its position that any future economic harm it might suffer would be traceable to Defendants. The Commonwealth states that "[i]n its motion to intervene, the Commonwealth cited a wealth of case law allowing a sovereign state to intervene as a right into litigation challenging federal action or decision making that affects the state intervenor," and that Defendants make no attempt to rebut that case law here. [*Id.* at 15.] However, precedent that supports the Commonwealth intervening as a defendant in a suit challenging federal action or decision making does not automatically confer Article III standing to the Commonwealth as a plaintiff to bring an independent suit against those challenging the federal action or decision making.

As *Lujan* counseled, "the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' " *Lujan*, 504 U.S. at 560-61. It is clear that the United States District Court for the District of Columbia is not before this Court as a party in this suit. It is also clear that if the Commonwealth ever suffers any economic injury as a result of not being able to implement Kentucky HEALTH, that injury will be traceable to whatever entity last affected its implementation, not these Defendants. The Court agrees with Defendants that there is no clear traceability between these Defendants' conduct and any future harm the Commonwealth claims will occur. Furthermore, even assuming the D.C. Action ultimately runs its full course and prevents the Commonwealth from implementing Kentucky HEALTH, any action thereafter concerning expanded Medicaid in Kentucky would be based on a policy decision by the Commonwealth. Such a decision might cause injury to the Commonwealth, at least the pleadings suggest as much [*see* R. 35

at 10-11], but that injury would be traceable to the Commonwealth's intervening policy decision and, again, not a result of any conduct by these Defendants.

C

Lastly, related to standing, Defendants attack standing's redressability requirement. [*See* R. 25-1 at 10.] "[P]revailing against these Defendants will not redress the Commonwealth's supposed potential injury, because that injury, if it occurs at all, will not be caused by the Defendants." [*Id.*] In its argument, Defendants acknowledge that causation and redressability are often linked, and "if a plaintiff can demonstrate that his injuries were caused by the defendant, the courts are in a position to redress the situation." [*Id.* (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1352 (6th Cir. 1996)).] In support of their redressability argument, Defendants point to the fact that Plaintiffs are not seeking to have the D.C. Action dismissed. [R. 25-1 at 10.] The D.C. District Court therefore will be free to invalidate the Section 1115 waiver if it so deems appropriate. Therefore, a favorable result in this Court will not redress any of the Commonwealth's alleged injuries. Presumably relying on the fact that causation and redressability are often considered together, and believing it suitably argued causation, the Commonwealth fails to respond to Defendants' redressability arguments.

***5** The Commonwealth seeks, in this action, a declaratory judgment that Kentucky HEALTH and all of its provisions comply with statutory mandates and that Kentucky HEALTH falls within the HHS Secretary's waiver authority. [R. 1 at 16-19.] It further seeks a declaration that the HHS Secretary's approval of the Kentucky HEALTH waiver complied with the Medicaid Act and "was not arbitrary and capricious, was not an abuse of discretion, and was supported by the evidence in the record." [*Id.* at 18-19.] Lastly, the Commonwealth seeks a declaration that Kentucky HEALTH and the Secretary's approval of the Kentucky HEALTH waiver was otherwise constitutional. [*Id.* at 19.] Comparatively, in the D.C. Action, the Kentucky Medicaid recipients seek a declaration, in relevant part, that the HHS Secretary's "approval of the Kentucky HEALTH waiver application violates the Administrative Procedure Act, the Social Security Act, and the United States Constitution...." [R. 1-5 at 79.] Because the declarations sought by the parties in the two independent actions are at polar opposites from each other, a favorable opinion for the Commonwealth in this action is not likely to redress the injury it supposedly alleged, that is "the Kentucky Defendants ... concrete steps to invalidate and enjoin Kentucky HEALTH...." [*See* R. 35 at 12.]

Article III's "irreducible constitutional minimum" of standing has three elements: injury, causation, and redressability. Because the Commonwealth fails to establish any of those three elements, this case will be dismissed for lack of subject matter jurisdiction. Moreover, because the Court disposes of this case on Defendants' Rule 12(b)(1) motion, the Court need not address the merits of Defendants' Rule 12(b)(6) arguments.

III

Not all disputes are capable of federal judicial review. Federal courts are limited in their jurisdiction, and they can only hear cases where the plaintiff can establish jurisdiction. Here, the Commonwealth failed to do so. Moreover, the Commonwealth has intervened in the D.C. Action, which, based on the Commonwealth's articulation of its filings in that case [*see* R. 35 at 17], allows the Commonwealth to protect its interests in implementing Kentucky HEALTH. In fact, Plaintiffs acknowledge that the Commonwealth intervened in the D.C. Action "to 'fully participate as a defendant....' " [*Id.*] To fully participate as a defendant means a defendant is free to file a counterclaim against any plaintiff. [*See* Fed. R. Civ. P. 13.] The Commonwealth, therefore, could, but was not required to, protect its interests and seek the same declaratory relief it seeks here in the D.C. Action.

Accordingly, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** as follows:

1) Defendants' Motion to Dismiss [**R. 25**] is **GRANTED;**

2) Judgment in favor of Defendants shall be entered contemporaneously herewith;

3) Kentucky Association of Health Plans, Inc.'s Motion to Intervene [**R. 4**] is **DENIED AS MOOT;** and

4) Kentucky Hospital Association's Motion to Intervene [**R. 7**] is **DENIED AS MOOT.**

All Citations

Not Reported in Fed. Supp., 2018 WL 3973409, Med & Med GD (CCH) P 306,351