IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO TRANSFER CASE TO THE EASTERN DISTRICT OF KENTUCKY

Pursuant to 28 U.S.C. § 1404(a), the Defendants hereby move to transfer this action to the United States District Court for the Eastern District of Kentucky. The plaintiffs in this action are sixteen residents of Kentucky who seek class certification of a proposed state-wide class of Kentucky Medicaid enrollees. Venue is permissible in the Eastern District of Kentucky because all plaintiffs live in Kentucky and most reside in the Eastern District, and the interests of justice and considerations of convenience warrant transfer to Kentucky, which has a strong interest in adjudicating a primarily local controversy in a local forum. For these reasons and others set forth in the accompanying Memorandum, the Court should transfer this matter to the Eastern District of Kentucky.

Plaintiffs have stated that they do not consent to this motion.

[1] Pursuant to Fed. R. Civ. P. 25(d), Alex M. Azar II is substituted as a defendant in his official capacity as Secretary of Health and Human Services, and Timothy B. Hill is substituted as a defendant in his official capacity as Acting Director of the Center for Medicaid and CHIP Services.

Dated: February 9, 2018

Respectfully submitted,

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DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER CASE TO THE EASTERN DISTRICT OF KENTUCKY

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INTRODUCTION

In this case, the plaintiffs have chosen the District of Columbia as the venue to adjudicate a controversy involving Kentucky Medicaid beneficiaries and the Kentucky Medicaid program. Plaintiffs are sixteen individuals who reside in Kentucky and are enrolled in Kentucky's state-administered Medicaid program. They purport to sue on behalf of a class of all Medicaid beneficiaries in Kentucky. They challenge several components of Kentucky's newly-approved Medicaid demonstration project, called Kentucky HEALTH, which will affect the terms and conditions of Medicaid for Kentucky residents exclusively. The circumstances that should have driven the plaintiffs' venue decision—the location of the plaintiffs and putative class members, the convenience of the parties, and the local interest in deciding a local controversy at home—all point to venue in the Eastern District of Kentucky.

The only real connection of this case to the District of Columbia—that is, that certain aspects of the administrative decision at issue took place at agency headquarters in Washington, D.C—does not justify overriding Kentucky's stronger interest in adjudicating this case. This Court often transfers APA cases brought against the federal government to districts with more compelling reasons to hear the controversies, even when the federal defendant took some relevant action in Washington, D.C. And cases challenging the approval by the Secretary of Health and Human Services ("Secretary") of Medicaid demonstration projects and Medicaid state plan amendments are almost exclusively heard in federal courts outside the District of Columbia.

These cases illustrate a longstanding principle that animates federal venue law: that there is a "local interest in having localized controversies decided at home." *Atl. Marine*

Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 581 n.6 (2013). That principle applies with particular force to the Medicaid program, which is administered on a state-by-state basis. As Plaintiffs themselves allege, the impact of the Secretary's approval of Kentucky HEALTH will be felt by "Kentuckians across the state—housekeepers and custodians, ministers and morticians, car repairmen, retired workers, students, church administrators, bank tellers, caregivers, and musicians—who need a range of health services" in Kentucky. Compl. ¶ 8, ECF No. 1.

Because the interests of Kentucky and its residents, including the thousands of Kentucky Medicaid recipients who are putative class members and who will be affected by Kentucky HEALTH, outweigh plaintiffs' counsel's choice of forum in the District of Columbia, this Court should transfer this case to Eastern District of Kentucky—a forum of the state in which all individual Plaintiffs and proposed class members reside, and the forum that the factors relevant to transfer pursuant to 28 U.S.C. § 1404(a) clearly favor.[2]

BACKGROUND

I. STATUTORY FRAMEWORK GOVERNING STATE MEDICAID PLANS

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, is commonly referred to as the Medicaid statute. Medicaid is a cooperative Federal-State program that provides health care to certain low-income persons. *See* 42 U.S.C. §§ 1396–1396v. *See also* 42 C.F.R. §§ 430.0 *et seq*. (implementing regulations). Its purpose is "to furnish [] medical assistance" to individuals "whose income and resources are insufficient to meet

[2] Under Local Rule 3.2(a)(3)(A) of the Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky, this action should be transferred to the Frankfort Docket of the Central Division of the Eastern District, where a substantial part of the events or omissions giving rise to the claim occurred.

the costs of necessary medical services," to provide "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care," and to accomplish all of this to the extent "practicable under the conditions [of each] State." 42 U.S.C. § 1396-1.

Medicaid benefits are provided pursuant to a State Medicaid plan, which specifies, among other things, the categories of individuals who are eligible to receive medical assistance under the State plan and the types of medical care and services that the State plan will cover. If the Secretary approves the State plan, the State becomes eligible to receive matching payments from the Federal government of a percentage of the amounts "expended . . . as medical assistance under the State plan." 42 U.S.C. §§ 1396b(a)(1), 1396d(b).

The Medicaid statute establishes a number of requirements that must be met in order for the Secretary to approve a State plan. *See generally id*. §§ 1396a(a)(1)–(65). Further, the Medicaid statute requires that a State plan make medical care available to certain groups of "categorically needy" persons, *id*. § 1396a(a)(10)(A)(i), and provides each participating State with the option to include in its State plan certain other specified groups of individuals. *Id.* § 1396a(a)(10)(A)(ii).

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. The ACA amended the Medicaid Act to add an additional mandatory group, often called the "expansion population." 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), 1396a(e)(14). The Secretary's approval of a State plan that covers individuals falling within the statute's

mandatory groups, including the expansion population under the ACA, or within other population groups that the State has elected to cover under the Medicaid program, makes those individuals eligible for Medicaid. Under *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), a State effectively has the option to decide whether to include the ACA's "expansion population" in its State plan. *Id.* at 575–87 (plurality opinion). A State that elects not to do so would not receive the funding that the ACA provided for the expansion population, but would continue to receive funding for its traditional Medicaid population. *See id.* Kentucky has elected to expand its Medicaid program to cover the expansion population.

II. THE SECRETARY'S SECTION 1115 WAIVER AUTHORITY

The Social Security Act provides the Secretary with two separate grants of authority to approve demonstration projects to enable States to carry out innovative health-care initiatives. *See* 42 U.S.C. § 1315 (Subchapter XI, section 1115 of the Social Security Act). First, the Secretary may waive "compliance with any of the requirements of section . . . 1396a," including, for example, free access to mandatory medical services, *id*. § 1396a(a)(14), medical assistance to certain mandatory eligibility groups, *id*. § 1396a(a)(10), and that eligibility be applied retroactively, *id.* § 1396a(a)(34). *See* 42 U.S.C. § 1315(a)(1). Second, the Secretary, pursuant to his demonstration waiver authority, may treat the State's costs of the demonstration project that would otherwise not be included as reimbursable Medicaid expenditures as "expenditures under the State plan" and therefore subject to federal reimbursement. 42 U.S.C. § 1315(a)(2). When the Secretary has exercised his authority under section 1115(a)(2), a State obtains federal matching funds for healthcare coverage provided for additional eligible populations and

services.

On January 11, 2018, the Centers for Medicare & Medicaid Services ("CMS") sent a letter to State Medicaid Directors in which it indicated that, subject to the full federal review process, it would "support state efforts to test incentives that make participation in work or other community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects authorized under section 1115[.]" Compl., Ex. D, Letter to State Medicaid Directors, at 2, ECF No. 1-4. The letter provides guidance for states interested in pursuing such demonstration projects. *Id.*

III. KENTUCKY'S APPLICATION FOR A SECTION 1115 WAIVER TO IMPLEMENT THE "KENTUCKY HEALTH" PROGRAM

On August 24, 2016, Kentucky Governor Matt Bevin submitted an application to the Secretary requesting a waiver, pursuant to Section 1115, of certain Medicaid Act requirements to implement the Commonwealth's proposed "Kentucky HEALTH" project. Compl. ¶ 84; *id.* Ex. B, Application. The application emphasized the project's goals of strengthening Kentucky's behavioral health delivery system—which was "critical to addressing Kentucky's substance abuse epidemic," *id.* Ex. B, Letter from Governor Matthew G. Bevin, at 5—and of "transform[ing] the Kentucky Medicaid program to empower beneficiaries to improve their health." *Id.* Ex. C, CMS Approval, at 3, ECF No. 1-3. Before submitting this application, Kentucky had conducted a public-comment period, during which the Commonwealth received 1,350 comments. *Id.* Ex. B, Application, at 3.

CMS provided a public comment period on the Kentucky HEALTH application from September 8, 2016, through October 8, 2016. Compl. ¶ 89. Over 1,800 comments

were submitted through the CMS website, including numerous comments from citizens of Kentucky and Kentucky-based groups. On July 3, 2017, Governor Bevin proposed modifications to the application based on the Commonwealth's ongoing program development efforts and continued negotiations with CMS. *Id.* ¶ 90; *id.* Ex. A, Application Modification. CMS held a public comment period on the proposed modifications from July 3, 2017, to August 2, 2017, and received over 1,200 comments during this period. *Id.* ¶ 90. At the same time, Kentucky conducted its own second public-comment period. *Id.* Ex. A, Application Modification Request, Letter from Governor Matthew G. Bevin, at 2.

On January 12, 2018, CMS issued a letter to Governor Bevin approving the application pursuant to the Secretary's Section 1115 waiver authority. *See id.* Ex. C, CMS Approval. Among other things, the letter noted that CMS took public comments into account as it worked with the Commonwealth to develop the special terms and conditions of the approval, and that the approval was based on "specific state assurances" concerning protections for Kentucky Medicaid beneficiaries. *Id.* at 9.

IV. THIS LAWSUIT

The plaintiffs in this action are sixteen individuals who are Medicaid enrollees residing in the Commonwealth of Kentucky. They filed their complaint against Defendants on January 24, 2018, *see* Compl., ECF No. 1, seeking declaratory and injunctive relief pertaining to the Secretary's approval of the Kentucky HEALTH application and CMS's issuance of the letter to State Medicaid Directors, and further, seeking to certify this case as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs assert several claims under the APA, 5 U.S.C. § 706(2), as well as a constitutional claim under the Take Care Clause of the U.S. Constitution, Art. II, § 3, cl. 5.

STANDARD OF REVIEW

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The party seeking transfer under section 1404(a) must first show that the transferee court is in a district where the action could have been brought originally. *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). It must then show that considerations of convenience and the interest of justice weigh in favor of transfer.

Section 1404(a) vests broad discretion in the district courts "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness' . . . [and] calls on the [] court to weigh in the balance a number of case-specific factors" relating to both the public interest of justice and the private interests of the parties and witnesses. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29–30 (1988) (quoting *Van Dusen*, 376 U.S. at 622); *Demery v. Montgomery County*, 602 F. Supp. 2d 206, 210 (D.D.C. 2009).

The private-interest considerations include:

> (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses of the plaintiff and defendant, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof.

Trout Unlimited v. U.S. Dep't of Agric., 944 F. Supp. 13, 16 (D.D.C. 1996) (citation omitted). The public-interest considerations include:

> (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home.

Id. If the balance of private and public interests favors a transfer of venue, then a court may order a transfer under section 1404(a). "[T]he showing defendants must make is lessened" where, as here, "transfer is sought to the forum with which [the] plaintiffs have substantial ties and where the subject matter of the lawsuit is connected to that state." *Id.* (internal citation omitted).

ARGUMENT

Defendants seek transfer to the Eastern District of Kentucky—a forum in the state where all of the individually-named Plaintiffs and the proposed class members reside, and where the Kentucky HEALTH program was devised and will be implemented. Because the interests of Kentucky and its residents outweigh the plaintiffs' counsel's choice of this forum, the factors under 28 U.S.C. § 1404(a) clearly favor transfer to that forum.

I. VENUE IS PERMISSIBLE IN THE EASTERN DISTRICT OF KENTUCKY

The threshold question under Section 1404(a) is whether the action could have been brought in the Eastern District of Kentucky. *See Van Dusen*, 376 U.S. at 616. In a civil suit, like this one, that is brought against an agency or department of the United States government or any of its officers or employees acting in their official capacity (and which does not involve real property), venue is proper in any judicial district where at least one plaintiff resides. 28 U.S.C. § 1391(e)(1)(C); *see Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 345–46 (6th Cir. 2005) (the residency requirement of 28 U.S.C. § 1391(e)(1)(C) "is satisfied if at least one plaintiff resides in the district in which the action has been brought"). Here, because many of the named Plaintiffs allege that they reside in cities and

counties located within the Eastern District of Kentucky,[3] Plaintiffs could have brought this action in that district. *See id.*

II. THE INTERESTS OF JUSTICE WARRANT TRANSFER TO THE EASTERN DISTRICT OF KENTUCKY.

The central issue in this case—the Secretary's approval of Kentucky HEALTH—involves a fundamentally local controversy, and convenience considerations and the interests of justice favor transfer to the Eastern District of Kentucky. As explained below, both the public-interest and private-interest factors support transfer to the Eastern District of Kentucky.

A. The Private-Interest Factors Weigh Decisively in Favor of Transfer.

1. Plaintiffs' "Claims Arose" in Kentucky, and Defendants' Choice of Forum is Consistent with the Claims' Connection to Kentucky.

In moving to transfer, Defendants have chosen a forum of Plaintiffs' home state, which, unlike the District of Columbia, has meaningful ties both to Plaintiffs and the controversy that is the subject of Plaintiffs' complaint.

An administrative claim is said to arise in this District if it challenges a decision that was drafted, signed, and published in this district, and if the controversy "stems from

[3] *See* Compl. ¶ 12 ("Plaintiff Ronnie Maurice Stewart . . . lives in Lexington, Fayette County, Kentucky"); *id.* ¶ 14 ("Plaintiff Lakin Branham . . . lives in Dwale, Floyd County, Kentucky"); *id.* ¶ 16 ("Plaintiff Dave Kobersmith . . . lives in Berea, Madison County, Kentucky"); *id.* ¶ 17 ("Plaintiff William Bennett . . . lives in Lexington, Fayette County, Kentucky"); *id.* ¶ 18 ("Plaintiff Shawna Nicole McComas . . . lives in Lexington, Fayette County, Kentucky"); *id.* ¶ 20 ("Plaintiffs Michael 'Popjaw' and Sara Woods . . . live in Martin, Floyd County, Kentucky"); *id.* ¶ 21 ("Plaintiff Kimberly Withers . . . lives in Lexington, Fayette County, Kentucky"); *id.* ¶ 22 ("Plaintiff Katelyn Allen . . . lives in Salyersville, Magoffin County, Kentucky"); *id.* ¶ 23 ("Plaintiff Amanda Spears . . . lives in Park Hill, Kenton County, Kentucky"); *id.* ¶ 24 ("Plaintiff David Roode . . . lives in Ludlow, Kenton County, Kentucky"); *id.* ¶ 26 ("Plaintiff Quenton Radford . . . lives in Ashland, Boyd County, Kentucky").

the formulation of national policy on an issue of national significance." *See Greater Yellowstone Coal. v. Kempthorne*, Nos. 07-2111, 07-2112, 2008 WL 1862298, at *5 (D.D.C. Apr. 24, 2008). But "the mere fact that a case concerns the application of a federal statute by a federal agency does not provide a sufficient nexus to the District of Columbia . . . ." *See Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 893 F. Supp. 2d 49, 55 (D.D.C. 2012). Rather, an APA challenge to an agency decision with "overwhelmingly local effects" has an attenuated connection to the District of Columbia. *Id*.

Here, transfer is warranted because "material events that constitute the factual predicate for the plaintiff's claims occurred" in the Eastern District of Kentucky. *See Kafack v. Primerica Life Ins. Co.*, 934 F. Supp. 3, 6–7 (D.D.C. 1996). For example, Plaintiffs allege that "Kentucky . . . has elected to participate in Medicaid, [and] [t]he Kentucky Cabinet for Health and Family Services, Department for Medicaid Services ('DMS') administers the program at the state level." Compl. ¶ 78. That state agency has its headquarters in Frankfort, Kentucky, which is within the Eastern District of Kentucky. "Kentucky Governor Matt Bevin submitted the application to the Secretary requesting [the] waiver . . . to implement the Kentucky HEALTH project," Compl. ¶ 84, from the state capitol in Frankfort. The application presented Kentucky HEALTH as "the terms under which the Commonwealth will continue Medicaid expansion." *Id*. The Commonwealth submitted this application after completing the process specified in 42 U.S.C. § 1315(d)(2), under which a State Medicaid agency submits its proposed waiver application to its own public for notice and comment, and for a public hearing, before finalizing it and submitting it to the Secretary. *See also* 42 C.F.R. § 431.408 (setting forth State public notice process). Kentucky noted in its application that, "[as] part of the waiver's development, [the State]

had a robust public comment process, which included three public hearings, and an extended comment period to ensure every Kentuckian that wanted to be heard could be included." Compl., Ex. B, Application, Letter from Governor Matthew G. Bevin, at 2. Further, Kentucky conducted a second comment period following its initial application submission. Compl., Ex. A, Application Modification Request, Letter from Governor Matthew G. Bevin, at 2.

The Secretary's approval of the waiver application was a product of yearlong discussions and negotiations with state officials in Frankfort, and CMS worked with the Commonwealth to develop the terms and conditions of the approval. *See* Compl., Ex. C, Letter from Brian Neale, CMS Deputy Administrator, to Adam Meier, Deputy Chief of Staff, Office of Governor Bevin ("I appreciate the spirit of partnership we have shared over the course of the past year."); *id.* Ex. C, Letter from Demetrios L. Kouzoukas, Principal Deputy Administrator, Center for Medicaid and CHIP Services, to Stephen P. Miller, Commissioner, Cabinet for Health and Family Services, at 9 ("noting Kentucky's "work with [HHS], as well as stakeholders in Kentucky, over the past months on this new demonstration"); *id.* at 7 (stating that "CMS took public comments submitted during the federal comment period into account as it worked with the Commonwealth to develop the special terms and conditions (STCs) that accompany this approval").

Indeed, the Secretary's Section 1115 waiver authority was designed to allow for state experimentation and local input, so that any involvement by officials in Washington, D.C., would be inextricably tied to the Commonwealth's involvement in designing and

testing its Section 1115 proposals.[4] *See* Compl., Ex. C, CMS Approval, at 4 ("Demonstration projects under section 1115 of the Act offer a way to give states more freedom to test and evaluate innovative solutions to improve quality, accessibility and health outcomes . . . provided that, in the judgment of the Secretary, the demonstrations are likely to assist in promoting the objectives of Medicaid."); *id*. (noting that states are in the best position to design solutions that address the unique needs of their Medicaid-eligible populations). Section 1115's policy in favor of state experimentation and participation in the waiver approval process would best be served if judicial review of the State's application and Secretary's approval were to occur in a forum within the state where the proposal was designed and modified based on local input, and where those affected by the waiver reside.

2. Plaintiffs' Choice of Forum is Entitled to Minimal Deference in This Putative Class-Action Brought by Kentucky Residents Enrolled in Kentucky's State Medicaid Program.

The plaintiff's choice of forum is given deference "where the plaintiffs have chosen their home forum and many of the relevant events occurred there." *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 724 F. Supp. 2d 90, 95 (D.D.C. 2010) (citation omitted).

[4] Likely for this reason, nearly every other case for the past fifty years challenging a state-initiated Section 1115 demonstration project was originally filed in the state in which the project was to be implemented. *See, e.g.*, *Aguayo v. Richardson*, 352 F. Supp. 462 (S.D.N.Y. 1972), *aff'd*, 473 F.2d 1090 (2d Cir. 1973); *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995), *aff'd*, 92 F.3d 171 (3d Cir. 1996); *Wood v. Betlach*, 922 F. Supp. 2d 836 (D. Ariz. 2013). Cases challenging the approval of State plan amendments under the Medicaid Act likewise are almost exclusively litigated in the local forum. *See, e.g.*, *Christ the King Manor, Inc. v. Burwell*, 163 F. Supp. 3d 123 (M.D. Pa. 2016), *aff'd*, 673 F. App'x 164 (3d Cir. 2016); *Cal. Med. Ass'n v. Douglas*, 848 F. Supp. 2d 1117 (C.D. Cal. 2012). A rare exception is *Pharm. Research & Mrfs. of Am. v. United States*, 135 F. Supp. 2d 1 (D.D.C. 2001), *rev'd*, 51 F.3d 219 (D.C. Cir. 2001), in which the plaintiff was a pharmaceutical trade group with no ties to the local forum.

But as this Court has held, "less deference is given where, as here, Defendants seek transfer to the plaintiffs' resident forum." *Pres. Soc. of Charleston v. U.S. Army Corps of Engineers*, 893 F. Supp. 2d 49, 54 (D.D.C. 2012). *See also Airport Working Grp. of Orange Cnty, Inc. v. Dep't of Def.*, 226 F. Supp. 2d 227, 230 (D.D.C. 2002) (collecting authorities). An "insubstantial factual nexus between the case and the plaintiff's chosen forum" further weakens the deference given to plaintiffs' choice of forum. *New Hope Power Co.*, 724 F. Supp. 2d at 95. And "in a class action suit in which the plaintiffs propose to represent a class of potential plaintiffs who reside [in another forum], the plaintiffs' choice of forum deserves less weight than it is typically given." *Berenson v. Nat'l Fin. Servs., LLC*, 319 F. Supp. 2d 1, 3 (D.D.C. 2004).

These well-established exceptions to the deference ordinarily given to the plaintiff's choice apply with great force here. Not one of the sixteen individually-named plaintiffs resides in the District of Columbia, or even alleges any particular connection to this District. Rather, all allege that they reside in the Commonwealth of Kentucky, Compl. ¶¶ 12–26, and their sole interest in this matter arises solely from their residency in the Commonwealth and their enrollment in Kentucky's State Medicaid program.

Moreover, Plaintiffs seek class certification under Rule 23(b)(2) on behalf of a "statewide proposed class" of "*all residents of Kentucky* who are enrolled in the Kentucky Medicaid program on or after January 12, 2018." Compl. ¶ 33 (emphasis added). In deciding whether to transfer a putative class action suit, courts routinely afford greater weight to the residence of the proposed class members than to the plaintiff's choice of forum. *See Warrick v. Gen. Elec. Co.*, 70 F.3d 736, 741 n.7 (2d Cir. 1995) (noting that plaintiff's choice of forum is "a less significant consideration" where the plaintiff seeks

class certification, and noting that the forum in which many of the putative class members reside would serve interests of convenience); *Job Haines Home for the Aged v. Young*, 936 F. Supp. 223, 228 (D.N.J. 1996) (stating in the context of a § 1404(a) transfer motion that "the weight of authority holds that in class actions and derivative law suits the class representative's choice of forum is entitled to lessened deference"); *Donnelly v. Klosters Rederi A/S*, 515 F. Supp. 5, 6–7 (E.D. Pa. 1981) (affording "little weight" to plaintiffs' choice of forum even though the named plaintiffs resided there, because many class members resided outside the chosen forum).

The principle behind these cases is of particular significance here, where a judgment entered by this Court could bind thousands of individuals residing in Kentucky if Plaintiffs' proposed class is certified under Rule 23(b)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011) (expressing concern that, were Rule 23(b)(2) class improperly certified, absent class members "would be *precluded* by litigation they had no power to hold themselves apart from"); *id.* at 362 ("The Rule *provides no opportunity* for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.") (emphasis added). In other words, a final judgment in this case (following proper class certification) could be preclusive on "*all residents of Kentucky* who are enrolled in the Kentucky Medicaid program," Compl. ¶ 33 (emphasis added), even though they did not choose a foreign forum for this litigation. Under these circumstances, the interests of justice require that the suit be transferred to the state in which the entire class resides, so as to afford all putative class members the opportunity to have their rights litigated in a local forum. *See Adams v. Bell*, 711 F.2d 161, 167 n.34 (D.C.

Cir. 1983) (noting a preference for resolving cases within view of people "whose rights and interests are in fact most vitally affected by the suit").

Because the connection between the controversy, the plaintiffs, and the chosen forum is attenuated, Plaintiffs' choice of forum is entitled to minimal deference. *See Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 67 (D.D.C. 2003).

3. Convenience Considerations Weigh Strongly in Favor of Transfer.

The remaining three private-interest factors reflect considerations of convenience. On balance, they weigh strongly in favor of transfer to the Eastern District of Kentucky, which best serves the convenience of the putative class members.

Convenience of the Parties. Transfer of this case to the Eastern District of Kentucky would not inconvenience the individually-named Plaintiffs, all sixteen of whom allege that they reside in the Commonwealth of Kentucky, Compl. ¶¶ 12–26, or the proposed class members, each of whom is alleged to be an "adult resident of Kentucky who is enrolled in the Kentucky Medicaid program and will be subject to the requirements of the Kentucky HEALTH waiver." Compl. ¶ 34(d). It is inconceivable that litigating in this District would be more convenient for the Plaintiffs than their own home state, especially given that Plaintiffs purport to bring this case on behalf of a state-wide class whose putative members undoubtedly would take an interest in these proceedings.

As noted above, Plaintiffs seek certification of a "statewide proposed class" under Rules 23(a) and 23(b)(2) of "all residents of Kentucky who are enrolled in the Kentucky Medicaid program on or after January 12, 2018." *Id*. ¶ 33. To certify the proposed class, *see* Fed. R. Civ. P. 23(c), the court would need to determine, among other things, whether "the representative parties will fairly and adequately protect the interests of the class," *id.*

23(a)(4); whether Plaintiffs' requested relief "is appropriate respecting the class as a whole," *id.* 23(b)(2); whether there are questions of law or fact common to the class; and what would constitute "appropriate notice to the class," *id.* 23(c)(2)(A). Interests of the putative class members, who, by Plaintiffs' account, all reside in Kentucky, are relevant to the adjudication of these questions, and are best served if the questions are resolved in a convenient forum.[5]

Further, although little consideration is given to the convenience of counsel in the motion-to-transfer analysis, it is worth noting that at least two of the counsel who signed Plaintiffs' complaint list an office address in Kentucky, with the Kentucky Equal Justice Center in Louisville. Even if these counsel, or Plaintiffs' counsel located in other states, would have to incur "the minimal fees for *pro hac vice* admission" in the Eastern District of Kentucky, that fact would "not [be] substantial enough to tip the balance in a transfer case." *Oceana, Inc. v. Pritzker*, 58 F. Supp. 3d 2, 7 (D.D.C. 2013) (internal citation omitted).

Convenience of the Witnesses. The fourth private-interest factor, the convenience of witnesses, also weighs in favor of venue in Kentucky. Although judicial review of the *merits* will be limited to the administrative record and there will be no discovery or trial,

[5] Similarly, Plaintiffs' standing to bring this action may involve a fact-specific inquiry into whether or how each named and putative plaintiff is impacted by the Secretary's approval of Kentucky HEALTH. "The Rule 23 requirement that a class representative be an 'adequate' representative often overlaps with the Court's inquiry into a party's standing since a putative class member who did not suffer the same injury as the putative class lacks standing to bring the class claim." *Brewer v. Holder*, 20 F. Supp. 3d 4, 14 (D.D.C. 2013) (citation omitted). Evidence pertaining to this inquiry, including information about each plaintiff's benefits under the state Medicaid program, is likely located in the Commonwealth. *See, e.g.*, Compl. ¶¶ 171–338 (alleging harm to the named Plaintiffs based on the approval of Kentucky HEALTH).

and no witnesses, for that purpose, *see Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), any potential discovery into whether Plaintiffs have *standing*, as well as any potential class discovery, would occur exclusively in Kentucky.

Ease of Access to Evidence. The final private-interest consideration, ease of access to the sources of proof, likewise tilts in favor of transfer. If discovery into standing or class discovery were to occur, the sources of proof would be located exclusively in Kentucky, where the plaintiffs live.

B. THE PUBLIC-INTEREST FACTORS REQUIRE THE TRANSFER OF THIS CASE, WHICH PRESENTS A PRIMARILY LOCAL CONTROVERSY.

The first two public-interest factors, the transferee court's familiarity with the governing law and the relative congestion of the courts' calendars, pertain to considerations of judicial economy, and they are neutral or favor transfer. *See infra* Part II(B)(2). But those factors pale in comparison to the third public-interest factor, the strong local interest that warrants transfer. *See infra* Part II(B)(1). The local interest in having local controversies decided at home is "arguably most important" of the public-interest factors, *see Pres. Soc'y of Charleston*, 893 F. Supp. 2d at 57–58 (citation and internal quotation marks omitted), and the fundamental issue in this case—the Secretary's approval of Kentucky HEALTH—is a profoundly local controversy.

1. Kentucky's Interest in Having this Localized Controversy Decided Locally Should Be Given Dispositive Weight.

There can be no question that the Commonwealth of Kentucky has a substantial interest in the resolution of the claims of this lawsuit. The issue is one of substantial local interest and controversy, and it is the citizens of Kentucky who will directly feel the effects of the demonstration project. The Commonwealth's strong interest in having this

controversy decided locally should be given dispositive weight. *See Chrysler Capital Corp. v. Woehling*, 663 F. Supp. 478, 483 (D. Del. 1987) ("The most significant criterion for deciding a motion to transfer is the interest of justice.") (internal citation omitted); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986) (the interests of justice may be dispositive).

The Commonwealth has a keen interest in the outcome of Plaintiffs' claims challenging terms of Kentucky HEALTH that may have great impact on many Medicaid recipients residing in the State. As CMS noted, "[t]he KY HEALTH demonstration broadly encompasses several initiatives impacting a wide range of Kentucky Medicaid beneficiaries." Compl., Ex. C, CMS Approval, at 1. The program was "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.* The Commonwealth's application emphasized the project's goals of strengthening Kentucky's behavioral health delivery system—which was "critical to addressing Kentucky's substance use epidemic," *id.* at 2—and of "transform[ing] the Kentucky Medicaid program to empower beneficiaries to improve their health." *Id*.

Suits such as this one, which involves matters that are of great importance in the Commonwealth of Kentucky, should be resolved in the forum where the people live "whose rights and interests are in fact most vitally affected by the suit"—that is, the people of Kentucky. *Adams*, 711 F.2d at 167; *Trout Unlimited*, 944 F. Supp. at 20. Indeed, Plaintiffs allege that the impact of the Secretary's approval of Kentucky HEALTH will be felt by "Kentuckians across the state—housekeepers and custodians, ministers and morticians, car repairmen, retired workers, students, church administrators, bank tellers,

caregivers, and musicians—who need a range of health services" in Kentucky. Compl. ¶ 8. *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) ("There is a local interest in having localized controversies decided at home.").

The importance and localized nature of this controversy is further illustrated by the fact that numerous comments submitted for and against the Secretary's approval of the Kentucky HEALTH project were submitted by the citizens of the Commonwealth during the public comment phase.[6] *See Trout Unlimited*, 944 F. Supp. at 20 (finding that the "importance and localized nature of th[e] litigation" was demonstrated by the fact that a "great number of comments for and against the proposed action [were] submitted by citizens of Colorado during the public phase"). Further, as contemplated by 42 U.S.C. § 1315(d)(2), the Commonwealth undertook a separate administrative process as part of its development of the demonstration project, and, in fact, modified its Section 1115 application based on local concerns. *See* Compl., Ex. B, Application, Letter from Governor Matthew G. Bevin, at 2.

Plaintiffs do not challenge the "formulation of national policy on an issue of national significance," such that their claims can be said to arise primarily in the District of Columbia. *See, e.g., Oceana, Inc. v. Pritzker*, 58 F. Supp. 3d 2, 6 (D.D.C. 2013) (denying transfer in a case involving "a decision made at the *headquarters* of a federal agency with overwhelmingly *regional*—and perhaps even national—effects"). Rather, the

[6] *See* Public Comments, Kentucky HEALTH, List of Responses, https://public.medicaid.gov/connect.ti/public.comments/questionnaireVotes?qid=1888067; *see also* Public Comments, Kentucky HEALTH—Proposed Modifications to Application, List of Responses, https://public.medicaid.gov/connect.ti/public.comments/questionnaireVotes?qid=1891139.

bulk of the allegations in the complaint focuses on effects felt solely in Kentucky.[7] Indeed, Plaintiffs devote approximately 40% of the allegations and pages in their Complaint to describing "the Kentucky HEALTH approval's effect on the Plaintiffs," Compl. ¶¶ 166–330, and they base their claims on harm that will be felt by "Kentuckians across the state" who Plaintiffs allege will be deprived of a "range of health services" that they need in Kentucky. *Id*. ¶ 8. Plaintiffs allege no specific effects that would be felt in the District of Columbia, and there is no reason to suppose that this District has any particular interest in the adjudication of claims brought on behalf of a proposed statewide class of Kentucky residents enrolled in Kentucky's Medicaid program, where the requested relief pertains solely to the Kentucky HEALTH waiver under Section 1115. Because the potential impacts of Kentucky HEALTH would be felt locally, the controversy is local to the Eastern District of Kentucky. *See Pres. Soc'y of Charleston*, 893 F. Supp. 2d at 57 (holding that transfer was appropriate in part because "it is the citizens of Charleston who will most clearly feel the effects of the [challenged] project"); *Airport Working Grp.*, 226 F. Supp. 2d at 232 (granting transfer because the challenged decision "affects only the local

[7] The gravamen of the complaint is a challenge to the approval of the Kentucky HEALTH application. The complaint does also seek review of "the practices purportedly authorized" by CMS's letter to State Medicaid Directors. *See* Compl. ¶¶ 339–45 ("Count One"); Compl., Prayer for Relief ¶¶ 2, 4. It is apparent, however, that the plaintiffs' only purported injuries arising from that letter arise from the asserted effect that letter had on the Secretary's approval of the Kentucky application. Moreover, the district court's review in an APA case is limited to "final agency action," 5 U.S.C. § 704, and, thus, any relief that could be awarded to Plaintiffs in this case would not extend to the letter, which, by its terms, merely sets forth informal guidance for states that might be interested in pursuing demonstration projections pursuant to Section 1115. *See, e.g.*, Compl. ¶ 6 ("Defendants issued a letter to State Medicaid Directors announcing CMS's intention to, for the first time, approve waiver applications containing work requirements and outlining 'guidelines' for states to consider in submitting such applications."); *id.* ¶ 165 (alleging that CMS stated that it had announced "new policy guidance").

citizenry" in Orange County); *Sierra Club*, 276 F. Supp. 2d at 71 (finding Florida had a local interest in federal action in furtherance of plan "drafted by a state committee and adopted by the Florida legislature"); *Trout Unlimited*, 944 F. Supp. 17–18 (holding that Colorado had an "overwhelming connection to the subject matter" of the lawsuit because the "impact [of] the resolution of th[e] action" would be felt within Colorado, and the "affected public" resided in Colorado).

Accordingly, while this suit challenges an administrative waiver granted by officials at agency headquarters in Washington, D.C., after a Commonwealth-led process of notice and comment and public hearings that occurred in Frankfort, Kentucky, the concrete effects of the federal approval of this state-initiated demonstration project fall exclusively upon the Commonwealth of Kentucky, and any dispute about its lawfulness should be heard by a court in the Commonwealth.

2. Considerations of Judicial Economy Tilt in Favor of Transfer.

On balance, the factors pertaining to judicial economy tilt in favor of transfer to the Eastern District of Kentucky. While neither court's docket appears to be excessively congested, transfer would promote judicial economy because the Eastern District of Kentucky is already thoroughly familiar with the events at issue and with state laws and administrative procedures relevant to this dispute.

Transferee Court's Familiarity with Governing Laws. The familiarity of law factor tilts in favor of transfer to the Eastern District of Kentucky. Of course, courts in this District and the Eastern District of Kentucky are equally competent to resolve questions of administrative compliance with federal law that arise under the APA. *See Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 116 (D.D.C. 2015) (stating that "[t]he

general rule is that all federal courts are competent to decide federal issues correctly" (internal citation omitted)). However, Plaintiffs base their claims in part on allegations comparing the requirements of Kentucky HEALTH with existing requirements under state laws and regulations, *see, e.g.*, Compl. ¶ 137 (citing 907 Ky. Admin. Regs. 20:010), and the Secretary's approval was based in part on "state assurances" about Kentucky HEALTH's implementation under state law and addresses the impact on state administrative procedures.[8] Compl., Ex. C, CMS Approval, at 7. Transfer of this action to the Eastern District of Kentucky, which is already thoroughly familiar with the events at issue and experienced with laws in the Commonwealth that may be relevant to the review of Plaintiffs' claims, will therefore promote judicial economy. *See Trout Unlimited*, 944 F. Supp. at 19 (transferring APA case to Colorado forum after noting, "[w]hile this case deals directly with federal statutes and regulations, it may also, in part, involve the interpretation of Colorado law").

Relative Congestion of Court Calendars. The court-congestion factor is neutral. Judges in the District of Columbia have, on average, about two-thirds as many pending cases as do judges in the Eastern District of Kentucky.[9] But judges in the Eastern District,

[8] In its application for the waiver, the Commonwealth discussed the projected costs of providing benefits to the expansion population under the state's current Medicaid plan, the state tax revenue that Kentucky has been collecting as a result of its participation in the Medicaid expansion under the ACA, and its public-comment process in forming Kentucky HEALTH.

[9] *See* Administrative Office of the U.S. Courts, *Federal Court Management Statistics–Profiles* (Sep. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2017.pdf (showing 263 pending cases per judgeship in the District of Columbia and 382 pending cases per judgeship in the Eastern District of Kentucky, as of September 30, 2017).

on average, process cases slightly more quickly than do the judges of this Court, and there is no basis to conclude that transfer to the Eastern District of Kentucky would lead to unnecessary delay.[10] Further, this litigation is at its earliest stages, so there would be no delay associated with a Kentucky district court's familiarizing itself with this case. *See Trout Unlimited*, 944 F. Supp. at 19 (citing *Zurich Ins. Co. v. Raymark Indus., Inc.*, 672 F. Supp. 1102, 1104 (N.D. Ill. 1987)).

CONCLUSION

Because the public and private interests weigh decisively in favor of transfer, Defendants respectfully request that the Court grant Defendants' motion to transfer this case to the U.S. District Court for the Eastern District of Kentucky.

[10] *See id.* (showing that in the District of Columbia, the median time interval from filing to disposition of civil actions was 9.2 months for the 12-month period ending on September 30, 2017, while the median time interval for the Eastern District of Kentucky was 8.6 months for the same time period).

Dated: February 9, 2018

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