IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD SOUTHEAST, INC.; and FEMINIST WOMEN'S HEALTH CENTER; *Plaintiffs*, v. XAVIER BECERRA, in his official capacity as the Secretary of Health and Human Services, et al., *Defendants*, THE STATE OF GEORGIA, [*Proposed*] *Intervenor-Defendant*.	Case No. 1:21-cv-117-JEB

MOTION TO INTERVENE AND
SUPPORTING STATEMENT OF POINTS AND AUTHORITIES

Plaintiffs, Planned Parenthood Southeast and the Feminist Women's Health Center, brought this suit to challenge the Secretary of Health and Human Services and Secretary of the Treasury's ("federal defendants") approval of a Section 1332 State Innovation Waiver allowing Georgia to implement important reforms to its healthcare marketplace. Georgia respectfully seeks to intervene to defend its Section 1332 waiver. Courts have repeatedly allowed States to intervene in similar circumstances, most notably in two 2018 cases in which this Court allowed Kentucky and Arkansas to intervene to defend Medicaid program waivers. All criteria for both intervention as of right and permissive intervention are readily satisfied. Georgia's motion is timely, as this case is still in its earliest days. Moreover, if Plaintiffs prevail and the waiver is vacated and enjoined, the State will suffer significant harm to its sovereign interests in managing and overseeing its healthcare marketplace. And the State's weighty sovereign interests in this case are not adequately represented by the existing federal defendants.

Federal defendants take no position on this motion. Plaintiffs' position on this motion is as follows: "Plaintiffs take no position on the state's motion to intervene, but if the motion is granted,

Plaintiffs would request that any dispositive motions filed by the state be briefed on the same timeframe as any such motions filed by Defendants."

BACKGROUND

Georgia's health insurance market faces significant challenges. Between 2016 and 2019, total enrollment in individual market plans on the Federally Facilitated Exchange (FFE) fell by 22%—meaning there were over 129,000 fewer consumers on the FFE in 2019 than in 2016. *See* Letter from CMS Admin. Seema Verma to Ga. Gov. Brian P. Kemp 3 (Nov. 1, 2020) ("Approval Letter"). Additionally, unsubsidized enrollment dropped by 72% in this same period. *Id.* And this significant decline in enrollment occurred simultaneously with a monthly premium increase of 58%. *Id.* Furthermore, Georgia has one of the highest uninsured rates in the nation, at 13.7%—1.38 million uninsured. *Id.* Over half of the uninsured have a household income between 100% and 400% of the Federal Poverty Level, making them potentially eligible for federal subsidies. *Id.* at 3-4. However, under the current system, a "high number of consumers eligible for subsidies ... continue to not sign-up for individual market coverage through the Georgia FFE." *Id.* at 4. Finally, these problems disparately impact rural areas of Georgia, where coverage remains unaffordable. *Id.*

This data demonstrated that "the FFE and current applicable requirements are not providing accessible and affordable coverage to all residents." *Id.* After exhaustive research, the State determined that two primary factors were driving the high rates of uninsured in Georgia: lack of competition in the individual market and high provider service costs. *Id.* To address these issues, Georgia applied for a two-part Section 1332 State Innovation Waiver that would make important reforms to State's healthcare market. *Id.* at 5-6.

Section 1332 of the Patient Protection and Affordable Care Act ("ACA") vests the Secretary of Health and Human Services and the Secretary of the Treasury with discretion to approve a State's proposal to waive provisions of the ACA. *See* 42 U.S.C. §18052. The goal of the Section 1332 waiver

process is to empower States to innovatively address specific problems with their health insurance markets to promote affordable health coverage and reduce overall healthcare spending. *Id.* The Secretaries may approve a Section 1332 waiver only if the State's application meets four requirements, known as the statutory guardrails. First, the proposal must provide coverage that is at least as comprehensive as coverage defined in Section 1302(b) of the ACA and offered through the Exchanges established by Title I of the ACA. *Id.* §18052(b)(1)(A). Second, the proposal must provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as would be provided under Title I of the ACA. *Id.* §18052(b)(1)(B). Third, the proposal must provide coverage to at least a comparable number of the State's residents as Title I of the ACA. *Id.* §18052(b)(1)(C). Fourth, the proposal must not increase the federal deficit. *Id.* §18052(b)(1)(D).

To address the problems with its healthcare market, Georgia enacted enabling legislation and submitted a two-pronged Section 1332 waiver application. *See* Approval Letter 6-9. Before submitting its plan, the State conducted an exhaustive review process that included several notice and comment periods and public hearings. *See id.* at 7-9 (noting "how the state went above and beyond to satisfy [applicable procedural] requirements").

Part I of the application would implement the Georgia Reinsurance Program, which would reimburse individual health plan carriers in the individual market based on a three-tiered geographic structure to encourage more carriers to participate in parts of the State where there are fewer carrier options. *Id.* at 5. Part II of the application would transition the State's individual market from the FFE to the Georgia Access Model. *Id.* at 5-6. The Georgia Access Model would allow private sector entities to provide the front-end consumer shopping experience and enrollment operations, with the State providing back-end operations concerning eligibility determinations and enrollment reconciliation. *Id.* This arrangement would allow web-brokers, issuers, and agents to access a significantly larger market than under the current FEE model, increasing their incentive to invest in marketing and outreach to

retain existing enrollees and attract new consumers. *Id.* And the Georgia Access Model will particularly incentivize increased outreach to underserved rural areas. *Id.*

After an exhaustive review process, including several modifications of the State's application in response to federal concerns, the federal defendants approved Georgia's waiver application and determined that it satisfied Section 1332's statutory guardrails. *Id.* at 9-15. The waiver would cover the period between January 1, 2022 (when Part I begins) and December 31, 2026. Part II, the Georgia Access Model, would take effect on January 1, 2023. Two months after the final approval, Plaintiffs filed this suit, which asks the Court to vacate and set aside the federal defendants' approval of Georgia's Section 1332 waiver. Doc. No. 1.

ARGUMENT

I. Georgia is entitled to intervene as of right.

This Court "must grant a timely motion to intervene that seeks to protect an interest that might be impaired by the action and that is not adequately represented by the parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). "[T]he D.C. Circuit has taken a liberal approach to intervention." *Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000); *see Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) (emphasizing "the need for a liberal application [of Rule 24(a)] in favor of permitting intervention").

Specifically, under Rule 24(a)(2), this Court grants intervention as of right if:

1. The motion is timely;
2. Movant has "a legally protected interest" in the action;
3. The action "threaten[s] to impair that interest"; and
4. No existing party is "an adequate representative of [Movant's] interests."

Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008). Any movant "who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *see also Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) ("The standing inquiry is repetitive in the case of intervention as of right because an intervenor who satisfies

Rule 24(a) will also have Article III standing."). Georgia readily satisfies each requirement of Rule 24(a).

A. This motion is timely.

Georgia has filed a "timely motion" to intervene. Fed. R. Civ. P. 24(a). The State filed this motion approximately two months after the complaint was filed and before the federal defendants' answer or responsive pleading is due. *See*, *e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (motion timely filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer"); *Connecticut v. DOI*, 344 F. Supp. 3d 279, 304 (D.D.C. 2018) (motion timely filed "within a month of when Plaintiffs filed the complaint, and before Federal Defendants entered an appearance"); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (motion timely filed "approximately sixteen weeks after the initial complaint was filed"). Further weighing in favor of timeliness, no dispositive motions or responsive pleadings have yet been filed. *See Akiachak Native Cmty.*, 584 F. Supp. 2d at 5-6 (intervention timely in part because no dispositive motion yet filed). The purpose of the timeliness requirement is to prevent prejudice to the court or the parties. *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 274-75 (D.D.C. 2014). Since "no substantive progress has occurred in this action," Georgia's intervention at this early stage will not "unduly disrupt the litigation or pose an unfair detriment to the existing parties." *Id.* at 275.

B. Georgia has a protected interest in this action.

Georgia also has a "legally protected interest in [this] action." *Karsner*, 532 F.3d at 885 (citing Fed. R. Civ. P. 24(a)(2)). This "interest" test is a "liberal" one. *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109-10 (D.D.C. 1985). It is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700.

Courts within this circuit have routinely granted intervention to allow States to defend their sovereign interests in cooperative federalism regimes such as federal-state healthcare programs. *See*

Virginia v. Ferriero, 466 F. Supp. 3d 253, 258 (D.D.C. 2020) (granting intervention of right because States' "regulatory and procedural interests would be affected"); Minute Order, *Stewart v. Hargan*, No. 1:18-cv-152 (D.D.C. Mar. 30, 2018) (Boasberg, J.) (granting Kentucky's motion to intervene in challenge to Medicaid waiver); Minute Order, *Gresham v. Azar*, No. 1:18-cv-1900 (D.D.C. Sept. 6, 2018) (Boasberg, J.) (granting Arkansas's motion to intervene in challenge to Medicaid waiver); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3-5 (D.D.C. 2017) (noting State's "interest in 'protecting its comprehensive regulatory scheme'"); *Akiachak Native Cmty.*, 584 F. Supp. 2d at 5-7 ("Because [granting the plaintiff's request] would abrogate Alaska's taxing and regulatory authority over the trust land ... Alaska's interest may be impaired by the outcome of this litigation."); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 2012 WL 12870488, at *1-2 (D.D.C. June 7, 2012).

In *Stewart v. Hargan*, for example, this Court allowed the Commonwealth of Kentucky to intervene of right in nearly identical circumstances. The Commonwealth there was allowed to intervene in defense of its Kentucky HEALTH Medicaid program, which was approved by the federal government pursuant to a Section 1115 Medicaid waiver. The Commonwealth grounded intervention on its sovereign interests in developing and implementing the program authorized by the wavier. Specifically, Kentucky pointed to the "thousands of hours" it spent "creating and revising its waiver application," "months working with CMS ... to refine Kentucky HEALTH even further before approving it," and the actions of state officials "implementing Kentucky HEALTH in advance of its rollout." ECF No. 30-1, at 8-9, *Stewart v. Hargan*, No. 1:18-cv-152; *see also* ECF 18, at 2-5, *Gresham v. Azar*, No. 1:18-cv-1900. Georgia's interests in defending the Georgia Reinsurance Program and Georgia Access Model are identical to those warranting intervention in *Stewart* and *Gresham*. The State has invested significant resources developing and preparing to implement these programs, which respond to serious shortcomings in Georgia's health insurance market. The State's sovereign interest

in implementing these programs easily meets the standard for a protectable "interest" under Rule 24(a)(2).

C. This action threatens to impair Georgia's interests.

Georgia is "so situated that disposing of th[is] action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). When applying this prong of the intervention standard, "courts in this circuit look to the 'practical consequences' that the applicant may suffer if intervention is denied." *100Reporters*, 307 F.R.D. at 278.

Plaintiffs here seek a declaration that Georgia's waiver is unlawful and an injunction against Georgia's ability to implement its federally approved programs. If this relief is granted, Georgia will be prohibited from enforcing its duly enacted state laws and will be prevented from addressing the significant concerns with its health insurance market that spurred it to apply for the Section 1332 waiver. These potential harms are readily sufficient to find that this suit threatens to impair Georgia's interests. *See*, *e.g.*, *Ferriero*, 466 F. Supp. 3d at 258 ("[I]t is not difficult to conclude that Movants' interests will be impaired if Plaintiffs are successful in this case. Movants' regulatory and procedural interests would be affected if the Archivist were ordered to publish the amendment."); *Stewart*, 1:18-cv-152; *Gresham*, 1:18-cv-1900; *Akiachak Native Cmty.*, 584 F. Supp. 2d at 7 (allowing intervention because suit "would abrogate Alaska's . . . regulatory authority" and "may disturb the rights of the parties under [a settlement agreement]"); *Jewell*, 320 F.R.D. at 4 ("[I]f Plaintiffs were successful in this case, the economic and regulatory interests of Wyoming, Colorado, and Utah would likely be impaired. Other courts in this jurisdiction have found that similar situations justified intervention."); *cf. Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (movants "do not need to establish that their interests *will* be impaired," "only that the disposition of the action 'may' impair or impede their ability to protect their interests."). The "best" course—and the one that Rule 24 "implements"—is to give "all parties

with a real stake in a controversy … an opportunity to be heard" in this suit. *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972).

D. The existing parties do not adequately represent Georgia's interests.

No existing party to this case is "an adequate representative of [Georgia's] interests." *Karsner*, 532 F.3d at 885 (citing Fed. R. Civ. P. 24(a)(2)). This inadequate-representation requirement "is not onerous" and "should be treated as minimal." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *100Reporters*, 307 F.R.D. at 279. It is satisfied when "the applicant shows that representation of his interest 'may be' inadequate," *100Reporters*, 307 F.R.D. at 279; "[t]he applicant need … not [show] that representation will in fact be inadequate." *Dimond*, 792 F.2d at 192; *see Am. Tel.*, 642 F.2d at 1293 ("[Intervention is] ordinarily … allowed … unless it is clear that the party will provide adequate representation for the absentee."). Representation is inadequate when the existing parties have "a 'different' interest" from the movant, even if they have "'a shared general agreement,'" "'tactical similarity [in their] legal contentions,'" or "general alignment" on the correct outcome. *Fund for Animals*, 322 F.3d at 737; *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015).

The federal government does not—and cannot—adequately represent Georgia's distinct sovereign interests in defending its state laws and programs. The Georgia Reinsurance Program and Georgia Access Model were crafted to address issues unique to Georgia's health insurance market and to address the specific needs of Georgia's citizens. In particular, Georgia's high premiums and difficulty in providing competitive options to rural areas prompted it to pursue an innovative approach to its health insurance market. Georgia was—and remains—responsible for the creation, development, and implementation of these programs wholly apart from any separate interests possessed by the federal defendants. At the very least, Georgia will "serve as a vigorous and helpful supplement" to the federal government and "can reasonably be expected to contribute to the informed

resolutions of these questions." *NRDC v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977); *accord 100Reporters*, 307 F.R.D. at 286 ("Though the Court agrees that the DOJ can represent capably many of the interests asserted by the [movant], the Court also has found that … the strength of the DOJ's position will be enhanced by the assistance of the [Movant]").

More broadly, the D.C. Circuit "look[s] skeptically on [federal] government entities serving as adequate advocates for private parties," *Crossroads*, 788 F.3d at 321—much less for separate *sovereigns* like Georgia, *Fund for Animals*, 322 F.3d at 736. Indeed, "this Circuit has 'often concluded that [federal] governmental entities do not adequately represent the interests of aspiring intervenors' because the federal government's obligation 'is to represent the interests of the American people' as expressed in federal law, not the interests of other entities or governments." *Ferriero*, 466 F. Supp. 3d at 258; *see also Jewell*, 320 F.R.D. at 4-5 ("Several previous cases have permitted intervention by states when the federal government was already a party."); *Akiachak Native Cmty.*, 584 F. Supp. 2d at 7 ("[T]he existing defendants, the DOI and the Secretary, have no clear interest in protecting Alaska's sovereignty or Alaska's interest."); *WildEarth Guardians*, 2012 WL 12870488, at *2 ("Wyoming contends that defendant, as a federal agency, must represent 'a broad public interest in the management of [f]ederal lands' and therefore cannot represent the 'narrower, parochial interests of non-federal governmental entities in environmental litigation challenging federal action.' The Court agrees that no other party approaches the case from the state's unique perspective."). Because the federal defendants' "duty runs to the interests of the American people as a whole" while Georgia "will primarily consider the interests of [its] own citizens," intervention of right is appropriate to allow Georgia to vindicate its "unique sovereign interests not shared by the federal government." *Jewell*, 320 F.R.D. at 5.

Finally, "it is not difficult to see that the interests of [Georgia] and the federal government 'might diverge during the course of the litigation,' particularly since the federal government 'remains free to change its strategy' as the case proceeds." *Ferriero*, 466 F. Supp. 3d at 259. Indeed, federal

officials recently changed their position in pending challenges to other Medicaid waivers and pilot programs. *See*, *e.g.*, Motion to Vacate, at 6, *Cochran v. Gresham*, Nos. 20-37 and 20-38 (U.S. Feb. 2021), *available at* https://bit.ly/2ObfKTR (U.S. government seeking remand of challenge to state Medicaid community engagement requirements because it "has commenced a process to determine whether to withdraw its approvals of those requirements"). Georgia hopes that the federal defendants will fully defend their approval of the Section 1332 waiver at issue here, but the State "should not need to rely on a doubtful friend to represent [its] interests, when [it] can represent [itself]" as intervenor-defendant. *Crossroads*, 788 F.3d at 321.

II. Alternatively, Georgia is entitled to permissive intervention.

Even if Georgia were not entitled to intervene as of right under Rule 24(a), this Court should grant permissive intervention under Rule 24(b). Exercising broad judicial discretion, courts grant permissive intervention when the movant makes a "timely motion" and has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Courts also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* "While permissive intervention may be denied in order to avoid the likelihood of undue delay," it should not be denied based on the natural burdens that always come with adding parties—the likely delay must be "undue." *Nuesse*, 385 F.2d at 704 & n.13. Courts in this circuit are particularly "hospitable" to "governmental application[s]" for permissive intervention, like this one. *Id.* at 705.

The requirements of Rule 24(b) are all met here. As explained, Georgia sought intervention shortly after Plaintiffs filed their complaint and before any substantive developments in this case. And Georgia will raise defenses that share many common questions with the parties' claims and defenses. These "similarities between the issues presented by [the proposed intervenor-defendant] and those raised by the DOJ" and Plaintiffs warrant permissive intervention. *100Reporters*, 307 F.R.D. at 286.

Georgia's intervention will not unduly delay or complicate this litigation. Georgia moved to intervene expeditiously while the case was "at … a nascent stage," *id.*, and its participation will add no delay beyond the norm for multiparty litigation. Although Georgia may potentially make "additional and different legal arguments," Plaintiffs will not be prejudiced because they "will have a full opportunity, in their … brief[s], to counter any such legal arguments." *United States v. Philip Morris USA Inc.*, 2005 WL 1830815, at *5 (D.D.C. July 22, 2005).

"The proper approach" to permissive intervention, this Court has explained, "is to allow all interested parties to present their arguments in a single case at the same time." *100Reporters*, 307 F.R.D. at 286. Georgia is unquestionably an interested party, it has important sovereign interests to represent, its participation is essential to the accurate resolution of this case, and this Court will benefit from its involvement. Georgia should at a minimum be granted permissive intervention.

CONCLUSION

The Court should grant this motion and allow Georgia to intervene as a defendant.

Dated: March 25, 2021

Respectfully submitted,

/s/ Jeffrey M. Harris

Jeffrey M. Harris
Tyler R. Green
Bryan Weir
Daniel Shapiro
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

CHRIS CARR
Attorney General of Georgia
Andrew Pinson
Solicitor General
OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square SW
Atlanta, GA 30334
(404) 458-3409

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I filed this motion and its attachments with Clerk of the U.S. District Court for the District of Columbia using the Court's CM/ECF system, thereby serving all counsel of record.

Dated: March 25, 2021 */s/ Jeffrey M. Harris*