IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

The State of KANSAS, *et al.*, Plaintiffs, v. UNITED STATES of AMERICA and the CENTERS FOR MEDICARE & MEDICAID SERVICES, Defendants.	Civil Action No. 1:24-cv-00150-DMT-CRH

PLAINTIFFS' MOTION FOR A STAY OF THE FINAL RULE AND PRELIMINARY INJUNCTION

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INTRODUCTION

Illegal aliens who have been granted deferred deportation under the Deferred Action for Childhood Arrivals (DACA) program are, by statute, ineligible for a range of federal public benefits, including subsidized health insurance under the Affordable Care Act (ACA). Congress explicitly limited eligibility to participate in such exchanges to citizens or nationals of the United States or to individuals "lawfully present" here. 42 U.S.C. § 18032(f)(3). Congress also excluded DACA recipients from the list of qualified aliens who are authorized to receive federally-funded benefits. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, Title VI, 8 U.S.C. § 401, 110 Stat. 2105, 2112 (currently codified at 8 U.S.C. § 1611). This was done for good reason: to discourage illegal immigration and avoid draining taxpayer resources.

The Centers for Medicare and Medicaid Services (CMS) has nonetheless now chosen to ignore Congress and grant DACA recipients access to the ACA's subsidized health exchanges anyway. They are doing this through a Final Rule that claims DACA recipients are "lawfully present" under CMS regulations. *See* "Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other NonCitizens for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program," 89 Fed. Reg. 39,392 (May 8, 2024). This action is both contrary to law and arbitrary and capricious.

This Final Rule will encourage DACA recipients and other unlawfully present persons to illegally remain in the United States in the hope of receiving subsidized health insurance through the ACA, the very harm Congress sought to prevent. Their continued unlawful presence will require Plaintiff States to expend their limited resources on education, healthcare, law enforcement, public assistance, and other forms of public assistance diverted to support

unlawfully present aliens. It will also directly increase administrative and economic burdens on states like Kentucky who run their own ACA exchange. *See* Ex. 2, Decl. of Meier, para. 20. The Final Rule's effective date is November 1, 2024. Unless the court intervenes, Plaintiff States will suffer irreparable harm from the Rule's implementation.

Accordingly, Plaintiff states request that the Court prevent the Rule from imminently going into effect and enter an order either: (1) postponing the effective date of the Final Rule pending judicial review or (2) enjoining Defendants from implementing the Final Rule pending judicial review.

STATEMENT OF FACTS

I. Statutory and Regulatory Framework

In the PRWORA, Congress announced a "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). Congress therefore provided that, "[n]othwithstanding any other provision of law," any noncitizen who is not a "qualified alien" is ineligible for any federal public benefit. 8 U.S.C. § 1611(a). Only lawful permanent residents, asylees, refugees, parolees granted parole for a period of at least one year, aliens granted withholding of removal, and certain battered aliens count as "qualified aliens." 8 U.S.C. § 1641(b), (c).

Years later, when enacting the ACA, Congress took a similar tack: expressly limiting eligibility for Qualified Health Plans (QHPs)[1] to individuals who are either citizens or nationals

[1] The Patient Protection and Affordable Care Act (i.e., the ACA), Pub. L. No. 111–148, 124 Stat. 119, was enacted in 2010. Among other things, it "required most Americans to obtain minimum essential health insurance coverage and imposed a monetary penalty upon most individuals who failed to do so." *California v. Texas*, 141 S. Ct. 2104, 2108 (2021). The ACA "require[d] the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans." *King v. Burwell*, 576 U.S. 473, 479 (2015). Under the ACA, each state may "establish its own Exchange, but [the ACA] provides that the Federal Government will establish the

of the United States or who are "lawfully present" here. 42 U.S.C.§ 18032(f)(3). The ACA further requires CMS to verify that health exchange applicants are lawfully present in the United States. 42 U.S.C. § 18081(c)(2)(B).

In June 2012, the Department of Homeland Security created the DACA program, declaring that certain individuals who came to the United States illegally as children could request consideration of deferred action (i.e. the deferral of their required deportation) for a period of two years, subject to renewal. Memorandum from Janet Napolitano, Sec'y, DHS, to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), *available at* https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. These individuals were also made eligible for DHS work authorization. *See* 8 C.F.R. § 274a.12(c)(33). The Department argued that this was merely an exercise of prosecutorial discretion to defer removal action for a period of time, and it expressly disclaimed providing anyone with lawful status. *See id.* ("This memorandum confers no substantive right, immigration status or pathway to citizenship. *Only the Congress, acting through its legislative authority, can confer these rights.*") (emphasis added).

Consequently, in August 2012, CMS amended its definition of "lawfully present"—located in 45 C.F.R. § 152.2—to take the exact same position Plaintiff States take today: DACA recipients are not lawfully present aliens. *See generally* "Pre-Existing Condition Insurance Plan Program," 77 Fed. Reg. 52,614 (Aug. 30, 2012). This definition extended to Medicaid, Children's Health Insurance Program (CHIP), and Basic Health Plan (BHP) eligibility. [2]

Exchange if the State does not." *Id.* The ACA requires all exchanges to "'make available qualified health plans to qualified individuals and qualified employers.'" 42 U.S.C. § 18031(d)(2)(A).

[2] CMS describes a BHP as "a health benefits coverage program for low-income residents who would otherwise be eligible to purchase coverage through the Health Insurance Marketplace."

The legality of the DACA program has been the subject of litigation since it was first promulgated. Last year, a federal district court enjoined and vacated DHS's DACA rule. *See Texas v. United States*, Civil Action No. 1:18-CV-00068, 2023 WL 5950808, at *1 (S.D. Tex. Sept. 13, 2023). The court's order allowed DHS to continue to administer the DACA program for individuals who registered prior to July 16, 2021.

II. The Final Rule

Now, CMS has changed its position for purely political ends to redefine both DACA recipients and employment-authorized aliens as "lawfully present" for purposes of the ACA. 89 Fed. Reg. 39,392. The agency justifies its 180-degree reversal by citing "the broad aims of the ACA to increase access to health coverage" 89 Fed. Reg. at 39,395. According to CMS, the prior practice of excluding DACA recipients "failed to best effectuate congressional intent in the ACA." *Id.* Defining DACA recipients as lawfully present, the agency claims, "aligns with the goals of the ACA—specifically, to lower the number of people who are uninsured in the United States and make affordable health insurance available to more people." 89 Fed. Reg. at 39,396. CMS also claims it was motivated by the national economic importance of DACA recipients, by the agency's desire to support the DACA policy, and by the disproportionately high percentage of uninsured DACA recipients. 89 Fed. Reg. at 39,395-96.

Basic Health Program, https://www.medicaid.gov/basic-health-program/index.html (last visited Aug. 27, 2024). Through a BHP, a state can

> provide coverage to individuals who are citizens or *lawfully present non-citizens*, who do not qualify for Medicaid, CHIP, or other minimum essential coverage and have income between 133 percent and 200 percent of the federal poverty level (FPL). People who are lawfully present non-citizens who have income that does not exceed 133 percent of FPL but who are unable to qualify for Medicaid due to such non-citizen status, are also eligible to enroll.

Id. (emphasis added).

In light of these justifications, CMS declared that it "s[aw] no reason to treat DACA recipients differently from other noncitizens who have been granted deferred action." 89 Fed. Reg. at 39,396. The Final Rule acknowledged the injunction against DACA (discussed above) in a footnote, saying that "[c]urrent court orders prohibit DHS from fully administering the DACA final rule. However a partial stay permits DHS to continue processing DACA renewal requests and related applications for employment authorization documents." 89 Fed. Reg. at 39,395.

Besides DACA recipients, the Final Rule also adds aliens granted employment authorization under 8 C.F.R. § 274a.12(c) into the definition of "lawfully present," for purposes of ACA eligibility. This expands the categories of aliens considered lawfully present from the seven enumerated categories under the former regulatory definition[3] to all thirty-six categories covered under 8 C.F.R. § 274a.12(c). *See* 89 Fed. Reg. at 39,408. CMS's only justification for this change was that it would make it easier to determine who was lawfully present if they could include anyone with DHS work authorization. *Id.* Even so, CMS acknowledged that its new definition of "lawfully present" might include noncitizens who were, in fact, not lawfully present. *See id.* ("*Almost all* noncitizens granted employment authorization under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations.") (emphasis added); *see also* 89 Fed. Reg. at 39,409 ("We agree that a grant of employment authorization does not result in an individual being considered a "qualified alien" under [PRWORA]."). In other words, CMS's new definition of "lawfully present" knowingly includes noncitizens that even the agency recognizes are *not* here lawfully.

CMS's justification for this result is non-sequitur: "we believe it is appropriate to include

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[3] The old version of 8 C.F.R. § 152.2(4)(iii) defined "Lawfully present" to include "Aliens who have been granted employment authorization under 8 CFR § 274a.12(c)(9), (10), (16), (18), (20), (22), or (24)."

all individuals with such [§ 274a.12(c)] employment authorization because DHS has made an affirmative determination that the individual has an underlying immigration status or category that authorizes them to work legally in the United States." *Id.*

III. DACA Recipients Reside in the Plaintiff States

As of December 31, 2023, the Federal government's own data confirms that there were approximately 530,110 active DACA recipients distributed across the nation. U.S. Citizenship & Immigr. Servs., Office of Performance & Quality, Count of Active DACA Recipients by State or Territory as of December 31, 2023, *available at* https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy2024_q1.xlsx [hereinafter "DACA Recipients by State"].

According to U.S. Citizenship and Immigration Services, the (rounded) number of DACA recipients in each Plaintiff State is as follows:

Alabama	3,460
Arkansas	3,680
Florida	21,080
Idaho	2,250
Indiana	7,450
Iowa	2,010
Kansas	4,350
Kentucky	2,230
Missouri	2,550
Montana	80
Nebraska	2,420
New Hampshire	220

North Dakota	130
Ohio	3,290
South Carolina	4,840
South Dakota	190
Tennessee	6,360
Texas	87,620
Virginia	7,810

Id.

And according to CMS, the Final Rule is expected to result in 147,000 DACA recipients becoming newly eligible for a subsidized health plan. *See* 89 Fed. Reg. at 39,425. This includes 86,000 in Fiscal Year 2026 alone, at a cost of $305 million—$3,547 per DACA recipient per year. Ex. 1, Camarota Decl. para. 5. These benefits are significant, especially considering that DACA recipients tend to have modest levels of education and are more likely to have incomes below 200% of the federal poverty line. *Id.* at para. 6. DACA recipients are especially likely to have been born in countries where healthcare does not meet American standards. *Id.* at para. 10.

IV. Plaintiff States' Involvement in the ACA

Under the ACA, states have the option to create an exchange program to handle QHP enrollment. 42 U.S.C. § 18041. Plaintiffs Idaho, Kentucky and Virginia administer their own state-run ACA exchanges to handle QHP enrollment. *See* The Marketplace in Your State, https://www.healthcare.gov/marketplace-in-your-state/ (last visited Aug. 28, 2024) [hereinafter "Marketplace"]. All states that run their own Exchange will incur significant costs. The Final Rule notes the following costs on the states: (1) $194,650 to develop and code changes to each states Exchange eligibility system, and (2) $624,142 in state application processing charges to

assist individuals impacted by the final rule. Final Rule, 89 Fed. Reg. at 39,426; *see also* Ex. 2, Decl. of Meier, para. 20-22.

LEGAL STANDARD

The Administrative Procedure Act provides that:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. This provision "authorizes reviewing courts to stay agency action pending judicial review." *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citation omitted).

"Motions to stay agency action pursuant to these provisions are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Id.* (citing *Cuomo v. Nuclear Regul. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). Preliminary injunctive relief is available to plaintiffs who demonstrate: (1) the probability or likelihood of success on the merits, (2) the real threat of irreparable harm or injury absent immediate relief, (3) that the balance of equities resulting from the issuance of the injunction against the order's effect on the defendant and third parties weighs in favor of plaintiffs, and (4) that the public interest favors immediate injunctive relief. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). While likelihood of success on the merits is generally the "most significant" factor, *S&M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992), "[n]o single factor in itself is dispositive," *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

"In considering the likelihood of the movant prevailing on the merits, a court does not decide whether the movant will ultimately win." *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). Rather, the plaintiff must show "a reasonable likelihood" at least one of the movant's claims will succeed on the merits. *Id.* In other words, the plaintiff must show more than a "possibility" he will succeed, but need not demonstrate to a mathematical certainty that there is "a greater than fifty per cent likelihood that he will prevail on the merits," *Id.* at 1143 (quoting *Dataphase*, 640 F.2d at 113); *accord Nken v. Holder*, 556 U.S. 418, 434–35 (2009); *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013). To determine likelihood of success, "a court should flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" *Calvin Klein*, 815 F.2d at 503 (quoting *Dataphase*, 640 F.2d at 113). Plaintiffs meet this standard.

A. The Final Rule is contrary to law

Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory . . . authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency has acted in excess of statutory authority when it "has gone beyond what Congress has permitted it to do" either by assuming authority it does not have or by exercising the authority it does have in an impermissible way. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

CMS's determination that DACA recipients are "lawfully present" is contrary to law, because the "action" that is deferred by the DACA program is enforcement action—i.e., deportation—on recipients' unlawful presence. *See* 8 C.F.R. § 236.22(b)(4) (limiting DACA

availability to aliens who lack lawful immigration status); *see also* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); *id.* § 1229a(a)(2) (noting that inadmissible aliens are removable).

Several courts have recognized the obvious fact that DACA recipients are unlawfully present. As the Eleventh Circuit explained, DACA recipients are simply "given a reprieve from potential removal; that does not mean they are in any way 'lawfully present' under the [INA]." *Estrada v. Becker*, 917 F.3d 1298, 1305 (11th Cir. 2019) (citation omitted). Similarly, another court has stated that "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present, and Congress has not granted the Executive Branch free rein to grant lawful presence to persons outside the ambit of the statutory scheme." *Texas v. United States*, 549 F. Supp. 3d 572, 609–10 (S.D. Tex. 2021) (internal quotes omitted), *aff'd in relevant part*, 50 F.4th 498 (5th Cir. 2022). As the Fifth Circuit put it later in the same litigation:

> DACA creates a new class of otherwise removable aliens who may obtain lawful presence, work authorization, and associated benefits. Congress determined which aliens can receive these benefits, and it did not include DACA recipients among them. We agree with the district court's reasoning and its conclusions that the DACA Memorandum contravenes comprehensive statutory schemes for removal, allocation of lawful presence, and allocation of work authorization.

50 F.4th at 526.

Since DACA recipients *are not* lawfully present, they cannot receive federal benefits that are statutorily limited to individuals who *are* lawfully present. This is not a close or particularly difficult question of statutory interpretation.

In the PRWORA, Congress broadly prohibited non-qualified aliens from receiving any federal public benefit "[n]otwithstanding any other provision of law," 8 U.S.C. § 1611(a). Phrases such as this "broadly sweep aside potentially conflicting laws." *United States v. Novak*, 476 F.3d

1041, 1046 (9th Cir. 2007); *see also Campbell v. Minneapolis Pub. Hous. Auth. ex rel. City of Minneapolis*, 168 F.3d 1069, 1075 (8th Cir. 1999) ("The phrase, 'notwithstanding any other provision of law,' signals that the [statute] supersedes other statutes that might interfere with or hinder the attainment of this objective." (citations omitted)).

Nothing in the text of the ACA gives CMS the authority to act beyond the bounds of the PRWORA. In fact, the ACA's plain language, limiting eligibility to lawfully present individuals, aligns with PRWORA's restriction on the provision of federal benefits. *See* 42 U.S.C. § 18032(f)(3). Therefore, the PRWORA controls. *See Poder in Action v. City of Phoenix*, 481 F. Supp. 3d 962, 972 (D. Ariz. 2020) (when law was "utterly silent as to who should receive [] funds" and did not "provide a clear expression of congressional intent concerning whether certain aliens should be excluded from receiving [] funds," PRWORA controlled).

And the PRWORA's definition of qualified alien does not apply to DACA recipients. "Qualified aliens" must be lawfully admitted under the Immigration and Nationality Act (INA), or otherwise granted lawful status under a specific provision of United State immigration law. *See* 8 U.S.C. § 1641. No part of the definition of "qualified alien" contemplates someone whose unlawful presence is temporarily tolerated due to the executive branch's unlawful program of prosecutorial discretion. Since DACA recipients do not fall within the definition of "qualified alien" set forth in the PRWORA, they are ineligible for ACA benefits, full stop.[4]

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[4] Nothing in the ACA itself gives CMS the authority to extend any federal benefit to a class of people if Congress has deemed that class to be unqualified, therefore PRWORA controls. *See Poder in Action v. City of Phoenix*, 481 F. Supp. 3d 962, 972 (D. Ariz. 2020) (when the CARES Act was "utterly silent as to who should receive [] funds" and did not "provide a clear expression of congressional intent concerning whether certain aliens should be excluded from receiving [] funds," the court turned to PRWORA to determine eligibility).

Nonetheless, the Final Rule runs counter to the PRWORA by making aliens granted deferred action under DACA, or anyone DHS has granted employment authorization, eligible to enroll in QHPs through a subsidized Exchange. 89 Fed. Reg. 39,436. Aliens granted deferred action, including those in the DACA program, are not included within Congress's definition of "qualified alien," 8 U.S.C. § 1641, nor do they fall within an exception to the prohibition on public benefits. *See* 8 U.S.C. § 1611(b)(1) (providing exceptions to the prohibition against federal public benefits for certain public benefits, including emergency medical care, assistance for immunizations, certain non-cash, in-kind services, and other specific federal programs under certain circumstances).

In addition, aliens granted employment authorization under 8 C.F.R. § 274a.12(c) do not automatically fall within the definition of "qualified alien" under the PRWORA either. "Qualified aliens" are generally eligible for employment authorization. *See generally* 8 C.F.R. § 274a.12(a) (making aliens with certain immigration statuses eligible for employment authorization, including lawful permanent residents and refugees). But not all those granted employment authorization are qualified aliens. *See* 89 Fed. Reg. 39,408 ("Almost all noncitizens granted employment authorization under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations"); *id.* at 39,409 ("We agree that a grant of employment authorization does not result in an individual being considered a 'qualified alien' under 8 U.S.C. 1641(b) or (c) [PRWORA]"). So a mere grant of employment authorization cannot confer lawful presence under either the INA or PRWORA.

By making both DACA recipients and employment-authorized aliens eligible to enroll in a QHP through an Exchange, the Final Rule runs contrary to law because subsidies provided to QHP enrollees constitute a federal public benefit under PRWORA. *See* 8 U.S.C. § 1611(c)(1)(B) (defining "federal public benefit" to include any health benefit "for which payments or assistance

are proved to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States."). The Final Rule, by including in its definition of aliens "lawfully present" in the United States both DACA enrollees and aliens granted work authorization, is thus both not in accordance with the PRWORA and in excess of CMS' statutory authority.

B. The Final Rule is arbitrary and capricious

Under the APA, a court must also "hold unlawful and set aside agency action" that is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). An agency acts arbitrarily and capriciously when it departs sharply from prior practice without reasonable explanation or fails to consider either alternatives to its action or the affected communities' reliance on the prior rule. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *see also In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005) (agency action is arbitrary and capricious when agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). An agency also acts arbitrarily and capriciously when it fails to consider costs, which are a "centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

The ACA does not allow federal healthcare subsidies or coverage for aliens who are not lawfully present in the United States. 42 U.S.C. 18032(f)(3). As discussed above, DACA recipients are not lawfully present. Prior to the Final Rule, CMS policy recognized this fact. *See, e.g.*, 77 Fed. Reg. at 52,615 ("As it also would not be consistent with the reasons offered for adopting the DACA process to extend health insurance subsidies under the [ACA] to these individuals, HHS is amending its definition of 'lawfully present' in the [Pre-existing Condition

Insurance Plan Program], so that the [] program interim final rule does not inadvertently expand the scope of the DACA process."). In the Final Rule, CMS reversed its prior policy without explanation and did not consider the full scope of costs to States in doing so.

In promulgating the Final Rule, Defendants failed to provide a reasonable explanation for the sharp departure from CMS' own its own past practice and prior assertions. The Final Rule does not attempt to explain why the agency's about-face is now consistent with the "reasons offered for adopting the DACA process." Nor does it explain why the reasons for adopting the DACA process are in any way related to the conditions for ACA eligibility. And while CMS offers conclusory statement that the Final Rule is consistent with the goals of the ACA (*see* 89 Fed. Reg. at 39,396), the ACA does not give CMS authority to expand a federal benefit program to those to whom Congress has expressly denied benefits.

Further, CMS's redefinition of DACA recipients as "lawfully present" is facially irrational. The self-contradictory nature of Defendants' determination that deferred action recipients are lawfully present is obvious when it is spelled out in full: those aliens on whose *unlawful presence* DHS is deferring action are *lawfully present*. Defendants' Final Rule treating such aliens as "lawfully present" is unreasonable, arbitrary, and capricious, and should be enjoined under 5 U.S.C. § 706.

Defendants also failed to consider the costs States would incur as a result of the Final Rule. States which operate their own exchanges will see operating costs increase and premiums rise. These include technology and staffing expenses, funded from state revenues. *See* Ex. 2, Decl. of Kentucky, paras. 20-22. And every Plaintiff State will experience decreased emigration by illegal aliens, as expanded eligibility for ACA coverage and subsidies encourages more illegal aliens to remain in the country. *See* Ex. 1, Camarota Decl. With more illegal aliens residing in Plaintiff States, the States will foreseeably incur additional costs as they provide driver's

licenses, public education, and emergency services to illegal aliens. And all the States bear the costs of the DACA program in the form of incarceration of DACA recipients who commit crimes. *See* U.S. Citizenship and Immigration Services, *DACA Requestors with an IDENT Response: November 2019 Update*, at 1, *available at* https://tinyurl.com/ytrrhwj7 (between 2012 and October 2019, nearly 80,000 illegal aliens with prior arrest records were granted DACA status).

Defendants did not consider any of these costs when promulgating the Final Rule. Instead, the only costs to States Defendants' accounted for were "system changes" to ACA exchanges in order to comply with the Final Rule's new eligibility requirements. *See* 89 Fed. Reg. at 39,434 ("States that do not have a BHP and do not operate their own Exchange… are not expected to incur any costs as a result of this rule."). This failure to consider, at all, the foreseeable and substantial costs the Final Rule will impose on the States arbitrary and capricious, and provides another reason why Plaintiffs are likely to succeed on the merits of their challenge.

II. Plaintiffs have standing and will suffer irreparable harm absent a stay and preliminary injunction.

"[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis omitted). A party must make a "clear showing" that harm is more than simply a "possibility" and is not merely "speculative." *Id.* at 21–22. As demonstrated below—and as admitted by Defendants in the proposed rule—the likelihood Plaintiff States will suffer irreparable harm is more than a possibility—it is a near certainty. Here, Plaintiffs are asserting "procedural right[s] to protect [their] concrete interests." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). The States can thus assert their procedural rights under the APA "'without

meeting all the normal standards for redressability and immediacy.'" *Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007) (quoting *Lujan*, 504 U.S. at 572 n.7).

CMS itself admits that the Final Rule will make 147,000 uninsured DACA recipients newly eligible for subsidized health insurance. 89 Fed. Reg. at 39,425. Expanding eligibility for ACA coverage will impose additional administrative and resource burdens on states that have established their own ACA exchange by allowing additional persons to use such exchanges. *See* 89 Fed. Reg. at 39,424, 39,426; *see also* Ex. 2, Decl. of Meier, paras. 20-22. Plaintiffs Idaho, Kentucky, and Virginia administer their own state-run ACA exchange to handle QHP enrollment. Marketplace, *supra*. These states will face increased administrative and system costs when they are forced to distribute ACA exchange subsidies to a new class of illegal aliens who are disproportionately lower-income. The Final Rule expressly acknowledges these costs will be incurred by the Plaintiff States. *See* 89 Fed. Reg. at 39,424, 39,426. Those Plaintiff States' standing cannot seriously be disputed, and "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

Moreover, in addition to the financial and administrative burdens the Final Rule puts on Plaintiff States who run their own ACA exchanges, subsidized health insurance through the ACA is a valuable public benefit, worth an average of $3,547 per year to each DACA recipient. This public benefit foreseeably encourages alien beneficiaries who are unlawfully present in the United States to remain in the United States. *See* Ex. 1, Camarota Decl. paras. 5-6. It goes without saying that aliens' immigration decision-making is heavily influenced by the availability of welfare and other public benefits. *Id.* para 9. And for the majority of DACA recipients, who come from countries with healthcare systems that are inferior to what is offered in the United States, ACA eligibility is an even greater inducement to remain. *Id.* para. 10.

Therefore, the Final Rule will foreseeably cause all the Plaintiff States to expend more of their limited education, healthcare, law enforcement, public assistance, and other resources on illegally present aliens. *Id.* This harm is far from remote or speculative. Congress itself concluded that "the availability of public benefits" provides an "incentive for illegal immigration," 8 U.S.C. § 1601(5), hence the need to limit the availability of such benefits to those Congress has authorized to be here—that's why PRWORA was enacted. *See id.* § 1601(2)(B).

As an example, every Plaintiff State must allow minors who are not lawfully present in the United States to attend their schools. *Plyler v. Doe*, 457 U.S. 202, 223–30 (1982). Each incurs a substantial cost to educate school aged children. *E.g.*, Kan. State Dep't of Educ., Expenditures Per Pupil: 2020-2021 at 8 (Jan. 2021), available at https://shorturl.at/bIUXY (noting 2020-2021 school year expenditures per pupil were approximately $15,869); North Dakota Dep't of Public Instruction, School Finance Facts, at 4 (Feb. 2023), available at https://www.nd.gov/dpi/sites/www/files/documents/SFO/2023FinFacts.pdf (2021-2022 expenditure of $14,174 per pupil). Consequently, all the Plaintiff States incur fiscal costs through the provision of free K–12 public education to DACA recipients and their children (as well to as other unlawfully present persons), since some portion of the DACA recipients are either the parents of K–12 school-age children or are themselves K–12 school-age children.

Additionally, most of the Plaintiff States incur costs through the issuance of driver's licenses to DACA recipients. *E.g.*, Ind. Code 9-24-11-5(c); Iowa Code §§ 321.190(d) and 321.196(a); Kan. Stat. Ann. §§ 8-240(b)(2)(H), 8-243(a) (2022); Mont. Code Ann. §§ 61-5-110, 61-5-105(10); Neb. Rev. Stat. §§ 60-484.04, 60-484.05; N.H. Code Admin. R. Saf-C 1002.06; SD ST §

32-2-1-1; Tenn. Code. Ann. § 4-58-102; Va. Code § 46.2-328.3.[5] *See also Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017), cert denied 138 S.Ct. 1279 (2018) (enjoining Arizona's policy of refusing to issue driver's licenses to DACA recipients).

And DACA recipients also consume public benefits in the form of emergency care and other public assistance expenditures in Plaintiff States. *See* Kan. Dep't of Health and Env't, Medicaid Transformation 214 (Jan. 2009), available at https://www.kdhe.ks.gov/253/Medicaid-Transformation (noting "[illegal aliens] have been found to use hospital and emergency services at over twice the rate of the overall U.S. population," and observing that there is a "large number of" "uninsured" illegal aliens). States also incur additional costs when they incarcerate DACA recipients and are required to fund their legal defense. Since the Final Rule is highly likely to reduce the number of DACA recipients who leave the United States (*see* Ex. 1, Camarota Decl.), the Final Rule will increase the costs imposed on Plaintiff States.

III. The equities overwhelmingly favor a stay of agency action and preliminary injunction

The two final prongs of the stay/preliminary injunction inquiry overwhelmingly favor granting relief. The government Defendants will suffer no harm if the Final Rule is stayed are enjoined from enforcing the Final Rule. *See Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (agency suffers no harm when it is prohibited from acting "in violation of applicable statutory restraints"); *cf. Dakotans for Health v. Noem*, 52 F.4th 381, 392 (8th Cir. 2022) (state "has no interest in enforcing overbroad restrictions that likely violate the Constitution").

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[5] In North Dakota, licenses can be issued to non-citizens that give proof of "legal presence" which can be proven through Employment Authorization Cards given to DACA recipients. *See* N.D.C.C. § 39-06-07.1 (requiring license applicant to verify legal presence); N.D. Dept. of Transp., *Noncommerical Drivers License Manual*, at 5 (2021)* (listing an Employment Authorization Card as a valid proof of legal presence).

In fact, quite the opposite is true. Congress has already conclusively declared that the nation's "compelling" interest lies in "remov[ing] the incentive for illegal immigration provided by the availability of public benefits," 8 U.S.C. § 1601(6). To *not* suspend the Final Rule would empower CMS to *harm* the federal government's interests. In addition, third-party DACA recipients' have no legally cognizable interest in obtaining public benefits for which they are statutorily ineligible. *See Evanoff v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 11 F. App'x 670, 670–71 (8th Cir. 2001); *cf. Lyng v. Payne*, 476 U.S. 926 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.").

Finally, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021). To the contrary, where, as here, a party has demonstrated a strong likelihood of success on the merits, it is "a strong indicat[ion] that a preliminary injunction would serve the public interest." *Id.* As established above, the Plaintiff States and the public at large have a compelling interest in preventing the expenditure of public funds to those who are not eligible. Because the Final Rule extends public benefits to classes of aliens beyond those identified by Congress, it is contrary to the public interest.

CONCLUSION

For the foregoing reasons, Plaintiff States asks this Court to postpone the effective date of the Final Rule and preliminarily enjoin Defendants from implementing the Final Rule pending judicial review.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

The State of KANSAS et al., Plaintiffs, v. UNITED STATES OF AMERICA and the CENTERS FOR MEDICARE & MEDICAID SERVICES, Defendants.	Civil Action No. 1:24-cv-00150-DMT-CRH

DECLARATION OF STEVEN CAMAROTA IN SUPPORT OF PLAINTIFFS' MOTION FOR STAY AND PRELIMINARY INJUNCTION

I, Steven Camarota, declare under penalty of perjury under the laws of the United States that the following statement is true to the best of my knowledge:

1. My background, qualifications, and professional affiliations are set forth in my CV, which is attached to this declaration. As seen from my CV, for the last three decades I have conducted research and published on the fiscal, economic, and demographic impact of immigration in the United States.
2. I have been the Director of Research at the Center for Immigration Studies since 2000, and I was a resident fellow at the Center from 1996 to 2000. I have testified before Congress dozens of times on the economic, fiscal, and demographic impact of immigration, including twice in the last year. In addition, from 2000 to 2006 I was the lead researcher on a contract with the Census Bureau examining the quality of immigrant data in the American Community Survey.

3. My research has been featured on the front pages of The New York Times, The Washington Post, and USA Today, as well as numerous other media outlets. I have written for a number of journals including The Public Interest, Social Science Quarterly, National Interest, Academic Questions, and Foreign Affairs. I have also published general interest pieces for such publications as the Chicago Tribune, Los Angeles Times, National Review, and the Dallas Morning News. I have appeared on radio and television news programs including CNN, MSNBC, Fox News, NBC Nightly News, ABC World News Tonight, CBS Evening News, National Public Radio, and the PBS NewsHour.
4. I hold an M.A. in Political Science from the University of Pennsylvania and a Ph.D. in Public Policy Analysis from the University of Virginia. I have also received additional training in statistics at the University of Michigan ICPSR program.
5. The administration currently estimates that 86,000 DACA recipients will benefit from the rule change in FY 2026. *See* Table 3, 89 Fed. Reg. at 39,428. Tables 4 and 5 of the Final Rule show a cost in FY 2026 of $305 million. *See* Tables 4 & 5, 89 Fed. Reg. at 39,431-2. Dividing the total cost estimate by the number of beneficiaries estimated by the government indicates the value of ACA subsidies to each DACA recipient benefiting will be $3,547 per year by 2026.
6. This is a significant benefit, especially when one considers that DACA recipients have modest levels of education and modest incomes. The

Migration Policy Institute estimates that only 4 percent of DACA recipients ages 15 to 32 had completed a bachelor's degree. Jie Zong, et al., "A Profile of Current DACA Recipients by Education, Industry, and Occupation," MIGRATIONPOLICY.ORG, Nov. 2017, at 4, Table 1, available at https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf. A 2021 analysis by the Kaiser Family Foundation estimates that 43% of the DACA-eligible population have incomes below 200% of the federal poverty threshold, compared to 26% of individuals born in the United States who are in the same age group. Kaiser Family Foundation, "Key Facts on Deferred Action for Childhood Arrivals (DACA)," Apr.13, 2023, available at https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/.

7. Moreover, the above figures are for all those with DACA, while it is primarily those with lower incomes that will benefit from the largest ACA subsidies. That the new policy provides a substantial benefit to DACA recipients is not in dispute. It is one of the chief reasons given by the administration for providing ACA subsidies to this population. Given the size of this subsidy, there is good reason to believe that it will impact the future migration decisions of some recipients.

8. It is well established that a significant number of illegal immigrants leave the country on their own each year. Some of the most extensive research on

this topic comes from Robert Warren at the Migration Policy Institute. From 2010 to 2018, Warren estimates that 305,000 illegal immigrants left the country, not including those who were deported. Robert Warren, "Reverse Migration to Mexico Let to US Undocumented Population Decline: 2010 to 2018," 8(1) JOURNAL ON MIGRATION & HUM. SEC. 32, (2020), available at https://journals.sagepub.com/doi/full/10.1177/2331502420906125. By giving a large new benefit, the regulation adopted by the administration increases the incentive for DACA recipients to remain in the country. This is especially true of those low-income DACA recipients struggling to afford health care or those with serious medical conditions.

9. There is empirical research showing that public benefits of this kind can impact the migration decision of immigrants. Research indicates that immigrants tend to be attracted to countries with more generous welfare systems. Agersnap, Jensen, and Kleven found that by reducing benefit levels, Denmark substantially reduced the flow of immigrants into the country. *See* Ole Agersnap, et al., "The Welfare Magnet Hypothesis: Evidence from an Immigrant Welfare Scheme in Denmark." 2(4) AM. ECON. REV.: INSIGHTS 527 (2020), available at https://www.aeaweb.org/articles?id=10.1257/aeri.20190510. De Giorgi and Pellizzari also found that the generosity of public benefits had an impact on migration patterns in Europe. *See* Giacomo De Giorgi & Michele Pellizzari, "Welfare migration in Europe," 16(1) LABOUR ECON. 353 (2009), available at

https://www.sciencedirect.com/science/article/abs/pii/S0927537109000062?via %3Dihub. In the American context, Borjas (1999) found that the settlement of immigrants is influenced by benefit levels. *See* George J. Borjas, "Immigration and Welfare Magnets," 17(4) JOURNAL OF LABOR ECON. 607, October (1999), available at https://www.journals.uchicago.edu/doi/10.1086/209933. Similarly, Dobson (2001) also found a "significant correlation" between the inflow of immigrants and a locality's welfare benefits. *See* Marvin E. Dodson, "Welfare generosity and location choices among new United States immigrants," 21(1) INT'L. REV. OF LAW & ECON. 47 (2001), available at https://www.sciencedirect.com/science/article/abs/pii/S0144818800000405?via %3Dihub. A significant public benefit, such as the ACA subsidies provided to lower-income DACA recipients, can be expected to impact their migration patterns, including the probability that they will leave the country. This is especially true when one considers the limited healthcare options available to low-income DACA beneficiaries in their home countries.

10. The federal government reported in 2017 that Mexico (79.45%), El Salvador (3.7%), Guatemala (2.6%), and Honduras (2.3%) accounted for 88 percent of DACA recipients. *See* U.S. Citizenship and Immigration Services Data Sheet, "Approximate Active DACA Recipients," September 4, 2017, available at https://www.uscis.gov/sites/default/files/document/data/daca_population_data .pdf. An estimate from 2023 from the Center for Migration Studies show that

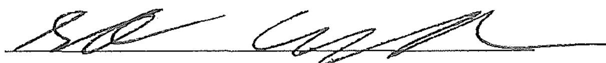
these four counties still account for about 90 percent of those with DACA. Ariel G. Ruiz Soto & Julia Gelatt, "A Shrinking Number of DACA Participants Face Yet Another Adverse Court Ruling," MIGRATIONPOLICY.ORG, Sept. 2023, available at https://www.migrationpolicy.org/news/shrinking-number-daca-participants. While the governments of these four countries provide some healthcare to their citizens, in each case the public healthcare system has struggled with underfunding. In general, low-income persons with health insurance in the United States would be expected to have access to better healthcare than lower-income people in these countries. This fact creates a significant incentive for lower-income DACA recipients who will benefit from ACS subsidies to remain in the United States.

11. The decision of illegal aliens to leave the country reflects many factors. Their economic well-being is chief among them. There is good reason to believe that providing a benefit worth several thousand dollars a year to lower-income DACA recipients will impact the decision of some to stay in the country who might otherwise leave. By reducing emigration, the new regulation will mean more people with DACA will remain in the country than otherwise would be the case, creating more costs for states and local governments.

DECLARATION UNDER PENALTY OF PERJURY

I, Steven Camarota, a citizen of the United States and a resident of the State of Virginia, hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 27th day of August, 2024.



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Vita **August 2023**

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Demography
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The Quarterly Review of Economics and Statistics
Industrial and Labor Relations Review
International Social Science Review
The National Academies of Sciences, Engineering, and Medicine
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Assessing the Quality of Data Collected on the Foreign Born: An Evaluation of the American Community Survey Pilot Study, with Jeffery Capizzano, 2004.

Assessing the Quality of Data Collected on the Foreign Born: An Evaluation of the American Community Survey, Full Study Findings, with Jeffery Capizzano, 2004.

Evaluation of Subnational ACS Foreign-Born Data, with Jeffery Capizzano, 2005.

Selected journal articles/book chapters

"The Cost of Illegal Immigration," *National Affairs,* Summer 2024, Num. 60.

"Immigration 'Experts' vs. Wages," *Academic Questions,* Spring 2021, Vol.34, Num. 1.

"Immigration and the Aging Society," *National Affairs,* Summer 2021, Num. 48.

"All Longer-Term Employment Growth Has Gone to Immigrants, 2000 to 2014," with Karen Zeigler, *Debating Immigration, Second Edition* edited by Carol Swain, Cambridge University Press, 2018.

"The Fiscal and Economic Impact of Immigration: The Current Debate" in *Guide to U.S. Economic Policy,* edited by Robert E. Wright and Thomas W. Zeiler. Congressional Quarterly Press, 2014.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

The State of KANSAS, *ET AL.*, *Plaintiffs*, v. UNITED STATES OF AMERICA and the CENTERS FOR MEDICARE & MEDICAID SERVICES, *Defendants*.	Civil Action No. 1:24-cv-00150

Declaration of Adam M. Meier in Support of Plaintiffs' Motion for a Preliminary Injunction

1. My name is Adam Michael Meier. I am a resident of Fort Thomas, Kentucky. I currently work as a Senior Fellow and Legal Counsel for a state-policy focused think tank. I also provide consulting services in the healthcare, technology, and public sectors.

2. I formerly served in several high-ranking roles in the Kentucky State Government. First, I served as the Deputy Chief of Staff for Governor Matt Bevin

from December 2015 to May 2018. Subsequently, I served as the Cabinet Secretary for the Cabinet for Health and Family Services from May 2018 to December 2019.

3. In both capacities, I was actively involved in the strategy, direction, and operations of the Kentucky Health Benefit Exchange, which facilitated the application and enrollment in Qualified Health Plans (QHPs) and associated subsidies in accordance with the Affordable Care Act.

4. I have been requested to opine on whether the expansion of eligibility for QHPs and associated subsidies to certain non-citizens such as those under Deferred Action for Childhood Arrival (DACA) status will have any financial impact to Kentucky State Government.

5. In short, based on my experience and knowledge, it is a near certainty that this expansion of eligibility will result in additional costs to the Commonwealth.

Background

6. The Affordable Care Act (ACA) introduced health insurance marketplaces, also known as exchanges, to provide individuals and families with a platform to compare and purchase affordable health insurance plans. These marketplaces offer a variety of plans that meet specific coverage standards, such as essential health benefits.

7. There are three main types of marketplaces:

a. **Federally Facilitated Marketplaces (FFMs):** These marketplaces are operated directly by the federal government, using

the Healthcare.gov platform. States without their own state-based exchanges typically use FFMs.

b. **State-Based Exchanges on the Federal Platform (SBE-FPs):** These exchanges are operated by states but utilize the federal platform (Healthcare.gov) for enrollment and other functions. This model allows states to have more control over their marketplaces while leveraging the federal government's infrastructure.

c. **State-Based Exchanges (SBE):** These exchanges are fully operated by States, using their own platforms and systems. States that choose this model have complete control over their marketplace operations, including enrollment, eligibility determination, and plan offerings.

8. These marketplaces fulfill several critical functions of the enrollment process of ACA plans, also known as Qualified Health Plans (QHPs). They take application information and, utilizing a rules engine, make eligibility determinations for enrollment in QHPs (or referrals to Medicaid) based on applicant income as well as several non-financial factors such as citizenship, age, and disability. They also help to determine appropriate amounts for cost sharing reductions (CSR's) as well as advanced premium tax credits (APTC) and apply them to monthly premiums.

9. The primary difference among these three types of marketplaces lies in the level of State involvement and control. FFMs have the least State involvement, while

SBEs have the most. SBE-FPs offer a middle ground, providing States some control over their marketplaces while relying on the federal platform for certain functions.

10. Another difference is in the cost and funding method for operating the exchange. To use the federal platform (HealthCare.gov), a user fee is applied to help cover the cost of operating the website and technology, as well as other associated costs such as marketing and outreach. The user fees are a percentage of the premiums sold on the exchange. While the user fee has fluctuated over the years, it has always been highest for an FFM. The fee has been slightly lower for SBE-FPs, since States operating these marketplaces take on some of the cost of operations aside from utilizing the federal platform. SBE's are not charged a federal user fee, as they are responsible for bearing the cost of operating the exchange.

11. FFM user fees have evolved as follows: 3.5% for plans years 2014 to 2019; 3% for plan years 2020 and 2021; 2.25% for plan year for 2022; 2.75% for plan year 2023; 2.2% for plan year 2024.

12. SBE-FP user fees have evolved as follows: 1.5% for plan years 2017 to 2020; 2.5% for plan year 2021; 1.75% for plan year 2022; 2.25% for plan year 2023; 1.8% for plan year 2024.[1]

Kentucky's Exchange

[1] *See* GetInsured, *User Fees for HealthCare.gov* (last visited, Aug. 29, 2024), https://perma.cc/Y4Y8-6W2.

13. The Commonwealth of Kentucky has never used the FFM model. From 2013 to 2016, it utilized an SBE model. *See* Ky. Cabinet for Health and Family Servs., *Update on Plans to Transition to a State Based Exchange* (July 29, 2020), https://perma.cc/3YLE-SU7A (CHFS PowerPoint). During this time, Kentucky funded the operation of the SBE through restricted funds generated from state assessments on insurance premiums that were repurposed from the Kentucky Access Program outlined in KRS 304.17B-021. It is my recollection that some federal funds were also available during ACA implementation to support certain activities and technology cost.

14. Kentucky moved to an SBE-FP in 2017 in an effort to reduce State spending. At the time, the user fee for SBE-FP plans was only 1.5%. This meant that federal user fees supported the bulk of operational/technology cost, with a smaller share coming from the Kentucky Access Fund.

15. The Commonwealth's SBE-FP was a hybrid model. It utilized the federal HealthCare.gov website for enrollment, but the Commonwealth managed policy and operations of the exchange. The Commonwealth's responsibilities included processing applications, managing contractors and applications assisters, and working with health plans offering products on the exchange. Again, the federal government charges a premium surcharge on those plans sold on the marketplace to support operations of HealthCare.gov. In addition, Kentucky also had an assessment on

insurance premiums utilizing authority in KRS 304.17B-021. This assessment is utilized to support the cost of operating the state-based exchange functions.

16. In 2021, however, the Commonwealth moved back to an SBE model. Based on a 2020 presentation given by the Cabinet for Health and family Services, it appears that the funding source to support both the technology changes and operations is coming from state restricted funds. These funds are most likely supported primarily from the Kentucky Access Fund, an assessment on state regulated insurance plans. *See supra* CHFS PowerPoint, Slide 8.

17. This means that operations of the SBE are supported by a State revenue source generated by an assessment arising out of a State statute. Furthermore, the Commonwealth's operating budget provides that the Department for Community Based Services (DCBS) "provides eligibility determination services for health insurance premium assistance program via the state-based American Health Benefit Exchange (Kentucky Health Benefit Exchange)." 2024–2026 Budget of the Commonwealth at 247, https://perma.cc/3DXC-KU5F.

18. This is because the DCBS division of family support has state workers located across the Commonwealth that assist with applications in Kentucky's integrated eligibility system known externally as "Kynect." This integrated eligibility system utilizes an integrated application platform that collects information for a multitude of public assistance programs such as SNAP, TANF, Medicaid and, of relevance here, the ACA Exchange plans (QHPs).

19. Based on my experience and knowledge, my understanding is that in order to allocate funding across the various programs, the Department studies a snapshot in time (known as a random moment time study) to determine what programs each worker is working on at that particular time. This data is then used to develop a cost-allocation methodology that can allocate programs funds from various sources to cover the proportional cost associated with each program. These allocation formulae are developed and used not only to allocate cost for staff time, but also technology costs.

20. Given the above, there would almost certainly be a cost impact to expanding eligibility to those individuals with DACA status. First, they would not be initially accounted for in the time snapshot, resulting in an increase in staff time assisting with enrollment. Second, once the time study is conducted and updated, the increase in persons eligible for QHPs would be reflected and allocated to the health benefit exchange operations, which to the best of my knowledge is funded out of state restricted revenue from the Kentucky Access Assessment.

21. Also, there would likely be at least some costs, even if minimal, for technology. First, these applications, associated personally identifiable information (PII), and advanced premium tax credit information, etc., must all be stored on State system or in the State cloud. Processing these applications takes bandwidth and electricity, all of which cost money.

22. Even if Kentucky (or other states) utilized the FFP model, there would still be a nominal costs related to the expansion of DACA. This is because these

applications and materials move back and forth between State workers/systems and the FFP/HealthCare.gov. These systems must communicate information, check for minimum essential coverage, and check eligibility for other programs such as Medicaid, among other things. Additionally, there would likely need to be changes to State eligibility systems to update the rules engines and configuration to ensure these DACA individuals' applications are appropriately processed. These changes will likely require updates in the application intake process, such as in the consumer facing portal, through the entire determination and decision-making rules within the system. Such changes may be state funded or partially funded through a Medicaid match of 90% federal and 10% State, depending on the use case.

23. Finally, there could also be downstream cost for services such handling appeals regarding eligibility or other components, fraud detection and enforcement, and customer service and call center activities.

Conclusion

24. In summary, given the discussion above and based on my personal knowledge and experience and publicly available information, it is my opinion that the expansion of eligibility for DACA plan enrollment would have a cost and resource impact to Kentucky state government.

25. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 30, 2024

Adam M. Meier