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

STATE OF KANSAS, STATE OF NORTH DAKOTA, *et al.*, *Plaintiffs*, **v.** **UNITED STATES OF AMERICA, *et al.*,** *Defendants.*	Case No. 1:24-cv-00150-DMT-CRH

DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED RULING

Consistent with Federal Rule of Civil Procedure 62(c)(1) and Federal Rule of Appellate Procedure 8(a)(1), Defendants move for a stay pending appeal of the Court's order granting the motion for preliminary injunction or stay and denying the motion to dismiss or transfer. *See* Order, ECF No. 117. As explained below and in prior briefing, *see* ECF Nos. 61, 90, 96, 107, 108, 112, Defendants are likely to succeed in their appeal because the Court lacks jurisdiction, venue is improper, and Plaintiffs' claims lack merit. A stay of the preliminary injunction is appropriate here because the Court's order—entered in the sixth week of Open Enrollment—will require cancellation of approximately 2,700 enrollments and costly system changes to the Federally-facilitated Exchange (FFE) on an emergency basis, which cannot easily be undone. Given the time-sensitive nature of this request, Defendants request an expedited ruling, and absent relief from this Court, Defendants will seek relief from the United States Court of Appeals for the Eighth Circuit shortly.

BACKGROUND

The Centers for Medicare & Medicaid Services published the Final Rule in the Federal Register on May 8, 2024. 89 Fed. Reg. 39,392. Plaintiffs waited three months to file suit, ECF

No. 1, and nearly another month to move for a preliminary injunction and to serve Defendants, *see* ECF Nos. 35, 42 ¶ 3. On October 9, the parties finished briefing on the motion for a preliminary injunction, *see* ECF Nos. 61, 81, and the Court held argument on October 15, ECF No. 89. Over Defendants' objections, *see* ECF No. 90, the Court directed Defendants to produce names and addresses of DACA recipients in North Dakota and permitted North Dakota to supplement its submission, which it did on October 31 and November 12, *see* ECF Nos. 103, 111. On November 1, after Open Enrollment began and the Final Rule had gone into effect, Plaintiffs moved for a temporary restraining order. *See* ECF No. 105. Defendants rapidly responded to each submission. *See* ECF Nos. 107, 112.

On December 9, nearly six weeks after DACA recipients started enrolling in health insurance through the Affordable Care Act exchanges—and after coverage for many enrollees had already commenced—the Court granted the motion for preliminary injunction. *See* ECF No. 117. The Court recognized that "North Dakota does not suffer a direct injury from the Final Rule," *id.* at 7, but it accepted the State's attenuated theory of standing and thus found that venue was proper, *id.* at 7-9. It further concluded that Plaintiffs were likely to succeed on their claim that the Final Rule is contrary to law, *see id.* at 11-14; that Plaintiffs had proven irreparable harm in the form of unrecoverable costs and a "Hobson's choice" between "comply[ing] with what they believe to be an unlawful directive or los[ing] federal government support to operate the costly exchanges required under the ACA," *id.* at 14-15; and that the equities favored an injunction because "the agency action is unlawful," *id.* at 16. The Court also granted the motion to stay the final rule and denied Defendants' motion to dismiss for the same reasons. *Id.* at 17-18.[1] It limited relief to the Plaintiff States. *Id.* at 18 (ordering that "Defendants are preliminar[ily] enjoined from enforcing the Final Rule against the 19 Plaintiff States").

[1] The order states that "[t]he deadline for Defendants to file a Reply has passed." Order at 2. However, Plaintiffs filed their opposition to the motion to dismiss on November 25, and under *D.N.D. Civ. L. R.* 7.1(A)(1), Defendants had 14 days—until the end of December 9—to file their reply brief. The Court entered its order before Defendants' time to file had elapsed.

LEGAL STANDARD

"While an appeal is pending from an interlocutory order," the Court may "suspend" or "modify … an injunction." Fed. R. Civ. P. 62(d). The Court considers four factors in determining whether to grant a stay: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Federal Rule of Appellate Procedure 8(a)(1) "ordinarily" requires a party seeking a stay to "move first in the district court."

ARGUMENT

I. Defendants are likely to succeed on their appeal

The Court erred in granting the motion for a preliminary injunction or stay. Plaintiffs, particularly North Dakota, did not submit evidence establishing their standing, thereby failing to establish this Court's jurisdiction and making venue improper. Plaintiffs' claims also fail on the merits, and the equities strongly weigh against their requested relief. Defendants will therefore likely succeed in their appeal.

First, contrary to the Court's decision, North Dakota lacks standing. The Supreme Court has rejected the State's indirect-costs theory of standing. *See United States v. Texas*, 599 U.S. 670, 680 & n.3 (2023); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 392 (2024). In any event, the Court has made clear that a State has an obligation to establish its standing by "point[ing] to factual evidence"—not "mere allegations" or "guesswork." *Murthy v. Missouri*, 603 U.S. 43, 57-58 (2024). Because North Dakota "does not suffer a direct injury from the Final Rule," Order at 7, that means it needed evidence showing that (1) but for the Final Rule, some number of the approximately 130 DACA recipients in North Dakota would imminently leave the State, and (2) if those individuals left, North Dakota would spend less on issuing driver's licenses or educating children, *see id.* at 8 (citing *Texas v. Mayorkas*, 2024 WL 4355197, at *4 (S.D. Tex. Sept. 30, 2024)). North Dakota did not carry its burden on either point.

The State did not present any evidence that any DACA recipients would imminently leave the State if they were not eligible to enroll in qualified health plans on the FFE. The order does not find otherwise; rather, it asserts that "[t]he additional alien presence is easily met as the Final Rule contemplates an additional 147,000 aliens will be eligible to receive benefits, effectively increasing the population." Order at 8.[2] But deeming DACA recipients already present in North Dakota eligible to obtain health insurance does not automatically maintain or increase the number of DACA recipients presently residing in North Dakota. *See* 89 Fed. Reg. at 39,399 (The Final Rule "does not address or revise immigration policy.").

Nor is it "common-sense" that any of the approximately 130 DACA recipients in North Dakota would leave but for the Final Rule. Order at 9. DACA recipients have lived in the United States since 2007, *see* 87 Fed. Reg. 53,152, 53,175 (Aug. 30, 2022), and before the Final Rule, they did so without being able to obtain health insurance through the FFE, *see* 89 Fed. Reg. at 39,394. So far, despite being in the sixth week of Open Enrollment, only one DACA recipient in North Dakota has obtained insurance through the FFE. *See* Declaration of Jeffrey Grant ¶ 16 (Ex. 1). "[N]either logic nor intuition" supports the "inference" that any DACA recipients were about to leave North Dakota and decided to stay only due to the Final Rule. *California v. Texas*, 593 U.S. 659, 676 (2021). Nor does *Department of Commerce v. New York*, 588 U.S. 752, 768 (2019), support the Court's decision. Unlike in that case, North Dakota failed to submit evidence regarding DACA recipients' historical behavior. The State has relied entirely on speculation, and the Court erred in finding it sufficient. *See Texas*, 2024 WL 4355197, at *5; Order at 4, *Indiana v. Mayorkas*, No. 23-cv-106 (D.N.D. Nov. 26, 2024), ECF No. 90 (dismissing case because "the States provide *no evidence* that this particular rule

[2] The Court refers to 147,000 DACA recipients who may be eligible to enroll in health insurance through the exchanges as the relevant population. However, "standing is not dispensed in gross," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021), and the relevant population for North Dakota is some portion of the approximately 130 DACA recipients currently residing in its territory.

exception 'demonstrates a realistic danger' of higher numbers of persons released into the United States." (emphasis added)).

North Dakota also failed to establish that if some DACA recipients left the State, it would spend less on driver's licenses and education. North Dakota has supposedly spent $584.74 on providing driver's licenses to DACA recipients, Order at 8, but past costs are insufficient for prospective injunctive relief, *Murthy*, 603 U.S. at 59. Even if past costs were enough here, neither the State nor the Court has explained why North Dakota issues licenses at a loss when Texas turns a profit on each one, *see Texas v. DHS*, 722 F. Supp. 3d 688, 702 (S.D. Tex. 2024), *appeal filed,* No. 24-40160 (5th Cir. Mar. 12, 2024), or how such a self-inflicted loss could be a cognizable injury, *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). While North Dakota has also claimed that at least one DACA recipient or dependent is enrolled in a K-12 public school, and that the State spends $14,345.87 per pupil annually, Order at 8, this too is insufficient. Defendants submitted uncontradicted evidence that the youngest DACA recipient in North Dakota is 22 years old, *see* ECF Nos. 90 at 3, 90-1 ¶ 6, and thus ineligible to attend K-12 public school, *see* N.D. Cent. Code § 15.1-06-01(1)(c). Any money spent because North Dakota has allowed an ineligible person to attend public school despite state law is a self-inflicted injury. *Pennsylvania*, 426 U.S. at 664. And to the extent North Dakota objects to educating U.S. citizen dependents, it has failed to establish that those individuals would leave North Dakota even if their DACA recipient parent planned to do so or that one student's departure from the public-school system would result in changes to the State's expenditures. Instead, North Dakota has again relied only on speculation, and standing cannot properly be based on such guesswork.

Because North Dakota lacks standing, and it is the only Plaintiff who can establish venue in this district, venue is improper. *See, e.g.*, *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1205 (11th Cir. 2018); *Kansas v. Garland*, 2024 WL 2384611, at *1 (E.D. Ark. May 23, 2024); *Dayton Area Chamber of Comm. v. Becerra*, 2024 WL 3741510, at *8 (S.D. Ohio Aug. 8, 2024).

And because venue is improper, the Court erred in granting Plaintiffs' requested relief. *See Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 907 (8th Cir. 1987).

Second, the Court erred in concluding that Plaintiffs have "a fair chance of prevailing" on their claim that the Final Rule's definition of "lawfully present" was contrary to 42 U.S.C. § 18032(f)(3) and 8 U.S.C. § 1611(a). Order at 11-14. At the outset, Plaintiffs must establish likelihood of success, not just a "fair chance of prevailing," in "seek[ing] to enjoin a government regulation that is based on presumptively reasoned democratic processes." *Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 517 (8th Cir. 2024).

In addition, the Court determined that DACA recipients cannot be "lawfully present" under the Affordable Care Act because they lack lawful status. *Id.* at 13. But lawful presence and status are not synonymous. *See* 61 Fed. Reg. 47,039, 47,040 (Sept. 6, 1996). The Executive Branch has long considered certain noncitizens who "remain in the United States under a Presidential or administrative policy" to be "lawfully present" even when they lack legal status under the Immigration and Nationality Act (INA). *Id.* Congress has granted the Executive Branch authority to do so. *See, e.g.*, 8 U.S.C. § 1611(b)(2)-(4). And when Congress drafted the Affordable Care Act, it knew well that the Department of Justice and Department of Homeland Security had, for decades, considered deferred action recipients to be "lawfully present" for purposes of receiving certain Social Security benefits regardless of whether they have lawful immigration status under the INA. *See* 8 C.F.R. § 1.3. Similarly, CMS has always interpreted "lawfully present" in 42 U.S.C. § 18032(f)(3) to include non-DACA deferred action recipients. *See* 45 C.F.R. § 152.2 (2012). Congress has never amended that definition, and Plaintiffs do not challenge it here. Neither Plaintiffs nor the Court have identified any statutory basis for requiring DACA recipients to be treated differently than other deferred action recipients under the Affordable Care Act. Doing so would, in fact, be inconsistent with many of Plaintiffs' own laws that define "lawfully present" to include all deferred action recipients without singling out DACA recipients for disfavor. *See, e.g.*, Kan. Stat. Ann. §§ 8-237(i), 8-240(b)(2)(H); Ind. Code §§ 9-13-2-92.3(a)(2)(G), 9-24-11-5(c)(4); S.D. Codified Laws

§ 32-12-1.1(7). The Court's decision nevertheless requiring such disparate treatment of DACA recipients under the Affordable Care Act accounts for none of this history.[3]

The Court's conclusion that the Final Rule conflicts with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) is likewise faulty. Congress's more specific and more recent choice in the Affordable Care Act to extend eligibility to those lawfully present, and not just "qualified aliens," controls—not PRWORA. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Dorsey v. United States*, 567 U.S. 260, 274 (2012). Even then, PRWORA itself distinguishes between "qualified aliens" and those "lawfully present," *compare* 8 U.S.C. §§ 1611(a), 1641, *with id.* § 1611(b)(2)-(4). If those terms were meant to be synonymous under PRWORA, there would be no need for Congress to delineate exceptions to the rule that only "qualified aliens" may receive federal public benefits or grant the Executive Branch discretion to determine lawful presence for purposes of such benefits.

Third, the Court erred in concluding that the equities favor Plaintiffs. It described Plaintiffs as facing a "Hobson's choice": "comply with what they believe to be an unlawful directive or lose federal government support to operate the costly exchanges required under the ACA." Order at 15. But that is not true for at least the 16 Plaintiff-States that rely on the federal government to operate the exchanges in their States—and they do not claim otherwise. These States do not have to do anything to comply with the Final Rule. Three Plaintiff-States operate their own exchanges, and even assuming that they bore costs to update their eligibility criteria to align with the Final Rule before Open Enrollment began and that these costs are cognizable, *but see* 42 U.S.C. § 18031(d)(5)(A), the Court's order does not provide relief for

[3] The Court appears to base its sweeping interpretation of "lawfully present" on two out-of-circuit cases. *See* Order at 11-13 (citing *Estrada v. Becker*, 917 F.3d 1298 (11th Cir. 2019), and *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022)). Neither case cites, let alone interprets, 42 U.S.C. § 18032(f)(3) or meaningfully addresses the longstanding interpretation of "lawfully present" for purposes of 8 U.S.C. § 1611, and the Supreme Court has noted that "lawfully present" does not convey the same meaning in every context, *see DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 26 n.5 (2020). These cases do not answer the statutory question here.

that supposed harm. If anything, it means the three States may incur further costs to revamp their eligibility criteria in the middle of Open Enrollment. *Cf.* Grant Decl. ¶ 19 (detailing costs of updating FFE eligibility engine). To the extent that the Court found irreparable harm based on the cost of processing applications, none of these three States has ever submitted evidence that the marginal costs associated with processing the comparatively small number of DACA recipients' applications outstrips the revenue collected through assessments or surcharges. Regardless, any harms to these three States would be a basis for enjoining the Final Rule only in those three States—not in the other 16. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018).

The Court also identifies "allowing potential unlawful action" as an "irreparable harm." Order at 15 (citing *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021)). That finding is inconsistent with the Supreme Court's repeated warnings that courts are not "continuing monitors of the wisdom and soundness of government action," *All. for Hippocratic Med.*, 602 U.S. at 383-84, and binding precedent limiting injunctive relief to cases where a movant has demonstrated "certain and great" and "imminent" harm absent equitable relief, *Morehouse Enters., LLC v. ATF*, 78 F.4th 1011, 1017 (8th Cir. 2023).[4] A mere "belie[f] that the government is acting illegally" is not enough to sustain a lawsuit in federal court, much less obtain an injunction. *All. for Hippocratic Med.*, 602 U.S. at 381. If any party will suffer *per se* irreparable harm in this case, it is Defendants who are enjoined from effectuating a federal regulation. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Finally, the Court failed to give appropriate weight to the significant countervailing harms that will follow from Plaintiffs' requested relief. As Defendants showed, ECF No. 61 at 27-29, precluding DACA recipients from enrolling in health insurance (even when many are essential workers) will negatively affect their health, leading to more absenteeism in the workplace, more strain on the health care system, and more uninsured children. *See* 89 Fed. Reg. at 39,395-96, 39,402, 39,406. Given Plaintiffs' delay in seeking relief and the timing of

[4] *Shawnee Tribe* does not hold to the contrary; the quoted language appears in the D.C. Circuit's discussion of the public interest, not irreparable harm. *See* 984 F.3d at 102.

the Court's order, it will also cause significant disruption to Open Enrollment for Defendants, potentially impacting States that operate their own exchanges and individuals seeking to enroll in health insurance through the exchanges as well. *See* ECF No. 61 at 28. While the Court cited a general statement of national policy to deter illegal immigration, *see* Order at 16 (citing 8 U.S.C. § 1601(6)), "no law pursues its purposes at all costs," *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023) (cleaned up), and it was error not to account for the many harms caused by Plaintiffs' requested relief.

For all of these reasons, Defendants are likely to succeed on appeal.

II. The equities strongly favor a stay of the preliminary injunction

Open Enrollment began—and the Final Rule went into effect—on November 1. *See* 45 C.F.R. § 155.410(e)(4). The FFE and presumably the State-based Exchanges are programmed to make eligibility determinations based on the law as it existed on November 1—and federal preparations to implement these changes were many months in the making. *See* Grant Decl. ¶¶ 11-12. Absent a stay of the preliminary injunction, Defendants and potentially millions of third parties, including DACA recipients, will be irreparably harmed by the Court's order requiring changes to the exchanges' eligibility engines during Open Enrollment. And none of the Plaintiffs would suffer any substantial harm from a stay, and indeed, Plaintiffs operating State-based Exchanges may avoid incurring further expense of implementing emergency changes to their eligibility engines. The Court should accordingly stay its order pending appeal.

Open Enrollment is when all individuals—not just DACA recipients—may select a new plan or make enrollment changes on the exchanges. These exchanges, particularly the FFE, are complex systems. More than 500 employees and approximately 1,500 contractors maintain the FFE, and last year, more than 16 million people in about 31 different States (including 16 of the 19 Plaintiff-States) used it to enroll in health insurance from more than 400 insurers. Grant Decl. ¶ 3. In the months leading up to November 1, CMS rolls out and tests updates to the FFE, including the Standalone Eligibility Service that reviews age,

location, income, immigration status, and other data to automatically determine whether a consumer can enroll in a plan or obtain premium assistance or cost-sharing reductions. *Id.* ¶ 6; *see id.* ¶¶ 11-12 (noting CMS teams took months studying and implementing the Final Rule's changes to eligibility criteria). CMS also coordinates with stakeholders during that time and prepares supporting materials. *See id.* ¶¶ 6-9, 13. Once Open Enrollment begins and especially as the calendar approaches December 15—the peak of the enrollment season, as it is the deadline for enrolling in coverage that begins January 1—CMS rarely makes any changes to the FFE. *Id.* ¶ 9. Making system changes "could inadvertently cause disruptions and prevent consumers from enrolling in full-year coverage" as has happened before. *Id.*

Complying with the Court's order in the middle of Open Enrollment will impose significant costs on Defendants. As the Grant Declaration explains, updating eligibility criteria ordinarily takes months of planning and testing, and there is no history of introducing such updates during the highest traffic period of Open Enrollment. *Id.* ¶¶ 9, 11-12. Making emergency changes by December 22—the earliest possible date—will require contractors to work approximately 1,500 hours at a cost of about $200,000. *Id.* ¶ 19. On top of that, CMS will have to revise HealthCare.gov further to explain the consequences of the Court's order to consumers, promulgate new guidance for third parties assisting consumers in obtaining insurance, cancel 2025 plan year coverage for the nearly 2,700 DACA recipients who have already enrolled in insurance through the FFE during Open Enrollment, stop renewals of coverage for the more than 800 DACA recipients who obtained coverage starting December 1, and provide notice to FFE stakeholders and DACA recipients of such cancellation. *Id.* ¶¶ 14-21. All of this will add to CMS's existing burdens during Open Enrollment, and if the preliminary injunction is reversed on appeal, further costs would be incurred to unwind these changes to the FFE. *See id.* ¶ 21.

In States where individuals obtain insurance through the FFE, including non-Plaintiff-States, the Court's order drastically increases the risk of disruptions to Open Enrollment. Introducing technical changes to eligibility criteria, during Open Enrollment and on an

emergency basis, creates a significant risk of technical errors that could lead to system downtime and affect consumers' ability to enroll by the various deadlines, and that may deter some consumers from enrolling at all. *Id.* ¶¶ 9, 18. The Final Rule set November 1 as an effective date to provide CMS and SBE-operating States sufficient time to make these changes before Open Enrollment began and avoid these risks. The Court's order makes these disruptions much more likely—to all consumers' detriment.

For DACA recipients in the 19 Plaintiff-States, the Court's order will have certain and irreversible negative consequences. Approximately 2,700 DACA recipients in the 16 Plaintiff-States covered by the FFE, and an unknown number of DACA recipients in the three Plaintiff-States that operate SBEs, have enrolled in health insurance starting January 1, 2025. *Id.* ¶ 16. That insurance must now be canceled, and unless those individuals obtain alternative coverage before December 15, they are unlikely to have coverage at the start of the year. *Id.* ¶ 17. Nearly 900 DACA recipients in the 16 FFE-covered Plaintiff-States, and an unknown number of DACA recipients in the three SBE Plaintiff-States, have already obtained coverage starting December 1. *Id.* ¶ 20. That insurance will not be renewed as of January 1, even though these individuals may have already started treatment or scheduled appointments relying on the existence of this coverage. *Id.* And those individuals' ability to obtain immediate alternative coverage may be limited. *See id.* Termination of insurance will further exacerbate the harms that the Final Rule aimed to address.

The Plaintiff-States will, in contrast, suffer no substantial harm from a stay of the preliminary injunction. The Final Rule does not require the 16 FFE Plaintiff-States that do not operate an exchange to take any action at all, and they have submitted no evidence that the injunction will imminently reduce their spending on driver's licenses or education. As for the three Plaintiff-States with SBEs, they claimed (without supporting evidence) that they incurred real costs to update their eligibility engines prior to Open Enrollment to comply with the Final Rule. *See* ECF No. 35 at 16. A stay may save them the cost of implementing emergency changes to the exchanges and any resulting disruptions. In sum, the balance of

harms strongly favors Defendants, and the Court should stay its order granting a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should stay pending appeal its order granting a preliminary injunction or stay of the Final Rule.

Dated: December 11, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ERIC B. BECKENHAUER
Assistant Branch Director
Federal Programs Branch

/s/ Christopher A. Eiswerth
Christopher A. Eiswerth (D.C. Bar No. 1029490)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-0568
Email: christopher.a.eiswerth@usdoj.gov

Counsel for Defendants

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DECLARATION OF JEFFREY GRANT

I, Jeffrey Grant, pursuant to 28 U. S. C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby declare as follows:

1. I currently serve as the Deputy Director for Operations in the Center for Consumer Information and Insurance Oversight (CCIIO) at the Centers for Medicare & Medicaid Services (CMS). In that role, I oversee operations for the Federally-facilitated Exchanges (FFEs) and State-based Exchanges on the Federal Platform (SBE-FPs) (referred to collectively as the FFE). This declaration will address the operations of the FFE and CMS's implementation of the preliminary injunction. This declaration will not address how the three Plaintiff-States will revise their exchanges' eligibility criteria to align with the Court's interpretation of "lawfully present."

2. I enlisted in the US Navy in 1982, received an honorable discharge from active duty in 1987, and ultimately served for a total of 22 years in the Naval Reserve. After

discharge from active duty, I obtained a BA in History from the University of Michigan and a Master of Public Administration from the George Washington University. I have over 30 years of experience as a manager of major health programs in the federal sector, leading the implementation of Affordable Care Act, Medicare Advantage, and Medicare Prescription Drug Benefit payment policies, operations, and systems.

3. The FFE is a centralized, cloud-based federal platform that manages all data and information related to applications for and enrollments in qualified health plans (QHPs) through the FFE. It serves as the Affordable Care Act marketplace for individuals in 31 States. During the most recently completed Open Enrollment Period for plan year 2024, from November 2023 through January 2024, more than 16.4 million individuals utilized the FFE to apply for and enroll in health insurance coverage offered by more than 400 health insurance plan issuers. The FFE is a highly complex system maintained by a team of more than 525 federal employees and 1500 technical contractors.

4. I am aware of, and familiar with, the Final Rule issued by CMS, entitled "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, and a Basic Health Program." 89 Fed. Reg. 39,392 (May 8, 2024) (the "CMS DACA Final Rule"). The CMS DACA Final Rule, among other things, removed the DACA exception from the definition of "lawfully present" at 45 C. F. R. § 152.2, allowing certain eligible DACA recipients and other noncitizens (collectively, "DACA recipients") to enroll in health insurance on the Exchanges.

5. On December 9, 2024, the United States District Court for North Dakota issued a preliminary injunction in *Kansas v. United States*, No. 24-cv-150-DMT-CRH (D.N.D.), enjoining CMS from enforcing the Final Rule against the 19 Plaintiff-States, 16 of which are served by the FFE. On December 11, 2024, the U.S. Department of Justice filed a notice of appeal.

6. The FFE determines whether a consumer is eligible to enroll in a plan and have advance tax credits paid on their behalf to subsidize premium costs or cost-sharing reductions to reduce out-of-pocket costs. Eligibility depends on a variety of demographic factors including age, geographic location, family composition, expected annual income, and citizenship and immigration status. The FFE verifies key eligibility information by calling certain data sources. The FFE utilizes an eligibility engine known as the Standalone Eligibility Service, which automates the eligibility determination process based on information provided by a consumer. States that operate SBE-FPs utilize the Standalone Eligibility Service and other FFE functionalities.

7. Consumers have the option of working with agents and brokers in the application, enrollment, and post-enrollment processes. Most agents and brokers use the Direct Enrollment (DE) or Enhanced Direct Enrollment (EDE) processes, which involve private web sites that are connected to the FFE. EDE partners are third-party organizations that interface with the FFE to streamline the FFE health insurance enrollment process. They integrate their platforms with the FFE, allowing consumers to compare, select, and enroll in qualified health plans directly through their websites, similar to how HealthCare.gov works. There are currently 83 active EDE partners.

8. Each year, the teams supporting the FFE make updates to ensure the FFE is compliant with applicable laws and provides a positive experience for the users of the system, including consumers, brokers, plan issuer partners, states, and other federal agencies. Changes and updates are designed, executed, and repeatedly tested to ensure that all systems across the FFE and key stakeholders, including DE and EDE partners and health insurance issuers, work correctly in combination.

9. In general, we require all our internal teams and external partners to minimize technical changes during the Open Enrollment period due to the risks associated with making changes, particularly those that have a short turnaround time when adequate time to perform full system testing is unavailable. Because the FFE sees a very high volume of traffic during

the peak Open Enrollment season that culminates with our mid-December deadline for obtaining January 1 coverage, CMS takes steps to prevent any unintended disruptions that could substantially impact a consumer's ability to enroll by the deadline. Specifically, CMS implements a moratorium on changes to systems and processes during Open Enrollment to avoid the risk that a system change could inadvertently cause disruptions and prevent consumers from enrolling in full-year coverage. This risk is real; such a disruption occurred on December 17-18, 2021, when an incorrectly developed emergency change in response to a security vulnerability produced a significant failure rate in the services that support the FFE's consumer-facing application, which hindered the ability of consumers to submit applications, and ultimately, enroll in coverage. While there are rare exceptions to this change moratorium, CMS generally does not make significant changes with respect to eligibility logic (such as this preliminary injunction would require) during Open Enrollment, and has no history of making such changes after December 1 or before the mid-December deadline. The most recent change in this category was the December 1, 2023 implementation of Medicaid expansion in the state of North Carolina, which was a relatively simple update to a data table, not a change in programming logic.

10. Each year, the highest traffic to FFE systems and supporting processes occurs during the Open Enrollment period, with the peak taking place in the week up to and including the regular cutoff date for consumers to select a plan in order to have coverage beginning on January 1. This cutoff date is currently December 15 (technically, 5 am ET on December 16). Traffic drops off rapidly in the days following the deadline. For reference, here is relevant historical data from the last Open Enrollment period, for 2024 plan year coverage:

Date	*Applicants*	*Plan selections*
12/9/23	149,801	130,996
12/10/23	147,956	124,591
12/11/23	408,471	371,441
12/12/23	452,273	411,092
12/13/23	497,633	409,083
12/14/23	628,656	608,912
12/15/23[1]	703,214	745,044
12/16/23	98,470	92,557
12/17/23	25,893	19,363

11. To prepare to implement the proposed changes ultimately finalized in the CMS DACA Final Rule, CMS project teams began working with contractors in spring 2023 to review potential solutions to implement the proposed definition of "lawfully present" for coverage that would allow DACA recipients to be eligible for coverage through the Marketplace. Those solutions involved changes to the FFE eligibility system, the Federal Data Services Hub (Hub), and the FFE eligibility applications. CCIIO teams initiated the project in April 2023 and completed work in August 2023, approximately 5 months start to finish.

12. Later, in fall 2024, during the months leading up to the current Open Enrollment period for 2025 plan year coverage, our teams planned and implemented further changes to update the Standalone Eligibility Service to comply with the CMS DACA Final Rule. In order to implement policy changes made between the proposed rule and the final rule, following months more of planning, CCIIO teams deployed final system updates in October 2024.

[1] Plan selections tend to exceed applications on the final day because consumers who saved an application without selecting a plan tend to return on the deadline day and make their plan selection for January 1 coverage.

13. In addition to system changes, CMS prepared a significant amount of supporting materials for stakeholders including 1) new trainings, call scripts, and backend development work for the Marketplace's Eligibility Support Workers, 2) technical assistance to State-based Exchanges, and 3) communications materials to support rollout of the rule, including fact sheets, toolkits, and other stakeholder materials for agents, brokers, navigators, and assisters. Additionally, CMS conducted webinars and distributed educational materials to FFE stakeholders to inform them of the impacts of the CMS DACA Final Rule.

14. The preliminary injunction in this case requires CMS to modify eligibility systems and make website changes to ensure that DACA recipients are deemed ineligible by the FFE systems for purposes of Marketplace coverage in the 16 affected FFE states. CCIIO is planning to deploy these changes on December 22, 2024, the earliest possible release window, to prevent disruption in the peak period of enrollments when system stability is needed to enroll over one million consumers. If this rapid release does cause disruption, such disruption will impact far fewer consumers, and principally consumers enrolling in February 1 coverage, giving until January 15 to correct for the disruption. Further, after the completion of necessary system work on December 22, 2024, CMS will cancel 2025 plan year coverage for any DACA recipients who reside in the Plaintiff-States and were able to enroll through the FFE. Consequently, while some additional DACA recipients from those states may enroll in plan year 2025 coverage between the injunction's issuance and December 22, 2024 despite CMS's notices that the Court's preliminary injunction makes them ineligible, *see infra* ¶ 15, those enrollments will be cancelled so as to never be in effect.

15. The injunction was entered on December 9, 2024. We immediately complied, posting a notice regarding the Court's preliminary injunction on HealthCare.gov, explaining that "DACA[] recipients' ability to enroll in a qualified health plan (QHP) through the Health Insurance Marketplace® has been placed on hold in the 19 states that are involved in the lawsuit." *See* https://www.healthcare.gov/court-decisions/. CMS will also take the following actions, and require EDE partners to do the same:

a. CMS will deploy additional information on HealthCare.gov informing consumers of the new eligibility restrictions in the 16 affected FFE states and Idaho, Kentucky, and Virginia. CMS will also require EDE partners to implement this same type of information on their websites.

b. CMS will also promulgate guidance to agents, brokers, navigators, and certified assisters on the implementation of the preliminary injunction for the period prior to the full implementation of the system changes. These professionals are responsible for over 75% of enrollments during this Open Enrollment period. These professionals usually interact via telephone with consumers while entering application information on the website, which means that they control the information entered into the application. The guidance will instruct these professionals how to answer the application questions for consumers who fall into the categories covered by the preliminary injunction, which we expect to significantly limit the number of covered individuals who might otherwise attempt to enroll and receive an inappropriate eligibility determination that would require a subsequent reversal.

16. Open Enrollment for 2025 plans began on November 1, 2024. From that date through December 10, 2024, 6,491,299 consumers selected a medical QHP through the FFE platform. That includes including an estimated 2,669 DACA recipients in the 16 plaintiff FFE states, including one individual in North Dakota. Additional DACA recipients may have enrolled through the Idaho, Kentucky, and Virginia State-based Exchanges, but at this point, that data is unavailable to me.

17. In addition to the technological changes described above, the injunction will require that CMS take additional steps to ensure that DACA recipients, who enrolled for coverage before the issuance of the injunction and before the forthcoming changes described above are made to the FFE system, are deemed ineligible for coverage in the 16 Plaintiff-States where the FFE operates. Accordingly, CMS will cancel 2025 enrollment for any such ineligible person. CMS will also develop system functionality to generate and deliver notices

to impacted individuals as required by regulation at 45 CFR § 155.310(g). The process to cancel 2025 plan year coverage for any DACA and impacted non-citizen consumers within those states will commence upon completion of necessary system work on December 22, 2024. Plaintiffs Idaho, Kentucky, and Virginia are responsible for operating their State-based Exchanges and will thus need to implement any necessary changes to their platforms. CCIIO staff who oversee State-based Marketplaces will review how the states have revised their exchanges to account for the Court's order.

18. Cancellation of an enrollment before coverage becomes effective has the effect of making it as if the enrollment never existed. Therefore, DACA recipients in the 16 FFE Plaintiff-States will have no coverage through the FFE for Plan Year (PY) 2025, and no subsidies will be paid for 2025 coverage. This cancellation timeline and process ensures compliance with the Court's injunction, while mitigating the risk associated with making quick changes to eligibility logic and application instructions during Open Enrollment. In order for these consumers whose coverage was scheduled to begin on January 1 to obtain alternative coverage, they will likely need to enroll in such alternative coverage by December 15. However, because they will not receive notice that their QHP enrollment has been canceled until after December 22, many of these consumers will likely have a gap in coverage.

19. Federal contractors working on the FFE will spend approximately 1500 hours at a cost of about $200,000 to make the emergency update to the FFE eligibility criteria due to this injunction. In addition, as described in paragraph 9, attempting to implement an emergency update to the FFE of this scope more rapidly than described above would be unprecedented and would present an unacceptable risk of technical errors causing system downtime that could impact all consumers' ability to enroll by the deadline. Even pursuing an emergency update on the timeline described above creates a risk of system downtime that could deter consumers from enrolling in QHPs.

20. As of mid-day December 10, 2024, there are 876 DACA recipients in the 16 FFE-covered Plaintiff-States who had obtained coverage through the FFE that started

December 1, 2024. This one month of coverage will remain in place since it took effect prior to the Court's ruling but will not be renewed for plan year 2025. These consumers would not be able to purchase alternative coverage for the time period between December 1, 2024, and January 1, 2025, and some of them will have utilized services with the understanding that they have health insurance coverage. If these existing contracts were not honored, payers might deny provider medical claims or reverse the claims if previously approved for payment. Providers would have to bill consumers directly, and these consumers would be charged costs for health care visits during December 2024 that they and the providers legitimately believed the insurance company would cover. The consumer would also lose access to the payers' negotiated rates, meaning the bill can be increased beyond the original total cost of the service when covered by insurance.

21. There will be additional costs associated with informing FFE stakeholders that the injunction currently renders DACA recipients ineligible for coverage. CMS will have to inform DACA recipients, which involves sending a notice to the affected households within the 16 FFE Plaintiff-States explaining why their 2025 enrollment was canceled. The estimated cost to develop the notice is $14,450. The estimated cost of the current count to print and mail the notice is $2,241.96. CMS will also need to communicate with agents and brokers, assisters, SBE-FPs, consumers not impacted by this injunction, and plan issuers. If the injunction were reversed on appeal, some portion of these costs would be reincurred to send out further updates to DACA recipients.

22. The combined effects of the injunction of the CMS DACA Final Rule will create substantial operational complexities, impose costs on the federal government, and potentially limit CCIIO's ability to ensure smooth operation of the Exchanges for all consumers who purchase health insurance through the Exchanges during Open Enrollment.

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

JEFFREY GRANT -S Digitally signed by JEFFREY GRANT -S
Date: 2024.12.11 17:57:36 -05'00'

Jeffrey Grant

Dated: December 11, 2024