UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of Kansas, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	File No. 1:24-cv-00150
	)	
United States of America, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF MOTION HEARING

Taken at
United States Courthouse
Bismarck, North Dakota
October 15, 2024

BEFORE THE HONORABLE DANIEL M. TRAYNOR
-- UNITED STATES DISTRICT COURT JUDGE --

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(The above-entitled matter came before the Court, the Honorable Daniel M. Traynor, United States District Court Judge, presiding, commencing at 1:40 p.m., Tuesday, October 15, 2024, in the United States Courthouse, Bismarck, North Dakota. The following proceedings were had and made of record in open court with the parties present:)

THE COURT: We'll open the record in the State of Kansas, et al., versus the United States, et al., 24-cv-150. I'm District Judge Dan Traynor.

Will counsel for the plaintiffs, State of Kansas, et al, identify themselves for the record.

MR. WRIGLEY: Good afternoon, Your Honor. Drew Wrigley for the State of North Dakota. Thanks for this opportunity this afternoon.

Let me introduce who I could real quickly. Kris Kobach from the State of Kansas, the Attorney General.

THE COURT: General.

MR. WRIGLEY: To my immediate right is Mr. Abhi Kambli.

MR. KAMBLI: Yep.

MR. WRIGLEY: How did I do?

MR. KAMBLI: Yeah. You did good.

MR. WRIGLEY: Thank you. He's from the State of Kansas also. To my left is Marty Jackley, the Attorney General

from the State of South Dakota. And then Mr. David Bryant from the Attorney General's office in the State of Texas.

THE COURT: All right. Welcome, all.

And for the federal defendants.

MR. EISWERTH: Christopher Eiswerth on behalf of the United States, Your Honor.

THE COURT: All right. I don't believe your microphone is on.

MR. EISWERTH: Might just have been a little bit too low.

THE COURT: Oh, that might -- I think that helped.

This matter is here today for a motion for a stay and a preliminary injunction filed by the plaintiffs on August 30. A response reply and amicus have also been filed in the matter.

The Court requested the hearing to clarify the issues presented. Plaintiffs asked the Court to enjoin the defendants from enforcing the Final Rule promulgated by CMS to expand lawful presence status to DACA recipients in anticipation of the upcoming open season commencing on November 1 of 2024.

We're here on the plaintiffs' motion so they may go first.

General Wrigley, who's speaking on behalf of Plaintiff States?

MR. WRIGLEY: That would be Mr. Kobach from the State of Kansas.

THE COURT: All right. General, you may proceed.

MR. KOBACH: Thank you, Your Honor.

May it please the Court, as you've noticed I'm joined by my fellow state attorneys general here in what may be the first occasion we've had three state attorneys general in federal district court today.

Because illegal immigration is principally regulated by the federal government, the burdens fall overwhelming upon state government. What I'd like to do is spend two minutes describing the statutory context and how it arose, and then go straight to the principal contested issues on the merits, and then if I may reserve 15 minutes for rebuttal to discuss standing, if the defendants bring that up, or I can certainly address it now if Your Honor wishes.

So the statutory context. In 1996 Congress passed the famous Welfare Reform Act of that year. It was known as the Personal Responsibility and Work Opportunity Act or PRWORA, as the acronym goes.

In it Congress did three things regarding illegal immigration, two of which are relevant here. First, in 8 U.S.C. 1601, Congress stated that it is the compelling government interest of the United States, quote, "to remove the incentive for illegal immigration caused by the availability of public benefits," end quote, including healthcare as one of the listed benefits. Second, in 8 U.S.C. 1611, the -- Congress

stated unlawfully present aliens who are not among the qualified aliens listed in the act are barred from receiving all federal public benefits. And the one that is less relevant is in 8 U.S.C. 1621, Congress did the same thing for state public benefits. Those too are prohibited from illegal aliens or unlawfully present aliens receiving them.

The second major statute at issue here is in 2010, the Affordable Care Act, known colloquially sometimes as Obamacare or the ACA, was passed. As everyone in here can doubtless remember, the bill faced heated political opposition. The final vote was extremely close. It passed 220 to 215 in the House with 39 Democrats voting no, and in the Senate it had exactly the 60 votes needed to overcome the filibuster.

I mention this, the vote count, because absolutely essential and necessary for its passage was defeating the argument that unlawfully present aliens might receive these subsidized benefits of the bill. To answer that challenge and to secure the necessary votes for passage, ACA proponents added what would become 42 U.S.C. 18032(f)(3). And I'll just quote that, it's a long sentence. "If an individual is not a citizen or national of the United States or an alien lawfully present in the United States, the individual shall not be treated as a qualified individual and may not be covered under a qualified health plan in the individual market that is offered through an Exchange," end quote. Without that provision in it, the ACA

doubtless would not have passed.

So let's go to the merits. Our principal argument and the principal question on the merits is whether DACA recipients can be deemed lawfully present as the defendants attempt to do. Now, if you look at the text of the two statutes and ask whether they are lawfully present under the ACA or whether they are qualified aliens under PRWORA, the answer is undoubtedly no. But the defendants claim that they can redefine through regulatory fiat the statutory term "lawfully present" to say for the purposes of Obamacare or ACA these aliens are lawfully present.

Now, they find no support in the ACA itself for this. The closest they come is in Section 18081 where the HHS administrators are given the authority to determine whether a specific alien is lawfully present. And it's phrased in the singular -- whether a noncitizen, singular, is lawfully present. But that merely is directing them to come up with a mechanism so that they can determine who's lawfully present and who isn't, and those mechanisms have existed for over two decades.

The most prominent one is the SAVE verification system run by the federal government which over 1,200 federal and state agencies use every day to determine if somebody's here in the country legally or illegally and entitled to benefits under PRWORA. But the text of the ACA gives

defendants no authority to actually redefine the term "lawfully present" which is what they attempt to do in the Final Rule.

So unable to find any text in any federal statute giving them this awesome authority to redefine who is lawfully present, they rely on words published in the Federal Register by DHS in order to justify a federal rule that was vacated. Specifically they seized upon the following explanation offered by DHS concerning the DACA rule when it was attempting to justify why DACA aliens should not be considered unlawfully present. And I'm going to quote the language they refer to. Quote, "The term 'lawful presence' is reasonably understood to include someone who is, under the law as enacted by Congress, subject to removal, but whose temporary presence in the United States the government has chosen to tolerate," end quote.

And according to defendants, the magic word here is "tolerate." If the Executive Branch chooses to tolerate an alien or a class of aliens, suddenly they become magically lawfully present without any action by Congress.

Well, the Southern District of Texas vacated that DACA rule that was attempted to be justified by those words and imposed a nationwide injunction against its implementation on September 13, 2023. In doing so, Texas versus United States, the Federal District Court said Congress's careful plan for the allotment of lawful presence forecloses the possibility that DHS may designate up to 1.5 million people to be lawfully

present. The Fifth Circuit agreed saying, quote, "Declining to prosecute does not transfer presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change," end quote. And that was the Fifth Circuit's 2022 case. You may note that we've quoted multiple Fifth Circuit cases since all of the DACA and DAPA litigation went through the Fifth Circuit.

So unable to do -- unable to find real support of any weight in the words of a Federal Register statement by DHS, defendants also attempt to conflate DACA recipients, deferred action recipients, from other classes of aliens who have been granted deferred action. Deferred action is a real thing. You'll find it in federal statute but only in the specific categories of people who can get it, that Congress has said can get it.

And the reason that DACA was struck down and DAPA have been struck down is because the federal government, the Department of Homeland Security, attempted to give deferred action to classes of individuals on their own without Congress saying so. And as Texas said, again in the -- this one in the 2015 case, the DAPA case: Congress has also identified narrow classes of aliens eligible for deferred action, including certain petitioners per immigration status --

THE COURT REPORTER: I'm sorry.

MR. KOBACH: I'm sorry. I'm going too fast.

Congress has also identified narrow classes of aliens eligible for deferred action, including certain petitioners for immigration status under the Violence Against Women Act of 1994, immediate family members of Lawful Permanent Residents (LPR) killed by terrorism and immediate family members of LPR killed in combat and granted posthumous citizenship, and that was in the 2015 DAPA case at page 179.

So defendants cannot conflate deferred action granted by executive fiat with deferred action that is legitimate and that is granted by Congress to certain categories. And as we make the point in our reply brief, if defendants were allowed to do this, it would lead to absurd consequences. Because by that logic through any memorandum -- and by the way, DACA was initially created by memorandum, just a directive from the Department of Homeland Security. The Department of Homeland Security could announce that all aliens who have been in the country -- illegal aliens who have been in the country more than five years are now deemed lawfully present, all illegal aliens from name a country, lawfully present because we have decided to tolerate you.

Obviously the Executive Branch does not have the authority to flout the act of Congress that is what they must enforce and which they are not enforcing in the DACA case and which now in the CMS instance attempts to use to give benefits unlawfully.

And, furthermore, there's the absurd consequence that if we -- if you deem nonenforcement to confer lawful status, that's similar to saying if you get by with speeding down the highway at 15 miles per hour over the speed limit and you're never pulled over, no one would reasonably say, well, your driving is now lawful because you weren't pulled over, but that's essentially analogous to what the argument made by the federal government is that by tolerating illegal behavior, somehow it becomes legal behavior.

I want to address one more argument on this point. Again, there looks -- grasping at straws, I would say, to find some way of justifying this asserted ability to define lawful presence, defendants make the argument in their response brief that maybe there's a conflict between PRWORA, the Welfare Reform Act of 1996, and the ACA. Now, to be sure there, they're framed differently. PRWORA says these classes of aliens are eligible or qualified, others are not. And there's a more blanket statement specific to the ACA that says only lawfully present aliens can receive this benefit. But they're entirely consistent. There's no textual -- there's no obvious textual conflict at all between the two. And, indeed, in reading opposing counsel's brief I was scratching my head trying to figure out, well, how is there any conflict.

But to put a finer point on it, we pointed out in our final brief that there's actually some legislative history

where the proponents of the bill also said their effort -- of the ACA, was to echo and reinforce what PRWORA did and deny federal benefits to illegal aliens. And I'll just quote the three sentences from Congressman Rush Holt, which is in our brief, "Another myth is that health reform" -- referring, of course, to the ACA -- "would provide federal benefits for undocumented aliens. Undocumented immigrants certainly may not receive any federal benefits except in specific emergency medical situations. There are no provisions in the House Health Reform Bill that would change this policy. In fact, the legislation explicitly states that federal funds for insurance would not be available to any individual who is not lawfully present in the United States."

I think the statutory argument is fairly airtight. I don't see how they have made a plausible claim that they have the authority to magically deem unlawfully present aliens to be lawfully present. But even if the statutory argument weren't there, there's also the APA argument we bring, which that is this is arbitrary and capricious action from the CMS defendants. Indeed, I would argue it's the very definition of arbitrary and capricious. They are declaring, by executive decree, that those who are unlawfully present under statute are now deemed lawfully present. And that capriciously contradicts the agency's correct statement in 2012 that DACA aliens are of course not lawfully present. So they've made a 180-degree

turn.

In order to do so, under the APA, defendants must provide a reasonable explanation for this dramatic change in policy. Well, defendants offer no newly discovered facts. Rather, they state the following: Giving DACA recipients subsidized health insurance would, quote, "create stability for those noncitizens," end quote. Well, of course it would. But we knew that back in 2012. We knew that all along. You give a check for roughly $3,500 to somebody, that gives them more stability. Stating something that was obvious then and is obvious now does not suffice to provide a reasoned explanation for a 180-degree departure from past practice by the agency.

In addition, the agency must also consider reliance interests under the APA. Now, the agency did consider the reliance interest of the three states that have state-based exchanges: Kentucky, Idaho, and Virginia. And they, indeed, admit in the prose accompanying the regulation that the -- that there would be a substantial amount of costs, and I'll save that for our standing analysis if we get there. But the defendants did not consider any of the other reliance interests by the other 16 states here and all of the states, indeed, in the Union. And that is increasing the costs of drivers' licenses, K through 12 education, criminal costs associated with DACA aliens and the other aliens covered by the rule.

THE COURT: How are those direct costs and not just

attenuated costs from a federal policy?

MR. KOBACH: Well, I would argue that they are certainly indirect, but I would not agree that they are attenuated because they are costs that you can reasonably predict will flow from it. And that is to say that if you give a valuable benefit of $3,500, some DACA aliens will elect not to return to their home country. And as our reply brief indicates, they're returning at a rate of 50,000 to 100,000 a year. We started at 800,000. Now we're down to about 500,000.

THE COURT: So what is Kansas's direct injury as a result of the Final Rule?

MR. KOBACH: The direct injury would be the drivers' licenses most immediately --

THE COURT: What's the dollar amount?

MR. KOBACH: Do we have our -- we don't have ours for you. We have Texas's. They've calculated theirs at a net cost of 130. We have the K through 12 education for every beneficiary of DACA residents or DACA residents themselves, that's about $15,000 a year, and then the criminal costs which have been relied upon in a lot of the Fifth Circuit cases. Every time one of these individuals commits a crime, the state incurs costs there but that of course is more dependent upon --

THE COURT: General Kobach, my concern as an Article III Court is that -- in North Dakota is that I need to evaluate North Dakota's direct injuries, Kansas's direct

injury. I think it's reasonably clear that the state-based exchanged states have a direct injury but that's three of the plaintiffs here. That's Kentucky, Idaho, and Virginia, but it's not Kansas, it's not North Dakota, and the federal government has basically said that they'll bear any costs associated with the DACA expansion for non-SBE states.

So have you thought about submitting a bill to the feds for this increased educational costs or other costs associated with it?

MR. KOBACH: Well, I know that the feds have, for decades, promised states to cover the costs of crimes committed by unlawfully present aliens. It's the SCAAP funding program. And for the same decades it's never been funded fully and states rarely receive a penny from it. So we have a record of knowing they're not going to pony up some money for it.

But I would point Your Honor to two things real quickly though. So when the defendants issued their rule and they said in their briefing that they did not need to address those costs because we haven't established -- we, the states, haven't established the factual predicate that these benefits, the ACA benefits, provide an incentive. But I would argue Congress already established the factual predicate when it passed 8 U.S.C. 1601. Congress said that the incentive for illegal immigration provided by the availability of public benefits exists, and indeed it is a compelling government

interest to get rid of that incentive.

So I think Congress has provided the predicate that these benefits do cause people to stay or to come to the United States. People who act illegally with respect to immigration laws are nevertheless rational actors, and if you give them something worth $3,500 a year, they are more likely to stay here.

And then the other point I would make is that the -- taking the drivers' license one in particular because that one has been litigated over and over again in the Fifth Circuit. The Fifth Circuit has said absolutely that is one of the things, among many, that DACA aliens will get by staying here. They will eventually need to drive, and the State of Texas along with North Dakota and along with Kansas all require these individuals to get drivers' licenses if they're going to be on our roads. And that, of course, forces them to get insurance. It's a matter of public safety. And that cost, even though it's only $130 a person, is sufficient to establish standing in all of the DACA and DAPA cases. And if Your Honor would wish, we can certainly supplement the record with the cost, the net cost per drivers' license in the other states.

THE COURT: Yeah. I think I -- frankly, I'm going to need that. Because my concern, General Kobach, to maintain venue here in this court is that I need to have -- I think it's reasonably clear that the State-based Exchanges -- that that's

a direct injury. There's $810,000, I think, in costs associated to those states. Those three states, which are not North Dakota, they're not Kansas, they're not South Dakota, General, but they're three of the plaintiff states but none of them are -- we're not in the District of Kentucky or District of Idaho or District of Virginia. We're in the District of North Dakota in a venue that may not be appropriate based upon the fact that they have a direct injury in those three states. And we have what you, I think, are describing reasonably well, as an indirect injury that would be occurring to the taxpayers of Kansas, the taxpayers of North Dakota, the taxpayers of South Dakota, and the other states -- or Texas. But they do not, perhaps, provide anything more than just a result of a federal policy that increases state spending. And that is -- in the United States versus Texas case, the Supreme Court said that that is more attenuated for purposes of determining venue and maintaining standing or jurisdiction in this court; so...

MR. KOBACH: So if Your Honor is referring to the 2023 United States/Texas case, Supreme Court -- I would argue that the Supreme Court did not in any way say that the cost of the drivers' licenses -- or actually in that case it was criminal costs, was the reason for the lack of standing, rather it was the remedy. The Court said under no circumstances does a state have a standing to order or request that the federal government arrest more people or prosecute more people, and

that was the basis for the denial of standing there.

Whereas in the DAPA case, when that went to the Supreme Court in 2016, the Supreme Court affirmed in a 4-4 judgment without opinion the decision of the Fifth Circuit below, and the Fifth Circuit had rested its decision on the cost of drivers' license. Presumably the Supreme Court of the United States would have -- under the duty to analyze its own jurisdiction, would have found no standing if it hadn't existed.

But I do want to get to your point about venue.

So I think it's fairly undeniable that the three states you've mentioned have standing. What if you were to come to the conclusion that the other states do not have standing? Just let's hypothesize. Well, in the Supreme Court case of Biden versus Nebraska, the Supreme Court looked at the fact that only Missouri had standing. This was the student loans case under the MOHELA program only Missouri had. Well, they didn't address the other states' standing. They said we know though MOHELA has standing, Missouri has standing through MOHELA and that's enough. We need not look at the other states. All six states may proceed in the case based on Missouri's standing.

THE COURT: But that -- was that case in Missouri?

MR. KOBACH: The case was originally brought in, yeah, Eastern District of Missouri. Correct, Your Honor.

THE COURT: So Kansas versus Garland, the District of Arkansas transferred the case because the plaintiff Arkansas had not met its burden to prove that it had standing, therefore making Arkansas an improper venue. We're in the Eighth Circuit and I -- that's -- you know, that's Eighth Circuit case law here that I need to be able to deal with. How is this case distinguishable from that circumstance?

MR. KOBACH: Sir, with respect to the --

THE COURT: And I'm not saying that the -- I'm not saying the North Dakota, Kansas, the other states should be dismissed. I'm just saying maybe I should just ship the whole case to Kentucky where they clearly have venue to handle the case and they can decide whether North Dakota and Kansas are proper parties in that court not here.

MR. KOBACH: So the -- because venue, as you know, oftentimes doesn't get resolved on appeal or -- you know, because it just leaves. Poof. It's gone from the original court.

THE COURT: Right.

MR. KOBACH: So in that case we were unable to appeal it. But I would note this, though, in the case of Kansas v. Biden, that's 2024 Westlaw 2880404, the District Court found that Kansas did not have standing but that other states did. But, nevertheless, the District Court kept it, in part because I think there was a pending deadline. This was the second

student loan forgiveness effort by the current administration.

THE COURT: And you think I should keep the case here because you have a deadline of November 1st?

MR. KOBACH: Yeah. Yes, Your Honor. There's nothing in the venue statute that suggests that a court must sua sponte dismiss a state and then after that cannot keep the case. If the state is a party at the inception of the case and one of the states does have standing sufficient to invoke the court's jurisdiction, the court can retain venue. And we think the court did so properly in the case of Kansas versus Biden. And so we would argue that venue still is proper here.

And the other -- you know, the other issue is, of course, we're at a very preliminary stage in this injunction -- in this litigation. And the states' -- the issue of standing may be more fully fleshed out, and indeed we're certainly willing to find information on drivers' licenses and quantify them, K through 12 costs and such, as the record is developed. And so the Court does not necessarily have to reach a standing decision here sua sponte, dismiss North Dakota, and then move the venue of the case. That can certainly be done at a later stage but we think at this stage, for sure, because of the short, short timeline we have here, the venue in this court is appropriate.

THE COURT: Well, what's the turnaround for providing the information? With all due respect to the taxpayers of

Kansas, I'm more concerned about the taxpayers of North Dakota because we're sitting in North Dakota, to maintain venue here. What's the turnaround to get that information filed so that it can be considered here in the record?

General Wrigley?

MR. WRIGLEY: Your Honor, I can't imagine -- I can't imagine that would take long at all. I mean, I think that we could put that together this week, in a day or two. I would think we could get that court -- that information and make it available for the Court. We'll do that immediately, if that's the Court's wish.

THE COURT: Well, I think it's something that I'm going to need in order to deal with the issue of maintaining the case here if that's -- I think it's clear and, General Kobach, you, I think, would agree too that Idaho, Kentucky, Virginia, the defendants have mentioned Maryland, District of Columbia, that those are also locations where this could be held because they have independent exchanges where they can -- where that basically their taxpayers are on the hook. But states like Kansas and North Dakota have allowed the federal government to run the exchange and as a result they don't have the same direct impact financially.

MR. KOBACH: And, Your Honor, since we're talking about standing, if I might expound a little bit further on that, you know, the standard is not that the injury must be

direct. The standard is that the injury must be predictable. And of course the, you know, case that really went into detail in that and the Supreme Court was New York versus Department of Commerce. That was the case about adding the citizenship question to the census. And the Supreme Court held that it was predictable, reasonably predictable that some people who answer -- fill out the census form who are not citizens might choose not to fill out the form. And they might look at the citizenship question and say, "Oh, I'm not going to fill this out."

Now, that -- and that, in turn, would cause a second chain in the -- link in the chain of events. And that is because they didn't fill it out, the State of New York would have one less warm body in it. And because it has one less warm body in it, then presumably some federal agency would give them a little bit less money when doling out federal money.

THE COURT: And they might get less of a congressman.

MR. KOBACH: And a little bit less of a congressman too. You're right. And the point is there were multiple chains of events in that indirect injury but nevertheless, the Supreme Court said that it was reasonably predictable. And that's really the same standard here. Is it predictable that some DACA aliens will remain in North Dakota and in the other states because of this valuable benefit?

THE COURT: Are you or are the plaintiffs asking me

to use -- I think the Fifth Circuit has described the Special Solicitude standard for standing as adopted in the Fifth Circuit. It's been rejected in the Eighth Circuit. That's my concern.

MR. KOBACH: I don't think we need to rely upon Special Solicitude. That is a, you know, doctrine that developed after Massachusetts versus EPA. And under that doctrine if a federal regulation affects a state's quasi sovereign interest, which the Fifth Circuit held -- and you've probably read the two to three pages where they talk about that. The Fifth Circuit held that, well, immigration is a quasi sovereign interest because the states by joining the union give up the ability to defend their own borders; therefore, the federal government, if it fails or if it encourages illegally immigration, it affects the quasi sovereign interest of the state. So it meets that hurdle.

And then the Supreme Court says that relaxes the remediability and the immediacy of the harm. And we really don't think that that's strictly relevant here. We think the remedy is very clear. The remedy we are seeking is a stay of the -- first and foremost it's just a stay of the effective date. A preliminary injunction might not even be necessary but of course in the wisdom of the Court might choose to do that, but a stay is the remedy. And we don't feel like we need Special Solicitude to get there. So I don't think we have to

rely upon that.

We obviously assert it. We think states are entitled to Special Solicitude but it's not necessary to find standing.

THE COURT: You got to convince three people above me to change their mind.

MR. KOBACH: Exactly.

THE COURT: General Wrigley, I think there are 130 DACA recipients in North Dakota. Do you have any idea or awareness of how many are using the public school system?

MR. WRIGLEY: Your Honor, I'm scratching down some notes along these lines right now --

THE COURT: Sure.

MR. WRIGLEY: -- breaking that down further. And I think that also would be information we could probably get to the Court pretty quickly and will do so.

THE COURT: All right.

MR. KOBACH: Your Honor, continuing on the standing question, so the phrase, again, it was based on predictable actions of third parties. That's from the -- I'll just give you the quote, Department of Commerce versus United States, 588 752 at page 768. "We are satisfied that in these circumstances respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question even if they do so unlawfully and despite the requirement that the government keep individual answers

confidential," end quote.

We would argue that the reaction is far more predictable. If you hold a $3,500 benefit in front of a person, their reaction is far more predictable than them deciding whether or not they want to fill out the census which they may not want to fill out in the first place anyway. The incentive, the financial incentive is real and that's why, of course, Congress recognized in 8 U.S.C. 1601, it's real. It's interesting, Congress doesn't usually make factual findings and put them into law but in this case they did. It is a real incentive and I think the defendants, as an executive agency, have to defer to that congressional finding. And I think Article III courts have to defer to that factual finding of Congress.

So if you have that logical conclusion etched into law that this $3,500 does provide an incentive, if we can show that DACA aliens get drivers' licenses, or DACA aliens and their dependents, if they're of school age, do attend K through 12 schools, then I think we're -- you know, then we're there. And certainly the Supreme Court didn't disturb that in the DAPA case when it went there.

I would also point this out, it's in our reply brief so you wouldn't have seen it unless -- I just want to make sure you note that. The number of DACA recipients in the United States has been shrinking steadily since the program began. I

mention this because defendants make an argument that on first blush might seem convincing. And, that is, well, these DACA individuals are here. They may have been here from as long as 2012 when the program was first created by President Obama or by Janet Napolitano who's DHS secretary.

They're staying here without ACA benefits so why -- why does this change anything? Well, the answer is they aren't all staying here. The programs have been shrinking steadily as they have returned to their home countries. At the program's inception in 2012 there were approximately 800,000 DACA recipients. By September 2017, when the Trump administration first attempted to rescind the program, the number was down to 689,800. And then at the end of 2023, the number was down to 530,000. And so the number has been steadily going down as individuals leave the United States for any number of reasons.

And our declaration by our expert witness Camarota points out that on average about 305,000 unlawfully present aliens leave the United States every year; so some of them are DACA recipients. But if you give them this incentive, this $3,500 incentive to stay, many of them will elect to stay, incurring those K through 12 expenses, incurring those drivers' license expenses.

And one final point here, which is not in our brief but I'm sure the Court is already aware of this, there's no minimum threshold in the dollar amount that a state must

suffer. As the Supreme Court said back in the United States versus SCRAP in 1972, quote, "An identifiable trifle is enough for standing," end quote. And that's 412 U.S. 669, at 689, note 14.

One final point, and then I'll save the rest of the time for any rebuttal, is the scope of relief. Now, in their response brief, defendants suggest that if the Court were to provide any preliminary relief, that the Court should limit it to the states in the case. But we are seeking, first and foremost, a stay. And a stay operates on the federal rule itself. It doesn't operate on the state or the parties of the case. It stays the effective date of the rule. As 5 U.S.C. 705 says, it allows the Court to, quote, "Issue all necessary and appropriate process to postpone the effective date of an agency action," end quote, not to make it go into effect in some states and not go into effect in other states. But, rather, stay it or do not stay it.

So we would argue that you can't divvy up -- if the relief that we are seeking -- and it is this case -- is a stay, a stay can't be -- of an effective date, the effective date can't be stayed for some states and not stayed for others. It has to be nationwide.

The second point I would make -- and these cases are not in our reply brief so I'll give you the cites. In immigration-related cases, the two circuits that have the most

experience here have said that nationwide preliminary relief is favored and those are, of course, the Fifth Circuit and the Ninth Circuit; the Fifth has Texas and the Ninth has, of course, Arizona and California. The Fifth Circuit specifically held this in immigration cases -- I'll quote -- "Partial implementation of the agency act in question would," quote, "detract from the -- would detract from the," quote, "integrated scheme of regulation created by Congress," end quote. And, therefore, they went for a nationwide injunction in that case. That was Texas versus United States, 809 F.3d. at page 188.

The same court also said there was a, quote, "Substantial likelihood that a geographically limited injunction would be ineffective because the aliens," in brackets, "would be free to move among the states," end quote.

The Ninth Circuit has held the same. This was in the 2018 case of Regents of the University of California versus DHS stressing, quote, "The need for uniformity in immigration policy," end quote, as a basis for issuing a nationwide injunction. And I don't know if I gave you the cite. 908 F.3d. at page 511. And so we would argue that because this is an immigration-related thing, it affects the situation of noncitizens in the United States. It's outwardly looking toward other countries as well that it is -- it should be uniform.

And secondly, since we're asking for a stay of the effective date, the statute itself, the APA indicates that stays of effective dates are nationwide because they operate on the rule itself, not upon the parties to the case.

So with that, Your Honor, I'd be happy to reserve the remainder of what time I have for rebuttal.

THE COURT: Sure. And, General Kobach, in the Department of Commerce versus New York case, is that distinguished -- distinguishable on the injury and fact requirement? The quote that you provided earlier in the argument was regarding traceability, not whether the injuries were direct or indirect.

MR. KOBACH: I would say, Your Honor, the traceability goes to the directness of the injury. I guess you could look at -- it's two ways of looking at the same question. The injury is caused by -- the federal government acts -- or the defendant acts and it causes the injury. The argument that the injury is -- the defendants make, that this injury is speculative, is I think just another way of saying that the injury is indirect because a third party has to intervene and either seek the benefits or not seek the benefits, or in Department of Commerce, fill out the question [sic] or don't fill out the questionnaire of the census. So I think it ultimately becomes the same question, if I'm understanding your query.

THE COURT: All right. That's fine.

Mr. Eiswerth.

MR. EISWERTH: Yes, Your Honor. So I'd like to take just a step back from the beginning. That we are here on plaintiffs' motion for a preliminary injunction means they have a burden of making a clear showing that they have standing, the venue is proper, and that they satisfy the four, or three if you combine the last two factors, for preliminary relief. In many ways they have failed that burden here. And they have had more than enough time to submit evidence to satisfy it at this stage.

If I could, I'd like to begin with standing since, as Your Honor knows, that's jurisdictional. And as you were discussing with my colleague on the other side, there are two divisions of state here. There are North Dakota and Kansas and several others, and then there are the three states that operate their own exchanges. I'd like to first address the first category.

So first under United States versus Texas, these indirect injuries are not cognizable. Footnote 3 makes very clear when you look at Massachusetts v. Laird, when you look at cases like Florida v. Mellon, that there are always going to be indirect effects from any federal policy on individuals in a state. And if you allow those indirect effects to be sufficient for standing, you're going to have standing for

everything, to challenge whether the Executive Branch can persist with the Vietnam War, to challenge different taxes and things of that nature like in Florida v. Mellon.

THE COURT: Well, aren't these just a little bit more than just indirect? I mean, aren't they somewhat predictable? That if you're going to give away something free, that somebody's going to take advantage of it?

MR. EISWERTH: I think it's very hard to draw a line between what is sufficiently direct/indirect versus what is too indirect/indirect.

THE COURT: So a couple weeks ago I was at the Spirit Lake Casino and they -- I pulled into the parking lot because I like to go to the buffet. It has cheap food and it's easy to feed my family. And the parking lot was full of people. And I didn't know why. But I walked up and they're giving away a couple of side-by-sides, so they had a big raffle. It seemed like everybody in town was there because they were giving away something free.

Isn't that what's going to happen to these states when DACA recipients realize that they get this free benefit?

MR. EISWERTH: No, Your Honor. And that's not their argument.

If you look at cases like Texas versus DHS with Judge Tipton which is -- I'll abbreviate as the CHNV case, or if you look at the public charge case that also just came down in

Texas, what you're looking for here -- even if you accept that United States versus Texas doesn't render all of these non-cognizable, is you have to show a change in the number of immigrants that are in the particular jurisdiction, that the rule would have that effect. And then on top of it you would have to show that that change would lead to a difference in spending. And so here the states fail at both steps.

These are -- there are 130 DACA recipients in North Dakota. They have been here for at least 17 years in the United States. The states have come forward with no evidence, no logical reason that all of a sudden these individuals were about to leave but for this rule that allows them to apply for healthcare or allows some number of them -- because many of them already get healthcare through their employers.

There is just nothing in the record. Mr. Camarota's declaration doesn't even address DACA recipients specifically. The 305,000 people who supposedly left between 2010 and 2018 are not limited to DACA. That study only referenced DACA recipients when it was trying to calculate the number of immigrants in the country total, not the ones who were leaving. There is simply nothing that links their allegation that DACA recipients would leave but for this rule and the rule itself.

If you -- when they submitted their Complaint, they relied on first quarter data from 2024 that represented there were 130 DACA recipients in North Dakota. When we submitted

our response, we had Q3 data available; it was the same number. It was the same number for South Dakota. And for Kansas the number actually went up, that there were more DACA recipients who had moved to Kansas in Q3 than in Q1. So there's just simply nothing in the record that indicates these recipients would leave the United States but for this rule.

Then when you turn to the public benefit spending, I'm a bit perplexed to hear drivers' license trotted out as the evidence here, that of increased spending. Judge Tipton found in the CHNV case that Texas, in fact, makes a profit on drivers' license, that it was $3 that were being used to do the background check and they charged $33. And so I understand that, you know, almost a decade ago the numbers might have been different, but that is not the case today and that is not the case of what Judge Tipton found.

As to education spending, again, there's no evidence in the record as for what North Dakota is spending on DACA recipients. Just by how long this program has been around and the age of these individuals, it is hard-pressed to believe that there is even one of the 130 in North Dakota who is a school-aged child. They've all been here since 2007. So even if they came as, you know, a month old, they're seniors in high school at least. And, again, that's -- it's just a tiny, tiny percentage of the DACA recipients nationally who are under the age of 20.

As for criminal spending, again, there's no evidence tying that to DACA recipients generally. And so I think it's fair to say that North Dakota, at least at this stage, has not carried its burden for demonstrating standing. And without North Dakota, the venue is not proper here and the appropriate move, as Your Honor was indicating, is as it was in Kansas versus Garland which is to transfer it to a state where venue may be proper.

THE COURT: And that, in your view, is Washington D.C. or Maryland but wouldn't it also be Idaho, Kentucky, and Virginia?

MR. EISWERTH: If you assumed that those states had standing. I think the --

THE COURT: So you don't assume that the states with a direct injury have standing?

MR. EISWERTH: I don't think they have presented evidence to show that that direct injury actually exists.

So I understand that they've --

THE COURT: Don't they have $810,000 of costs associated with running their own exchange?

MR. EISWERTH: No. So it's not $810,000 in costs for those three states. I think it's off by a factor of 10, is even what the estimate would have been from the rule itself. Now, again, what's going on there is they are trying to approximate the costs in terms of societal value not

necessarily actual expenditures from the states. And so what you're looking at is on a per-state basis, the estimate was about $10,000 potentially to update the systems and then about $8 a person to process applications.

Now, where Kentucky goes wrong here is there's no evidence that they've actually spent that money. What the public record shows is that there's a contract in which an IT vendor is the one doing the updates for the eligibility systems. There's no showing that this wasn't included within the contract, that it wasn't already covered.

There's no allegation that they've had to hire new staff or pay overtime, or forgone certain matters that they wanted to work on in order to accomplish that. There's just no change. Standing is not an academic exercise in what is conceivable, it's looking at what the real world cost is. And Kentucky hasn't come forward in showing any cost.

The only thing in the record is a declaration from Mr. -- I believe it's Mr. Meyer, who is a former official from a prior administration who has not worked on the current version of the State-Based Exchange. He -- there is -- you know, I believe the comment in the brief was the best evidence is the rule. That's just an estimate.

The best evidence is clearly a Kentucky individual coming forward with data or a document showing what they actually spent. And the fact that that is not in the record,

not even on reply, is glaring. And absent those costs, there's just -- there's nothing to show the eligibility engine update incurred any money.

And then as far as the $8 they're expected to spend on helping individuals go through the application process, first we're talking about 600 people maybe, is how many would be applying here, but Kentucky does a 1 percent assessment for premiums before any sort of tax credit or cost sharing reduction is applied to the plan. So whatever that $8 is, insurance premiums are far more than that even under the exchange. And so you're -- that's getting covered immediately.

And the comment has been made that, well, this type of accounting for standing has been rejected. That's not the case in fact. Henderson from the Fifth Circuit was a case where taxpayers challenged the state issuing pro-life license plates. And they said, well, I can't have my money spent on this. And the state came back with evidence showing, well, in fact, we charge more for the license plates than is spent and that defeated the state of standing in that case.

And that's exactly what's going on here where Kentucky, in a sense, is complaining that it's going to have to spend $8 when it's being -- when it's receiving far more than that from having these individuals be enrolled on the insurance on their exchange.

THE COURT: The Final Rule states the burden

associated with all system updates will be 1,900 hours at a cost of $184,918; therefore, the total burden on state exchanges not on the federal platform to assist eligible beneficiaries and process their applications will be 12,912 hours annually at a cost of $624,142.

MR. EISWERTH: Yes, Your Honor, but that's for all State-Based Exchanges, not one.

THE COURT: Yeah. But isn't that a direct injury?

MR. EISWERTH: No, Your Honor. Again, because they have not shown that they've actually spent real world money on that as opposed to just having their IT people include this in alongside the update to the federal poverty line or whatever else they have --

THE COURT: Then why do you have it in the Final Rule? Why do you have any dollar amount in the Final Rule if it's not going to be a direct injury? Why didn't you just say the burden associated with the system updates will be covered under your current contract? But you don't say that, you say that it's going to be X amount of dollars.

MR. EISWERTH: But, again, Your Honor, that is an estimate of what will happen. And, again, under Circular A-4 this is an accounting exercise that's required by the -- this type of --

THE COURT: Yeah, but it also identifies a direct injury, Counsel.

MR. EISWERTH: No. Your Honor, that's not our position. And what I would say is if you look at a couple pages later --

THE COURT: It may not be your position, but it's what the rule is.

MR. EISWERTH: I understand, Your Honor. But if you look at a few pages later, it also does the same analysis for what it would cost for the applicants to apply, and it also has that in millions of dollars. And clearly people applying to do health insurance through the exchanges are not paying millions of dollars to do so. It's the same sort of analysis. It doesn't necessarily correlate with real world costs. And it's the real world costs that the Supreme Court told us matters for standing analysis.

THE COURT: So why do you even have that in the rule?

MR. EISWERTH: Because that's what is required under the executive order that governs how -- the back-end of the rules --

THE COURT: So it doesn't mean anything, it's just words on a page?

MR. EISWERTH: No. It has a clear meaning as far as weighing benefits and costs from a different perspective but it's not equivalent to costs for standing purposes.

THE COURT: Then what is it? If it doesn't establish standing, what does it establish?

MR. EISWERTH: This is a way in which the federal government evaluates whether the rule is on balance, a good idea. And it's taking a economist's view of costs rather than a pocketbook type of injury. Again, if you take the example of the $8 you're going to spend helping somebody through the exchange, it's not accounting for the assessment fee or the user fee that gets charged and all of that and says, well, in the end you make out better. I mean, it says that on the last page but it doesn't factor that into calculating that cost.

THE COURT: So at this point in the litigation, aren't we required to only consider the injury or the potential -- the potential injury as calculated by your own accountants?

MR. EISWERTH: No, Your Honor. It's their -- the states' burden at this stage to come forward with evidence that they've been injured. Even if --

THE COURT: Yeah. But the rule hasn't come into effect.

MR. EISWERTH: All of this --

THE COURT: They're trying to stop the rule from going into effect to prevent the injury, but you've set out what the injury is going to be in the rule. You say the injury is going to be X dollars.

MR. EISWERTH: That it --

THE COURT: Right.

MR. EISWERTH: With all due respect, that's not what rule says. The rule estimates the costs to update the engines.

THE COURT: Okay. And that is a direct injury.

MR. EISWERTH: That does not necessarily mean that any state will have to spend a dollar more.

THE COURT: Okay. Fair enough. It may not be a direct injury that has occurred -- incurred, but it identifies what a direct injury is expected to be. Is that fair?

MR. EISWERTH: As far as how the rule defines costs, the rule says what it says when it comes to that.

THE COURT: Isn't that fair to say that that is an expectation of what the direct injury will be, Counsel?

MR. EISWERTH: No, Your Honor. And, again, the way this works as far as open enrollment opening in two weeks, all of this has been done or at least a good portion of it has already been done. This is not estimating what it would cost November 1st. This type of analysis and these types of changes are done months in advance. They are tested. If you look at -- Virginia has said it's already released its eligibility update, or whatever, to go through pressure testing. Idaho and Kentucky have also said on their websites DACA recipients are going to be able to apply on November 1st.

The only way that those statements could be made is if that work has already been done, like all the other work that gets done in updating the eligibility engines for the open

enrollment period that's about to start in two weeks.

THE COURT: And so what evidence do you have that the dollar amount incurred by the states is not $184,918 for the 1,900 hours that it took to do it?

MR. EISWERTH: It is not my burden to negate their standing --

THE COURT: Well, but you have it in your rule that that's the expected cost.

MR. EISWERTH: And, again, the states have to come forward with evidence and say, at least, yes, I incurred that cost. There's --

THE COURT: Sure. And they've incurred the cost. Once people apply, they'll incur the cost. But you've set out this is what we think -- this is what we think it's going to be.

MR. EISWERTH: But, again, Your Honor, the costs you're identifying there go to the eligibility engines which if they had actually incurred those costs, it would be very simple to have somebody come in with an affidavit and say, yes, we spent this much. You don't have to even do the accounting as far as the offset between user fees or assessments and what they're paying -- the $8 they would pay for a person. That evidence is missing. It is their burden to come forward with that evidence at least to say, yes, we've incurred those costs; they were right. Because we've seen at times these estimates

are off.

THE COURT: Sure. And that is something that would come out in the later stages of the litigation; correct?

MR. EISWERTH: I don't think with the eligibility engines that that is true. No. I think if they've spent the money, they've spent it by now. And, again, whether you agree with me or not, for standing purposes they have to show it for irreparable harm and that absolutely does the balancing that they say doesn't happen at the standing stage. And, moreover, they have to show that they will spend the money, that they will incur those costs in the future, and that they haven't already because injunctive relief looks forward only.

THE COURT: How are the indirect costs in states like Kansas and North Dakota that will incur with regard to educating children and -- you know, you say the basically 130 in North Dakota are too old to go to high school. But how are those costs not indirect costs that should be considered by this Court to establish a proper venue here?

MR. EISWERTH: Again, North Dakota has to come forward with some evidence there would be a change in population from the baseline of today and there's no evidence of that. And then on top of it, again --

THE COURT: Well, if you're giving something away for free, people are going to show up.

MR. EISWERTH: But DACA is a closed program. You

can't enter it at this point. It's only the people who have received it; they can keep renewing it but they can't enroll further people.

THE COURT: They're also not leaving because you're giving everything away for free.

MR. EISWERTH: But they've been here for 17 years and they haven't left. That's the key. There's no evidence that there would be a change but for this rule.

If I can turn to the -- turn to the merits, Mr. Kobach laid out a history of PRWORA and the ACA that omits a few key pieces. First, there's 8 U.S.C. 1611(b) which, yes, there is the bar on qualified aliens in A but then it goes on to B and gives the Attorney General the authority to designate certain people as lawfully present who then are eligible to receive certain social security benefits, for example. This rule came out weeks after Congress passed PRWORA interpreting lawfully present as used in Subsection B there. Congress responded by giving the Attorney General even more authority to designate lawfully present for other purposes. That, of course, now is with the Secretary of Homeland Security who has that authority.

But when Congress came around to the ACA it specifically looked at that language of lawfully present and how it had been defined. And when the Attorney General and the DHS before had defined lawfully present, it included all

recipients of deferred action. DACA recipients by definition are recipients of deferred action.

And so it is of a piece -- now, what happened is in 2010 you have the ACA and in 2012 DACA comes along, and first HHS had defined lawfully present for purposes of healthcare, obtaining healthcare here, to include deferred action recipients. And then a couple of months later when DACA came out it then included an exclusion specifically for DACA recipients that said, yes, yes, yes, we know what we said, but, no, we're going to exclude DACA recipients.

The states have never challenged, at least to my knowledge, the inclusion of deferred action recipients as lawfully present in either the 8 U.S.C. 1.3 or 8 C.F.R. 1.3 or in the original rule for the ACA, 152.2 -- 42 -- 45 C.F.R. 142 -- 152.2.

THE COURT REPORTER: Can you say that again?

MR. EISWERTH: I'm not sure I can. 45 C.F.R. 152.2.

And so what is going on in this rule is CMS has determined that the exclusion is no longer warranted, that it should treat all deferred action recipients equally, and that is what's going on.

Now, as far as the ACA and whether it's consistent with the use of lawfully present as used in 1803(2)(F)(3), deferred action has been accepted as lawfully present. And so it is just simply going back and saying to treat all deferred

action recipients equally.

Now, what I find remarkable is this idea that the states say that this is facially irrational to define lawfully present to include deferred action recipients. Well, their own laws do the same thing. Kansas's law says that you can't -- I want to make sure I get this right. Kansas's law says that you can prove someone is, quote, "lawfully present in the United States by presenting evidence that he," quote, "has approved deferred action status," again, marrying lawfully present to deferred action status. And that's exactly what CMS has done here. It's totally consistent with the ACA, with the understanding which, again, as the state said, look to PRWORA. Well, in 1611(b) is the statute that uses lawfully present. It has always been understood since 1996 to include recipients of deferred action. And as far as deferred action, it's always an executive decision. Congress has ratified some of those decisions and we include an example of that, footnote going to -- linking two examples of that, but that is what it always has been. It is consistent with the ACA.

And then as to PRWORA, the ACA postdates PRWORA. I understand there's the language in 1611(a) about qualified aliens but Congress understood how lawfully present is used and specifically chose to use it, the same term. And, again, has never gone back and said, no, no, no, even though you've included deferred action recipients as lawfully present since

2010, they've never required a change.

If I can, I'd just like to turn to the equities a bit and then last to the scope of relief.

Even if you take the states' allegations as far as what their injuries are, we are talking some handful of dollars, and for the State-based Exchanges, for each one of them, under six figures. I'm not disagreeing that that's money. But, again, a good portion of that can be -- or all of it, in fact, can be recouped or wasn't -- hasn't been shown to be spent. But that's ordinarily not what you get an injunction for, is money.

And on the other side of this we have individuals who would obtain healthcare. That makes them more productive. That means they're showing up to work more often. They're paying more taxes.

And so again -- and then on top of that, you have to look at the harm that any sort of stay or an injunction would impose here. So a number of states, as the New Jersey brief indicates, have already gone through and updated their eligibility. A stay requires them to, at least on a nationwide scale, to redo all of that work that supposedly is the source of the injury here; so it's being imposed twice. And, again, this is all for a speculative cost.

Last as to the remedy. This is not an immigration rule. I understand that it's tangentially related, but it

governs who's eligible to purchase healthcare. This law is designed to operate on a state-by-state basis. In fact, the exchange is defined by the states' boundaries. So to the extent there's any relief, we think it should be limited to the State-based Exchanges, the rules operation in those states, or at very most to the plaintiff states here.

The Supreme Court has been very clear lately in Labrador versus Poe and other decisions that nationwide injunctions are disfavored. 705 doesn't change any of this. 705 speaks in terms of irreparable harm. It invokes the same principles of equity that govern injunctions. The legislative history there corroborates that. And I will just point out that that is at least a conference report as opposed to a statement that was submitted for the record and not even delivered on the House floor on which the states rely.

But, again, Your Honor, we think the simplest way to address this is first to deny the motion, recognize that North Dakota doesn't have standing, and transfer this case. We think the best course is to D.C. or Maryland because we know venue is proper there and it doesn't depend on whether the State-Based Exchanges can make their showing of standing, in which case you may end up having a case transferred for a second time which seems like an unnecessary use of resources when it could be put in D.C. or Maryland where either of the defendants are clearly at home and venue is proper.

So with that, Your Honor, we would ask that if you are inclined to rule in favor of the states, that you stay your order for some period of time so that the Solicitor General may consider any appellate options. And with that we'd ask that you deny the motion.

THE COURT: All right. Thank you, Mr. Eiswerth.

General Kobach.

MR. KOBACH: Yeah, Your Honor. I'll take about 15 minutes to answer some of the specific arguments on -- made by counsel opposite.

First of all, U.S. versus Texas, Footnote Number 3. We would argue that defendants have misquoted or mischaracterized that footnote, maybe not intentionally but certainly mistakenly if not. So let's look at what that footnote says. Quote, "None of the various theories" -- this is the Supreme Court speaking. This is the case that sought to force the federal government to make more immigration arrests. "None of the various theories of standing asserted by the states overcome the fundamental Article III problem," end quote.

Now, the various theories of standing asserted by the states were that there would be law enforcement costs because these illegal aliens would remain in the states, they would be arrested and they would have prison costs, et cetera. But none of them overcome the fundamental Article III problem. Well,

defendants fail to acknowledge what the fundamental Article III problem is, and it's in the actual sentence that the footnote is attached to. And the Article III problem is this. Quote, "In both Article III cases and APA cases, this court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions," end quote.

In no way, in no way at all did the Supreme Court suggest or hold that states do not have standing to sue based on the pocketbook costs of increased arrests, increased drivers' licenses, and other state expenditures.

Next argument, the opposing counsel argued that, well, DACA is a closed program. It's true. You can't have more DACA recipients. But this case isn't just about DACA, this is also about the unlawfully present individuals that the current administration is giving employment authorization to by the thousands every -- every month. And that's not an exaggeration.

We're seeing an average of about 200,000 coming in. It would be no exaggeration at all to say at least a thousand of those are getting employment authorization even though they have no lawful status. Those individuals have an incentive to keep coming because if they get that employment authorization piece of paper when they come across the border, then they're

also going to get ACA benefits worth 3,500 a year. So it is an incentive to come in. We're not just talking about DACA.

Third argument, opposing counsel says we provided no evidence that these DACA recipients are about to leave. Well, we have showed you that the recipients are leaving and that is a fact. Opposing counsel suggested, well, those are just the DACA-eligible population. No. Those numbers that go from 500,000 to 700,000 -- sorry, 800,000 down to 700,000 down to 500,000, those are the DACA recipients themselves. The recipients are leaving the United States. And defendants haven't provided any evidence to the contrary that, well, these individuals are absolutely going to stay. Clearly they are not staying, and it is reasonable to assume that those people leaving at a rate of whatever the amount might be -- 60,000 a year, something like that -- are not leaving from all of the states in this litigation.

Then opposing counsel says this: Well, what about the 130 DACA recipients in North Dakota? They aren't school-aged children. Probably right, if they've been here 17 years. However, their dependents almost certainly are school-aged children. And if you are a parent of a child born in the United States and you are here unlawfully, you have to go home to your home country and you can take your U.S. citizen child with you. It happens all the time. At least it did happen under prior administrations when deportations actually

occurred, that if you have U.S. children, they have the golden card of U.S. citizenship, but you have to return to your home country if you are here illegally. Your U.S. citizen child when they turn 18 can walk right into the United States if they wish. But that is a fact and their dependents must leave.

So I would say this. If Your Honor would like North Dakota to provide additional information so that we can try to quantify what the K through 12 cost is, what the drivers' license cost is, we would request that the Court direct opposing counsel to provide the names of the 130 in North Dakota. That would make it very easy to determine if they have drivers' licenses and if they have school-aged children, otherwise we're just -- if we don't know any names, it will be very difficult to quantify exactly how many have dependents.

And, you know, ideally we'd love to have the 190 South Dakota names and the 4,300 Kansas names. But at a minimum I would think opposing counsel could ask DHS to give us the names of the 130 in North Dakota which would make it very easy to quantify exactly what the financial cost to the state is of those individuals.

Now moving to the --

THE COURT: Mr. Eiswerth, what's your response to that request?

MR. EISWERTH: It is their burden to come forward and show they've been harmed. This is a fishing expedition. There

are privacy protections as far as children. I'm not entertaining this.

THE COURT: Well, you said they're not children. They've been here 17 years.

MR. EISWERTH: He's talking about to identify whether they have dependents.

THE COURT: No. He said he wants the names of the 130 in North Dakota. You said they've been around here for 17 years.

MR. EISWERTH: By definition of the program, yes, but I'm not in a position to say anything about any data on that.

THE COURT: Okay.

MR. KOBACH: Well, I think, Your Honor, the point is this, you know, the Supreme Court of the United States, at least tacitly, recognized Texas's standing based on the drivers' licences that cost 130 bucks apiece to the state. Texas was never forced to provide the name of each DACA recipient who had had a drivers' license. But now opposing counsel is saying, no, you have to quantify the exact dollar amount that North Dakota is going to suffer.

THE COURT: And states that they've calculated will have incurred costs, but now they say the costs aren't actually incurred even though we put it in the rule.

MR. KOBACH: Right. And then there's that too which apply to the other three states, and I was about to get to

that. But if they would like or if the Court would like specific numbers on North Dakota costs, we can find them out really quickly if we are given those 130 names. They wouldn't be made public at all. My guess is that opposing counsel can't get them from his fellow agency, but maybe he can. But if we have that information, we can certainly provide exact dollars for North Dakota and every other state if we get the names.

Now going to the next point, opposing counsel says Kentucky hasn't incurred those costs yet, or we need to show the money that Kentucky and Idaho and Virginia have spent. Well, the bulk of it is going to be spent, as was pointed out in the rule itself, in processing the application; each application that you process has a cost. And that's where the 620 -- the Final Rule is $624,142 to process applications for enrollments. Now, that's a national figure so you would have to divide that by the 50 states and it doesn't divide evenly, of course.

And then the cost of roughly 10,000 a state to update the eligibility systems, those costs presumably are being encountered right now. They may not -- the states may not have a bill yet for that, but the bulk of the cost is the processing that is a future cost that is entirely predictable. Indeed the rule itself says it's going to happen, the costs are going to incur because the rule itself predicts that these DACA aliens and the aliens who have employment authorization but are not

lawfully present, they are going to sign up for the program.

So, you know, if it's in the rule itself, Your Honor, I would say that that's all the Court needs. And we find this in the self-evidence standing point which we make in our reply brief. And this is from Sierra Club versus EPA. It's in the reply brief. 292 F.3d at page 899. In many cases, if not most cases, the petitioner standing to seek review of administrative action is self-evident. No evident -- sorry. "In many cases if it is self-evident, no evidence outside of the administrative record is necessary to be sure of it," end quote.

Here it's clearly self-evident. The agency itself has said it's going to cost these states with SBEs this dollar amount in total. Presumably all of those three states will have some amount of that cost -- will bear some amount of that cost; therefore, it's self-evident. The idea that we would have to have our ex -- or rather our fact witness from Kentucky find out exactly how many dollars have been spent up till today is not necessary for standard -- for standing under Sierra Club versus EPA.

Now the opposing counsel also makes another argument which needs to be rebutted. He says, no, the Fifth Circuit says the accounting exercise is okay. You do get to offsetting costs. And they give the example of the pro-life license plates. Actually, the Fifth Circuit talked about that very

thing and said this is different from pro-life license plates. And I'm quoting from Texas versus United States 787 F.3d. at page 750.

That approach -- referring to the pro-life license plates, that approach is appropriate, if at all, where the costs and benefits are of the same type and arise from the same transaction because the plaintiff has suffered no real injury. In other words, it costs less to make the license plate than to sell it to the consumer.

But then two sentences later, talking about the sister circuits which reject these accounting exercises, our sister circuits' approach makes sense. In that contest -- in contrast, other circuits have declined to consider offsetting benefits from different types from different transactions. Our sister circuits' approaches makes sense in that context because attempting to balance all the costs and benefits associated with a challenged policy would leave plaintiffs without standing to challenge legitimate injuries, given that defendants could point to unrelated benefits, improperly shifting to the plaintiffs the burden of showing that the costs outweigh them, end quote. That is what the Fifth Circuit has said.

And that's what the Second, Third, and Fourth Circuits have said and in addition the Sixth and the Ninth. We discovered two more circuits that have adopted this and you'll

find them in Footnote 35 of the 2015 Texas versus United States case.

So every state that has -- every circuit that has addressed the issue of whether you do this accounting exercise has come to the same conclusion: You don't do it. You can look at the cost of the actual license plate or the actual drivers' license, the income and the outflow of that transaction, but you don't add in all of these other benefits the defendants are trying to claim occur, but of course they haven't proven that they're going to occur.

THE COURT: General Kobach, let's talk a little bit about Kansas versus Garland decided by judge -- is it Moody?

MR. KOBACH: Yeah.

THE COURT: Judge Moody in May. The injuries that the plaintiffs identified were a decrease in state tax -- this was a challenge to an ATF rule --

MR. KOBACH: Yes.

THE COURT: -- Final Rule by the ATF. And plaintiffs argued that implementation of the Final Rule will result in a decrease in state tax revenue collected by the states specifically as to Arkansas, because Judge Moody was in Arkansas. Plaintiffs anticipate that the Final Rule will reduce the number of firearms sold and the number of vendors at gun shows resulting in a decrease in gun show table rentals and tax revenue. Arkansas charges a 1 percent short-term tax on

the cost of any table rentals that are at gun shows in addition to a sale tax that applies to the sale of a firearms at gun shows and online.

Judge Moody concluded that these injuries are vague and speculative and the State of Arkansas has not shown that the injuries are, quote, "concrete, particularized, and actual or imminent," citing the Clapper case. And he transferred the case to the District of Kansas for further proceedings.

So how are the injuries here by the State of North Dakota not -- or how are they concrete, particularized, actual or imminent?

MR. KOBACH: So in the -- in that particular case the -- several states, including Kansas, had provided declarations and affidavits saying our gun show this year had 30 percent fewer people, and this resulted in a tax loss to the state of X dollars. And so we were able to show that it was already happening. And we also had an affidavit from a person whose gun show was going to have to be cancelled and that last year it provided a certain number of dollars to a state. And so several states had provided that. Arkansas --

THE COURT: But not Arkansas.

MR. KOBACH: But not Arkansas. And so the judge said, well, Arkansas hadn't provided any specific numbers. He wanted, therefore, to transfer the case to one of the states that had, and Kansas was one of those states. And so it was

more of a comparison of which state had provided numbers and which state had not provided specific numbers.

THE COURT: So would you argue that the state tax revenue collected the gun show -- the reduced gun show income to the states, that that was an indirect effect of this federal rule change that provided standing at least to -- and venue to Kansas because Kansas submitted an affidavit saying this is the dollar amount that it's decreased over time?

MR. KOBACH: Yes, Your Honor. And the Kansas District Court did go ahead and reach the merits on the preliminary injunction motion. And, yes, we would say that that is an indirect cost, but it is a cost sufficient because it is -- for standing because its predictable under the Department of Commerce versus New York case.

The next argument I want to answer goes to the -- is on the merits. Opposing counsel said recipients of deferred action are lawfully present in the eyes of the Department of Homeland Security. They are lawfully present if it's a category of deferred action recognized by Congress. And this, again, gets to this conflation by opposing counsel of deferred action for specific categories, like LPRs who die in combat and are posthumously given citizenship, or Violence Against Women Act visa recipients. Those individuals get deferred action because Congress has said so.

The Executive Branch, ever since DACA, has been

trying to confer deferred action by executive decree and that has been struck down again and again and again. And so they -- one cannot conflate deferred action where Congress says this group of people gets it versus deferred action where the executive says, no, we think these other people should get it too. And since we've got Congressionally created deferred action, let's just make it easy and treat all deferred action the same. But they can't be treated the same because one had no congressional creation of that platform of lawful presence, and that gets to the definition of what it means to be lawfully present.

The lawful presence, it's a concept that is inextricably trinked -- linked to immigration status. Now in their brief, opposing counsel say, well, immigration status and lawful presence are different things. Yeah, they're different things but they're inherently linked. To have lawful presence, you have to have a lawful immigration status created by Congress. You might an LPR, a lawful permanent resident, you might be a B1 or a B2 temporary resident, you might be someone who came in on a visa from a visa-waiver country like England where you don't need a visa but you are lawfully present for 90 days.

I'm sorry. I'll slow down.

You might be a -- you might have a lawful presence if you are an immigrant from a -- rather a nonimmigrant from a

visa-waiver country. Those individuals have lawful presence for 90 days. But in each case you are standing on a platform created by Congress. Congress says this category has lawful presence, that category has lawful presence. If you're not standing on one of those Congressionally created platforms, you are unlawfully present in the United States because you have no lawful immigration status.

And interestingly, the DACA directive itself in June 2012 claimed, quote, "this memorandum confers no substantive right or immigration status." The Department of Homeland Security then later when they issued the DACA rule tried to reel back those words, and say, oh, maybe it does, maybe we do. By tolerating them we can create their immigration status. But, again, it is improper to conflate deferred action recognized by Congress with the deferred action that is an attempt by the Executive Branch to do it by fiat.

Let me -- I only have a couple of other arguments. Oh, Kansas. One more argument to answer. Opposing counsel says Kansas's own law recognizes that some deferred action individuals are granted lawful presence. Well, I would argue that that reference in Kansas law is to the Congressionally recognized or Congressionally created deferred action. But, secondly, you know, I think it is a fair point to say many states have had to cope with the DACA program which was created 12 years ago. You now have half a million people. It was

800,000, now half million people running around unlawfully present in the United States, but the DHS has decided to tolerate them.

Therefore, the states have to decide, well, do we encourage these people to get auto insurance and to get a license, and in the process takes driver's ed because the home country of Mexico where 80 percent of them come from, you know, doesn't have much driver's education. Do we encourage them to become safe drivers? Okay. Most states have said, yeah, we do. So we're going to give them drivers' licenses even though they're unlawfully present. That's a matter of public safety caused by the federal government's unlawful acts. And so at some point states have to deal with the problem created by the federal government's refusal to deport or remove these unlawfully present individuals.

But under no circumstances should the federal government be able to wave a magic wand and declare people who are unlawfully present to be lawfully present and then give a valuable public benefit in violation of two different statutes.

Thank you, Your Honor.

THE COURT: All right. Thank you, General.

Anyone else from the Plaintiffs wish to speak?

MR. WRIGLEY: No, Your Honor.

THE COURT: All right. I'll take the matter under advisement, issue a written decision at a later time.

And have a good day. We're off the record.

(Proceedings recessed at 3:01 p.m., the same day.)

CERTIFICATE OF COURT REPORTER

I, Ronda L. Colby, a Certified Realtime Reporter and Registered Merit Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 18th day of October, 2024.

/s/ Ronda L. Colby

RONDA L. COLBY, RPR, CRR, RMR
United States District Court Reporter
District of North Dakota
Western Division