Case No. 24-3521

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF KANSAS, et al.,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendant-Appellants.

BRIEF FOR APPELLEES

Appeal from the
United States District Court for the District of North Dakota
Honorable Daniel M. Traynor, District Judge
District Court Case No. 1:24-cv-00150

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SUMMARY AND ORAL ARGUMENT STATEMENT

In May 2024, the Centers for Medicare & Medicaid Services (CMS) promulgated a Rule that allows unlawfully present aliens enrolled in the Deferred Action for Childhood Arrivals (DACA) program, as well as other unlawfully present aliens, to obtain health insurance through the Affordable Care Act (ACA). In other words, this Rule provides illegal aliens with a public benefit.

Plaintiff States sued, alleging that the Rule violated the ACA, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and was otherwise arbitrary and capricious. They further alleged that the Rule would irreparably harm them by increasing costs for States that run their own state-based exchange programs for insurance while also incentivizing DACA recipients to remain unlawfully in the United States, thereby increasing State spending on social services, education, and driver's licenses.

The district court agreed with Plaintiff States and enjoined the Rule. This Court subsequently upheld the injunction pending appeal.

Plaintiff States agree that oral argument would aid the Court, and also request twenty minutes.

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INTRODUCTION

This case concerns an effort by CMS to push forward an unlawful Rule[1] that confers public benefits on a group of illegal aliens. Specifically, it tries to bestow ACA eligibility on certain illegal aliens, including those in the DACA program (which has never been upheld as lawful). But they are ineligible for ACA benefits; two separate federal statutes plainly prohibit these public benefits from going to those aliens who are unlawfully present. Thus, CMS's promise was never tenable.

Nineteen Plaintiff States were harmed by the Rule and sued in the District of North Dakota, where the inevitable result of Defendants' unlawful actions came to fruition. After briefing and argument, the district court issued a geographically limited injunction that preliminarily halted Defendants from implementing the Rule against Plaintiff States. *See* App. 181; R. Doc. 117; Add. A1.[2]

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[1] Specifically: Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other NonCitizens for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, 89 Fed. Reg. 39,392 (May 8, 2024).

[2] References to the district court docket are "R. Doc.," references to the Joint Appendix are "App.," references to the Addendum are "Add.," and references to Defendants' Opening Brief are "OB."

Defendants then asked this Court to stay the injunction pending appeal, thereby allowing their unlawful Rule to take effect. After thorough briefing, this Court declined.

Defendants again ask this Court to clear the path for their unlawful Rule. This Court should once again decline.

The Rule is unlawful because it both exceeds statutory authority and is arbitrary and capricious. Defendants effectively recognize this reality by devoting significant space within their Opening Brief attempting to convince this Court to avoid the merits. Instead, they focus on standing and venue, neither of which can save their unlawful Rule. The district court appropriately concluded it had jurisdiction and that the Rule is unlawful.

In sum, the Rule irreparably harms at least one Plaintiff, the Rule is unlawful, and the equities and public interest lie with Plaintiffs. Accordingly, this Court should affirm.

STATEMENT OF JURISDICTION

Although Plaintiffs agree with Defendants that this Court has jurisdiction over an appeal from the district court's order granting injunctive relief, *see* Fed. R. App. P. 28(b)(1), for the reasons explained

in Argument Section I(b)(ii), *infra*, this Court does not have jurisdiction over the district court's denial of Defendants' motion to dismiss or transfer based on improper venue.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs had standing to challenge the Rule when it would cause them monetary harm.
    - *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017)
    - *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006)
    - *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025)
2. Whether (assuming venue is even at issue) venue was proper in the District of North Dakota when North Dakota was a Plaintiff, the suit was against the federal government, and no property was at issue.
    - *Stafford v. Briggs*, 444 U.S. 527 (1980)
    - 28 U.S.C. § 1391
3. Whether the district court properly enjoined the Rule because it was contrary to statute.
    - *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025)

- *Poder in Action v. City of Phoenix*, 481 F. Supp. 3d 962 (D. Ariz. 2020)
- 8 U.S.C. §1611
- 42 U.S.C. §18032

4. Whether the Rule is arbitrary and capricious because it represents a sharp departure from past agency practice without reasonable explanation and because it failed to account for costs incurred by Plaintiff States.
    - *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016)
    - *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025)
    - *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021)

STATEMENT OF THE CASE

I. Statutory and regulatory background

Congress enacted PRWORA to advance the "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(b). PRWORA mandates that, "[n]otwithstanding any other provision of

law," only a "qualified alien" is eligible for federal public benefits. 8 U.S.C. § 1611(a).

"Qualified alien" is a defined term that includes certain enumerated categories, lawful permanent residents, asylees, refugees, parolees granted parole for a period of at least one year, aliens granted withholding of removal, and certain battered aliens. 8 U.S.C. § 1641(b)–(c). No agency is authorized to change the definition of "qualified alien."

The ACA is designed to protect the same compelling interest as PRWORA—its text ensures this statute does not induce or otherwise incentivize illegal immigration. It limits eligibility for the ACA's Qualified Health Plans (QHPs)[3] to U.S. citizens and other individuals who are "lawfully present." 42 U.S.C.§ 18032(f)(3). Accordingly, the

[3] The Patient Protection and Affordable Care Act (*i.e.*, the ACA), Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010), was enacted in 2010. Among other things, it "required most Americans to obtain minimum essential health insurance coverage" and "imposed a monetary penalty . . . upon most individuals who failed to do so." *California v. Texas*, 593 U.S. 659, 664–65 (2021). The ACA "require[d] the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans." *King v. Burwell*, 576 U.S. 473, 479 (2015). Under the ACA, each state may "establish its own Exchange, but [the ACA] provides that the Federal Government will establish the Exchange if the State does not." *Id.* The ACA requires all exchanges to "make available qualified health plans to qualified individuals and qualified employers." 42 U.S.C. § 18031(d)(2)(A).

ACA requires CMS to verify that health exchange applicants who are aliens are lawfully present in the United States. 42 U.S.C. § 18081(c)(2)(B).

II. The DACA program

The Department of Homeland Security (DHS) created the DACA program in 2012 when it issued a memorandum declaring that some individuals who came to the United States illegally as children could request consideration of deferred action (*i.e.*, deferral of their required removal from the United States) for a period of two years, subject to renewal. Memorandum from Janet Napolitano, Sec'y, DHS, to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. These aliens were also made eligible for DHS work authorization, despite their unlawful presence. *See* 8 C.F.R. § 274a.12(c)(33).

By its own terms, DACA only temporarily deferred removal action; it did not grant lawful immigration status. *See* Napolitano Memo, *supra* ("This memorandum confers no substantive right, immigration status or pathway to citizenship. *Only the Congress, acting through its legislative*

authority, can confer these rights.") (emphasis added)). And CMS initially shared that position—less than three months after DACA's inception, CMS amended its definition of "lawfully present" to expressly exclude DACA recipients from ACA eligibility. *See generally* Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614 (Aug. 30, 2012). DACA recipients were excluded from Medicaid, Children's Health Insurance Program (CHIP), and Basic Health Plan (BHP) eligibility under the ACA.[4] CMS maintained its position that DACA recipients were ineligible under the ACA from 2012 until the promulgation of the Rule.

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[4] CMS describes a BHP as "a health benefits coverage program for low-income residents who would otherwise be eligible to purchase coverage through the Health Insurance Marketplace." *Basic Health Program*, https://www.medicaid.gov/basic-health-program/index.html (last visited Aug. 27, 2024).

Through a BHP, a state can

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

Id. (emphasis added).

In 2022, DHS promulgated a rule attempting to codify the DACA program as a federal regulation; it maintained the essential requirements from the Napolitano Memo. *See* Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152 (Aug. 30, 2022). Like the Napolitano Memo, the DACA rule "[wa]s not intended and d[id] not create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." *Id.* at 53,300 (codified at 8 C.F.R. § 236.25(b)).

Since its inception, the DACA program—first as guidance, then as a rule—has been challenged as unlawful. And it has been repeatedly found to be unlawful. In 2022, the Fifth Circuit held: "DACA creates a new class of otherwise removable aliens who may obtain lawful presence, work authorization, and associated benefits. Congress determined which aliens can receive these benefits, and it did not include DACA recipients among them." *Texas v. United States*, 50 F.4th 498, 526 (5th Cir. 2022). The Fifth Circuit also stated: "Like DAPA, DACA is foreclosed by Congress's careful plan; the program is manifestly contrary to the statute." *Id.* at 528 (quotation marks omitted).

In 2023, a federal district court enjoined and vacated the DACA rule. *See Texas v. United States*, No. 1:18-CV-00068, 2023 WL 5950808, at *1 (S.D. Tex. Sept. 13, 2023). The district court's order allowed DHS to continue to administer the DACA program for individuals who registered prior to July 16, 2021.

III. The Rule

Six months before the 2024 presidential election, despite PRWORA's and the ACA's statutory prohibitions, the illegality of the DACA program, and CMS' own prior policy excluding DACA recipients from ACA eligibility—Defendants published their Rule attempting to redefine "lawfully present" to include DACA recipients. *See* 89 Fed. Reg. at 39,392.

CMS justified its 180-degree reversal by citing "the broad aims of the ACA to increase access to health coverage" and claiming that the prior practice of excluding DACA recipients "failed to best effectuate congressional intent in the ACA." *Id.* at 39,395. Suddenly, CMS claimed that defining DACA recipients as lawfully present "aligns with" the ACA's goals—"specifically, to lower the number of people who are uninsured in the United States and make affordable health insurance

available to more people." *Id.* at 39,396. CMS also claimed to be focused on the alleged national economic importance of DACA recipients, its desire to support the DACA policy, and the disproportionately high percentage of uninsured DACA recipients. *Id.* at 39,395–96.

Accordingly, CMS "s[aw] no reason to treat DACA recipients differently from other noncitizens who have been granted deferred action." *Id.* at 39,396. The Rule shrugged off the injunction against DACA in a footnote, saying that "[c]urrent court orders prohibit DHS from fully administering the DACA final rule. However, a partial stay permits DHS to continue processing DACA renewal requests and related applications for employment authorization documents." *Id.* at 39,395 n.27.

But the Rule is not limited to DACA recipients. It also adds aliens granted employment authorization under 8 C.F.R. § 274a.12(c) into the definition of "lawfully present" for purposes of ACA eligibility. This expands the categories of aliens considered lawfully present from the seven enumerated categories under the former regulatory definition[5] to

[5] The old version of 45 C.F.R. § 152.2(4)(iii) defined "Lawfully present" to include "Aliens who have been granted employment authorization under 8 CFR § 274a.12(c)(9), (10), (16), (18), (20), (22), or (24)."

all thirty-six categories covered under 8 C.F.R. § 274a.12(c). *See* 89 Fed. Reg. at 39,408.

CMS's only justification for this change was to make it easier to determine who was lawfully present if they could include anyone with DHS work authorization. It did this knowing that it would include noncitizens, whom even the agency recognizes are *not* here lawfully. *See id*. ("*Almost all* noncitizens granted employment authorization under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations." (emphasis added)); *see also id*. at 39,409 ("We agree that a grant of employment authorization does not result in an individual being considered a 'qualified alien' under [PRWORA].").

IV. The Plaintiff States

Under the ACA, states are authorized to create an exchange to handle QHP enrollment. 42 U.S.C. § 18041. Plaintiffs Idaho, Kentucky and Virginia administer their own state-based exchanges (SBEs). *See The Marketplace in Your State*, https://www.healthcare.gov/marketplace-in-your-state/ (last visited December 18, 2024). Expanding the ACA to DACA recipients will result in significant costs for these SBE States—costs that the Rule itself

acknowledges: (1) $194,650 to develop and code changes to each SBE system, and (2) $624,142 in state application processing charges to assist individuals impacted by the rule. 89 Fed. Reg. at 39,426; *see also* App. 90; R. Doc. 35-2.

The Rule harms all Plaintiff States, however, because collectively they are home to approximately 162,000 DACA recipients, including approximately 130 in North Dakota.[6] CMS expects the Rule to bestow ACA eligibility on 147,000 DACA recipients nationwide. *See* 89 Fed. Reg. at 39,425. This includes 86,000 in Fiscal Year 2026 alone, at a cost of $305 million. *See* App. 74; R. Doc. 35-1 at 2. Considering that DACA recipients tend to have modest levels of education and are more likely to have incomes below 200% of the federal poverty line, these benefits are significant—$3,547 per DACA recipient per year. *See* App. 74–75; R. Doc. 35-1 at 2–3. And DACA recipients are especially likely to have been born in countries where publicly subsidized healthcare options are not as good as American equivalents, which makes eligibility for state-

[6] U.S. Citizenship & Immigr. Servs., Office of Performance & Quality, *Count of Active DACA Recipients by State or Territory as of December 31, 2023*, available at https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy2024_q1.xlsx.

subsidized American healthcare a strong inducement to remain in the United States. *See* App. 77–78; R. Doc. 35-1 at 5–6.

The continued unlawful presence of DACA recipients in Plaintiff States will directly increase administrative and economic burdens on States who run their own ACA exchange. In addition to those costs borne by SBE states, the Rule will require all Plaintiff States to expend their limited resources supporting unlawfully present aliens who are induced by valuable ACA benefits to remain in the United States unlawfully.

V. Previous proceedings

Plaintiffs challenged the Rule in the District of North Dakota on August 8, 2024,[7] App. 27; R. Doc. 1, and moved for a preliminary injunction and stay on August 30, 2024, R. Doc. 35. Specifically, they argued that CMS lacked statutory authority to issue the Rule and that, in any event, the Rule was arbitrary and capricious. Responding,

[7] Plaintiffs amended the complaint on August 28 to add Plaintiff States Arkansas, Florida, Kentucky, and Texas. App. 50; R. Doc. 27.

Defendants argued in part that Plaintiffs lacked standing and that venue was improper in North Dakota. R. Doc. 61 at 9–20.

On October 15, the district court heard oral argument on Plaintiffs' motion. App. 99; R. Doc. 82, 89. Defendants again raised arguments concerning Plaintiffs' standing and venue. To aid its consideration of those issues, the court ordered Defendants to supply Plaintiffs, under protective order, the names and addresses of all DACA recipients residing in North Dakota. R. Doc. 87. Defendants unsuccessfully moved for reconsideration of this supplemental-information order, *see* R. Doc. 98, and then subsequently complied, R. Doc. 101. Plaintiffs used that information to supplement their evidence on standing and venue. App. 167, 178; R. Doc. 103-1, 111-1.

Because the Rule's effective date—November 1—was approaching and the district court had yet to issue a decision, Plaintiffs then moved for a temporary restraining order. R. Doc. 105. Defendants moved to dismiss the case for lack of jurisdiction and failure to state a claim, and to dismiss or transfer for improper venue. R. Doc. 108.

On December 9, the district court preliminarily enjoined and stayed the Rule.[8] App. 181; R. Doc. 117; Add. A1. The district court found that North Dakota had standing, and so venue was proper. App. 190; R. Doc. 117 at 10; Add. A10. And it concluded Plaintiffs "will likely succeed on the merits" because the Rule is unlawful. App. 194; R. Doc. 117 at 14; Add. A14. The court found the Rule violated PRWORA and the ACA; it did not address whether the Rule was also arbitrary and capricious. App. 194; R. Doc. 117 at 14; Add. A14. The court found Plaintiffs' motion for a temporary restraining order to be moot, and it denied Defendants' motions to dismiss and transfer. App. 198; R. Doc. 117 at 18; Add. A18.

Defendants moved the district court to stay the preliminary injunction pending appeal. R. Doc. 119. Defendants alleged for the first time that complying with a preliminary injunction would impose administrative costs on Defendants, and that DACA recipients may experience gaps in health insurance coverage as a result of the order.

[8] Like Defendants, Plaintiffs' references to and analysis on the preliminary injunction encompass the stay. *See* OB at 13 n.6.

Plaintiffs opposed the stay, but agreed to an expedited decision. R. Doc. 127. The district court denied the motion. App. 210; R. Doc. 130.

Before the district court could rule on their motion for a stay, Defendants appealed the preliminary injunction to this Court on December 13, 2024, and filed an emergency motion seeking a stay pending resolution of the appeal. Although this Court administratively stayed the injunction, it soon vacated the administrative stay and denied the motion. *Kansas v. United States*, 124 F.4th 529, 534 (8th Cir. 2024) (per curiam). In doing so, this Court recognized Congress's policy, as codified in PRWORA, to discourage illegal immigration by withholding public benefits from illegal aliens. *See id.*

SUMMARY OF ARGUMENT

This is a simple case governed by a clear congressional directive: do not confer any public benefits upon illegal aliens unless expressly authorized by Congress. Congress reiterated that directive when the ACA was enacted, specifically excluding aliens who were not lawfully present. In promulgating the Rule, Defendants got caught violating that

directive, and they now try to avoid the consequences of their actions. This Court should not let them.

First, Defendants try to get this Court to avoid the merits, arguing that Plaintiff North Dakota lacked standing and venue was improper, so the district court could not enjoin the Rule. But only one Plaintiff needs standing to sue, and Plaintiffs exceed that standard: the SBE States are harmed by the Rule. Defendants cannot realistically win on this issue when *their own Rule conceded* that these three States would suffer financial harm from its implementation. The other States also possess standing based on the financial harm caused by DACA aliens remaining and imposing costs through driver's licenses and the provision of other public services. And because at least one Plaintiff had standing and North Dakota remained in the case, venue was proper under the expansive venue statute designed to make it easier to sue the federal government.

As the district court recognized, North Dakota itself has standing because the Rule causes the State financial injury in fact. North Dakota presented evidence of the monetary harms it will suffer from the Rule incentivizing DACA recipients to remain in the State. Defendants may

try to minimize this evidence, but they cannot overcome it. The district court considered this evidence in light of basic economics and common sense, and properly determined that North Dakota has standing.

Second, Defendants try to mount a merits defense, but they cannot overcome the plain statutory language that expressly prohibits what they try to do through the Rule: confer a public benefit on illegal aliens. The Rule violates two statutes and is thus unlawful.

Further, the Rule is arbitrary and capricious. It represents a sharp departure from prior agency practice (correctly recognizing DACA recipients cannot enroll in coverage under the ACA) without reasonable explanation. And in promulgating the Rule, Defendants did not consider all the costs that Plaintiff States would necessarily and logically bear from DACA recipients remaining within their boundaries. Plaintiffs are more than likely to succeed on the merits.

Finally, the equities and public interest lie with Plaintiffs. While Defendants will not be harmed by being unable to enforce an unlawful regulation, Plaintiffs will experience monetary harm if the preliminary injunction is lifted. A preliminary injunction also upholds the public interest as written, determined, voted on, and codified by Congress: it

disincentivizes illegal immigration. The remaining two factors support affirmance.

ARGUMENT

Because the district court properly enjoined the Rule, this Court should affirm. Through the Rule, Defendants attempt to confer a public benefit on illegal aliens, despite Congress's contrary directive. Beyond this bare illegality, the Rule is arbitrary and capricious. And it also harms Plaintiffs by requiring them to expend limited funds both directly supporting the Rule and as the logical consequence of the Rule incentivizing DACA recipients to remain. The public has no interest in an unlawful Rule that represents an untenable political promise made to aliens unlawfully present in the country, and the equities likewise tip against it. The district court properly saw the Rule for what it is—a blatantly unlawful agency overreach—and enjoined it.

In reviewing the district court's decision, this Court applies a "layered" standard of review: legal conclusions are reviewed de novo, factual findings are reviewed for clear error, and the "application of the law to the facts" is reviewed for an abuse of discretion. *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342–43 (8th Cir. 2024) (quotation marks

omitted); *see also Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 517 (8th Cir. 2024). A district court has "broad" discretion to grant a preliminary injunction in light of the showing before it, *Bricker*, 103 F.4th at 1343, and the court is entitled to deference "because of its greater familiarity with the facts and the parties," *Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044 (8th Cir. 2020).

The district court was correct and did not abuse its discretion in enjoining the Rule. Accordingly, this Court should affirm.

I. Plaintiffs have standing, and venue is proper

Defendants do their best to get this appeal jettisoned on standing or venue. But their arguments fail. If one Plaintiff has standing, then this Court (like the district court) possesses subject-matter jurisdiction and may consider the merits. Here, at least four States—the three that run SBEs and North Dakota—will be harmed by the Rule. That is more than enough. And because North Dakota remained a Plaintiff, venue (assuming Defendants can even challenge it on appeal) was proper.

This Court should quickly reject Defendants' standing and venue arguments and proceed to the merits.

a. The three SBE Plaintiffs have standing, which is all that is necessary.

Plaintiffs are nineteen States. As long as one has standing, then the district court has jurisdiction. *See Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Elder v. Gillespie*, 54 F.4th 1055, 1063 (8th Cir. 2022) (recognizing same). As the district court properly determined (and as explained more fully below), North Dakota has standing.

But other States, including the three that run SBEs, also have standing, which can support the injunction. *See Moffit v. State Farm Mut. Auto. Ins. Co.*, 11 F.4th 958, 960 (8th Cir. 2021) (recognizing that this Court may affirm "on any basis supported by the record"); *Gen. Land Off. v. Biden*, 71 F.4th 264, 271 (5th Cir. 2023) ("Each State asserts it has standing. But only one needs standing for the action to proceed.").

The three SBE States—Kentucky, Idaho, and Virginia—raised additional theories of harm because they administer state-run ACA exchanges for QHP enrollment. These States face increased

administrative and system costs when they are forced to distribute ACA exchange subsidies to a new class of illegal aliens who are disproportionately lower-income. Defendants try to discount the harms, yet their assertions are unavailing given that the Rule *expressly acknowledges these costs will be incurred*—specifically, $624,142 in total across the SBE States. *See* 89 Fed. Reg. at 39,424, 39,426. That ends the standing analysis, as only one plaintiff needs standing for the lawsuit to proceed, allowing the other parties to remain in the case. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

The magnitude of the harm is not relevant. As long as the States have to expend even a single dollar to comply with the Rule, that is enough. *See United States v. Students Challenging Regul. Agency Process (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("[A]n identifiable trifle is enough for standing . . . ." (quotation marks omitted)). Basic economic logic and common sense—both of which are relevant—establish that these three States will be burdened by the Rule because they will be required to spend more money running their SBEs. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.); *New York v. Yellen*, 15 F.4th 569, 577 (2d Cir. 2021).

Defendants' contention that these States now lack standing because the district court enjoined the Rule after enrollment began is similarly unavailing. The enrollment period would have run through the end of December, during which the SBE States would have had to assist DACA recipients trying to enroll. And if the injunction were lifted, these States would have to assist these recipients, determine their eligibility and process their applications, and update the exchanges. That is enough. *See Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019) (recognizing that "Article III 'requires no more than *de facto* causality'" (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)).

It is irrelevant that the States may collect some additional revenue from these enrollments.[9] Defendants' argument is a request for this Court to engage in an improper "accounting excise," which this

[9] And there is no guarantee SBE States *will* collect additional revenue. States generally recover costs through ACA "user fees" included with premium payments, but some applicants, who earn less than the Federal Poverty Level, will be ineligible to enroll and the State will never recover the cost of processing their application. *See* U.S. Internal Revenue Service, *Eligibility for the Premium Tax Credit*, available at https://www.irs.gov/affordable-care-act/individuals-and-families/eligibility-for-the-premium-tax-credit (last visited Oct. 6, 2024).

Court should decline. *See Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015). "A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise[.]" *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013); *see also* 13A Charles A. Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3531.4 (3d ed. June 2024 update) ("Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant."); *Missouri v. Biden*, 738 F. Supp. 3d 1113, 1143–44 (E.D. Mo. 2024) (recognizing same); *New York v. Scalia*, 490 F. Supp. 3d 748, 771–72 (S.D.N.Y. 2020) ("So even if the Final Rule increases certain tax revenue streams—indeed, even if the Final Rule increases state tax revenue overall—that would not necessarily defeat the States' standing based on decreased tax revenues.").

At least these three Plaintiff States have standing, which is all that is necessary. *See Rumsfeld*, 547 U.S. at 52 n.2. Indeed, during the hearing, the district court believed it was "reasonably clear that the state-based exchanges states have a direct injury." App. 113; R. Doc. 89

at 15; *see also Moffit*, 11 F.4th at 960. Additionally, the court recognized their harm in its order. App. 195; R. Doc. 117 at 15; Add. A15.

Because at least one Plaintiff has standing, this Court (like the district court) has jurisdiction. *See Rumsfeld*, 547 U.S. at 52 n.2; *Nebraska*, 143 S. Ct. at 2368.

b. Defendants' venue arguments are unavailing

The question of venue is not on appeal. The district court rejected Defendants' venue arguments and denied their motion to dismiss or transfer based on improper venue. App. 197–98; R. Doc. 117 at 17–18; Add. A17–A18. But Defendants never asked the district court to certify this denial for interlocutory appeal. Instead, Defendants try to improperly bootstrap this denial onto the grant of injunctive relief. This Court should reject this improper jurisdictional end-run.

Regardless, venue in the District of North Dakota is proper because North Dakota remains a Plaintiff and, for good measure, has its own standing. *See* 28 U.S.C. § 1391(e)(1). As the district court found:

> North Dakota has submitted evidence it costs $584.74 to issue driver licenses and identification cards to the 126 identified DACA recipients in the State. Doc. No. 103, p. 7. North Dakota also claims, while it cannot provide an exact figure, it can confirm at least one DACA recipient or dependent is enrolled in the state's public education system,

> incurring a cost of $14,345.87 per pupil on the State. Doc. No. 111. This amounts to almost $15,000 in monetary costs.

App. 188; R. Doc. 117 at 8; Add. A8. Defendants cannot succeed on their venue argument by contriving new, extra-statutory limits on the traditional forum rules.

i. Defendants cannot challenge venue

Like all federal courts, this Court has limited jurisdiction. In addition to limited subject-matter jurisdiction, it also has limited appellate jurisdiction. *See Rux v. Republic of Sudan*, 461 F.3d 461, 474 (4th Cir. 2006). Accordingly, it will only hear certain appeals. Defendants' attempt to appeal venue falls outside this limited category.

Defendants have the burden of establishing appellate jurisdiction. *See, e.g.*, Fed. R. App. P. 28(a)(4)(B); *Reinholdson v. Minnesota*, 346 F.3d 847, 849 (8th Cir. 2003). And they have not met their burden with respect to the denial of their motion to transfer venue.

"It borders on the axiomatic that, subject to certain limited exceptions, [federal] appellate jurisdiction is limited to final orders from the district courts." *Rux*, 461 F.3d at 474; *see also Jenkins v. Prime Ins. Co.*, 32 F.4th 1343, 1345 (11th Cir. 2022) ("As a court of limited jurisdiction, we may exercise appellate jurisdiction only where

'authorized by Constitution and statute.'" (quoting *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994)). The order denying the motion to dismiss or transfer based on venue is not final, nor does it fall within one of the well-recognized exceptions. *See Rux*, 461 F.3d at 474 (discussing final orders and exceptions)

Indeed, the denial of a such a motion is not immediately appealable. *See In re Carefirst of Md., Inc.*, 305 F.3d 253, 256 (4th Cir. 2002) (recognizing "[c]ourts have consistently held that transfer orders under sections 1404(a) and 1406(a) do not satisfy the requirements of the collateral order doctrine" and collecting cases); *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) ("The courts have almost universally agreed that transfer orders fall outside the scope of the collateral order exception."); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 772–73 (3d Cir. 1984) (recognizing same); *cf.* 14D Charles A. Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3827 (4th ed. June 2024 update) ("An order of transfer under Section 1406(a) is interlocutory and cannot be appealed immediately."). The same goes for an order denying a motion to dismiss based on improper venue. *See La. Ice Cream Distributors, Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th

Cir. 1987) ("The denial of a motion to dismiss for improper venue is not a final order under 28 U.S.C. § 1291. Rather, it is an interlocutory order which is not subject to immediate appeal.").

Defendants try to get around this principle by asserting that the same order that grants injunctive relief also denies transfer. In other words, they argue that there is a single interlocutory order that can be appealed. But that oversimplifies matters.

If for no reason beyond judicial economy, different orders can be—and often are—contained in the same document. *See, e.g.*, *Boshears v. PeopleConnect, Inc.*, 76 F.4th 858, 861–62 (9th Cir. 2023) (dismissing portion of appeal for lack of appellate jurisdiction because "[n]otwithstanding its label as a single 'order,' the document clearly contains multiple orders"). Here, the district court did just that: combine multiple orders into one document. That did not make all of the discrete orders contained therein appealable. *See id.*

Defendants attempt to rely on a footnote in *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 903 n.1 (8th Cir. 1987), to argue that the order was appealable. But they do not address *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 890–92 (8th Cir. 2013), which explains that

the proposition for which Defendants cite *Maybelline* has been narrowed by *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), and thus does not bind this Court. Defendants must establish appellate jurisdiction, and they have facially failed to do so.

Because the order denying Defendants' motion to dismiss or transfer is not immediately appealable, venue could only be at issue if Defendants pursued an interlocutory appeal under 28 U.S.C. § 1292(b), *i.e.*, certification. But they did not. Thus, while Defendants can challenge North Dakota's standing, they cannot properly challenge venue. *See Indus. Addition Ass'n v. Comm'r*, 323 U.S. 310, 313 (1945) (recognizing distinction between jurisdiction and venue); *Hutson v. Fehr Bros.*, 584 F.2d 833, 837 (8th Cir. 1978) (recognizing "that the question of jurisdiction . . . is distinct from that of venue"); *Driscoll v. New Orleans Steamboat Co.*, 633 F.2d 1158, 1159 n.1 (5th Cir. 1981) ("Venue may be proper or improper, independent of questions of subject[-]matter . . . jurisdiction.").

For these reasons, Defendants cannot use the district court's order granting injunctive relief as a vehicle to appeal its order denying the

motion to dismiss or transfer based on improper venue. Accordingly, this Court should not consider Defendants' venue arguments.

ii. Venue is proper in North Dakota because North Dakota is a Plaintiff

In any event, Defendants' arguments regarding improper venue fail on their own terms, too. As previously noted, at least the three SBE State Plaintiffs have standing. The district court thus has subject-matter jurisdiction over this action. And the district court was not required to dismiss the other Plaintiffs. *See Biden*, 143 S. Ct. at 2365; *cf. Rumsfeld*, 547 U.S. at 52 n.2. Defendants now seek to conjure up new limitations on venue that lack legal support and are untethered to the applicable venue statute.

When interpreting a statute, the text controls. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). Here, 28 U.S.C. § 1391(e)(1) is the relevant statute, and it forecloses Defendants' arguments.

Section 1391(e)(1) allows the federal government and its agencies to be sued in any venue where a "plaintiff resides if no real property is involved in the action." In other words, if a plaintiff resides in the venue, then the federal government (*i.e.*, Defendants) can be sued there. Indeed, this venue provision was intentionally drafted to be broad so that it is more convenient for plaintiffs to sue the federal government. *See Stafford v. Briggs*, 444 U.S. 527, 542–44 (1980) (recognizing broad reach of venue statute in suits against federal government and officers); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460 (9th Cir. 1985) ("Section 1391(e) is . . . designed to permit an action which is essentially against the United States to be brought locally rather than in the District of Columbia[.]"). And because North Dakota is one of the plaintiffs suing Defendants, no real property is at issue, and North Dakota remains in the case (*i.e.*, it was never dismissed), venue is proper.

Simply put: At least one Plaintiff State has standing to establish subject-matter jurisdiction + North Dakota is a Plaintiff = the District of North Dakota is a proper venue.

Defendants' cases in support of its argument are unavailing:

- *Maybelline Co. v. Noxell Corp.* involved a suit between private litigants, which triggered subsections (b) and (c) of § 1391. *See* 813 F.2d at 903. Accordingly, venue was proper in the district court only if the defendants were doing business within that venue or if the plaintiff's claim arose there. *Id. Maybelline* did not implicate subsection (e), and it has no bearing here.
- In *Georgia Republican Party v. S.E.C.*, the petitioners based their petition for judicial review on 15 U.S.C. § 78y(a). 888 F.3d 1198, 1205 (11th Cir. 2018). That statute provides: "A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit[.]" 15 U.S.C. § 78y(a)(1). The statute concerns *jurisdiction* (*i.e.*, the court's ability to even consider the petition), not *venue*. *See id.* (a)(3) ("On the filing of the petition, *the court has jurisdiction*, which becomes exclusive on the filing of the record, to affirm or modify and

enforce or to set aside the order in whole or in part." (emphasis added)); *NetCoalition v. S.E.C.*, 715 F.3d 342, 347–48 (D.C. Cir. 2013) (discussing provision as jurisdictional); *Watts v. S.E.C.*, 482 F.3d 501, 505 (D.C. Cir. 2007) (same); *see also Indus. Addition Ass'n*, 323 U.S. at 313 (recognizing distinction between jurisdiction and venue). And, in any event, 15 U.S.C. § 78y(a)(1) has a more stringent standard than 28 U.S.C. § 1391(e)(1): a party may have its petition reviewed only by a regional circuit court only if it resides or has its principal place of business within that court's jurisdiction. That is why the Eleventh Circuit transferred the case after it dismissed the Georgia petitioner. *See Ga. Republican Party*, 888 F.3d at 1205.

- *Railway Labor Executives' Association v. I.C.C.* similarly does not bolster Defendants' argument. 958 F.2d 252 (9th Cir. 1991). To the contrary, the Ninth Circuit's conclusion *supports* Plaintiffs' venue argument: "Because we decide that [one petitioner] has standing, we need not decide whether

venue is proper in this circuit for [another petitioner]." *Id.* at 256.

In short, the plain language of 28 U.S.C. § 1391(e) governs. Defendants have not offered any reason why subsection (e) does not mean what it says. Because at least one Plaintiff has standing and North Dakota remains in the case, venue is proper.

iii. Venue was proper in North Dakota because North Dakota had standing to sue

Finally, venue is proper in the District of North Dakota because North Dakota has standing. According to Steven Camarota, an expert who analyzed studies of DACA recipients' behavior and summarized his findings, the Rule harms every State where DACA recipients are encouraged not to emigrate. "By reducing emigration, the [Rule] will mean more people with DACA will remain in the country than otherwise would be the case, creating more costs for states and local government." App. 78; R. Doc. 35-1 at 6. And since "a loss of even a

small amount of money is ordinarily an 'injury,'" standing lies. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017).

North Dakota presented evidence of two specific monetary harms: the cost of providing driver's licenses and identification cards to DACA aliens who remain in the State and the cost of providing public K–12 public education to dependents of DACA aliens. The district court ordered Defendants to provide to North Dakota the names of DACA aliens living in the State so that those costs could be estimated. After reviewing the costs, the court concluded: "Their continued presence creates a substantial risk North Dakota will suffer monetary harm via issuing licenses and providing education. This is sufficient to meet the injury in fact requirement." App. 189–90; R. Doc. 117 at 9–10; Add. A9–10.

Licenses and Identification: North Dakota established net costs to the State for issuing driver's licenses and identification cards to DACA recipients. App. 164–66; R. Doc. 93-1 at 1–3. And because driver's licenses and identification cards must be renewed if a person remains in the State, the State will continue incurring those costs as long as DACA recipients remain.

This conduct by DACA recipients who remain is entirely "predictable," *New York*, 588 U.S. at 768, and the preliminary injunction reduces the risk of this future harm, *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007); *see also Murthy v. Missouri*, 603 U.S. 43, 97 (2024) (Alito, J., dissenting). North Dakota established the harm has occurred in the past and is likely to occur again. *See Winter v. Nat. Res. Def. Council*, Inc., 555 U.S. 7, 22 (2008) (recognizing that irreparable injury must only be "likely"). That is enough.

Public Education: Defendants do not dispute that there is at least one dependent of a DACA recipient enrolled in public education in North Dakota, which costs the State $14,345.87 per child per year. R. Doc. 103-2 at 1–4; App. 174–77; R. Doc. 111-1 at 1–3; App. 178–80. Because North Dakota is required to provide public education for students regardless of their legal status, *Plyler v. Doe*, 457 U.S. 202, 230 (1982), it is not speculative that the State will continue incurring costs related to the education of DACA recipients' children, who will foreseeably remain in the State in order to receive the Rule's unlawful monetary benefits, *see New York*, 588 U.S. at 768.

Defendants try to undermine North Dakota's injuries as speculative. But Defendants, not Plaintiffs, are the ones speculating. North Dakota presented repeated evidence to establish its harms, which the district court properly considered in light of basic economic logic and common sense. *See Carpenters Indus. Council*, 854 F.3d at 6. And Defendants provided evidence that at least one DACA recipient in North Dakota enrolled in an ACA health plan before the district court enjoined the Rule. *See* App. 205; R. Doc. 119-1 at 7

Again, it is immaterial that the Rule might conceivably provide some other economic benefits to Plaintiffs; courts do not engage in accounting excises when considering standing. *See Texas*, 809 F.3d at 156; *NCAA*, 730 F.3d at 223; 13A *Federal Practice & Procedure*, *supra*, § 3531.4, *supra*; *Missouri*, 738 F. Supp. 3d at 1143–44; *New York*, 490 F. Supp. 3d at 771–72.

Recently, the Fifth Circuit reviewed the unlawful DACA program and affirmed that Texas had standing because the program incentivized DACA recipients to remain in the State; the standing requirement is "not a high bar." *See Texas v. United States*, 126 F.4th 392, 412 (5th Cir. 2025) ("Texas must demonstrate that, in the absence of DACA, at least

some DACA recipients would leave the state and thereby partially alleviate its injury."). There, Texas "put[] forward sufficient, unrebutted evidence to support the common-sense assertion that, absent DACA, some recipients would leave the United States." *Id.* (quotation marks omitted). Texas focused on money it would expend on social services and public education on DACA recipients who remained, which would logically and necessarily decrease if DACA recipients and their families left instead. *Id.*

Like Texas, North Dakota also provided evidence that DACA aliens have been steadily leaving the United States since DACA's inception in 2012, from approximately 800,000 down to 530,110 in 2023. *See* R. Doc. 81 at 11. North Dakota also put forward evidence that it would suffer monetary harm from the Rule incentivizing DACA recipients to remain. And, if the Rule were to take effect again, North Dakota will continue incurring monetary harm from DACA recipients whom the Rule encourages to remain in the State. North Dakota thus has standing.

* * *

Defendants' failed venue arguments are not properly before this Court and even if they were, North Dakota remained a Plaintiff so venue is proper as long as at least one Plaintiff had standing. Regardless, North Dakota has its own standing, so venue is proper. Ultimately, Defendants lose this argument, whether on jurisdiction, venue, or both.

II. Plaintiffs are likely to succeed on the merits

The merits strongly favor Plaintiffs.[10] The likelihood of success "has been referred to as the most important of the four factors." *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). Because the Rule is both unlawful and arbitrary and capricious, Plaintiffs are likely to succeed.

a. The Rule is unlawful

Under the Administrative Procedure Act, a rule is unlawful if it is "not in accordance with law" or "in excess of statutory . . . authority, or

[10] Once again, Defendants diverge from the merits by arguing that the district court applied the wrong standard in issuing the injunction. OB at 44. But the district court only enjoined the Rule because it "concluded Plaintiffs will likely succeed on the merits because CMS acted contrary to law." App. 194; R. Doc. 117 at 14; Add. A14. That recognition satisfies this Court's standard. *See Garland*, 112 F.4th at 517. Defendants' argument is a nonstarter.

limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency exceeds statutory authority when it "has gone beyond what Congress has permitted it to do" either by assuming authority it does not have or by exercising the authority it does have in an impermissible way. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

CMS's brazen determination that DACA recipients are "lawfully present" is contrary to law, because the "action" that is deferred by the DACA program is an enforcement action—*i.e.*, removal—based on recipients' unlawful presence. *See* 8 C.F.R. § 236.22(b)(4) (limiting DACA availability to aliens who lack lawful immigration status); *see also* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); *id.* § 1229a(a)(2) (noting that inadmissible aliens are removable).

Several courts have recognized the obvious fact that DACA recipients are unlawfully present. As the Eleventh Circuit explained, DACA recipients are simply "given a reprieve from potential removal; that does not mean they are in any way 'lawfully present' under the

[Immigration and Nationality Act (INA)]." *Estrada v. Becker*, 917 F.3d 1298, 1305 (11th Cir. 2019) (citation omitted). Similarly, another court has stated that "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present, and Congress has not granted the Executive Branch free rein to grant lawful presence to persons outside the ambit of the statutory scheme." *Texas v. United States*, 549 F. Supp. 3d 572, 609–10 (S.D. Tex. 2021) (quotation marks omitted), *aff'd in relevant part*, 50 F.4th 498 (5th Cir. 2022). As the Fifth Circuit put it later in the same litigation:

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

50 F.4th at 526. And the Fifth Circuit reaffirmed this reality yet again earlier this year. *See Texas*, 126 F.4th at 418 ("DACA remains manifestly contrary to the [INA]." (quotation marks omitted)).

Because DACA recipients are not lawfully present, they cannot receive federal benefits that are statutorily limited to individuals who

are lawfully present. This is not a close question of statutory interpretation. There are two separate federal statutes that prohibit unlawfully present aliens from receiving ACA benefits.

First, in PRWORA, Congress stated: "Notwithstanding any other provision of law and except as provided in subsection (b), an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit[.]" 8 U.S.C. § 1611(a). Virtually all illegal aliens, including those granted deferred action, are not "qualified aliens." 8 U.S.C. § 1641. Congress could not have been clearer. Indeed, by including, "notwithstanding any other provision of law," Congress "broadly swe[pt] aside potentially conflicting laws." *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007); *see also Liberty Mar. Corp. v. United States*, 928 F.2d 413 (D.C. Cir. 1991) (recognizing that it "is difficult to imagine" a "clearer statement" by Congress (quotation marks and citation omitted)). As this Court has recognized, "The phrase, 'notwithstanding any other provision of law,' signals that the [statute] supersedes other statutes that might interfere with or hinder the attainment of this objective." *Campbell v. Minneapolis Pub. Hous. Auth. ex rel. City of Minneapolis*, 168 F.3d

1069, 1075 (8th Cir. 1999) (citations omitted). This means that Defendants could enact the Rule only if another statute (here, the ACA) expressly vested them with this authority.

As noted above, PRWORA's definition of "qualified alien" does not include DACA recipients. "Qualified aliens" must be lawfully admitted under the INA, or otherwise granted lawful status under a specific provision of United State immigration law. *See* 8 U.S.C. § 1641. No part of the definition of "qualified alien" contemplates someone whose unlawful presence is temporarily tolerated due to the executive branch's unlawful program of prosecutorial discretion. *See also Texas*, 126 F.4th at 417–18 (discussing the INA). Because DACA recipients do not fall within the definition of "qualified alien" set forth in PRWORA, they are ineligible for ACA benefits, full stop.[11]

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

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

Additionally, aliens granted employment authorization under 8 C.F.R. § 274a.12(c) do not automatically fall within the definition of "qualified alien" under PRWORA either. "Qualified aliens" are generally eligible for employment authorization. *See generally* 8 C.F.R. § 274a.12(a) (making aliens with certain immigration statuses eligible for employment authorization, including lawful permanent residents and refugees). But not all those granted employment authorization are

"qualified aliens." *See* 89 Fed. Reg. at 39,408 ("Almost all noncitizens granted employment authorization under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations"); *id.* at 39,409 ("We agree that a grant of employment authorization does not result in an individual being considered a 'qualified alien' under 8 U.S.C. 1641(b) or (c) [PRWORA.]"). So, a mere grant of employment authorization cannot confer lawful presence under either INA or PRWORA.

By making both DACA recipients and employment-authorized aliens eligible to enroll in a QHP through an Exchange, the Rule runs contrary to law because subsidies provided to QHP enrollees constitute a federal public benefit under PRWORA. *See* 8 U.S.C. § 1611(c)(1)(B) (defining "federal public benefit" to include any health benefit "for which payments or assistance are proved to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States."). The Rule, by including in its definition of aliens "lawfully present" in the United States both DACA enrollees and illegal aliens granted work authorization, is thus both not in accordance with PRWORA and in excess of CMS's statutory authority.

The second statute prohibiting Defendants from conferring ACA benefits on unlawfully present aliens is the ACA itself. The ACA's plain language aligns with PRWORA's restriction on the provision of federal benefits because the ACA limits eligibility to "lawfully present" individuals: "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 . . . ." 42 U.S.C. § 18032(f)(3). The text of the ACA is perfectly clear.

In their Opening Brief, Defendants torture the statutory text in order to claim that the ACA gives them the extraordinary authority to *redefine* the statutory term "lawfully present" so that it includes classes of aliens who are unlawfully present and removable by DHS at any time. *See* OB at 36. Their strained attempt to find statutory support fails, for four independent reasons.

First, the text of the ACA confers no such suthority on Defendants. The text of the ACA simply directs the Secretary of HHS to establish a process for ascertaining whether an individual "meets the requirements of section[] 18032(f)(3) . . . that the individual be a citizen

or national of the United States or an alien lawfully present in the United States." 42 U.S.C. § 18081(a)(1). In other words, HHS must set up a process to confirm aliens' lawful presence with DHS. Presumably, Congress was thinking of the online Systematic Verification for Entitlements (SAVE) program that was set up by DHS in the wake of PRWORA so that other federal agencies, as well as state and local governments, could ensure that unlawfully present aliens did not receive public benefits. Some 1,200 agencies already use the program. *See* U.S. Citizenship and Immigration Services, *About SAVE*, https://www.uscis.gov/save/about-save/about-save. But Defendants claim that these simple words actually confer a much greater power on HHS—the power to transform aliens from unlawfully present to lawfully present.

But Defendants seek an even broader power than determining a particular alien's status. They claim the power to redefine what "lawfully present" means, baldly claiming, "The ACA leaves to HHS the task of defining the phrase 'lawfully present.'" OB at 36. The authority to determine whether a particular alien is lawfully present does not in any way imply the authority to redefine the term lawfully present.

Nevertheless, Defendants are trying to redefine this central term of federal statute.[12] The text of the ACA gives them no authority to do so; and Defendants are unable to point to anything in the statute conveying such power.

Second, explanatory text concerning a vacated rule is not authority. Unable to find any text in a federal statute that gives them this awesome authority, Defendants attempt to rely on words that were published in the federal register in an effort to justify a federal rule. That is bad enough. Worse, the federal rule in question has been vacated. In other words, another federal court was not persuaded by those words. Specifically, Defendants seize upon the following explanation offered by DHS concerning its DACA rule when it was attempting to justify why DACA aliens should not be considered unlawfully present: "the term [lawful presence] is reasonably

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[12] The term "lawfully present" is used pervasively throughout federal immigration law. *See, e.g.*, 8 U.S.C. § 1229a(c)(2) ("the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States."); 8 U.S.C. § 1357(g)(10) ("for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.").

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*." 87 Fed. Reg. at 53,209 (emphasis added); quoted in OB at 39. According to Defendants, the magic word is "tolerate." In their view, as long has DHS chooses to "tolerate" the presence of an alien who is unlawfully present, he magically becomes lawfully present.

The Southern District of Texas vacated the DACA rule and enjoined its implementation. *Texas*, 2023 WL 5950808, at *1, *aff'd in relevant part*, *Texas*, 126 F.4th at 417–18. The DACA program itself is now unlawful, as it always was. In explaining its vacatur of the DACA rule, the Southern District of Texas referred back to its 2021 decision vacating the DACA program prior to the issuance of the rule. *Texas v.*, 2023 WL 5950808, at *1. In that decision, the court emphatically rejected the claim that DHS's tolerating the presence of an illegal alien somehow confers lawful presence on the alien; only Congress can define which categories of aliens are lawfully present. "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." *Texas*,

549 F. Supp. 3d at 609. The Fifth Circuit agreed: "Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change." *Texas*, 50 F.4th at 526.[13]

Only Congress, not executive branch agencies, can enact federal immigration laws. U.S. Const. art. I, §§ 1, 8. And Congress has created an intricate statutory scheme for determining which specific classes of aliens may receive lawful presence, discretionary relief from removal, deferred action, and work authorization. In striking down the DACA program (as it existed prior to the DACA Rule), the Fifth Circuit concluded that: "Congress's rigorous classification scheme forecloses the contrary scheme in the DACA Memorandum. Entirely absent from those specific classes Congress defined is the group of 1.7 million aliens who would be eligible for lawful presence under DACA." *Texas*, 50 F.4th at 526 (internal quotations and footnotes omitted).

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[13] *See Gen. Land Office v. Biden*, 2024 WL 1023047 (S. D. Tex. Mar. 8, 2024) (*Immigration Priorities* was "narrow and simply maintains the longstanding jurisprudential status quo") citing *United States v. Texas*, 599 U.S. 670, 686 (2023); *Florida v. United States*, 717 F. Supp. 3d 1196 (N. D. Fla. 2024); *Texas v. Mayorkas*, No. 2:22-CV-094-Z, 2024 WL 455337 (N. D. Tex. Feb. 6, 2024)).

Because DACA recipients are not "lawfully present" in the United States pursuant to legislation enacted by Congress, DHS was prohibited from deeming them to be "lawfully present" through the DACA program. Defendants in the instant case cannot deem any class of unlawfully present aliens—whether it be DACA recipients or employment authorization recipients—to be "lawfully present" either. Defendants also attempt to conflate DACA recipients with other classes of aliens who have been granted deferred action pursuant to legislation enacted by Congress. As the Fifth Circuit recognized in 2015:

> 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 ("LPRs") killed by terrorism, and immediate family members of LPRs killed in combat and granted posthumous citizenship.

Texas v. United States (DAPA), 809 F.3d 134, 179 (5th Cir. 2015) (footnotes omitted) (citing 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (defining classes of aliens who are eligible for deferred action and work authorization); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b)(1), 115 Stat. 272, 361 (making family members of LPRs killed by terrorism eligible for deferred action and work authorization); National

Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-95 (making immediate family members of lawful permanent residents killed in combat and granted posthumous citizenship eligible for deferred action, advance parole, and work authorization). In contrast, DACA attempted to confer deferred action upon aliens who were unlawfully present in the United States without any authorization from Congress. DHS's attempt to confer "lawful presence" upon DACA recipients has been described as the "epitome of 'the Executive seizing the power of the Legislature.'" *Texas v. United States*, 691 F. Supp. 3d 763, 788 (S.D. Tex. 2023) (quoting *Nebraska*, 143 S. Ct. at 2373). Defendants' effort to equate the unlawful conferral of deferred action in DACA with congressional conferral of deferred action via statute must be rejected.

Third, Defendants' argument leads to absurd consequences. To believe Defendants' argument, one would have to conclude that those aliens who are here unlawfully who were given deferred enforcement (also unlawfully) can be suddenly deemed lawfully present for the purpose of receiving subsidized healthcare under the ACA (when Congress prohibited those unlawfully present from receiving public

benefits). This argument is without merit. That DACA recipients' temporary presence must be "tolerated" reveals that their presence is anything but "lawful." As the Fifth Circuit put it, "Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence." *Texas*, 50 F.4th at 526. Defendants' argument knows no limits. The executive branch could effectively transform any group of aliens it selected (perhaps by country of origin or by duration of unlawful presence in the United States) into "lawfully present" aliens simply by publishing a memorandum or promulgating a rule.

Finally, Defendants' argument conflicts with legislative history. The legislative history of the ACA demonstrates that it was never intended to expand the universe of those who are "lawfully present" for the purpose of the subsidy. Nor are Defendants correct in their illogical assertion that there is some conflict between the PRWORA's limitation of federal public benefits only to "eligible aliens" (a designation that excludes those unlawfully present) and the ACA's limitation of benefits only to "lawfully present" aliens. In the House debate at the time the ACA was passed, Congressman Rush Holt Jr. (D.-N.J.) stated:

> Another myth is that health reform would provide federal benefits for undocumented aliens. Undocumented

> immigrants *currently 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.

155 Cong. Rec. H12876 (daily ed. Nov. 7, 2009) (statement of Rep. Holt) (emphases added). The policy that Representative Holt was referring to was PRWORA's prohibition of federal public benefits to unlawfully present aliens. As he said, "There are no provisions in the House health reform bill that would change this policy." *Id.* The two statutes are perfectly consistent and perfectly clear. Indeed, the ACA (which passed the Senate with no votes to spare) never would have been enacted if its subsidies were extended to unlawfully present aliens. It is precisely that concern that Representative Holt was seeking to address. Any argument that unlawfully present aliens such as DACA recipients were intended by Congress to be beneficiaries of ACA subsidies is entirely without merit.

b. The Rule is arbitrary and capricious

The Rule is also arbitrary and capricious. Although the district court did not reach this argument, this is an independent basis upon which this Court may affirm. *See Moffit*, 11 F.4th at 960.

The APA forbids an agency from engaging in action that is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). An agency acts arbitrarily and capriciously when it departs sharply from prior practice without reasonable explanation or fails to consider either alternatives to its action or the affected communities' reliance on the prior rule. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020); *see also In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005). An agency also acts arbitrarily and capriciously when it fails to consider costs, which are a "centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015). The Final Rule is the very definition of arbitrary and capricious rulemaking. An agency declares by executive fiat that those who were unlawfully present are now lawfully present. And that declaration capriciously contradicts the agency's (correct) statement in 2012 that DACA aliens are not lawfully present. 77 Fed. Reg. at 52,615–52,616.

First, Defendants did not provide a reasonable explanation for their sharp departure from their prior policy of considering DACA recipients "unlawfully present" for purposes of ACA eligibility. They merely stated that the change in definition is consistent with the goals of the ACA, *see* 89 Fed. Reg. at 39,396, without explaining or judging tradeoffs for departing from the prior policy which made DACA recipients ineligible. That is not enough. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

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

CMS reversed its prior policy without explanation and did not consider the full scope of costs to States in doing so.

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

Defendants must provide a reasonable explanation for their sharp departure from past practice. Like the CMS explanation for the Final Rule, Defendants' Opening Brief offers no newly discovered facts. Defendants state that giving DACA recipients subsidized health insurance would "provid[e] recipients with a degree of stability." OB at 10. Of course it would. So would giving them each a $4,000 check. That was obvious in 2012, just as is it is now. Stating the obvious does not

suffice as providing a reasoned explanation for a 180-degree shift. The only thing that changed since the agency's past position is that the DACA program has been deemed unlawful by courts. But Defendants have decided for political reasons to confer ACA benefits upon DACA recipients nonetheless.

Second, the Rule's definition of DACA recipients as "lawfully present" is facially irrational: DACA recipients are aliens whose unlawful presence is subject to deferred action; they cannot be considered lawfully present at the same time. An agency action cannot be upheld if it is "internally inconsistent or not reasonable and reasonably explained." *Garland*, 112 F.4th at 520.

Finally, Defendants also failed to consider the costs States would incur as a result of the Rule. States that operate their own exchanges would see operating costs increase and premiums rise. These include technology and staffing expenses, funded from state revenues. *See* App. 96–97; R. Doc. 35-2 at 7–8. And every Plaintiff State would experience decreased emigration by illegal aliens, as expanded eligibility for ACA coverage and subsidies encouraged more illegal aliens to remain in the country. *See generally* App. 73; R. Doc. 35-1; *see also Texas*, 126 F. 4th

at 412. With more illegal aliens residing in Plaintiff States, the States would foreseeably incur additional costs as they provided driver's licenses, public education, and emergency services to illegal aliens. And all the States bear the costs of the DACA program in the form of incarceration of DACA recipients who commit crimes. *See* U.S. Citizenship and Immigration Services, *DACA Requestors with an IDENT Response: November 2019 Update*, at 1, available at https://tinyurl.com/ytrrhwj7 (between 2012 and October 2019, nearly 80,000 illegal aliens with prior arrest records were granted DACA status).

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

and provides another reason why Plaintiffs are likely to succeed on the merits of their challenge.

* * *

Congress set a national policy of deterring illegal immigration by making illegal aliens generally ineligible for public benefits. Defendants cannot override that decision in the absence of clear statutory authority. They have none. And even if somehow permitted by statute, the Rule is arbitrary and capricious, given its sharp departure without reasonable explanation, facial irrationality, and failure to consider costs to the States. The district court was correct when it determined Plaintiffs are likely to succeed on the merits.

III. The equities and the public interest favor an injunction

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

Constitution"). Congress has already conclusively declared in statute what the public interest is. The nation's "compelling" interest lies in "remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). Allowing the Rule to remain effective would empower CMS to defeat the federal government's interests, which Congress expressed in statute.

Additionally, third-party DACA recipients have no legally cognizable interest in obtaining public benefits for which they are statutorily ineligible. *See Evanoff v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 11 F. App'x 670, 670–71 (8th Cir. 2001); *cf. Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.").

It was not until Defendants moved for a stay in the district court that they meaningfully invoked any harm DACA recipients would endure from enjoining the Rule. And when they moved for a stay in this Court, Defendants tried to pass off this alleged harm as their *own* irreparable harm, which this Court recognized was improper. *See*

Kansas, 124 F.4th at 533–34. This Court should again refuse to consider alleged harms to DACA recipients as harm to Defendants.

In any case, withholding ACA benefits from DACA recipients does not harm the public interest. As this Court recognized, DACA recipients were previously ineligible for health insurance through ACA, and so it is doubtful that withholding unlawful benefits from illegal aliens, who did not previously have them, warrants lifting the injunction. *See id.*

And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (quotation mark omitted). To the contrary, "there is substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations." *Texas v. U.S. Dep't of Homeland Sec.*, 123 F.4th 186, 213 (5th Cir. 2024) (quotation marks and citations omitted).

And where, as here, a party has demonstrated a strong likelihood of success on the merits, it is "a strong indicat[ion] that a preliminary injunction would serve the public interest." *Shawnee Tribe*, 984 F.3d at 102 (quoting marks omitted). Importantly, this is the rare case where *Congress codified an explicit statement of the public interest*, which is

deterring illegal immigration by denying public benefits to illegal aliens.

As established above, Plaintiff States and the public at large have a compelling interest in preventing the expenditure of public funds to those who are not eligible. *See, e.g.*, *id.* at 102–03 ("Here, the Tribe is likely to succeed in showing that the Secretary is distributing congressionally appropriated funds in violation of the authorizing statute, and the public interest therefore favors the Tribe."). Because the Rule extends public benefits to classes of aliens that Congress expressly excluded, it is contrary to the public interest.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,334 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-counting function of Microsoft Word.

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I hereby certify that on the 7th day of February, 2025, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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