

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

State of KANSAS, <i>et al.</i> , <div style="text-align: center;">Plaintiffs- Appellees,</div> <div style="text-align: center;">v.</div> UNITED STATES of AMERICA, <i>et al.</i> , <div style="text-align: center;">Defendants- Appellants.</div>	<div style="text-align: center;">Case No. 24-3521</div> On appeal from the United States District Court for the District of North Dakota Case No. 1:24-cv-00150-DMT
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**RESPONSE IN OPPOSITION TO MOTION TO HOLD APPEAL
IN ABEYANCE AND PLAINTIFFS' REQUEST
TO EXPEDITIOUSLY DECIDE THIS APPEAL ON THE BRIEFS**

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Plaintiffs respectfully request this Court deny Defendants’ Motion to Hold Appeal in Abeyance, allow the current abeyance to expire, and expeditiously decide this case on the briefs.

BACKGROUND¹

This appeal stems from an effort by Plaintiffs to enjoin an unlawful Rule, 89 Fed. Reg. 39,392 (May 8, 2024), that allows Deferred Action for Childhood Arrivals (DACA) recipients to enroll in health insurance through Patient Protection and Affordable Care Act (“ACA”) exchanges. *See generally Kansas v. United States*, 124 F.4th 529 (8th Cir. 2024) (per curiam) (declining to stay preliminary injunction of Rule pending appeal).

On February 11, 2025—after the opening brief, response brief, and two amicus briefs were submitted—Defendants filed a consent motion to hold this appeal in abeyance so the new Administration could evaluate the issues. On February 19—the day on which their reply brief was due—Defendants notified the Court that they would not file a reply because the abeyance motion remained pending. On February 24, this

¹ To avoid unnecessary recitation of facts with which this Court is familiar, Plaintiffs provide an abbreviated background.

Court granted the motion and ordered the appeal be held in abeyance for 60 days.

On March 19, Defendants published a notice of proposed rulemaking; the Proposed Rule would make DACA recipients ineligible to use ACA exchanges. 90 Fed. Reg. 12,942 (Mar. 19, 2025). In light of this development, Defendants asked Plaintiffs to consent to holding this appeal in abeyance pending final action on the Proposed Rule. Plaintiffs opposed the request, and Defendants filed the instant Motion.

ARGUMENT

This Court should not indefinitely delay a decision when the issue—whether the district court correctly preliminarily enjoined the Rule—is ripe for review. Plaintiffs are sensitive to the issues facing a new Administration; that is why they agreed to a relatively short 60-day abeyance. And Plaintiffs greatly appreciate that Defendants, as shown by the Proposed Rule, recognize the myriad legal and policy flaws in the challenged Rule. Indeed, they seem to have determined that the Rule is unlawful, in which case they should advise this Court and the district court. Instead, they seek to hold this Court, the parties, and other impacted individuals in an indefinite state of uncertainty.

Plaintiffs never agreed to an indefinite stay of the appeal.² This case is not moot, and it may never be moot. Accordingly, this Court has a duty to decide the case in accordance with the expedited schedule it already determined was appropriate.

First, there is no indication of when—if at all—a new *final* rule will be issued that excepts DACA recipients from being able to access ACA exchanges. Defendants received over 25,000 comments on the Proposed Rule.³ It will take time for Defendants to consider the comments, respond to them, and revise the Proposed Rule as necessary until a final rule is issued. Thus, it may be a while before the Proposed Rule (if it ever does) becomes law.⁴ Although the district court’s

² After agreeing to Defendants’ request for an abeyance, Plaintiffs filed a Rule 28(j) letter in which they identified a recent decision by this Court that supports their arguments in this case. *See* Entry 5486818 (Feb. 18, 2025). This action illustrates Plaintiffs’ belief that any abeyance would be temporary and that this appeal would proceed to a resolution on the merits.

³ *See* Ctrs. for Medicare & Medicaid Servs., *Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability CMS-9884-P*, Dkt. CMS-2025-0020, <https://www.regulations.gov/document/CMS-2025-0020-0011/comment> (last visited April 22, 2025).

⁴ Defendants first proposed the challenged Rule in April 2023, but did not adopt it until May 2024. If the Proposed Rule takes that same time, then the resulting final regulation will not be issued until April 2026.

preliminary injunction will remain effective for the States in this suit, the Rule will continue its harm elsewhere. This Court should not allow the administrative rulemaking process (which can be quite lengthy) to indefinitely interfere with its review.

Second, it is worthwhile for this Court to decide this appeal. A swift opinion by this Court would provide certainty for Plaintiffs, Defendants, and other impacted individuals and organizations while the rulemaking process plays out.

It would also clarify the proceedings in the district court, where the case has been stayed pending this Court's decision on the merits of the preliminary injunction. *See* Dist Ct. Dkt. 143. An indefinite abeyance of the present appeal could result in the intervenor-defendants, *see* Dist. Ct. Dkt. 171, moving to lift that stay. If the district court agreed to lift the stay, the preliminary injunction would remain effective while the case proceeded on the merits. Practically, that result would be tantamount to this Court affirming without this Court's considered judgment, depriving courts and litigants of meaningful guidance. And that is harmful.

And this Court’s analysis of the legal issues—particularly the likelihood-of-success factor—will be invaluable, especially because Plaintiffs anticipate litigation over any new final rule, which may result in that new rule (*i.e.*, the effective recession of this Rule) being enjoined or vacated.⁵ This Court can bypass uncertainty by deciding this appeal now.

Finally, this case, like this Court, is ready for a decision. This Court has already recognized the significance of this case—and the need for a prompt decision—by imposing an expedited briefing schedule. *See* Entry 5469591 at 1 (Dec. 23, 2024). Defendants have filed an opening brief in which they vigorously defend the Rule and argue that the district court erred in preliminarily enjoining it. They are joined by two amicus briefs that strongly urge this Court to reverse. Plaintiffs have filed a response brief in which they thoroughly argue that the Rule is unlawful and this Court should affirm, and they later filed a supportive Rule 28(j) letter. Defendants’ failure to file a reply brief should not impede this Court’s consideration of the merits.

⁵ *See, e.g., Comment Letter* (Apr. 11, 2025), <https://perma.cc/M9U6-V4KE>.

“A reply brief . . . generally is not essential for appellate review.” *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986). Indeed, although Defendants “may” file a reply brief, they are not required to do so. *See* Fed. R. App. P. 28(c); *Birtle*, 792 F.2d at 848 (recognizing that Rule 28(c) “indicates that the filing of a reply brief is discretionary” and noting that “parties often decide not to file a reply brief”). All the relevant arguments are before this Court. There is “no need” for a reply brief, and this case is ready for disposition.⁶ *Cf. Birtle*, 792 F.2d at 848.

Plaintiffs initially agreed with Defendants that this case warrants oral argument (and this Court then set the case for argument). But after further consideration and in light of Defendants’ subsequent proposed rulemaking and request for further abeyance, Plaintiffs

⁶ In their Notice Regarding the Filing of a Reply Brief, Plaintiffs asked this Court to grant them “an adequate period . . . to determine the appropriate next steps in this appeal” if the Court lifts the abeyance. Entry 5487390 at 2 (Feb. 19, 2025). Given the 60-day abeyance, Plaintiffs believe Defendants have had sufficient opportunity to determine their strategy and that no additional time is warranted. And as previously noted, it is not necessary for Defendants to file a reply brief. This undercuts Defendants’ concern for party resources. But if this Court orders Defendants to file a reply or otherwise grants them additional time, it should limit Defendants to the time they initially had to file their reply: 12 days.

believe this Court can—and should—proceed to decide the case on the existing briefs. *See* 8th Cir. R. 34A(c) (authorizing hearing panel to reclassify case as suitable for disposition without oral argument); *see also* Fed. R. App. P. 34(a)(2)(C).⁷

* * *

This expedited appeal raises important issues stemming from an unlawful Rule that, for the foreseeable future, remains the law of the land (albeit with its effects stayed in certain States). The parties, other affected individuals and organizations, and the district court are waiting for this Court’s determination of the merits. Accordingly, this Court should proceed to expeditiously decide this appeal based on the briefs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants’ Motion to Hold Appeal in Abeyance, allow the current abeyance to expire, and expeditiously decide this case based on the filed briefs.

⁷ If this Court still believes argument is warranted, then Plaintiffs request the argument be scheduled for the earliest available opportunity.

Dated: April 23, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,402 words. It also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared using Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

Pursuant to Eighth Circuit Rule 28A(h)(2), I further certify that the foregoing has been scanned for viruses, and the foregoing is virus free.

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