CENTER FOR IMMIGRATION STUDIES

June 23, 2023

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD
21244

RE: Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs (File Code CMS–9894–P).

Dear Secretary Becerra:

The Center for Immigration Studies (CIS) submits the following feedback to the U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), in response to the HHS's proposed rule, titled *Clarifying Eligibility for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs*, as published in the Federal Register on April 26, 2023.[1]

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration's far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

I. Background

The Patient Protection and Affordable Care Act (ACA) generally requires that in order to enroll in a Qualified Health Plan (QHP) through an Exchange, an individual must be either a citizen or national of the United States or be "lawfully present" in the United States.[2] The ACA also generally requires that individuals be "lawfully present" in order to be eligible for insurance

[1] 88 Fed. Reg. 25313 (Apr. 26, 2023).
[2] 42 U.S.C. § 18032(f)(3).

affordability programs such as premium tax credits (PTC),[3] advance payments of the premium tax credit (APTC),[4] and cost-sharing reductions (CSRs).[5] Enrollees in a Basic Health Program (BHP) are required to meet the same immigration status requirements as QHP enrollees.[6] Additionally, the ACA required that individuals be "lawfully present" in order to qualify for the Pre-Existing Condition Insurance Plan Program (PCIP), which expired in 2014.[7] The ACA further requires that the CMS verify that Exchange applicants are lawfully present in the United States.[8]

The ACA, however, does not define "lawfully present," but specifies that an individual is only considered lawfully present for ACA purposes if they are reasonably expected to be lawfully present for the period of their enrollment.[9] As a result, CMS issued regulations in 2010 to implement the ACA and define "lawfully present" for the purposes of determining eligibility for PCIP;[10] in 2012 for the purpose of determining eligibility to enroll in a QHP through an Exchange by cross-referencing the existing PCIP definition;[11] and in 2014 to cross-reference the definition for the purpose of determining eligible to enroll in a BHP.[12]

Currently, HHS regulations at 45 C.F.R. § 152.2 define "lawfully present" to include the following classes of aliens:

- Qualified aliens as defined in at 8 U.S.C. § 1641;
- Aliens in nonimmigrant status who have not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission;
- Aliens in temporary resident status pursuant to 8 U.S.C. § 1160 or 1255a;
- Aliens with Temporary Protected Status (TPS) under 8 U.S.C. § 1254a;
- Aliens who have been granted employment authorization under 8 C.F.R. § 274a.12(c)(9), (10), (16), (18), (20), (22), or (24);
- Family Unity beneficiaries pursuant to section 301 of Public Law 101-649 as amended;
- Aliens currently in Deferred Enforced Departure (DED) pursuant to a decision made by the President of the United States;
- Aliens with deferred action;
- Aliens with approved visa petitions and who have a pending application for adjustment of status;
- Aliens with a pending asylum claim under 8 U.S.C. § 1158 or withholding of removal under 8 U.S.C. § 1231 or under the regulations implementing the Convention Against Torture (CAT) who have been granted employment authorization, and such an

[3] 26 U.S.C. § 36B(e)(2).
[4] 42 U.S.C. § 18082(d).
[5] 42 U.S.C. § 18071(e).
[6] 42 U.S.C. § 18051(e).
[7] 42 U.S.C. § 18001(d)(1).
[8] 42 U.S.C. § 18081(c)(2)(B).
[9] 42 U.S.C. § 18032(f)(3), 42 U.S.C. § 18071(e)(2).
[10] 75 Fed. Reg. 45013 (Jul. 30, 2010).
[11] 77 Fed. Reg. 18309 (Mar. 27, 2012).
[12] 79 Fed. Reg. 14111 (Mar. 12, 2014).

application who is under the age of 14 who has had an application pending for at least 180 days;
- Aliens who have been granted withholding of removal under CAT; and
- Children who have pending applications for Special Immigrant Juvenile status as described at 8 U.S.C. § 1101(a)(27)(J).

Importantly, CMS amended its regulatory definition of "lawfully present" in August 2012 to explicitly exclude Deferred Action for Childhood Arrivals (DACA) recipients, thereby treating DACA recipients differently than other aliens with deferred action for purposes of these benefits programs.[13] CMS also issued a 2012 State Health Official (SHO) letter excluding DACA recipients from the definition of "lawfully residing" for the purposes of Medicaid or Children's Health Insurance Program (CHIP) eligibility in States that elect to cover "lawfully residing" pregnant individuals and children under section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA 214 option). In 2014, CMS issued regulations establishing the framework governing a BHP, which also adopted the definition of "lawfully present" at 45 C.F.R. § 152.2. As a result, DACA recipients are not currently eligible to enroll in a QHP through an Exchange, or for APTC or CSRs in connection with enrollment in a QHP through an Exchange, nor are they eligible to enroll in a BHP or for Medicaid or CHIP under the CHIPRA 214 option because they are not considered lawfully present for purposes of these programs.

CMS's proposed rule amends the definition of "lawfully present" at 45 C.F.R. § 152.2 to include DACA recipients, and make technical changes to cover other categories of aliens in limited circumstances. The result would allow the covered individuals to establish eligibility to enroll in a QHP through an Exchange and for a BHP, as well as become eligible for APTC and CSRs.[14] The proposed rule would also impose a similar definition of "lawfully present" applicable to eligibility for CHIP in States that elect to cover "lawfully residing" pregnant individuals and children the CHIPRA 214 option.[15]

CMS states that its target effective date for this rule is November 1, 2023. The agency is accepting comments on potential effective dates if the rule is finalized.

II. Definition of "Lawfully Present" for Purposes of ACA Benefits Eligibility

CIS strongly recommends CMS amend its regulatory definition of "lawfully present" for purposes of ACA benefits eligibility to exclude classes of aliens that have no lawful immigration status, and therefore, may not be "reasonably expected" to be lawfully present in the United States for the duration of enrollment, as statute requires.[16] Because deferred action, TPS, DED, and parole recipients have no legal right to remain in the United States, CMS does not have a reasonable basis to assume these classes will retain lawful presence for the duration of a potential

[13] 77 Fed. Reg. 52614 (Aug. 30, 2012).
[14] 45 C.F.R. § 155.305(f)(1)(ii)(A) and (g)(1)(i)(A).
[15] 88 Fed. Reg. 25313, 25314 (Apr. 26, 2023).
[16] 42 U.S.C. § 18032(f)(3); 42 U.S.C. § 18071(e)(2).

enrollment in covered benefits. Accordingly, CMS must exclude these classes of aliens from its proposed definitions of "lawfully present" for these purposes.

Additionally, because the DACA program is not a lawful exercise of deferred action and CMS's reversal in policy is not based on a reasonable rational, the proposed rule's extension of benefit eligibility to DACA recipients is *ultra vires* and violates the APA.

A. CMS Must Exclude Deferred Action, TPS, and DED Recipients from the Definition of "Lawfully Present" for the Purpose of ACA Benefits Eligibility.

CMS must amend its proposal to remove deferred action, TPS, and DED recipients from the proposed definition of "lawfully present" for purposes of ACA benefits eligibility. These classes of aliens have no lawful immigration status in the United States. Rather, they have received various forms for forbearance from removal. As a result, they have no legal right to remain in the United States and remain subject to removal.

The federal government describes "lawful presence" as a "specialized term of art" that is separate from "lawful status," which may only be conferred through an act of Congress.[17] As the Supreme Court noted in *Department of Homeland Security v. Regents of the University of California*, "Lawful presence is a statutory prerequisite for receipt of certain benefits. … (citing 8 U. S. C. §1611). It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, *see* 8 C.F.R. §1.3; 42 C.F.R. §417.422(h), agencies can also exclude them from this designation."[18] Accordingly, because lawful presence is context-dependent and "there is no express definition of 'lawfully present' or 'unlawfully present' for all purposes," CMS may exclude deferred action, TPS, and DED recipients from the regulatory definition of "lawfully present" for purposes of ACA benefits eligibility.[19]

While, pursuant to other regulations, these classes of aliens are sometimes considered "lawfully present" for certain purposes, such as Social Security benefits and application of the three- and ten- year bars,[20] Congress has further limited who may be considered lawfully present for the purpose of ACA benefits eligibility. Under the ACA, if an alien "is not reasonably expected to be for the entire period for which enrollment is sought…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."[21] Additionally, statute states that "an individual shall be treated as lawfully present only if the individual is, and reasonably expected to be for the entire period of enrollment for which the cost-sharing reduction under this section is being claimed,… an alien lawfully present in the United States."[22]

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[17] *See* 87 Fed. Reg. 53152, 53156; 88 Fed. Reg. 25313, 25315.
[18] *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020).
[19] *See* 87 Fed. Reg. 53152, 53209.
[20] *See* 8 C.F.R. § 1.3(a)(4)(vi); 8 U.S.C. § 1182(a)(9)(B).
[21] 42 U.S.C. § 18032(f)(3).
[22] 42 U.S.C. § 18071(e)(2).

Deferred action recipients, however, are by definition subject to removal and have no legal right to remain in the country. As DHS has repeatedly articulated, deferred action confers no lawful immigration status to its recipients.[23] Rather, deferred action is an acknowledged "deferral" of proceedings provided to aliens who are subject to removal from the United States, including aliens who entered without inspection, overstayed a visa, or otherwise violated the terms of their admission.[24] Most importantly, DHS may, in its discretion, revoke an alien's deferred action at any time in its discretion.[25]

TPS is another form of forbearance from removal proceedings. Congress created TPS to be a temporary form of relief, to be terminated when conditions in designated countries improve. Under 8 U.S.C. § 1254a, the Secretary of Homeland Security may only designate a country for TPS for a period of up to 18 months.[26] While the Secretary of Homeland Security may extend a country's TPS designation, he or she may lawfully set or extend TPS designations for periods that are potentially shorter in duration than a beneficiary's term of enrollment. Additionally, even if a TPS designation is set the maximum period permitted under the statute, a particular designation could nonetheless end during an ACA beneficiary's enrollment period, depending on the date the individual enrolls and the termination date of their country of origin's TPS designation. Finally, DHS can also rescind a prior TPS designation decision.[27] TPS was never meant to provide a long-term or permanent immigration status for aliens living in the United States without a lawful immigration status.

DED is a third form of forbearance from removal.[28] Unlike deferred action and TPS, DED is ordered by the President of the United States under his constitutional authority to conduct foreign affairs. Like deferred action and TPS, however, DED provides no lawful immigration status to its recipients, no legal right to remain in the United States, and may be terminated at any time.

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[23] *See, e.g.*, U.S. Department of Homeland Security, *DHS Support of the Enforcement of Labor and Employment Laws, Frequently Asked Questions* (May 31, 2023) *available at* https://www.dhs.gov/enforcement-labor-and-employment-laws; U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (last updated May 30, 2023) *available at* https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#:~:text=Q28%3A%20Can%20USCIS%20terminate%20my,time%2C%20at%20USCIS'%20discretion.

[24] *See* 8 U.S.C. § 1227.

[25] *See, e.g.*, U.S. Department of Homeland Security, *DHS Support of the Enforcement of Labor and Employment Laws, Frequently Asked Questions* (May 31, 2023) *available at* https://www.dhs.gov/enforcement-labor-and-employment-laws; U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (last updated May 30, 2023) *available at* https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#:~:text=Q28%3A%20Can%20USCIS%20terminate%20my,time%2C%20at%20USCIS'%20discretion

[26] 8 U.S.C. § 1254a(b)(2).

[27] *See* U.S. Department of Homeland Security, *DHS Rescinds Prior Administration's Termination of Temporary Protected Status Designations for El Salvador, Honduras, Nepal, and Nicaragua* (Jun. 13, 2023) *available at* https://www.dhs.gov/news/2023/06/13/dhs-rescinds-prior-administrations-termination-temporary-protected-status#:~:text=requirements%20for%20TPS.-,Existing%20TPS%20beneficiaries%20who%20wish%20to%20extend%20their%20status%20through,effective%20on%20June%209%2C%202023.

[28] U.S. Citizenship and Immigration Services, *Deferred Enforced Departure* (May 4, 2023) *available at* https://www.uscis.gov/humanitarian/deferred-enforced-departure.

It is unreasonable for CMS to assume these classes of aliens will be lawfully present for the entire enrollment period for such benefits. Accordingly, CMS must amend the proposed rule to strike deferred action, TPS, and DED recipients from the regulatory definition of "lawfully present" to comply with Congress's limitation in statute.

B. CMS Must Exclude Parolees from the Definition of "Lawfully Present" for the Purposes of ACA Benefits Eligibility.

CMS must also exclude parolees from the definition of "lawfully present" for purposes of ACA benefits eligibility. Like the classes of aliens who have received forms of forbearance from removal described in section A (above), parolees also do not have a lawful immigration status while they are in the United States and do not have a legal right to remain. Accordingly, CMS may not reasonably expect parolees to remain lawfully present in the United States for the duration of their enrollment in benefits.

Parole is temporary and confers no status to its recipients after it is terminated.[29] The INA, at 8 U.S.C. § 1182(d)(5)(a), authorizes DHS to parole aliens into the United States on a case-by-case basis for urgent humanitarian or significant public benefit reasons. The INA stipulates that, "when the purposes of such parole shall…have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."[30] Aliens may be granted parole for varying durations, depending on the specific urgent humanitarian or significant public benefit reason providing DHS's justification for the grant of parole, and parole may also be terminated at any time at the discretion of the agency.

CIS acknowledges that Congress has designated aliens who have been paroled into the United States under 8 U.S.C.§ 1182(d)(5) for periods of at least one year to be considered "qualified aliens" for purposes of general federal public benefits eligibility under 8 U.S.C. § 1641(b). Congress has not conditioned ACA eligibility, however, on status as a qualified alien under this statute.[31] As explained above, Congress extended ACA benefits eligibility generally to aliens who are "lawfully present" in the United States, but specified that an alien may only be considered "lawfully present" for these purposes if they are reasonably expected to be lawfully present for the duration of their enrollment.[32]

Because CMS has no reasonable basis to assume a parolee will remain lawfully present for the duration of their enrollment in benefits, CMS must amend its proposal to exclude parolees from the definition of "lawfully present" for these purposes. This will require amending the proposed rule to clarify that not all qualified aliens shall be considered "lawfully present."

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[29] 8 U.S.C. § 1182(d)(5)(a).
[30] *Id.*
[31] *See* 42 U.S.C. § 18032(f)(3); 26 U.S.C. § 36B(e)(2); 42 U.S.C. § 18082(d); 42 U.S.C. § 18071(e); 42 U.S.C. § 18051(e); 42 U.S.C. § 18001(d)(1).
[32] 42 U.S.C. 18032(f)(3), 42 U.S.C. 18071(e)(2).

C. CMS Must Exclude DACA Recipients from the Definition of "Lawfully Present" for the Purposes of ACA Benefits Eligibility.

Regardless of whether deferred action recipients, generally, are considered "lawfully present," for purposes of benefit eligibility under the ACA, CMS must exclude DACA beneficiaries from this definition because the DACA program violates procedural and substantive federal law.[33] Additionally, CMS's rationale for changing course in its interpretation of the term as it applies to DACA recipients is not justified by the facts and, therefore, unlawful under the APA. Accordingly, CIS strongly recommends CMS withdraw the proposed rule or otherwise amend the proposal to exclude DACA recipients from the definition of "lawfully present."

1. Defining "Lawfully Present" for Purposes of ACA Benefits Eligibility to Include DACA Recipients is *Ultra Vires*.

DACA recipients may not be included in the definition of "lawfully present" because the DACA program itself is unlawful.[34] Accordingly, a grant of deferred action issued pursuant to DACA is invalid and DACA recipients should not be treated as having lawful presence or being "lawfully present" for purposes of ACA benefits eligibility.

As CMS appears to have understood since 2012, there is good reason to treat DACA recipients differently than other aliens with deferred action. The DACA program was created on June 15, 2012 through the issuance of a three page long memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," by then-Secretary of Homeland Security Janet Napolitano. The program set out eligibility criteria for certain aliens who are in the United States illegally and entered as a minor to receive deferred action and work authorization documents under the guise of "prosecutorial discretion."[35]

Unlike other forms of prosecutorial discretion, however, DACA is plainly unlawful. DACA conflicts with numerous statutes and has never received Congressional authorization or ratification. To the contrary, legislation that would have legalized DACA, or otherwise provided the DACA-eligible population with similar benefits, has been repeatedly rejected by Congress for over two decades.[36] Furthermore, until 2022, the program never underwent notice-and-comment rulemaking, violating procedural requirements under the Administrative Procedure Act (APA).[37]

While Supreme Court declined at the time it decided *Regents* to rule on the lawfulness of DACA, federal courts have since determined that DACA is illegal. In July 2021, the U.S. District Court for the Southern District of Texas ruled that DACA's creation violated the notice-and-comment requirement under the APA.[38] The ruling went further, however, to hold that DACA is also substantively invalid because, as the court explained, "While the law certainly grants some

[33] *See Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).
[34] *Id.*
[35] *See* 87 Fed. Reg. 53152 (Aug. 30, 2022).
[36] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*,, 140 S. Ct. at 1919 n.2 (Thomas, J., dissenting).
[37] *Texas v. United States, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021).*
[38] *Id.*

discretionary authority to the agency, it does not extend to include the power to institute a program that gives deferred action and lawful presence, and in turn, work authorization and multiple other benefits to 1.5 million individuals who are in the country illegally."[39] Despite the court determining that the program violates both federal procedural and immigration laws, the Biden administration published a rule to codify the program into regulation in 2022.

On October 5, 2022, the Fifth Circuit Court of Appeals affirmed the district court's ruling. The Court of Appeals held that the original DACA program violated both procedural and substantive law, stating that "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."[40] The court held that deferred action policy implemented pursuant to the DACA Memorandum was "foreclosed" by Congress's rigorous classification scheme. The Court of Appeals remanded the case to the lower district court to reconsider the legal challenge as it applies to DHS's new DACA regulation.[41]

The Court of Appeals' decision allows current DACA recipients to maintain and renew their DACA status and work authorization while the case is pending resolution in the district court. DHS, however, is prohibited from approving new (or "initial") DACA applications.[42]

CMS must expect the 2022 DACA final rule, like the DACA Memorandum, to be vacated. Because the policy codified by the final rule is nearly identical to the original program established in 2012 under the implementing memorandum, the final rule suffers the same substantive legal defects, and is unlikely to survive review in the Fifth Circuit. The court resolutely concluded that Congress has not authorized DACA.[43]

2. Without Providing Sufficient Rationale to Support CMS's Reversed Position, CMS's Proposal to Consider DACA Recipients "Lawfully Present" is Unlawful.

In this proposed rule, CMS fails to adequately justify its reversal of its prior rules that define "lawfully present" to explicitly exclude DACA recipients. Without providing sufficient rationale to support the agency's reversed position, the proposed rule is unlawful and must be withdrawn.

In *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.,* the Supreme Court held that an agency "must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made," pursuant to the requirements of the APA.[44] The Supreme Court affirmed that agencies must supply a "reasoned

[39] *Id*. at 605.
[40] *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).
[41] *Id*. at 531.
[42] *Id*. at 531-32.
[43] *Id*. at 615.
[44] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

analysis" when changing course.[45] A court will typically hold a rule to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[46]

The Supreme Court further elaborated in *FCC v. Fox Television Stations, Inc.* that when an agency is changing a prior rule, an agency must provide a more detailed justification when it issues a rule that "rests upon factual findings that contradict those which underlay its prior policy."[47] Further, the APA requires that a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be …unsupported by substantial evidence."[48]

At the time CMS promulgated the existing rules defining "lawfully present," however, CMS reasoned that it should exclude DACA from the definition of "lawfully present" because "the rationale that DHS offered for adopting the DACA policy did not pertain to eligibility for insurance affordability programs."[49] CMS states that it interpreted DACA's implementing memorandum to understand that the program was created to "ensure that [its] enforcement resources are not expended on these low priority cases."[50] CMS noted that the memorandum did not address the availability of health insurance coverage through an Exchange, a BHP, Medicaid, or CHIP. Accordingly, it determined that eligibility for these benefits should not be extended as a result of DHS deferring action under the program.

Nevertheless, in this rule, CMS proposes eliminating the exclusion in order to consider DACA recipients "lawfully present" for purposes of eligibility for these public benefits. Despite the program's serious legal deficiencies and pertinent court rulings holding that the program violates both substantive and procedural law, HHS states that it "sees no persuasive reasons to treat DACA recipients differently from other [aliens] who have been granted deferred action."[51] Rather, CMS explained that "after further review and consideration" that it "is clear that the DACA policy was intended to provide recipients with the stability and assurance that would allow them to obtain education and lawful employment, and integrate as productive members of society."[52] Accordingly, CMS concluded that extending taxpayer-subsidized health benefits to DACA recipients is consistent with the fundamental goals of DACA and justified its change of policy on that basis.

This argument, however, is not only inconsistent with the scheme Congress created to regulate immigration into the United States but also with the inherent nature of deferred action, which *does not* provide long term stability and assurance to its beneficiaries. DHS has repeatedly stated

[45] *State Farm*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971)).
[46] *State Farm*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[47] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).
[48] 5 U.S.C. § 706(2)(A).
[49] 88 Fed. Reg. 25313, 25316 (Apr. 26, 2023).
[50] *Id.* at 25320.
[51] *Id*. at 25317.
[52] *Id*.

that deferred action is a temporary measure and DACA can be "terminated at any time, in its discretion."[53] These facts have not changed since 2012. In its Notice of Proposed Rulemaking (NPRM) for the DACA rule, DHS even wrote, "[d]eferred action is a longstanding practice by which DHS and the former Immigration and Naturalization Service (INS) have exercised their discretion to forbear or assign lower priority to removal action in certain cases for humanitarian reasons, administrative convenience, or other reasonable prosecutorial discretion considerations."[54] If DACA is truly a form of prosecutorial discretion, as DHS claims, DACA grants must be case-by-case and based on prioritization of cases. DHS cannot both argue that DACA is not a class-based benefits program, and yet DHS created DACA with the intent to provide stability and assurance to a specific, deserving class of beneficiaries in the same manner that standard immigration benefits provide.

Additionally, any sense of stability or assurance DACA beneficiaries receive as a result of the program is unwarranted. As explained above, DACA is substantively invalid and contradicts the scheme created by Congress.[55] Even without that finding, deferred action (under DACA or otherwise) does not provide recipients any lawful status, right to remain in the United States, nor does it excuse any past or future period of unlawful presence.[56]

Accordingly, CMS has not demonstrated that its change in course rests upon a reasonable analysis of facts that contradicts those which underlay its prior policy. The rule, therefore, must be withdrawn because it is not supported by adequate or substantial evidence.

III. Effective Date

In the alternative to withdrawing the provisions of the proposed rule that extend ACA benefits eligibility to DACA recipients, CIS strongly recommends that CMS refrain from finalizing the proposed rule and setting an effective date until the states' challenge to DACA in *Texas v. United States* has reached a final disposition. It is immaterial whether DHS agrees with a federal court's ruling when it is bound by its holdings unless and until an appellate court overturns the verdict. Pursuing this rulemaking while this litigation continues also reflects a gross mismanagement of public resources at both DHS and HHS.

IV. Conclusion

CIS strongly recommends that CMS amend its proposal to exclude deferred action, TPS, DED, parole recipients generally from the definition of "lawfully present" ACA benefits eligibility. These categories of aliens have received temporary forms of forbearance or permission to enter

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[53] U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (last updated May 30, 2023) *available at* https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#:~:text=Q28%3A%20Can%20USCIS%20terminate%20my,time%2C%20at%20USCIS'%20discretion.

[54] 86 Fed. Reg. 53736 (Sept. 28, 2021) (citing *Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999)).

[55] *See Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

[56] *See* U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (last updated May 30, 2023) *available at* https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#:~:text=Q28%3A%20Can%20USCIS%20terminate%20my,time%2C%20at%20USCIS'%20discretion

the United States, have no lawful immigration status, and as a result, no legal right to remain in the United States. Accordingly, CMS does not have a reasonable expectation that they will remain in lawfully present in the United States for the duration of their enrollment periods. Furthermore, CMS must continue to exclude DACA recipients from benefits eligibility because the DACA program is *ultra vires* and CMS's proposal to extend of benefits eligibility violates the APA.

Thank you,

Elizabeth Jacobs

Elizabeth Jacobs
Director of Regulatory Affairs and Policy