FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

June 22, 2023

Ms. Chiquita W. Brooks-LaSure
Administrator, Centers for Medicare & Medicaid Services
P.O. Box 8016
Baltimore, MD 21244–8016

RE: CMS–9894–P; Comment on 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

Dear Ms. Brooks-LaSure,

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comments to the Department of Health and Human Services (HHS) in response to the Department's request for information, as published in the Federal Register on April 26, 2023. *See 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* (CMS–9894–P).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

FAIR has over three million members and supporters of all racial, ethnic, and religious backgrounds, and across the political spectrum. The organization was founded in 1979 and is headquartered in Washington, D.C.

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I. Background

On April 13, 2023, the Biden Administration announced that aliens in the Deferred Action for Childhood Arrivals (DACA) program will soon be able to apply for healthcare coverage under the Affordable Care Act (ACA) and some Medicaid programs.[1] This move by the Biden Administration is not only counter to our immigration laws, it will also exacerbate the cost to taxpayers.

The 2010 Affordable Care Act (also known as Obamacare) rendered those with "lawful presence" eligible for benefits. The ACA implementing regulation defined "lawful presence" by incorporating the definition used in a 2010 guidance letter from the Center for Medicare and Medicaid Services (CMS) regarding the eligibility of certain Medicaid programs.[2]

The CMS guidance letter provided that a wide range of aliens are deemed to have lawful presence, including, in some cases, illegal aliens. These include green card holders, asylees, refugees, parolees (with exceptions), aliens granted withholding of removal, aliens on valid nonimmigrant visas who had not violated their terms of status, aliens with Temporary Protected Status (TPS) or TPS applicants granted work authorization, and aliens with pending applications for Special Immigrant Juvenile (SIJ) status, among others. The 2010 regulation and CMS letter also included "aliens currently in deferred action status," which would include DACA recipients. At the time, however, DACA did not exist.

DACA was created by a memorandum from then-Secretary of Homeland Security Janet Napolitano on June 15, 2012. At the time, the current DHS Secretary, Alejandro Mayorkas, was the Director of U.S. Citizenship and Immigration Services (USCIS), the agency that manages the program.[3] The DACA memo provided for exercising prosecutorial discretion when considering enforcement actions against aliens who:

- Were not above the age of thirty and entered the U.S. under the age of 16;
- Had no lawful immigration status on June 15, 2012, and at the time of application;

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[1] White House, "Fact Sheet: Fact Sheet: President Biden Announces Plan to Expand Health Coverage to DACA Recipients," April 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/13/fact-sheet-fact-sheet-president-biden-announces-plan-to-expand-health-coverage-to-daca-recipients/.

[2] Federal Register, "Pre-Existing Condition Insurance Plan Program," July 2010, 75 FR 45013; Department of Health and Human Services, "Re: Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women," July 2010, https://downloads.cms.gov/cmsgov/archived-downloads/smdl/downloads/sho10006.pdf.

[3] Department of Homeland Security, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," June 2012, https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

- Resided continuously in the U.S. since at least June 15, 2007, and were present in the U.S. on June 15, 2012;
- On June 15, 2012, were either in school, had graduated high school, gotten a GED, or had been honorably discharged from the military; and
- Had not been convicted of various crimes, or otherwise pose a threat to national security or safety.

Almost immediately, it became clear that illegal aliens granted DACA would become "aliens currently in deferred action status," and thus eligible for ACA exchanges and, in some cases, Medicaid. On August 30, 2012, however, the Obama Administration published a brief amendment to earlier implementing regulations clarifying that DACA recipients were not, in fact, eligible for ACA exchanges. Below is the language published in the Federal Register (77 FR 52614) and now at 45 CFR 152.2:

> **§ 152.2 Definitions.**
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> Lawfully present means—
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> (8) Exception. An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.[4]

Under the original definition of lawful presence, FAIR estimated that between 500,000 and 1 million aliens who entered the U.S. illegally nevertheless were eligible for benefits under the ACA and certain Medicaid programs.[5]

DACA is still being challenged in the court system. That litigation will likely reach the Supreme Court and has led USCIS to stop processing new DACA applications pending a final ruling.

II. DACA Eligibility Changes Made by the Proposed Rule

FAIR believes that the proposed changes to the definition of "lawfully present" for DACA recipients would reinforce the unlawful program and cause recipients to rely on benefits

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[4] Federal Register, "Pre-Existing Condition Insurance Plan Program," Aug. 2012, 77 FR 52614.
[5] Federation for American Immigration Reform, "The Fiscal Burden of Illegal Immigration on United States Taxpayers 2023," Mar. 2023, https://www.fairus.org/sites/default/files/2023-03/Fiscal%20Burden%20of%20Illegal%20Immigration%20on%20American%20Taxpayers%202023%20WEB_1.pdf.

that may not be available to them in the future if the court rules against DHS. According to the proposed rule, those granted deferred action under DACA would now be eligible for multiple federal and state benefits.

In addition to withdrawing the entire rule, FAIR strongly recommends:

- That the proposed changes to 42 CFR 435.4 and 457.320(c) to define DACA recipients as "lawfully present" for Medicaid and the Children's Health Insurance Program (CHIP) under section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) be struck, including for "States that have elected the option in their State plan to cover all lawfully residing children or pregnant individuals."
- That the proposed changes to 42 CFR 600.5 to define DACA recipients as "lawfully present" for the purposes of eligibility for Basic Health Programs (BHPs) in states that operate the program be rescinded.
- That the proposed changes to 45 CFR 152.2 and 155.20 to define DACA recipients as "lawfully present" for the purposes of eligibility to enroll in Qualified Health Plans (QHPs) through ACA exchanges, as well as eligible for advance payments of the premium tax credit (APTC) and cost-sharing reductions (CSRs) be removed.

III. The Proposed Rule Inappropriately Expands Coverage for the DACA-eligible Population in Contravention of Statute, Case Law, and Ongoing Litigation

FAIR believes that expanding benefits eligibility for DACA recipients directly conflicts with statute, case law, and ongoing litigation in the Fifth Circuit Court of Appeals regarding the program. The DACA program was created by memorandum by the Obama Administration, without any congressional approval or input, and has never been recognized by Congress. Yet, the Supreme Court has held consistently that Congress holds plenary authority over immigration. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court noted:

> The Court, without exception, has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier v. Immigration and Naturalization Service,* 387 U.S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339 (1909). In *Lem Moon Sing v. United States,* 158 U.S. 538, 547 (1895), the first Mr. Justice Harlan said:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."
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> Mr. Justice Frankfurter ably articulated this history in *Galvan v. Press*, 347 U.S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that "much could be said for the view" that due process places some limitations on congressional power in this area "were we writing on a clean slate," he continued:
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> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history'. . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . ."[6]

That is precisely what the Fifth Circuit Court of Appeals found in October 2022.[7] In its ruling, the Fifth Circuit held that, "Nothing in §§ 1221-1232 authorizes DHS to broaden the categories of aliens who are entitled to lawful presence in the United States … The DACA Memorandum contradicts significant portions of the INA."[8] The ruling also found that, "Because DACA did not undergo notice and comment, it violates the procedural requirements of the APA [Administrative Procedure Act]."[9] Ultimately the Fifth Circuit wrote that the DACA program failed under step one of the *Chevron* framework, before upholding the district court's nationwide injunction on new DACA grants and remanding the case back for further consideration on the merits.[10]

Beyond ongoing litigation, Congress has identified in the Immigration and Nationality Act (INA) several discrete categories of aliens that may be eligible for deferred action, nowhere granting the executive branch authority to unilaterally expand on those categories. Examples of categories that Congress has identified as potentially eligible for deferred action include Violence Against Women Act petitioners, victims of human trafficking or

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[6] *Kleindienst v. Mandel*, 408 U.S. 753 (1972), 766-67.
[7] *Texas v. United States*, 50 F.4th 498 (2022).
[8] *Id.* at 529.
[9] *Id*. at 524.
[10] *Id.* at 526, 530-32. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

other serious crimes, and immediate family members of those killed in specified terrorist attacks.[11] Notably absent are those granted deferred action under DACA.

IV. Costs

FAIR also believes that the regulation, as written, will harm American families and taxpayers. Just this year, FAIR released a study on the fiscal costs of illegal immigration, which is currently the only comprehensive examination of the financial impact of illegal immigration in the United States. FAIR's study found that illegal immigration is a net cost to taxpayers of about $151 billion per year.[12] It further found that illegal immigration costs each American taxpayer $1,156 per year ($957 after factoring in taxes paid by illegal aliens), and that each illegal alien or U.S.-born child of illegal aliens costs American taxpayers $8,776 annually.[13]

As highlighted in the cost study, and included below, the U.S. government already spends more than $23 trillion dollars annually on federal medical expenditures, including for Medicaid. Due to a lack of transparency, it is impossible to estimate how many illegal aliens participate in the ACA now, and what level of federal subsidy they receive, but expanding eligibility for federal and state benefits to DACA recipients will place an even greater burden on American taxpayers.[14]

Total Federal Medical Expenditures

Uncompensated Hospital Expenditures	$8,153,000,000
Medicaid Births	$1,596,902,000
Medicaid Fraud	$7,997,566,000
Medicaid for U.S.-Born Children of Illegal Aliens	$5,385,007,000
Total	**$23,132,475,000**

[11] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV); 8 U.S.C. § 1227(d)(2); 115 Stat. 272, 361.
[12] Federation for American Immigration Reform, "The Fiscal Burden of Illegal Immigration on United States Taxpayers 2023," Mar. 2023, https://www.fairus.org/sites/default/files/2023-03/Fiscal%20Burden%20of%20Illegal%20Immigration%20on%20American%20Taxpayers%202023%20WEB_1.pdf.
[13] *Id.* at 2.
[14] *Id.* at 15.

V. Conclusion

FAIR strongly urges that the *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* rule be rescinded. While the rule ill-advisedly expands benefits eligibility for several groups – and should be withdrawn on that basis – the most egregious example is that of DACA recipients.

The DACA program is unlawful and is likely to be ended as *Texas. v. United States* advances through the judicial system. Statute and case law clearly indicate that Congress holds plenary authority over immigration law and that DHS acted unlawfully in creating the DACA program. Proceeding to expand benefits eligibility for DACA recipients not only perpetuates the unlawful program but also provides benefits to recipients that they may come to rely on, only to have them rescinded.

Given the illegality of the DACA program, and the costs related to further expanding healthcare benefits to illegal aliens, FAIR strongly recommends that HHS remove DACA recipients from the definition of "lawfully present" for the purposes of benefits eligibility. It is both inappropriate and irresponsible to continue expanding on the DACA program, particularly while litigation is ongoing which points to the fatal defects of the program.

Sincerely,

Dan Stein
President