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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 4:20-cv-7331-JSW

Hon. Jeffrey S. White

Date: November 23, 2020
Time: 10:00 a.m.
Ctrm: 5

AMICUS BRIEF OF NEW YORK UNIVERSITY, BOSTON UNIVERSITY, BRANDEIS UNIVERSITY, BROWN UNIVERSITY, THE CATHOLIC UNIVERSITY OF AMERICA, COLUMBIA UNIVERSITY, CONNECTICUT STATE COLLEGES AND UNIVERSITIES, DARTMOUTH COLLEGE, EMORY UNIVERSITY, THE GEORGE WASHINGTON UNIVERSITY, GRINNELL COLLEGE, HARVARD UNIVERSITY, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, THE MOUNT SINAI HEALTH SYSTEM AND ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI, NORTHEASTERN UNIVERSITY, THE PENNSYLVANIA STATE UNIVERSITY, PRINCETON UNIVERSITY, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, SYRACUSE UNIVERSITY, TUFTS UNIVERSITY, THE UNIVERSITY OF CHICAGO, UNIVERSITY OF CONNECTICUT, UNIVERSITY OF PENNSYLVANIA, WELLESLEY COLLEGE, AND YALE UNIVERSITY, IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

At a time when the nation's colleges and universities face unprecedented challenges caused by the COVID-19 pandemic, the U.S. Departments of Homeland Security and Labor bypassed the required notice-and-comment procedures and issued Interim Final Rules[1] that fundamentally alter the H-1B, H-1B1, E-3, EB-2, and EB-3 visa programs relied upon by these institutions to employ thousands of highly skilled international workers. The new Rules will negatively impact workers who, through the research universities and academic medical centers that employ them, provide critical contributions to the research that drives our nation's scientific progress, public health, and economic vitality. Among other fields, these workers are performing research on Alzheimer's disease, cancer, COVID-19, diabetes, heart disease, malaria, vision loss, and many others. They also are valuable members of *amici*'s teaching staff, educating our nation's students so they can go on to be, themselves, highly skilled and productive members of society. The new Rules, designed to substantially restrict who will be eligible for visas, will materially disrupt academic institutions' planning for curricula and research programs, including basic, applied, and clinical research funded by the federal government, and are fundamentally unfair to the individuals and their families who have relied upon decades of well-settled immigration law to contribute to the betterment of our society through their scholarship and research in the United States.

Amici, a group of leading colleges and universities with campuses around the country, again oppose these unlawful efforts to restrict lawful immigration. *Amici* respectfully submit this brief in support of Plaintiffs' motion for a preliminary injunction, to provide the Court with specific information regarding the concrete harm that will result if the Rules are not enjoined.

First, the DHS Rule substantially restricts eligibility for H-1B visas, which will irreparably harm academic institutions' ability to employ highly skilled foreign workers in a broad range of fields for important teaching and research functions carried out by the institutions. By rewriting

[1] The Interim Final Rules are *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020) ("DHS Rule") and *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the U.S.*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) ("DOL Rule") (collectively, "Rules"). Capitalized terms not defined herein have the meaning ascribed to them in Plaintiffs' Complaint (ECF No. 1).

the definition of a qualifying "specialty occupation" and requiring what amounts to a degree in a sub-specialty directly related to the position, the DHS Rule will render many current H-1B visa holders ineligible for renewals of their visas. This will significantly impact institutions' ability to employ the world's most highly qualified and talented in many cross-disciplinary fields, such as information technology, bioinformatics, bioengineering, health care, infectious disease drug discovery and development research, and public policy.

Second, the DOL Rule drastically increases the prevailing wage levels that employers are required to pay to skilled foreign workers employed under the affected visa programs. If not enjoined, the Rule will force colleges and universities across the country to substantially narrow the group of potential candidates to fill critical current and future positions, impede pending renewals and require schools to revisit hiring decisions, or otherwise increase wages to arbitrary, unsustainable rates—all of which impair *amici*'s ability to carry out funded research critical for national security, health, and economic competitiveness. The Rule also will irreparably harm *amici*'s ongoing research—including critical COVID-19 research—disrupt their ability to educate their students, and materially impact some *amici*'s ability to provide health care to communities.

Third, the DHS and DOL Rules will irreparably harm foreign workers who would normally hold H-1B status while awaiting lawful permanent resident status in the United States.

Fourth, DHS and DOL have completely failed to consider the significant reliance interests of both visa sponsors and visa holders. Where, as here, agencies' prior policies have engendered serious reliance interests, these agencies must provide a more persuasive justification for the change than what would normally suffice. The agencies' arguments concerning COVID-19-related unemployment are plainly insufficient to justify the Rules.

Finally, if DHS and DOL had provided *amici* with formal notice and the opportunity to provide comments to the Rules, many *amici* would have filed—and the agencies would have been required to consider—comments describing the irreparable harm that will flow from the arbitrary and capricious rules.

INTEREST OF *AMICI CURIAE*[2]

This brief is submitted on behalf of proposed *amici curiae* New York University, Boston University, Brandeis University, Brown University, the Catholic University of America, Columbia University, Connecticut State Colleges and Universities, Dartmouth College, Emory University, the George Washington University, Grinnell College, Harvard University, Massachusetts Institute of Technology, the Mount Sinai Health System and Icahn School of Medicine at Mount Sinai, Northeastern University, the Pennsylvania State University, Princeton University, Rutgers, the State University of New Jersey, Syracuse University, Tufts University, the University of Chicago, University of Connecticut, University of Pennsylvania, Wellesley College, and Yale University, in support of Plaintiffs' motion for a preliminary injunction. *Amici* are leading colleges and universities that currently employ thousands of highly skilled workers in various roles under the H-1B, H-1B1, E-3, EB-2, and EB-3 visa programs. *Amici* substantially benefit from the knowledge, skill, and diverse perspectives that these foreign workers bring to their campuses and research facilities. The outcome of this action will have tremendous implications for *amici* and colleges and universities nationwide. If these Rules are not enjoined, *amici* will suffer irreparable harm very similar to that alleged by the University Plaintiffs in this action. The Rules' abrupt changes to regulations that *amici* have relied upon for decades will disrupt years of planning and curricula. *Amici* are well positioned to provide additional insight to the Court regarding the irreparable harm that academic institutions face if the Rules are not enjoined.

ARGUMENT

I. The DHS Rule Substantially Restricts Eligibility for H-1B Visas, Which Irreparably Harms Academic Institutions' Ability to Employ Highly Skilled Foreign Workers.

A. The DHS Rule Substantially Narrows the Definition of a "Specialty Occupation."

Congress designed the H-1B visa program to encourage the admission of highly skilled noncitizens into the United States to "perform services … in a specialty occupation" for an

[2] No party to the above-captioned action or any of their counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No third party—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

employer. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The term "specialty occupation" is defined by statute to mean "an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). Since December 1991, the definition of "specialty occupation" has not changed substantively:

> Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and **which requires the attainment of a bachelor's degree or higher in a specific specialty**[3], or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. § 214.2(h)(4)(ii)(4). Academic institutions and their international communities consistently have relied upon the plain meaning of this definition, in addition to well-settled law establishing that an H-1B position qualifies as an eligible "specialty occupation" even where the relevant position allows candidates to have earned degrees from more than one academic discipline. *See, e.g.*, *InspectionXpert Corp. v. Cuccinelli*, No. 1:19-cv-65, 2020 WL 1062821, at *26 (M.D.N.C. Mar. 5, 2020) (USCIS's "longstanding construction [ ] recognizes that a position can qualify as a specialty occupation even if it permits a degree in more than one academic discipline"); *RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 54 (D.D.C. 2019) (rejecting as "untenable" USCIS's position under this administration that because different types of degrees would allow a candidate to be qualified for a "data analyst" position, the position cannot be specialized).

In contravention of longstanding precedent, the DHS Rule rewrites the definition of "specialty occupation," restricting eligibility for the H-1B program, and requiring what amounts to a degree in a **sub-specialty** directly related to the position. Specifically, under DHS's new definition, a "specialty occupation" means an occupation that requires:

> (1) The theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor, such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, or the arts; and

[3] All emphasis herein has been added unless otherwise noted.

> (2) The attainment of a U.S. bachelor's degree or higher **in a directly related specific specialty**, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be **directly related** to the position. **A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position.** While a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.

85 Fed. Reg. at 63,964; *see id.* at 63,924–63,926.

B. The DHS Rule Substantially Impairs *Amici*'s Ability to Employ Highly Skilled Workers Across a Broad Range of Fields.

The DHS Rule's requirement that an H-1B visa holder must have what amounts to a degree in a sub-specialty directly related to the position will render many current employees ineligible for H-1B renewals. The Rule specifically will impact visa holders in fields such as bioinformatics, bioengineering, vaccine development, clinical education, health care, infectious disease drug discovery and development research, data science, information technology, computer science, management information systems, public policy, finance, and business. It will obviously impact any new and yet highly specialized fields of study, new positions within existing fields—especially those positions created because of technological innovation—and employees who earned degrees before a new industry existed. For example, one *amicus*' School of Engineering employs a tenure-track Assistant Professor on an H-1B visa, who holds a Ph.D. in Transportation. Under the new definition of a "specialty occupation," it is not clear if USCIS would approve an H-1B renewal for this professor, which jeopardizes the professor's teaching and research programs.

In addition, another *amicus* employs a specialty research group in its College of Engineering and Computer Science. This group's research interests are highly multidisciplinary—including the areas of multi-scale transport phenomena, thermal management, and biomechanical systems—with a focus on energy and water desalination and an emphasis on using the fundamentals of nanoscience and nanotechnology to build efficient mechanical systems. It is not clear how USCIS would treat H-1B visa holders working in this multi-disciplinary group.

Consider, too, the example of bioinformatics, which applies statistical analysis to research in the life sciences. Candidates for positions in the bioinformatics field may have biology degrees and supporting expertise in computer science or statistics, or the converse might be true. DHS's

ossified view of specialty occupation could well exclude this highly specialized work from H-1B sponsorship, simply because it integrates knowledge from more than one field and so could be readily performed by job candidates with different degrees.

National trends demonstrate an expansion in multi-disciplinary research projects, and many *amici* have invested heavily in independent research centers to support these types of projects. As the world continues to generate massive amounts of data and researchers develop ever sharper skills for analyzing it, more and more fields of study—from biology, economics, and public health to management, public administration, environmental sciences, and law—are opening to the possibilities of statistical and data analysis. DHS's "one-degree only" rule threatens to wall out worldwide expertise from this work in the United States, on the ground that researchers could have earned diplomas in the field or study of in a methods-based discipline.

C. The DHS Rule Fundamentally Disrupts Academic Institutions' Ability to Plan Curricula and Design Research Programs.

Because DHS failed to follow the notice-and-comment procedures required by the Administrative Procedure Act, the Rule takes effect less than two months after it was announced, on December 7, 2020. The choice by the administration to bypass the normal legal process by issuing an Interim Final Rule for such a significant change to the H1-B category injects a significant degree of confusion and uncertainty into a process that was already fraught with challenges. Colleges and universities are now forced to evaluate their foreign workforce and complete labor condition applications for existing visa holders under these circumstances. As a result, these institutions face tremendous uncertainty in planning their course offerings, preparing business plans and budgets, and designing research programs. All existing plans must be reconsidered and reevaluated wherever an H-1B visa holder is involved.

As explained by Plaintiffs' memorandum, current employees on H-1B visas may be forced to return overseas, relocating their families, which often include children who are U.S. citizens. (*See* Mem. at 25.) New H-1B employees may have their applications denied. Either scenario will leave institutions scrambling to fill vacant teaching positions, hire researchers, and staff critical needs, including healthcare and medical research related to COVID-19.

II. The Rules Will Irreparably Harm *Amici* and Their Employees.

A. If Not Enjoined, the DOL Rule Will Substantially Limit the Number of Highly Skilled Candidates for Critical Positions.

Amici consistently have been paying all H-1B employees in compliance with existing rules, commensurate with the wages paid to U.S. citizens and permanent residents performing comparable work, and have always been committed to fair and equitable compensation for all their employees, regardless of citizenship status. But the DOL Rule drastically and arbitrarily increases the prevailing wage levels that employers are required to pay to skilled workers employed under the H-1B, H-1B1, E-3, EB-2, and EB-3 visa programs. 85 Fed. Reg. 63,872. Because the increases are so extreme, if not enjoined, the Rule likely will fulfill its intended purpose and force colleges and universities across the country to substantially limit the group of potential candidates to fill critical current and future positions as professors, researchers, postdoctoral fellows, scientists, and engineers, and in some cases to revisit hiring decisions that may be pending.

The nature of the DOL Rule, and the manner in which it was adopted, suggest an intent to dissuade colleges and universities from sponsoring *any* foreign citizens through lawful immigration programs. This is not a case about incremental wage adjustments or cost of living increases. As Plaintiffs' memorandum explains, DOL designed the Rule to increase wage levels immediately and drastically—by rates ranging from 35% to over 200%. (*See* Mem. at 3.)

The specific wage increases cited in Plaintiffs' memorandum and accompanying declarations are common to all *amici* and cannot be cast aside as mere outliers. (*See* Mem. at 19–23.)[4] At one academic institution, DOL-mandated increases for H-1B researchers in the hard

[4] *See, e.g.*, Smith Decl., ECF 31-14, ¶ 5 (60% of H-1B employees and over 90% of H-1B postdoctoral scholars at Caltech do not meet the DOL's new salary minimums; the required increase for postdoctoral scholars would average $25,000); Princevac Decl., ECF 31-11, ¶ 7 (increase of $29,090 (34%) required for two newly hired assistant professors in UC-Riverside's Evolution, Ecology and Organismal Biology Department); Shankar Decl., ECF 31-13, ¶¶ 7, 10 (increases of over 50% and over 80% in salaries of two staff scientists at the University of Rochester Medical Center); *id.* at ¶ 11 (increases of between 108% to 246% for all postsecondary teachers employed by the University of Rochester, to meet the Rule's $208,000 minimum); Wolford Decl., ECF 31-15, ¶ 13 (increases from $102,023 to $208,000 (more than 100%) for new assistant professors in architecture). It also bears note that many of the standard occupational classifications that had wage data on October 7, 2020, no longer had available data when the DOL Rule became effective the next day. Because of this, the default prevailing wage for these positions is set at $208,000 annually, without any levels reflecting experience.

sciences generally ranged between 30% to 80%, which greatly exceeds the 2% or 3% annual wage increases commonly used for researchers who receive wages (in whole or in part) from federally funded award programs.[5] As an example, the Rule increased wage levels for the following H-1B researchers in positions that commonly charge salary or wages to federal grants:

Occupation[6]	Level 1	Level 2	Level 3	Level 4
Biological Scientists (All Other Category)	$42,890 to $57,866	$55,557 to $81,557	$68,203 to $105,248	$80,870 to $128,939
Life Scientists (All Other Category)	$37,024 to $59,717	$54,184 to $88,483	$71,323 to $117,250	$88,483 to $146,016
Medical Scientists (Except Epidemiologists)	$66,893 to $90,979	$88,982 to $138,091	$111,051 to $185,182	$133,141 to $232,294
Civil Engineers, R&D	$38,438 to $64,605	$60,070 to $104,395	$81,723 to $144,165	$103,355 to $183,955
Electrical Engineers, R&D	$28,870 to $57,346	$46,426 to $83,803	$63,981 to $110,282	$81,536 to $136,739

One institution has 446 active H-1B employees, including 228 H-1B holding researchers who were paid wages from approximately 297 federally funded awards or grants. These research projects involve the study of, *inter alia*, COVID-19, Alzheimer's disease, brain function, cancer, climate change, diabetes, drug resistance, cardiomyopathy, heart disease, HIV, malaria, pain relief, vision loss, and wireless communication. For another *amicus* institution, the DOL Rule mandates an over $20,000 increase for an English professor and an over $15,000 increase for a Geology professor. While some of these increases may not seem significant standing alone, when

[5] Because DOL's dramatic increases in minimum wage levels far exceed industry standards for comparable workers, the DOL Rule threatens to disrupt pay equity in the workplace. The Rule would artificially inflate salaries for H-1B workers, potentially compelling universities to pay foreign workers substantially more than their American counterparts performing the same work. In fact, the pay disparities created by the DOL Rule may actually violate state laws requiring pay equity among employees of different genders. For example, under the Massachusetts Equal Pay Act and New York's Pay Equity Law, employers are prohibited from paying any employee less than another employee of a different gender for substantially similar work. *See* M.G.L.A, Ch. 149, § 105A; N.Y. Lab. Law § 194(1). Neither of these statutes recognize immigration status or federal regulations setting minimum wage levels as valid reasons for pay disparities. *See id.* These laws, along with similar laws from other states, raise significant uncertainty with respect to how colleges and universities could implement the DOL's requirements, especially at a time when most institutions have already set their budgets for the fiscal year.

[6] This data is based on the Boston-Cambridge-Nashua MA-NH region and is available from the Foreign Labor Certification Data Center Online Wage Library, https://www.flcdatacenter.com.

considered in the aggregate, they impose a significant burden on individual institutions with many affected employees, as well as on the higher education sector nationwide.

Moreover, institutions that receive federal grants are required to provide budget projections to the government. The new prevailing wage rates will wreak havoc with those budgets whenever a researcher paid from a federal award needs to renew an H-1B visa during the life of that grant: these renewals will trigger massive pay increases, ten to thirty times greater than were projected at the point of submission. If the DOL Rule stands and the new prevailing wages become the norm, institutions will be forced either to staff research projects more leanly or avoid staffing H-1B investigators on federal research altogether. In either case, the quality of federally funded research will be diminished, and federal taxpayers will get less research output for their money. The DOL Rule gives no hint that in its precipitous rush to an interim final rule, the DOL took any time to consult with federal departments and agencies regarding the effect these dramatic prevailing wage increases would have on funded research.

One *amicus* institution employs several hundred H-1B, EB-2, and EB-3 employees each year throughout approximately 70 academic departments and research centers. The Rule increased wages by between 25% to 68% for the institution's Level 1 employees in the following categories: biomedical engineers, research astronomers, civil engineers, environmental engineers, physicists, computer and information research scientists, medical scientists, materials scientists, and research biochemists/biophysicists. Wage increases for Level 2 through Level 4 employees are even larger. In particular, the Rule would require an increase of nearly 50% in the salary of a research scientist engaged in modeling greenhouse gas emissions, and nearly 40% in the salary of a neuroscience researcher. Due to lack of DOL wage data, several other researchers would default to a $208,000 salary requirement.

It bears mentioning, too, that the DOL Rule's mandatory prevailing wage increases come at a time when some colleges and universities nationwide face significant revenue losses as a result of COVID-19, including reductions in state funding, decreases in auxiliary services such as room and board, recreation and event hosting, book sales, parking, and transportation. The losses have been compounded by the billions spent to implement COVID-19-related safety measures

such as testing, contact tracing, and remote-learning technology.[7] One month into the 2020 fall semester, colleges and universities have already reported combined revenue losses and costs in excess of $120 billion.[8,9]

B. If Not Enjoined, the Rules Will Irreparably Harm *Amici's* Significant, Ongoing Research Projects, Including Critical COVID-19-Related Research.

If academic institutions are forced to narrow their cadre of highly skilled foreign workers, the critical research they conduct will be disrupted, interrupted, or destroyed. *Amici* employ thousands of scientific researchers across a broad range of disciplines, including numerous researchers dedicated to COVID-19. Since the beginning of the pandemic, *amici* and their international workforce have worked tirelessly alongside public health agencies and other medical institutions to fight COVID-19. *Amici*'s critical research includes numerous simultaneous and distinct efforts to: (i) study the virus's genetic makeup, including analyzing and mapping the genome of the virus; study how the virus enters the human body, including the specific cells that are infected and how the virus impacts the lungs; (ii) develop a vaccine, including using computational biology to develop therapies that enable a patient to quickly develop antibodies; (iii) treat seriously ill children infected with COVID-19 and study the effects of the virus on children, including critical research concerning multisystem inflammatory syndrome in children (MIS-C); and (iv) analyze the effectiveness of other treatments and therapies, such as antiviral drugs like Remdesivir. Additionally, one *amicus* institution's microbiology research lab, which is comprised of many international researchers employed through these visa programs, developed, validated, and launched an antibody test that detects the presence or absence of antibodies to

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[7] *See, e.g.*, Chris Quintana, *US Colleges Scrambled to React to the Coronavirus Pandemic. Now Their Very Existence is in Jeopardy.*, USA TODAY (Mar. 20, 2020) (Moody's downgraded its outlook for higher education from stable to negative) https://perma.cc/DDF8-PEGB.

[8] *See* Letter from American Council on Education to Nancy Pelosi and Kevin McCarthy, U.S. House of Representatives (Sept. 25, 2020), https://perma.cc/6V7Q-5VQ5.

[9] Although it is true that colleges and universities have the option of using an alternate wage survey to mitigate the financial impact of the DOL Rule and potentially avoid the consequences discussed above, this is not a truly viable option because this route precludes employers from the benefit of the safe-harbor provision of a DOL prevailing wage. *See* DOL Website, Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3), https://perma.cc/4G4B-29UU. Further, the use of an alternate wage survey would complicate the USCIS adjudication of an employee's application.

COVID-19 and that was among the first to receive emergency use authorization from the state and federal governments. Plaintiffs and some *amici* are also working to improve existing testing; develop innovative testing methods that are faster, more accurate, and scalable; study new methods for infection prevention; and create new technologies to facilitate contact tracing. *See also* Shankar Decl., ECF 31-13 at ¶ 3; Wolford Decl., ECF 31-15 at ¶ 3. This significant COVID-19-related research will likely be disrupted if members of vital research teams are required to return to their countries of origin because of the Rules.

Amici also continue to conduct research in other key areas. This includes one institution's physics postdoctoral candidates, who hold H-1B visas and are conducting research on superconducting devices, nuclear physics, and particle physics while working as part of the Large Hadron Collider experiments at CERN in Switzerland. The contributions of foreign workers to the advancement of scientific research and innovation cannot be overstated. Irreparable harm will occur to these projects if the Rules are not enjoined and employment relationships are severed.

C. If Not Enjoined, the Rules Will Irreparably Harm *Amici*'s Ability to Educate the Nation's Students.

To maintain the excellence that characterizes their institutions, *amici* endeavor to recruit and retain the best scholars from both the U.S. and abroad. International scholars and researchers teach undergraduate and graduate students in a number of disciplines, including mathematics, engineering, computer science, information science, and business and entrepreneurship. For example, one institution has a bioengineering undergraduate program, which blends classroom learning with real-world practical research experience, and is led by an H-1B visa holder. Another *amicus* institution has junior faculty present on H-1B visas who study and teach in a broad range of disciplines, including biostatistics, physics, management, economics, and English.

These highly skilled workers are pioneers in their fields and contribute meaningfully to *amici*'s faculty. Under the new Rules, *amici* will be forced to scramble to fill these vacant positions. Moreover, these visas also are a common method by which international graduates of U.S. academic institutions can work for leading American employers after completing their degree programs. Because of these Rules and the significant uncertainty they cause, these graduates may

not wish to work in the U.S. For that matter, international students may opt not to enroll at U.S. colleges and universities, as they come to understand that the work opportunities available to them after graduation have been narrowly circumscribed by sudden, heedless rulemaking.

D. If Not Enjoined, the Rules Will Irreparably Harm *Amici's* Abilities to Provide Healthcare to Communities.

Some *amici* also use the H-1B visa programs to hire international doctors, nurses, dentists, and other medical professionals, who may not be available to treat patients in their communities because of the Rules. For example, a highly trained doctor and clinical Assistant Professor at an *amicus*' Medical School who specializes in treating migraines must renew their H-1B visa to work beyond April 30, 2021. The DOL Rule would require that the professor be paid a 15% increase over their existing salary. As a result, this institution may lose this valuable resource amid a severe national shortage of neurologists, including migraine specialists, which is expected to hit a shortfall of 19% by 2025.[10] Another *amicus* institution employs several H-1B workers in clinical faculty positions, providing advanced medical training to residents and fellows while engaging in clinical care, often in a highly specialized area. This institution also employs several H-1B faculty and researchers with expertise spanning medicinal chemistry, virology, molecular biology, toxicology, pharmacology, immunology, and computational biology for HIV and AIDS research.

III. The Rules Will Irreparably Harm Foreign Workers Who Rely on H-1B Visas While Awaiting Lawful Permanent Residence in the United States.

Many colleges and universities employ individuals who are currently awaiting lawful permanent resident status but face protracted processing delays as the government works through wait lists. The renewal of H-1B visas in these situations is crucial because, without a valid H-1B visa, these employees are not permitted to continue to live and work in the United States. Visa holders, especially from India, which is subject to extensive backlogs in the permanent resident process, face having to return to their country of origin while they wait out a process with seemingly no end in sight. Further, they have remained in H1-B status and lived in limbo for many years relying on the prospect of permanent residency.

[10] *See* Timothy Dall *et al.*, *Supply and Demand Analysis of the Current and Future US Neurology Workforce*, NEUROLOGY, Apr. 13, 2013, https://perma.cc/7VL7-SCQT.

According to USCIS data, the current backlog for certain employment-based visa holders seeking permanent residency is nearly ten years.[11] Under the system that has existed for decades, employees were permitted to continue living and working in the United States while their employers extended sponsorship of their visas, most commonly H-1B visas. If, because of the Rules, employers can no longer extend these visas, employees would be forced to uproot their families, leaving the United States and the lives they have worked so hard to create here.[12] The consequence of the agencies' capricious rulemaking will cause severe hardship to families during a time when many are already facing extreme adversity and uncertainty from the global pandemic.

To take one illustrative example, an *amicus* institution employs an Associate Professor on an H-1B visa who is paid a salary of approximately $86,000, which is above the previous prevailing wage of approximately $80,000. DOL has set the new minimum wage at in excess of $140,000. Critically, having just received tenure and while currently mired in the permanent residency process, the Associate Professor must rely on the renewal of their H-1B visa until they can become a lawful permanent resident. This individual is an Indian national, and therefore is subject to the processing backlogs for that country,[13] despite being in the EB-1 preference category and having been in H-1B status since 2013.

Amici's international employees have expressed their profound concerns regarding the impact of the Rules on their ability to continue to live and work in the United States. Many of *amici*'s H-1B workers fear having to return to their countries of origin and losing their positions with their institutions. This would not only force many well-respected scholars to return to their country of origin, but it would also force entire families to uproot their lives. Many members of

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[11] USCIS, *When to File Your Adjustment of Status Application for Family-Sponsored or Employment-Based Preference Visas: October 2020*, https://perma.cc/DRC8-JSKP.

[12] This also would decimate these employees' promising academic careers, their ability to earn tenure, and years of their own research experiments (some of which involves live animal subjects that need to be cared for, engineered tissue, genome lines, and specially designed and built equipment). Without completing their research and publishing, years of work would not appear in these researchers' records, which would be devastating to their careers.

[13] According to data from USCIS, as of November 12, 2019, there is a processing backlog of 29,630 petitions for EB-1 applications of Indian nationals. *See* Bier, *Backlog for Skilled Immigrants Tops 1 Million*, CATO Institute, Mar. 30, 2020, https://perma.cc/PD9W-2PQ6.

these families have spent the majority of their time lives here, and some dependents may even be citizens by birthright.

IV. The Rules Ignore *Amici's* Substantial Reliance on the Current Visa Programs.

Amici and their employees have enormous reliance interests on the issuance of these visas. These institutions and individuals have "organized themselves around the existing regulations" and consistently have relied on the pre-existing regulations for over a decade. (Compl. ¶ 159.) In seeking to immediately and dramatically change their positions with respect to these visas, DOL and DHS "must . . . be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted). The sweeping changes to these visa programs do not sufficiently account for the widespread reliance that has been in place for over a decade.

For example, *amici* have invested enormous amounts in their research centers and laboratories, many of which employ hundreds of researchers, staff, and personnel who play critical roles in the research projects. Many *amici* have a number of substantial research centers around the world that collaborate with each other and other affiliated institutions. These labs must purchase expensive equipment and materials to ensure successful execution—all of which is planned and budgeted years in advance. If an academic institution could not renew the visa of a critical member of its research team, the impact would be devastating.

Amici also have invested enormous amounts in recruiting and training the talented individuals holding these visas. These Rules would obliterate *amici*'s substantial investments and would force *amici* to invest significant resources in retaining new talent, stretching budgets that have already been stretched entirely too thin due to the pandemic. Further, *amici* follow strict procedures in implementing salary adjustments and DOL's wage increases took the entire academic community by surprise. *Amici* are now forced to consider these drastic wage increases outside of their usual salary planning process, throwing carefully planned budgets into disarray.

And as we have noted above, institutions administering research funding set budgets years in advance, so that they can scale their projects to the amounts awarded. These budget projections are communicated to funders, including federal departments and agencies, private foundations,

and NGOs. Institutions and their funders alike have relied on the preexisting H-1B wage structure in staffing researchers on projects and crafting their budgets. DOL's dramatic prevailing wage increases and DHS's truncation of the "specialty occupation" definition upend all these plans. And while the violated reliance interests belong to institutions and their funders—including the government itself—the effects of this disruption to research will be felt by the entire nation.

Moreover, the dire effects on institutions, stemming from the long-held reliance interests, will have far-ranging economic consequences. The changes these rules create would undoubtedly "necessitate systemic, significant changes" to employment in these industries and other industries across the country. *Navarro*, 136 S. Ct. at 2126. This would lead to loss of productivity, creativity, and innovation—areas in which the United States has always been a trailblazer.

Although the precise number is unknowable at the present time, we estimate that hundreds of employees of *amici* currently working and living in the United States would not be eligible to renew their visas because of the Rules. These employees would be forced to leave the country and the lives they have worked so hard to create here. These employees, many of whom have previously been approved for visas, undoubtedly have significant reliance interests. *See DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020). Where, as here, an agency's prior policy has engendered serious reliance interests, the agency must provide a more persuasive justification for the change than what would normally suffice. *Nat'l Urban League v. Ross*, 2020 WL 5739144, at *42 (N.D. Cal. Sept. 24, 2020). Ultimately, "the greater the reliance interests, the greater [DHS and DOL's] obligation to take them into account." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1085 n.115 (N.D. Cal. 2018). Here, the agencies have completely failed to consider the significant reliance interests on behalf of both visa sponsors and visa holders. Instead, they bypassed the baseline notice-and-comment process and rushed sweeping changes into a final rule. *Finally*, if DHS and DOL had provided *amici* with formal notice and the opportunity to provide comments, many *amici* would have filed comments explaining the irreparable injury that will flow from these arbitrary and capricious rules. Having been denied that opportunity, *amici* appreciate the opportunity to present their concerns to the Court.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that Plaintiffs' motion for a preliminary injunction should be granted by this Court.

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Respectfully submitted,

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