

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS,
STATE OF COLORADO, STATE OF
CONNECTICUT, STATE OF DELAWARE,
DISTRICT OF COLUMBIA, STATE OF
ILLINOIS, STATE OF MARYLAND, STATE
OF MICHIGAN, STATE OF MINNESOTA,
STATE OF NEVADA, STATE OF NEW
JERSEY, STATE OF NEW MEXICO, STATE
OF OREGON, COMMONWEALTH OF
PENNSYLVANIA, STATE OF RHODE
ISLAND, STATE OF VERMONT,
COMMONWEALTH OF VIRGINIA, and
STATE OF WISCONSIN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; CHAD F. WOLF, in
his official capacity as Acting Secretary of
Homeland Security; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; and MATTHEW
T. ALBENCE, in his official capacity as Acting
Director of U.S. Immigration and Customs
Enforcement,

Defendants.

Civil Action No. 20-11311

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Commonwealth of Massachusetts, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Illinois, State of Maryland, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont,

Commonwealth of Virginia, and State of Wisconsin (collectively, “the Plaintiff States” or “the States”) bring this action to challenge the federal government’s cruel, abrupt, and unlawful action to expel international students or force campuses to be less safe amidst the SARS-CoV-2 pandemic that has wrought death and disruption across the United States.

2. Our States’ colleges and universities—incubators of the very advancements in science and public health that we hope will conquer the pandemic—have not been spared its effects. As millions of SARS-CoV-2 infections have spread across the country and more than 137,000 people have suffered and died from COVID-19 disease as a result, our institutions of higher education have had to overhaul their operations to keep students, faculty, and staff safe while continuing their vital missions.

3. These institutions’ efforts are consistent with the continuing recognition of an ongoing public health emergency by the federal government and by all of the Plaintiff States, and with carefully designed guidance and directives by the States to control the spread of the virus given the specific conditions in each state and at each school.

4. Recognizing that indoor gatherings pose particular risk for transmitting the highly contagious—and sometimes deadly—virus, colleges and universities have eliminated some or all in-person classes. A blanket approach to holding in-person classes, no matter the current, local public health risks, endangers not only students, faculty, and staff, but also their household members and our communities more broadly.

5. In light of the need to limit or eliminate in-person classes during the pandemic, on March 13, 2020, U.S. Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security (DHS), issued guidance advising students and educational institutions that, “[g]iven the extraordinary nature of the COVID-19 emergency,” exemptions

would be granted “for the duration of the emergency” to allow international students attending our colleges and universities on certain nonimmigrant student visas (“F-1” and “M-1” visas) to take online classes to fulfill the course of study required by their visas (the “March 13 Guidance”).¹ At the time of the March 13 Guidance, there were known to have been a total of 4,575 COVID-19 cases and 55 related deaths in the United States.²

6. Without warning, on July 6, 2020—a date on which the country recorded 47,375 new positive COVID-19 tests in a single day, and by which date a total of 122,915 known deaths had occurred in the United States, with hundreds more occurring every day³—ICE announced through a “Broadcast Message” a new directive that international students can no longer live in the United States and take their classes online (the “July 6 Directive” or “Directive”).

7. This abrupt change came after colleges and universities had final or near-final plans already in place for fall 2020. Because of the months-long efforts required to coordinate these plans, institutions were forced to rely on the March 13 Guidance announced “for the duration of the emergency” in making these preparations, and the vast majority have opted for continued use of online learning to ensure the health and safety of students, faculty, staff, and the public at large.

8. The July 6 Directive upended these carefully developed plans by requiring students who are not taking a sufficient number of in-person classes to “depart the country or

¹ U.S. Immigration and Customs Enforcement, Homeland Security Investigations, National Security Investigations Division, Student and Exchange Visitor Program, COVID-19: Guidance for SEVP Stakeholders, at 1-2 (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf.

² The COVID Tracking Project, U.S. Historical Data, <https://covidtracking.com/data/us-daily>.

³ *Id.*

take other measures, such as transferring to a school with in-person instruction to remain in lawful status or potentially face immigration consequences including, but not limited to, the initiation of removal proceedings.”⁴ The Directive further demanded that educational institutions advise the federal government within 9 days—by July 15, 2020—whether they intend to offer only remote courses in the fall semester, and to certify within 20 days—by August 4, 2020—that each individual student taking in-person classes meets particularized requirements for in-person learning or a “hybrid” of in-person and online learning.⁵

9. ICE offered no rationale for this abrupt reversal of the March 13 Guidance, which had explicitly allowed exemptions to in-person learning requirements “for the duration of the emergency” our States and schools continue to face. It failed to consider the health and safety of our students, faculty, staff, and the untold other residents of our States with whom they interact; it failed to consider the tremendous costs and burden this abrupt reversal would impose on our institutions of higher learning; and it failed to consider that, for many of our international students, remote learning in the countries and communities from which they come would impede their studies or be simply impossible. It is the essence of arbitrary and capricious to withdraw, without explanation, a commonsense measure to manage the pandemic currently engulfing our country.

10. This reversal leaves colleges and universities with an agonizing dilemma. To ensure all of their students can remain in the United States to continue their courses of study, they must scramble to offer sufficient in-person classes in myriad subjects for hundreds of thousands of international students, mere weeks before the semester starts, and without regard

⁴ Student and Exchange Visitor Program, Broadcast Message: COVID-19 and Fall 2020, at 1 (July 6, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2007-01.pdf>.

⁵ *Id.* at 2.

for the public health impact of doing so. The alternative is to lose significant numbers of international students from their campuses, who will be forced to leave the country to participate remotely insofar as they are able, transfer to another school offering sufficient in-person classes, or disenroll from school altogether.

11. Either choice will inflict harm. In-person instruction offered only for the purposes of meeting this arbitrary Directive risks sacrificing the health and safety of students, faculty, and staff—and, indeed, our States more generally. Losing the presence—and in many cases the enrollment—of international students would result in the loss of invaluable perspectives and contributions by these students, hundreds of millions of dollars in foregone tuition as well as fees for housing and other services, and hundreds of billions of dollars in revenue for our States' economies.

12. ICE's reversal also imposes an insuperable burden on our colleges and universities. These institutions now must certify by August 4, 2020, for each and every international student, that the students' respective class schedules meet the federal requirement for sufficient in-person learning. These same institutions have, for months, been devising detailed, multifaceted plans to ensure the safety and well-being of our students, faculty, and staff, while also preserving learning opportunities for students, all while dealing with the uncertainty of the pandemic's course. Now, with insufficient notice, zero explanation, and severely depleted resources, colleges and universities are forced to readjust all of those plans to account for whether every single international student, in every single program, will have sufficient in-person learning opportunities to maintain their visa status in the United States—a determination they must make before many students have registered for a single class, while many faculty and

staff are absent from campus due to the pandemic or on leave for the summer, and while the pandemic's course this summer and autumn remains worrisome and unclear.

13. ICE's reversal is senseless and cruel to our universities and students. It also violates the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, by failing to offer any reason for the dramatic policy reversal, neglecting to consider the myriad ways in which the colleges, universities, and students relied on the previous policy, disregarding our country's ongoing—indeed worsening—public health emergency, and imposing an effective date that makes compliance all but impossible. Thus issued wholly without warning or opportunity for notice and comment from the myriad affected individuals and entities, the July 6 Directive is also procedurally invalid. This Court should therefore stay the effective date of the Directive pending judicial review; grant the Plaintiff States declaratory and injunctive relief from the Directive on a preliminary and permanent basis; vacate and set aside the Directive; and award the Plaintiff States such other relief as is requested herein.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 and may enter declaratory, injunctive, and other relief under 28 U.S.C § 2201(a) and 5 U.S.C. §§ 702, 705-706.

15. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e)(1). Defendants are United States agencies or officers sued in their official capacities. The Commonwealth of Massachusetts is a resident of this judicial district, and a substantial part of the events or omissions giving rise to this complaint occurred within the district.

PARTIES

16. Plaintiff Commonwealth of Massachusetts, represented by and through its Attorney General, is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Maura Healey, who has both statutory and common-law authority and responsibility to represent the public interest for the people of Massachusetts in litigation, as well as to represent the Commonwealth, state agencies, and officials in litigation. Mass. Gen. Laws ch. 12, § 3; *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977).

17. Plaintiff State of Colorado is a sovereign state of the United States of America. This action is brought on behalf of the State of Colorado by Attorney General Phillip J. Weiser, who is the chief legal counsel of the State of Colorado, empowered to prosecute and defend all actions in which the state is a party. Colo. Rev. Stat. § 24-31-101(1)(a).

18. Plaintiff State of Connecticut, represented by and through its Attorney General, William Tong, is a sovereign state of the United States of America. The Attorney General brings this action as the state's chief civil legal officer under Conn. Gen. Stat. § 3-124 *et seq.*

19. Plaintiff State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings, the "chief law officer of the State." *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority. Del. Code Ann. tit. 29, § 2504.

20. Plaintiff District of Columbia is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The

District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81.

21. Plaintiff State of Illinois is a sovereign state of the United States of America. The State of Illinois is represented by Attorney General Kwame Raoul as its chief law enforcement officer. Ill. Constit. Art. V, § 15. Attorney General Raoul has broad statutory and common law authority to act in the interests of the State of Illinois and its citizens in matters of public concern, health, and welfare. 15 ILCS 205/4.

22. Plaintiff State of Maryland is a sovereign state of the United States of America. Maryland is represented by and through its chief legal officer, Attorney General Brian E. Frosh. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, J. Res. 1.

23. Plaintiff State of Michigan is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Dana Nessel, the State of Michigan's chief law enforcement officer, pursuant to her statutory authority. Mich. Comp. Laws § 14.28.

24. Plaintiff State of Minnesota is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Keith Ellison, the chief law officer of the State. Minn. Stat. § 8.01.

25. Plaintiff State of Nevada, represented by and through Attorney General Aaron D. Ford, is a sovereign state within the United States of America. The Attorney General is the chief law enforcement officer of the State of Nevada and is authorized to pursue this action under Nev. Rev. Stat. 228.110 and Nev. Rev. Stat. 228.170.

26. Plaintiff State of New Jersey is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State's chief legal officer. N.J. Stat. Ann. § 52:17A-4(e), (g).

27. Plaintiff State of New Mexico is a sovereign state of the United States of America. New Mexico is represented by its Attorney General, Hector Balderas, who is authorized to assert the state's interests in state and federal courts.

28. Plaintiff State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

29. Plaintiff Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority. 71 Pa. Stat. § 732-204.

30. Plaintiff State of Rhode Island is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Peter F. Neronha, the State's chief legal officer. R.I.G.L. § 42-9-5; R.I. Const., art. IX § 12.

31. Plaintiff State of Vermont is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Thomas J. Donovan, Jr., the State's chief legal officer. *See* Vt. Stat. Ann. tit. 3, §§ 152, 157.

32. Plaintiff the Commonwealth of Virginia is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Mark R. Herring. As chief executive officer of the Department of Law, General Herring performs all legal services in civil matters for the Commonwealth. Va. Const. art. V, § 15; Va. Code Ann. §§ 2.2-500, 2.2-507.

33. Plaintiff State of Wisconsin is a sovereign state of the United States of America. This action is brought on behalf of the State of Wisconsin by Attorney General Joshua L. Kaul pursuant to his authority under Wis. Stat. § 165.015(6). Attorney General Kaul brings this action at the request of Governor Tony S. Evers pursuant to Wis. Stat. § 165.25(1m).

34. The Plaintiff States are aggrieved and have standing to bring this action because Defendants' actions pose immediate and irreparable injuries to the Plaintiff States' proprietary, sovereign, and quasi-sovereign interests.

35. Defendant United States Department of Homeland Security is an agency of the United States federal government. DHS implements and enforces the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.*

36. Defendant U.S. Immigration and Customs Enforcement is a division of DHS.

37. Defendant Chad F. Wolf is the Acting Secretary of Homeland Security. He is sued in his official capacity.

38. Defendant Matthew T. Albence is Acting Director of ICE. He is sued in his official capacity.

FACTS

Our National Emergency

39. The COVID-19 pandemic's relentless spread began in late 2019, and the first United States case was confirmed on January 20, 2020. On March 11, 2020, the outbreak of COVID-19 was characterized as a pandemic by the World Health Organization. By March 13, 2020, 45 states—including all the Plaintiff States—had declared states of emergency due to escalating case counts, hospitalizations, and deaths worldwide and in the United States. By early April, all 50 states had declared a state of emergency.

40. On March 13, 2020, President Donald J. Trump announced a national emergency.

41. COVID-19 is a highly contagious, and sometimes fatal, respiratory disease. The disease has an extreme risk of person-to-person transmission via respiratory droplets and in close contact settings has also been demonstrated to be transmitted by aerosols. Although symptoms of the disease may include fever, cough, and shortness of breath, many individuals who contract COVID-19 are asymptomatic and indeed are unaware of their infection and risk of infecting others. Even those who ultimately show symptoms may not do so until days after exposure to the virus, during which time they may be infectious to others. It is generally thought that people with symptoms are likely able to actively spread virus for approximately 48 hours before their symptoms occur. The disease tends to have more severe outcomes for individuals aged 60 and over and individuals with underlying health conditions, but has had lethal effects across demographic groups. The risk of transmission is of concern for indoor gatherings of any size, but particularly for large, densely populated indoor gatherings. Such gatherings can facilitate the spread of infection of COVID-19 not only to the gathered individuals and to those with whom they come into close contact, but to others in their communities.

42. Federal, state, and local governments have issued guidance and directives to mitigate the spread of COVID-19. These measures have included mandating the shutdown of physical workplaces, advising residents to stay home, and limiting the size of gatherings. Those state governments that have allowed workplaces and sectors to reopen have required compliance with a variety of measures to mitigate the spread of COVID-19, including limiting the occupancy of buildings and the number of individuals that can gather indoors, and providing detailed protocols for social distancing, hygiene, staffing, cleaning, and disinfecting.

43. The Centers for Disease Control and Prevention has issued guidance encouraging virtual learning to reduce risks at colleges at universities.⁶ And most of the Plaintiff States have issued guidance or directives specific to the operations of colleges and universities to help schools navigate how to continue their educational missions and operations while also protecting students, faculty, staff, and the public health.

44. Because of the particular risk of indoor infection of COVID-19, and in order to comply with state and local limitations on and protocols for indoor gatherings, colleges and universities across the country suspended in-person instruction for the spring semester.

Defendants' Initial Response to the Pandemic

45. On March 13, 2020, ICE responded to these pandemic conditions and their obvious impact on in-person learning by issuing temporary exemptions “for the duration of the emergency” to the existing requirements that international students on F-1 and M-1 visas attend most or all of their classes in person.

⁶ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Considerations for Institutions of Higher Education, <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html>

46. As a condition of obtaining and maintaining an F-1 or M-1 visa to study in the United States, an international student must be “a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study[.]” at an institution that “shall have agreed to report to the Attorney General” regarding students’ attendance. 8 U.S.C. § 1101(a)(15)(F).

47. Institutions of higher education are required to report to the Attorney General information regarding their international students, including whether the students are “maintaining status as a full-time student.” 8 U.S.C. § 1372(c)(1)(C). DHS maintains this information in the Student and Exchange Visitor Information System, or SEVIS.

48. Students are admitted “for duration of status,” defined as “the time during which [the] student is pursuing a full course of study” or “engaging in authorized practical training following completion of studies[.]” 8 C.F.R. § 214.2(f)(5)(i). Students “may be admitted for a period up to 30 days before” they “need to be in attendance for required activities.” *Id.* § 214.2(f)(5)(i) (30 days); *id.* § 214.2(f)(7)(ii) (defining “report date”). “The student is considered to be maintaining status if he or she is making normal progress toward completing a course of study[.]” *id.* § 214.2(f)(5)(i), and stays in status “during the annual (or summer) vacation if the student is eligible and intends to register for the next term,” *id.* § 214.2(f)(5)(iii). *See also id.* § 214.2(f)(6)(iii)(B) (authorizing reduced course loads for up to 12 months based on substantiated medical conditions, among other grounds).

49. The regulatory definition of “full course of study” limits the amount of “on-line” or “distance education” courses “not requir[ing] the student’s physical attendance for classes, examination or other purposes integral to completion of the class” that can count toward a full course of study. 8 C.F.R. § 214.2(f)(6)(G). This limit is “no more than the equivalent of one class

or three credits per session, term, semester, trimester, or quarter.” *Id.* An “on-line or distance education course” is defined as one “offered principally through the use of television, audio, or computer transmission.” *Id.* For both F-1 students at language study programs and students with M-1 visas to study at vocational schools, “no on-line or distance education classes may be considered to count toward a student’s full course of study requirement.” *Id.* (language study programs); *id.* § 214.2(m)(9)(v) (vocational schools).

50. In addition to allowing students to study, F-1 and M-1 visas permit students to accept certain types of employment. 8 C.F.R. §§ 214.2(f)(9), f(10), & (m)(13)-(14). Students on F-1 visas may engage in on-campus employment, subject to some restrictions. 8 C.F.R. § 214.2(f)(9)(i). After their first year, F-1 students can engage in both on-campus employment and off-campus employment through curricular practical training (CPT) and optional practice training (OPT). *Id.* § 214.2(f)(10). After completion of their academic program, subject to certain restrictions, F-1 students can work on OPT for up to one year with the possibility of renewal in some circumstances. *Id.* § 214.2(f)(10)(ii). M-1 students may engage in practical training after they have completed their studies, with some restrictions. *Id.* § 214.2(m)(14).

51. Recognizing “the extraordinary nature of the COVID-19 emergency,” on March 13, 2020, ICE’s Student and Exchange Visitor Program (SEVP) announced it would “allow F-1 and/or M-1 students to temporarily count online classes towards a full course of study in excess of the limits stated in *Id.* § 214.2(f)(6)(i)(G) and (m)(9)(v).”⁷ ICE required educational institutions to “notify SEVP of COVID-19 procedural changes within 10 business days.” *Id.*

⁷ U.S. Immigration and Customs Enforcement, Homeland Security Investigations, National Security Investigations Division, Student and Exchange Visitor Program, COVID-19: Guidance for SEVP Stakeholders, at 1 (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf.

52. ICE stated that these exemptions would be “in effect for the duration of the emergency,” although a disclaimer at the end of the guidance noted that “[d]ue to the fluid nature of this difficult situation, this guidance may be subject to change.”

53. In additional guidance provided via Frequently Asked Questions, ICE further advised that, if schools were unable to offer all courses due to inability to deliver via online methods, course of study requirements could be waived via the school’s procedural change documents. Frequently Asked Questions for SEVP Stakeholders About COVID-19, at 8 (version last updated May 12, 2020), <https://tinyurl.com/y87ht4ye>. Moreover, “F and M students unable to participate in online or other alternative instruction requirements due to the lack of available technology resources [were to] notify their” schools, and schools were advised that they “may keep these student records Active in SEVIS as long as the student intends to resume their course of study when in-person classes resume.” *Id.* at 5.

54. As of ICE’s March 13, 2020 action, the United States had confirmed 4,575 COVID-19 cases anywhere across the country, and had recorded a total of 55 deaths.⁸

States’, Schools’, and Students’ Reliance on ICE’s Action in Planning for Fall 2020

55. Schools in the Plaintiff States⁹ substantially stopped in-person instruction and transitioned to remote learning in March 2020. Pursuant to public health and safety information, guidance, and mandates, schools moved courses online and students out of on-campus housing. During that time, as required by the March 13 Guidance, schools in the Plaintiff States submitted procedural changes to SEVP.

⁸ The COVID Tracking Project, U.S. Historical Data, <https://covidtracking.com/data/us-daily>.

⁹ Throughout this complaint, references to “colleges,” “universities,” “schools,” and the like refer to both public and private institutions of higher education, except where context dictates otherwise.

56. Soon thereafter, schools shifted to planning for the fall of 2020. College and university administrators and others undertook time- and resource-intensive planning over the course of several weeks and months, carefully weighing known and uncertain facts and circumstances and engaging in deliberative decision-making. These schools conducted outreach to interested and expert parties, such as public health and medical experts, to assist them in considering their options and developing and implementing plans. They also surveyed stakeholders, such as students, faculty, and staff. This planning involved both individualized campus-based assessments and system-wide coordination and decision-making. Colleges and universities invested extensive institutional resources in developing plans for the fall to balance the health and safety of students, faculty, staff, and the broader community with their commitment to providing high-quality education to their students. In many cases, colleges and universities invested significant resources specifically in developing and improving their capabilities for providing online learning to their students.

57. Colleges and universities in the Plaintiff States have announced or are imminently announcing their plans for the 2020-2021 academic year. Many intend to offer a carefully balanced hybrid of in-person and online instruction, favoring in-person courses for programs that require hands-on learning. As part of these plans, schools have set rules about students' return to campus. In some cases, for example, only first-years or seniors will return; in other cases, universities will permit vulnerable students—such as those with home environments that are unsafe or not conducive to learning—to return.

58. Many of these plans are designed to be flexible, so that students can shift back and forth between in-person and remote learning depending on the community trends of the

virus, outbreaks on campus, and specific factors for individual students such as illness, exposure to COVID-19, or compromised immune systems.

59. Given the extraordinary time, effort, and coordination required to develop and implement appropriate public health and safety measures on their campuses, schools were left with no option but to rely on the March 13 Guidance in preparing for classes to resume in the fall. Early preparation was particularly necessary so that students, faculty, and staff could make their plans for travel, housing, work, and study.

60. Students, faculty, and staff have accordingly been making such plans—relying on the announcements their colleges and universities have made—including securing leases, booking plane tickets, enrolling their children in schools, and seeking or planning for employment for themselves and their spouses.

ICE Reverses Course

61. On July 6, 2020, ICE abruptly reversed course. With no warning of any kind, let alone giving adequate notice and an opportunity to comment, ICE largely rescinded the pandemic exemptions to the in-person class requirements for the semester slated to begin in mere weeks, requiring all schools to report within 9 days if they would be conducting all of their classes remotely in the fall, and requiring schools to certify by August 4, 2020, for each individual F-1 and M-1 student, that the student’s academic program would meet new requirements for the level of in-person instruction deemed adequate by ICE.

62. The July 6 Directive provided that F-1 and M-1 students “attending schools operating entirely online may *not* take a full online course load and remain in the United

States.”¹⁰ Carrying out this reversal, “[t]he U.S. Department of State will not issue visas to students enrolled in schools and/or programs that are fully online for the fall semester nor will U.S. Customs and Border Protection permit these students to enter the United States.” *Id.* Accordingly, ICE directed, “Active students currently in the United States enrolled in such programs must depart the country or take other measures, such as transferring to a school with in-person instruction to remain in lawful status or potentially face immigration consequences including, but not limited to, the initiation of removal proceedings.” *Id.*

63. The July 6 Directive entirely rescinded the March 13 Guidance’s exemptions with respect to students on an M-1 visa pursuing vocational education and F-1 students in English language training programs, “who are not permitted to enroll in any online courses.” *Id.* (citing 8 C.F.R. § 214.2(f)(6)(i)(G); 8 C.F.R. 214.2(m)(9)(v)).

64. For schools “adopting a hybrid model,” which ICE defined to mean “a mixture of online and in person classes,” ICE newly required schools to certify, for each F-1 student, “within 21 business days of publication of this Broadcast Message (by August 4, 2020.[sic]),” that the student’s particular “program is not entirely online, that the student is not taking an entirely online course load for the fall 2020 semester, and that the student is taking the minimum number of online classes required to make normal progress in their degree program.”¹¹

65. Moreover, “[o]nly students enrolled at a school that is *only* offering online coursework can engage in remote learning from their home country.”¹²

¹⁰ Student and Exchange Visitor Program, Broadcast Message: COVID-19 and Fall 2020, at 1 (July 6, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2007-01.pdf> (emphasis in original).

¹¹ *Id.* at 1-2.

¹² *Id.* at 2 (emphasis added).

66. In other words, students have only three choices: (1) enroll in a program that only offers online classes and stay outside of the United States; (2) enroll in a program that offers a hybrid model, and make sure to take “the minimum number of online classes required to make normal progress” in the degree program; or (3) enroll in a fully in-person program. Schools must work to accommodate each individual international student to ensure that one of these options is possible and acceptable—and that it does not change over the course of the semester—or risk losing the student altogether.

67. The July 6 Directive’s dramatic reversal of course was issued without explanation. The Directive referred to the “need to resume the carefully balanced protections implemented by federal regulations,”¹³ but did not give any reason why this “need” arose amidst the on-going emergency that was the basis for its March 13, 2020 Guidance “for the duration of the emergency,” nor explain how the unspecified “balance[.]” had shifted.

68. On July 7, ICE issued a document entitled “Frequently Asked Questions for SEVP Stakeholders about Guidance for the Fall 2020 Semester” (“FAQ”).¹⁴ In purporting to explain the reasons for the new Directive after it was issued, this FAQ asserts that “DHS is seeking to maximize flexibility for students to continue their studies, while minimizing the risk of transmission of COVID-19 by not admitting students into the country who do not need to be present to attend classes in-person[.]” and that the July 6 Directive “provided the best options for flexibility for nonimmigrant students to continue education with health risks associated with international travel at this time.”¹⁵ Like the July 6 Directive, this FAQ, too, fails to explain why a reversal of the March 13 Guidance was warranted at this time, as the pandemic continues to

¹³ *Id.* at 1.

¹⁴ https://www.ice.gov/doclib/sevis/pdf/sevisFall2020_FAQ.pdf.

¹⁵ *Id.* at 2, 3.

ravage communities across the country. Moreover, this purported explanation has no logical connection to the Directive's requirement that students currently present in the United States must depart—and assume the “health risks associated with international travel at this time”—if their schools are currently offering only online instruction due to the pandemic.

69. The July 6 Directive fails to address the substantial reliance interests of students, colleges, and universities on the March 13 Guidance, the roadmap for planning that guidance provided to students, colleges, and universities, and the flexibility it allowed.

70. The July 6 Directive also fails to consider the harm to international students and their families whose lives will be upended; the lost revenue to colleges and universities if foreign students are forced to stay away; the enormous administrative burden on schools to rethink carefully calibrated fall semester plans and to make individual certifications for each individual international student in a matter of weeks, at a time when many students will not yet have even chosen their courses; the individual, community, and public health impact of schools being forced to offer additional and superfluous in-person learning in order to ensure the status of its international students; the harm to the university community of losing the perspectives, skills, and talents of so many international students; and the harm to the economy and society if international students are forced to leave.

71. And the July 6 Directive also fails to explain the impossibly short timeline for implementation of its requirements, leaving only nine days for colleges and universities to advise the federal government if they will be fully online for the fall 2020 semester and then only 20 days later to certify that each individual student will meet the requirements for hybrid or in-person learning.

The July 6 Directive's Irreparable Harms to Plaintiff States, Schools, and Students

72. The Directive will cause immediate and irreparable harm to the States as well as to their residents, schools, and students.

73. Collectively, the Plaintiff States are home to a combined 1,124 colleges and universities,¹⁶ hosting approximately 373,304 international students in 2019, who contributed an estimated \$14,502,646,811 to our States’—and the country’s—economy that year.¹⁷

74. The Plaintiff States’ own 487 public colleges and universities¹⁸ host tens of thousands of international students¹⁹ and contribute trillions of dollars to the economy each year. Of the twenty-five universities and colleges listed by the Institute of International Education as leading host institutions for international students in 2019, one-fifth are public colleges and universities located in Plaintiff States, hosting a combined 45,860 international students.²⁰

75. Each Plaintiff State funds, supports, and/or administers its own public colleges and universities. The July 6 Directive directly regulates these public colleges and universities, will harm their operations, will cost them significant resources, and will make it more difficult for them to ensure the safety of their students, faculty, staff, and the untold additional number of state residents with whom members of our school communities live and otherwise interact daily. The Directive will also cause irreparable harm to the public health and the economy in the Plaintiff States.

¹⁶ U.S. Department of Education National Center for Education Statistics College Navigator, <https://nces.ed.gov/collegenavigator/>.

¹⁷ Institute of International Education Data By State Fact Sheet, <https://www.iie.org/Research-and-Insights/Open-Doors/Fact-Sheets-and-Infographics/Data-by-State-Fact-Sheets> (statistical information on international exchange in each state in 2019).

¹⁸ U.S. Department of Education National Center for Education Statistics College Navigator, <https://nces.ed.gov/collegenavigator/>.

¹⁹ Institute of International Education Leading Host Institutions, <https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Leading-Host-Institutions>.

²⁰ Institute of International Education Leading Host Institutions, <https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Leading-Host-Institutions>.

Harm to Proprietary Interests

76. The July 6 Directive imposes immense and irreparable costs and burdens on Plaintiff States' public colleges and universities, costs and burdens ultimately borne by Plaintiff States.

77. To retain all international students despite the Directive, our colleges and universities would have to substantially reevaluate the carefully calibrated plans they have developed for the fall semester and instead develop and implement new, complex, and costly accommodations to meet ICE's new requirements. If the schools do not, they will lose significant numbers of international students.

78. Choosing to develop unanticipated fall 2020 plans that would expand the availability of in-person instruction poses enormous costs and burdens on schools, including staffing, COVID-19 testing, personal protective equipment sourcing, classroom space, class size assignments and reorganization, and instructor assignments.

79. Choosing to retain plans that greatly limit in-person instruction or eliminate it altogether will leave our students defenseless against the July 6 Directive's requirement that they depart to study remotely in their home countries—insofar as they are able—or disenroll from school altogether. This would be a huge loss of financial, human, and cultural capital for our schools.

80. Many students will be unable or unwilling to pursue their studies remotely from their home countries and will be forced to disenroll. These students would no longer pay tuition and housing, dining, and other fees at a time when colleges and universities are already faced with severe financial hardship. As a result, Plaintiff States' public institutions stand to lose tens of millions of dollars. This is a particularly acute loss because international students often pay

higher out-of-state tuition rates, which enhances public universities' ability to serve lower-income in-state students by reducing the amount of tuition they are required to pay. These international students would also likely no longer be able to work as employees on our campuses and help further important research goals for our institutions.

81. Even where it is feasible for students to depart to their home countries to pursue online studies, our colleges and universities will still unexpectedly lose housing, dining, and other fees paid by these students; the students' in-person participation in research and other on-campus work that is not part of their course of study; and the students' unique in-person contributions to the fabric of college and university life.

82. Indeed, the July 6 Directive will cause harm to schools' academic, extracurricular, and cultural communities. International students bring rich and diverse viewpoints, interests, and skillsets, which they share in classrooms, on-campus jobs, clubs, and other extracurricular activities, and social interactions with other students, faculty, and staff. If they are forced to disenroll or leave campus because of the July 6 Directive, schools and other students will lose their contributions.

83. Our colleges and universities will also be forced to expend time and resources to make individualized determinations to certify students with F-1 and M-1 visas and re-issue I-20s for each student. These certifications require not only a determination of the particular forms of instruction offered by the schools in which each student is enrolled, but also a determination of each individual student's course load and the format in which such courses will be taught—the latter of which may not be information readily available to the school administration. In some cases, instructors may be given the option to include in-person components, and those decisions may not yet have been made. In other cases, students will not have registered for their courses

before SEVP's certification deadline, putting schools in the impossible position of having to certify students before they determine their courses.

84. The 2020-21 academic year plans developed by schools, and their related operating budgets, of course do not account for the loss of revenue or any additional resources required to comply with the July 6 Directive. And the Directive's enormous impact comes as schools grapple with other financial challenges brought on by the COVID-19 pandemic.

Harm to Sovereign Interests

85. The July 6 Directive will irreparably harm the Plaintiff States' sovereign interest in regulating their public colleges and universities, particularly with regard to public health and safety amidst the pandemic.

86. Plaintiff States have issued guidance and mandates governing the reopening of colleges and universities. In Massachusetts, for example, the Department of Public Health and the COVID-19 Command Center issued mandatory workplace safety standards that apply to higher education institutions.²¹ Massachusetts also provided guidance to cover two different phases of reopening, with guidance for a third phase still pending.²² As part of the second phase, institutions of higher education must develop a written control plan outlining how each of their campuses will comply with the workplace safety mandates, including rules relating to social distancing, hygiene protocols, and cleaning and disinfecting.²³

²¹ <https://www.mass.gov/info-details/reopening-mandatory-safety-standards-for-workplaces#overview->.

²² <https://www.mass.gov/info-details/reopening-higher-education>.

²³ <https://www.mass.gov/doc/higher-education-covid-19-control-plan-template/download>.

87. The July 6 Directive interferes with implementation of such state guidance and mandates, because it has the effect of coercing schools to consider greater use of in-person instruction, lest they lose their international students.

88. The July 6 Directive also reduces the Plaintiff States' and their schools' flexibility in responding to changing conditions over the course of the pandemic. To the extent that pandemic conditions worsen, warranting further reduction or elimination of in-person instruction at schools not yet entirely online, the July 6 Directive will serve as a deterrent to making necessary changes as rapidly as possible and will impose additional costs—human, administrative, and pecuniary—in doing so.

89. In public statements, the Administration has expressly acknowledged these coercive effects of the July 6 Directive and even indicated that the directive was actually intended to pressure schools into reopening, overriding the deliberative planning by Plaintiff States to ensure the health and safety of students, faculty, staff, and the broader community. The same day as the announcement of the administration's reversal, the President of the United States made repeated public statements expressing the view that schools must reopen in the fall:



The next day, Acting Deputy Secretary of Homeland Security Ken Cuccinelli underscored the connection between the July 6 Directive and the administration's evident preference in favor of reopening, stating that the July 6 Directive would “encourage schools to reopen.”²⁴ Coercing

²⁴ Interview with Acting Deputy Secretary of Homeland Security Kenneth T. Cuccinelli, CNN (July 7, 2020), <https://twitter.com/CNNPolitics/status/1280576267360886784>. See also, e.g.,

schools into holding more in-person classes in the fall—regardless of the schools’ assessment of the health and safety risks of doing so—harms the Plaintiff States’ ability to regulate their institutions and protect the public.

Harm to Quasi-Sovereign Interests

90. The July 6 Directive also threatens irreparable injury to the Plaintiff States’ interests in the health and well-being, physical and economic, of our residents.

91. Our States have an interest in preventing the physical harm to our residents—and to the public health system more generally—caused by the insidious spread of COVID-19. The July 6 Directive undermines this interest by encouraging the expansion of in-person classroom instruction beyond that which will best prevent and mitigate the spread of the disease, thus increasing the risk of infection to students, faculty, and staff; to the members of their households; and to the communities in which they live.

Donald J. Trump, Twitter (July 6, 2020) (“Corrupt Joe Biden and the Democrats don’t want to open schools in the Fall for political reasons, not for health reasons! They think it will help them in November. Wrong, the people get it!”),

<https://twitter.com/realDonaldTrump/status/1280232979781111808>; Donald J. Trump, Twitter (July 8, 2020) (“I disagree with @CDCgov on their very tough & expensive guidelines for opening schools. While they want them open, they are asking schools to do very impractical things. I will be meeting with them!!!”),

<https://twitter.com/realDonaldTrump/status/1280857657365200902>; Donald J. Trump, Twitter (July 8, 2020) (“In Germany, Denmark, Norway, Sweden and many other countries, SCHOOLS ARE OPEN WITH NO PROBLEMS. The Dems think it would be bad for them politically if U.S. schools open before the November Election, but is important for the children & families. May cut off funding if not open!”),

<https://twitter.com/realDonaldTrump/status/1280232979781111808>.

Donald J. Trump, Twitter (July 10, 2020) (“Now that we have witnessed it on a large scale basis, and firsthand, Virtual Learning has proven to be TERRIBLE compared to In School, or On Campus, Learning. Not even close! Schools must be open in the Fall. If not open, why would the Federal Government give Funding? It won’t!!!”),

<https://twitter.com/realDonaldTrump/status/1281554061972692994>.

92. Our States also have an interest in preventing the economic harm caused by the spread of COVID-19, as well as the more specific harm caused by discouraging or precluding thousands of international students from coming to and residing in our States. In addition to the significant loss of tuition dollars, the Plaintiff States' economies will suffer harms if international students are forced to disenroll from schools because of the July 6 Directive.

93. Students working on campus as well as those with CPT and OPT authorization—opportunities made available to them because of their F-1 or M-1 status—contribute to our state economies by the thousands through their employment in fields such as science, technology, biotechnology, healthcare, business and finance, and education. Forcing F-1 and M-1 students to leave the country will diminish the chance that these students will have and accept the opportunity to make these contributions to our workforce, economy, and tax base.

94. In addition to contributing as workers, international students rent apartments and houses from local landlords; purchase food from grocery stores and restaurants; and patronize our retail stores and entertainment and leisure sectors. During the 2018-2019 academic year, international students studying at U.S. colleges and universities contributed \$41 billion and supported 458,290 jobs in the U.S. economy.²⁵ In Massachusetts alone, the 2019 economic impact of what was then approximately 71,000 international students was estimated as \$3.2 billion.²⁶ A loss of international students would damage local economies at a time of already severe economic disruption caused by the pandemic.

²⁵ NAFSA Economic Value Statistics, <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2>.

²⁶ *Id.*

CAUSES OF ACTION

COUNT I

**Agency Action That Is Arbitrary, Capricious, an Abuse of Discretion,
or Otherwise Not in Accordance with Law
5 U.S.C. § 706(2)(A)**

95. The Plaintiff States hereby incorporate by reference the foregoing paragraphs of this Complaint.

96. Under the APA, a court “shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

97. The July 6 Directive is arbitrary, capricious, and an abuse of discretion because it:

- a. Failed to offer a reasoned explanation for its action;
- b. Failed to consider important aspects of the problem in reversing the March 13 Guidance, including:
 - i. the need to protect public health and safety amidst the ongoing pandemic;
 - ii. the reliance interests of schools and students across the country on that Guidance in forming their multifaceted response to the COVID-19 crisis and their plans for the impending fall 2020 semester; and
 - iii. the July 6 Directive’s harm to and extreme burdens on public and private educational institutions and students;
- c. Failed to consider, or outright disregarded, overwhelming evidence before the agency that the pandemic conditions that necessitated the March 13 Guidance have not abated; and

- d. Required compliance on a timetable that does not afford the affected parties sufficient time to alter plans made in reliance on prior policy.

98. The July 6 Directive is also arbitrary and capricious and not in accordance with the INA, because in the context of an escalating global pandemic, whether a particular student's instruction is provided entirely online bears no relationship to whether that student is a "bona fide" student within the meaning of 8 U.S.C. § 1101(a)(15)(F).

COUNT II

Without Observance of Procedure Required by Law 5 U.S.C. § 706(2)(D)

99. Plaintiff States hereby incorporate by reference the foregoing paragraphs of this Complaint.

100. Under the APA, a court "shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(A).

101. Subject to enumerated exceptions not applicable here, federal agencies must complete the process of agency rulemaking before issuing a rule. *Id.* § 553(b).

102. The July 6 Directive is a rule for purposes of the APA because it is an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). The July 6 Directive indeed acknowledges that rulemaking is required to implement "the procedures and responsibilities" that it sets forth, where it provides that they will be published "in the near future as a Temporary Final Rule in the Federal Register."

103. Defendant's issuance of the July 6 Directive without notice and comment rulemaking, and without good cause to proceed without notice and comment rulemaking, is in violation of the APA.

PRAYER FOR RELIEF

Wherefore, the Plaintiff States request that this Court enter judgment in their favor and grant the following relief:

- a. Postpone the effective date of the Directive pending judicial review under 5 U.S.C. § 705;
- b. Declare the Directive invalid under 5 U.S.C. § 706(2)(A) & (D);
- c. Preliminarily and permanently enjoin the Defendants and their officers, employees, and agents from applying and enforcing the Directive;
- d. Vacate and set aside the Directive pursuant to 5 U.S.C. § 706(2);
- e. Award Plaintiff States reasonable costs and expenses, including attorneys' fees; and
- f. Award Plaintiff States such other relief as this Court deems just and proper.

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**Pro hac vice* motions will be forthcoming.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS,
STATE OF COLORADO, STATE OF
CONNECTICUT, STATE OF DELAWARE,
DISTRICT OF COLUMBIA, STATE OF
ILLINOIS, STATE OF MARYLAND, STATE
OF MICHIGAN, STATE OF MINNESOTA,
STATE OF NEVADA, STATE OF NEW
JERSEY, STATE OF NEW MEXICO, STATE
OF OREGON, COMMONWEALTH OF
PENNSYLVANIA, STATE OF RHODE
ISLAND, STATE OF VERMONT,
COMMONWEALTH OF VIRGINIA, and
STATE OF WISCONSIN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; CHAD F. WOLF, in
his official capacity as Acting Secretary of
Homeland Security; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; and MATTHEW
T. ALBENCE, in his official capacity as Acting
Director of U.S. Immigration and Customs
Enforcement,

Defendants.

Civil Action No. 20-11311

**PLAINTIFF STATES' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR
A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

This Court should enter a temporary restraining order and preliminary injunction pursuant to Rule 65. Mindful of the extraordinarily short time period this Court has to consider the merits of preliminary relief due to the July 15, 2020 deadline set by the Defendants in their July 6, 2020 Directive, the Plaintiff States will not burden this Court with repetitive briefing and

hereby adopt and incorporate by reference the memorandum of law filed by Harvard College and the Massachusetts Institute of Technology in support of a temporary restraining order and preliminary injunction, No. 20-11283, ECF No. 5 (July 8, 2020) (“Harvard & MIT PI Mem.”). In short, the States are likely to succeed on the merits of their claims that the Directive was arbitrary and capricious, because it failed to offer a reason for its reversal of prior policy, *id.* at 13-15; failed to consider the substantial reliance interests of universities and foreign students and the harms this abrupt reversal will cause, *id.* at 9-13; failed to consider—or outright disregarded—the evidence that the COVID-19 emergency is continuing unabated, *id.* at 14; and required immediate compliance without affording schools and their students sufficient time to alter plans made in reliance on prior policy, *id.* at 10-11. Moreover, the Directive was adopted without proper procedure. *Id.* at 16-17. Schools and students across the country will suffer irreparable harms akin to those of Harvard College and MIT without the requested injunction, and the balance of harms as well as the public interest both powerfully favor granting the injunction. *Id.* at 17-20.

Plaintiff States respectfully submit this short further memorandum of law to (1) succinctly outline the manifest irreparable harms faced by the Plaintiff States that are set forth at greater length in the accompanying declarations, and (2) address why, in the particular circumstances of this case, it is appropriate for the Court to issue preliminary relief in the form of vacating the Directive in its entirety. Vacating the Directive in its entirety is essential to preserve uniformity in national immigration policy and accords with the remedies Congress itself has set forth to redress such violations in the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 705, 706(2). And only vacating the rule in its entirety would afford the States and District complete

interim relief from the irreparable harms they face, and avoid the confusion and uncertainty that would inevitably arise from a patchwork immigration regime.

I. Plaintiff States Will Suffer Irreparable Harm in the Absence of Preliminary Relief Vacating the Rule.

Plaintiff States agree that the requirement of showing an injury that “cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy” is readily satisfied in this case. Harvard & MIT PI Mem. 17 (quoting *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005)). In support of our own request for preliminary relief, and to further apprise the Court of the vast harms the Defendants’ arbitrary and capricious actions will cause across the country, Plaintiff States offer this summary of the irreparable harms we face, as described in greater detail in the attached declarations. In short, in directly regulating our public colleges and universities, the July 6 Directive will impose significant financial costs and administrative burdens, and will make it more difficult for them to ensure the safety of their students, faculty, staff, and the untold additional number of state residents with whom members of our school communities live and interact daily. The Directive will also hamper Plaintiff States’ ability to regulate schools’ response to the epidemic in our States and irreparably harm the public health and economy in our States, to which our more than 373,000 collective international students contributed more than \$14 billion in 2019.¹

Harm to Proprietary Interests

¹ Institute of International Education Data By State Fact Sheet, *available at* <https://www.iie.org/Research-and-Insights/Open-Doors/Fact-Sheets-and-Infographics/Data-by-State-Fact-Sheets> (collecting information on international exchange for each state in 2019).

The July 6 Directive directly regulates and imposes immense and irreparable costs and burdens on Plaintiff States’ public colleges and universities—costs and burdens ultimately borne by Plaintiff States.

Costs of increasing in-person instruction. To retain all international students despite the Directive, our colleges and universities would have to substantially reevaluate the carefully calibrated plans they have developed for the fall semester² and instead develop and implement new, complex, and costly accommodations to meet ICE’s requirements.³ Developing unanticipated fall 2020 plans that would expand the availability of in-person instruction poses enormous burdens on schools, including staffing, additional COVID-19 testing, personal protective equipment sourcing, classroom space, class size assignments and reorganization, and

² See, e.g., Exh. 26, U. Mass. Decl. ¶¶ 12-17 (detailing University of Massachusetts’ planning efforts, including, among other things, facilities, public safety, transportation, contact tracing, testing, special accommodations for essential research to be done in person, budgeting, graduated levels of remote learning based on each campus’s and each program’s circumstances, alternative academic calendar, commuting students with vulnerable family members, vulnerable faculty members); Exh. 1, Conn. Coll. & Univ. Decl. ¶¶ 9-13; Exh. 2, UConn. Decl. ¶¶ 11-15; Exh. 4, Chi. St. Univ. Decl. ¶¶ 18-23; Exh. 5, DePaul Decl. ¶¶ 14-16; Exh. 13, Sch. of Art Inst. of Chi. Decl. ¶ 11; Exh. 19, Univ. System of Maryland Decl. ¶ 13; Exh. 20, Ass’n of Indep. Colls. & Univs. in Mass. Decl. ¶ 6; Exh. 21, Boston Univ. ¶¶ 11-13; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶¶ 16-17; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 18; Exh. 25, Ne. Univ. Decl. ¶¶ 13-17; Exh. 27, Minn. State System Decl. ¶ 15; Exh. 31, Tufts Univ. Decl. ¶¶ 17-23.

³ See, e.g., Exh. 26, U. Mass. Decl. ¶ 22 (listing necessary “adjustments in transportation services, cleaning regimes, campus signage, public safety, and myriad other changes,” all “at a time when execution is made more difficult since all staff are working remotely”); *id.* ¶ 47 (“It is hard to overestimate how burdensome this will be at such a late date; curriculum is generally set by April of the prior academic year.”); Exh. 3, Yale Decl. ¶ 15; Exh. 9, Loyola Univ. Chi. Decl. ¶¶ 23-24; Exh. 21, Boston Univ. ¶ 14; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶¶ 16, 18; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 20; Exh. 25, Ne. Univ. Decl. ¶¶ 11, 18; Exh. 27, Minn. State System Decl. ¶¶ 18-19.

instructor assignments.⁴ All of this would occur in an economic environment where universities already “envisioned a catastrophic level of revenue loss” in their pandemic-adjusted budgeting that is now unexpectedly “compounded by the potential loss of our international students.”⁵

Costs of losing international students. If schools do not alter plans to limit in-person instruction, they risk losing significant numbers of international students. Students may well transfer or disenroll from school because of their inability to obtain a visa and live in the United States based on their schools’ online instruction plans or the students’ intended fall 2020 course load.⁶ These students would no longer pay tuition and housing, dining, and other fees at a time when colleges and universities are already faced with severe financial hardship.⁷ This is a

⁴ See, e.g., Exh. 26, U. Mass. Decl. ¶¶ 19-21 (describing “massive reorganization of our teaching schedules and personnel, registration of students and changes in their programs, and an entirely new operational scheme intended to re-introduce a minimum of 7,200 students back to the physical campus” and reallocation of “thousands of hours of manpower” that would be required); *id.* ¶ 22 (further noting that “[s]upporting hybrid learning above and beyond what we have already planned, in order to implement this new scheme, will generate utility costs at least in the tens of thousands of dollars because our campuses will have to reopen buildings that have been shuttered since March”); Exh. 2, UConn Decl. ¶¶ 23-27; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶¶ 13-14, 20; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 17; Exh. 27, Minn. State System Decl. ¶ 16; Exh. 38, Walensky Decl. ¶¶ 16-23 (describing the COVID-19 testing and other requirements that must be in place before university campuses can safely allow in-person congregation).

⁵ Exh. 26, U. Mass. Decl. ¶¶ 13, 45. See also, e.g., Exh. 1, Conn. St. Coll. & Univ. Decl. ¶ 19 (COVID-related shortfall of \$30 million); Exh. 2, UConn Decl. ¶ 28 (\$134 million shortfall); Exh. 10, Northeastern St. Univ. (Illinois) Decl. ¶ 11; Exh. 19, Univ. System of Maryland Decl. ¶ 11 (\$200 million shortfall); Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 12; Exh. 27, Minn. State System Decl. ¶ 19; Exh. 31, Tufts Univ. Decl. ¶ 13.

⁶ Exh. 26, U. Mass. Decl. ¶¶ 30, 33 (outlining scenarios that may lead to losing students). See also, e.g., Exh. 6, E. Ill. Univ. Decl. ¶¶ 11-13; Exh. 14, S. Ill. Univ. Carbondale Decl. ¶¶ 11-14; Exh. 21, Boston Univ. ¶ 15; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶¶ 10-12, 14; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 13; Exh. 27, Minn. State System Decl. ¶ 11; Exh. 31, Tufts Univ. Decl. ¶¶ 11, 24; Exh. 39, Univ. of Dist. Columb. ¶ 6.

⁷ See Exh. 26, U. Mass. Decl. ¶¶ 45, 46. See also, e.g., Exh. 6, E. Ill. Univ. Decl. ¶¶ 12-13; Exh. 17, Univ. of Ill. System Decl. ¶ 16; Exh. 20, Ass’n of Indep. Colls. & Univs. in Mass. Decl. ¶ 10;

particularly acute loss because international students often pay higher out-of-state tuition rates, which enhances public universities' ability to serve lower-income in-state students by reducing the amount of tuition they are required to pay.⁸ Even where it is feasible for students to depart to their home countries to pursue online studies, our colleges and universities will still unexpectedly lose housing, dining, and other fees paid by these students; the students' in-person participation in research and other on-campus activities that are not formally part of their course of study; and the students' unique in-person contributions to the fabric of college and university life. And whether students leave the country to study remotely or disenroll altogether, both the schools and the students will likely lose the financial and other benefits of their ability to work as employees on our campuses.⁹

Costs to our institutions' educational missions. The July 6 Directive will also cause multifaceted harm to schools' academic, extracurricular, and cultural communities and their overall missions—both as a result of diminishment of international student enrollment, and also with respect to students who remain enrolled but are forced to move abroad. International

Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶¶ 14-16; Exh. 27, Minn. State System Decl. ¶¶ 13, 14; Exh. 30, Rutgers Decl. ¶ 14; Exh. 31, Tufts Univ. Decl. ¶ 12; Exh. 32, Univ. of Wisc.-Stevens Point Decl. ¶ 10.

⁸ See Exh. 26, U. Mass. Decl. ¶ 44; Exh. 2, UConn Decl. ¶ 29; Exh. 6, E. Ill. Univ. Decl. ¶ 13; Exh. 7, Governors St. Univ. Decl. ¶¶ 12-13; Exh. 15, S. Ill. Univ. Edwardsville Decl. ¶ 14; Exh. 17, Univ. of Ill. System Decl. ¶ 17; Exh. 23, Mass. Ass'n of Cmty. Colls. Decl. ¶ 28; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 12; Exh. 27, Minn. State System Decl. ¶ 14; Exh. 33, Univ. of Wisc.-Stout Decl. ¶ 8.

⁹ See Exh. 26, U. Mass. Decl. ¶ 5 (noting, for example, that at the University of Massachusetts Medical School, 30% of its Biomedical Sciences Ph.D. students international students, who are "active contributors to the research labs on the forefront of solving the COVID-19 crisis, not to mention the thousands of other bio-medical problems to which they apply their talents"). See also, e.g., *id.* ¶ 50; Exh. 15, S. Ill. Univ. Edwardsville Decl. ¶¶ 16, 23; Exh. 25, Ne. Univ. Decl. ¶ 22; Exh. 30, Rutgers Decl. ¶ 18.

students bring rich and diverse viewpoints, interests, and skillsets, which they share in classrooms, research projects, on-campus jobs, clubs, and other extracurricular activities, as well as in everyday social interactions with other students, faculty, and staff. If they are forced to disenroll or leave campus because of the July 6 Directive, schools and other students will lose contributions of many kinds from them.¹⁰

Administrative costs. Our colleges and universities will also be forced to expend time and resources to make individualized determinations to certify students with F-1 and M-1 visas and re-issue I-20s for each student.¹¹ The July 6 Directive requires institutions adopting a hybrid model to certify by August 4, 2020, as to each F-1 and M-1 visa holder, that the student is not taking an entirely online course load and that the student is taking the minimum number of online classes required to make normal progress in their degree program. For many institutions, making such certifications for every single student may not even be possible to achieve by the August 4 deadline.¹² These certifications require not only a determination of the particular forms

¹⁰ See, e.g., Exh. 26, U. Mass. Decl. ¶¶ 35-39 (elaborating on harms, including from loss of diversity; reduced learning in experimental fields; and teaching, instructional, and research support provided by international students); Exh. 8, Ill. St. Univ. Decl. ¶ 29; Exh. 11, N. Ill. Univ. Decl. ¶ 10; Exh. 13, Sch. of Art Inst. of Chi. Decl. ¶ 12; Exh. 16, Univ. of Chi. Decl. ¶ 9; Exh. 20, Ass'n of Indep. Colls. & Univs. in Mass. Decl. ¶ 10; Exh. 21, Boston Univ. ¶ 15; Exh. 23, Mass. Ass'n of Cmty. Colls. Decl. ¶ 23; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 22; Exh. 25, Ne. Univ. Decl. ¶ 22; Exh. 27, Minn. State System Decl. ¶ 12; Exh. 28, New Mexico Inst. of Mining Decl. ¶ 10; Exh. 39, Univ. of Dist. Columb. ¶ 15.

¹¹ See Exh. 26, U. Mass. Decl. ¶¶ 23-26 (describing challenges of this process, particularly amidst pandemic). See also, e.g., Exh. 4, Chi. St. Univ. Decl. ¶¶ 25-27; Exh. 21, Boston Univ. ¶ 14; Exh. 23, Mass. Ass'n of Cmty. Colls. Decl. ¶¶ 19-20; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 20; Exh. 25, Ne. Univ. Decl. ¶ 18; Exh. 27, Minn. State System Decl. ¶¶ 18-19; Exh. 28, New Mexico Inst. of Mining Decl. ¶ 11; Exh. 31, Tufts Univ. Decl. ¶ 25; Exh. 32, Univ. of Wisc.-Stevens Point Decl. ¶ 14-15.

¹² See, e.g., Exh. 26, U. Mass. Decl. ¶ 20 (noting that determining which new on-campus courses to create for all international students “in thousands of individualized programs,” and who needs

of instruction offered by the schools in which each student is enrolled, but also a determination of each individual student’s course load and the format in which such courses will be taught—the latter of which may not be information readily available to the school administration.¹³ In some cases, instructors may be given the option to include in-person components, and those decisions may not yet have been made.¹⁴ In other cases, students will not have registered for their courses before SEVP’s certification deadline, putting schools in the impossible position of having to certify students before they determine their courses.¹⁵ And again, all of this would have to occur amidst the pandemic, when many employees are working remotely, and some are furloughed.¹⁶

Harm to Sovereign Interests

The July 6 Directive will irreparably harm the Plaintiff States’ sovereign interest in regulating their public colleges and universities to ensure public health and safety amidst the pandemic. Plaintiff States have issued guidance and mandates governing the reopening of colleges and universities.¹⁷ These include, for example, Massachusetts’ requirements that

those courses, is “perhaps not possible for all students”); Exh. 8, Ill. St. Univ. Decl. ¶¶ 26-27; Exh. 12, Northwestern Decl. ¶ 11; Exh. 21, Boston Univ. ¶ 14; Exh. 25, Ne. Univ. Decl. ¶ 18; Exh. 27, Minn. State System Decl. ¶ 19; Exh. 34, Univ. of Wisc-Milwaukee Decl. ¶ 13.

¹³ See, e.g., Exh. 26, U. Mass. Decl. ¶ 23; Exh. 14, S. Ill. Univ. Carbondale Decl. ¶ 24; Exh. 15, S. Ill. Univ. Edwardsville Decl. ¶ 22; Exh. 36, Univ. of Vt. Decl. ¶ 13.

¹⁴ See, e.g., Exh. 26, U. Mass. Decl. ¶ 23; Exh. 15, S. Ill. Univ. Edwardsville Decl. ¶ 24.

¹⁵ See, e.g., Exh. 26, U. Mass. Decl. ¶ 23; Exh. 7, Governors St. Univ. Decl. ¶ 17.

¹⁶ See, e.g., Exh. 26, U. Mass. Decl. ¶ 25; Exh. 8, Ill. St. Univ. Decl. ¶¶ 26-27; Exh. 27, Minn. State System Decl. ¶ 19.

¹⁷ See, e.g., <https://www.mass.gov/info-details/reopening-mandatory-safety-standards-for-workplaces#overview->; Exh. 2, UConn Decl. ¶ 11 (noting Gov. Lamont’s “Reopening Task

institutions of higher education develop a written control plan outlining how each of their campuses will comply with the workplace safety mandates, including rules relating to social distancing, hygiene protocols, and cleaning and disinfecting.¹⁸ The July 6 Directive interferes with implementation of such state guidance and mandates, because it has the effect of coercing schools to consider greater use of in-person instruction, lest they lose their international students.

The July 6 Directive also threatens to reduce Plaintiff States' flexibility in responding to changing conditions over the course of the pandemic. If pandemic conditions worsen, warranting further reduction or elimination of in-person instruction at schools not yet entirely online, the July 6 Directive will serve as a deterrent to making necessary changes as rapidly as possible and will impose additional costs—human, administrative, and pecuniary—in doing so.¹⁹ Coercing schools into holding more in-person classes in the fall²⁰—regardless of the schools' assessment of the health and safety risks of doing so—harms the Plaintiff States' ability to regulate their institutions and protect the public.

Harm to Quasi-Sovereign Interests

Force”); Exh. 17, Univ. of Ill. System Decl. ¶ 7 (noting Gov. Pritzker’s “Restore Illinois” plan); Exh. 27, Minn. State System Decl. ¶ 15.

¹⁸ <https://www.mass.gov/doc/higher-education-covid-19-control-plan-template/download>.

¹⁹ See, e.g., Exh. 26, U. Mass. Decl. ¶ 29 (noting that, if cases should rise in Massachusetts, UMass would “have to be able to disband the campuses and send students away into a fully remote modality,” and that, without exemptions, “then our University and our students would face the same uncertainty and damage they do now, again and on a massive scale”); Exh. 2, UConn Decl. ¶ 25; Exh. 5, DePaul Decl. ¶ 18; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶¶ 20-21; Exh. 30, Rutgers Decl. ¶ 21.

²⁰ In public statements, the Administration has expressly acknowledged the pressure the July 6 Directive places on schools to reopen. See, e.g., Interview with Acting Deputy Secretary of Homeland Security Kenneth T. Cuccinelli, CNN (July 7, 2020), <https://twitter.com/CNNPolitics/status/1280576267360886784> (directive would “encourage schools to reopen”); Donald J. Trump, Twitter, July 6, 2020 (“SCHOOLS MUST OPEN IN THE FALL!!!”), <https://twitter.com/realDonaldTrump/status/1280209946085339136>.

The July 6 Directive also threatens irreparable injury to the Plaintiff States’ interests in the health and well-being, both physical and economic, of our residents. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 607 (1982) (“[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”).

Health. The July 6 Directive gravely undermines our States’ interest in preserving the health of our residents against the scourge of COVID-19. To avoid the loss of their international students, schools may be compelled to expand in-person classroom instruction beyond that which will best prevent and mitigate the spread of the disease, thus increasing the risk of infection to students, faculty, and staff; to the members of their households; and to the communities in which they live.²¹

Economic welfare. For reasons closely tied to, but going beyond, the proprietary reasons described above, the July 6 Directive also threatens the economic welfare of our residents by preventing thousands of international students, and discouraging many others, from coming to and residing in our States to attend both public and private institutions of higher education, amidst what is rapidly becoming not only a national health crisis but also an economic crisis in

²¹ Exh. 38, Walensky Decl. ¶¶ 24-26. *See also, e.g.*, Exh. 26, U. Mass. Decl. ¶ 28 (“Supporting hybrid learning above and beyond what we have already planned will also increase the level of health risk on our campus, as a result of welcoming more students, faculty and staff back to campus. The potential costs of this increased risk are incalculable.”); Exh. 21, Boston Univ. ¶ 13 (explaining that the flexibility of the “Learn *from* Anywhere” plan, which allows the school to present “the same academic content to students, whether they are in a classroom, a BU dormitory, or another location,” is “in the best interest of the public health of the City of Boston and surrounding communities”); Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶¶ 24-25; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶¶ 23-24; Exh. 35, Columbia Coll. - Chi. Decl. ¶ 22.

many parts of the country.²² The students themselves would bear tremendous costs of many kinds if forced to relocate.²³ But these students also contribute in excess of \$14 billion to Plaintiff States' economies.²⁴ Students who work on campus and those with CPT and OPT visas—opportunities made available to them because of their F-1 or M-1 status, and at risk if students are forced to leave or cannot enter the country—contribute to our state economies by the thousands through their employment in fields such as science, technology, biotechnology, healthcare, business and finance, and education.²⁵ And, of course, international students also rent apartments and houses from local landlords; purchase food from grocery stores and restaurants; frequent our retail stores; and make entertainment and leisure purchases. During the 2018-2019 academic year, international students studying at U.S. colleges and universities contributed \$41

²² See, e.g., Exh. 26, U. Mass. Decl. ¶ 52 (highlighting area in western Massachusetts home to 7,800 international students who contribute \$289 million to the local economy and support nearly 3,700 jobs; “[a] precipitous loss of international students would be very damaging to Western Massachusetts at a time of severe economic disruption caused by the pandemic”); Exh. 22, Grtr. Boston Chamb. of Comm. ¶ 5 (citing international students’ annual contributions of \$3.2 billion to the Massachusetts economy); Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶ 29; Exh. 29, Oregon High. Ed. Coordinating Comm. Decl. ¶ 14 (noting that “the proposed ICE rule change will directly lead to loss of over 2,800 living-wage jobs” in Oregon).

²³ See, e.g., Exh. 26, U. Mass. Decl. ¶ 43 (estimating costs of students unable to continue study as the result of the July 6 Directive); Exh. 18, W. Ill. Univ. Decl. ¶ 29; Exh. 20, Ass’n of Indep. Colls. & Univs. in Mass. Decl. ¶ 9; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶ 26; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 25; Exh. 25, Ne. Univ. Decl. ¶¶ 20-21.

²⁴ Exh. 17, Univ. of Ill. System Decl. ¶ 16 (noting expected financial hit to Illinois economy if rule goes into effect); Exh. 37, Univ. of Wisc.-Madison Decl. ¶ 13 (noting financial benefits of international students to Wisconsin).

²⁵ Exh. 26, U. Mass. Decl. ¶ 42 (noting that the annualized full-time salary that is given up by international students who are participating in an OPT program would most likely total over \$77 million”); Exh. 18, W. Ill. Univ. Decl. ¶ 30; Exh. 21, Boston Univ. ¶ 6; Exh. 22, Grtr. Boston Chamb. of Comm. ¶ 7; Exh. 23, Mass. Ass’n of Cmty. Colls. Decl. ¶ 27; Exh. 24, Mass. State Univs. Council of Presidents Decl. ¶ 26; Exh. 30, Rutgers Decl. ¶¶ 31-33.

billion and supported 458,290 jobs in the U.S. economy.²⁶ In Massachusetts alone, the 2019 economic impact of what was then approximately 71,000 international students was estimated as \$3.2 billion.²⁷ A loss of international students would damage local economies at a time of already severe economic disruption caused by the pandemic.

II. Vacating the Directive in Its Entirety Is the Appropriate Remedy.

A. Vacating Invalid Agency Action in Its Entirety Is Both Appropriate to the Legal Violation and Necessary to Preserve National Uniformity in Immigration Policy.

The July 6 Directive should be vacated in its entirety because this relief is both appropriate to the nature of the legal violation and vital to preserve uniformity in national immigration policy.

“[N]ationwide injunctions are especially appropriate in the immigration context” because of the need for a uniform national immigration policy. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *vacated on other grounds and remanded sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff’d by equally divided Court*, 136 S. Ct. 2271, 2272 (2016). As the Fifth Circuit has observed, the Constitution requires “an uniform Rule of Naturalization,” *id.* (quoting U.S. Const. art. I, § 8, cl. 4), and Congress has instructed that our immigration laws be enforced “uniformly,” *id.* (quoting Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384). The Supreme Court too has described immigration policy as “a comprehensive and unified system.” *Arizona v. United States*, 567 U.S. 387, 401-02 (2012).

²⁶ NAFSA Economic Value Statistics, *available at* <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2>.

²⁷ *Id.*

Thus, in the immigration context, courts have refused to geographically limit the scope of injunctive relief, where to do so would result in “fragmented immigration policy [that] would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.” *Hawaii v. Trump*, 859 F.3d 741, 787 (9th Cir.) (per curiam), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Washington v. Trump*, 847 F.3d 1151, 1166-67 (per curiam), *reh’g en banc and vacatur denied*, 858 F.3d 1168 (9th Cir. 2017). And courts have recognized the need for nationally uniform preliminary relief in challenges to nationwide immigration policies. *See, e.g., Hawaii*, 859 F.3d at 787 (injunction prohibiting enforcement of executive travel ban); *Washington*, 847 F.3d at 1166-67 (same); *Int’l Refugee Assistance Project*, 857 F.3d at 605 (same); *Texas*, 809 F.3d at 187-88 (preliminary injunction prohibiting implementation of DAPA program).

Vacating the July 6 Directive in its entirety also accords with Congress’s approval of such relief to redress unlawful agency actions, as reflected in the APA, 5 U.S.C. §§ 705, 706(2). Congress expressly authorized district courts to hold agency actions unlawful in their entirety and to prohibit all enforcement or implementation of an agency action. The APA empowers federal courts, prior to review of the lawfulness of a regulation on the merits, to “postpone the effective date of an agency action” pending conclusion of the proceedings, if “necessary to prevent irreparable injury.” 5 U.S.C. § 705. Such relief inherently covers all applications of the challenged regulation, not only the application of the regulation to the plaintiffs. The APA also establishes that, upon reaching the merits, federal courts can “set aside” unlawful rules in their entirety, not only as applied to the plaintiffs. 5 U.S.C. § 706(2). Accordingly, it has long been held that “when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is

proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)); accord *Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) (“A common remedy when we find a rule is invalid is to vacate.”).

Further, vacating the July 6 Directive in its entirety is particularly appropriate in the circumstances of this case because it revolves around an issue of law that is “not fact-dependent and will not vary from one locality to another.” *City of Chicago v. Sessions*, 888 F.3d 272, 290-91 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacating reh’g decision as moot*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). The arbitrariness and capriciousness of the Directive and its patent disregard for matters of both substance and procedure does not vary across our country. And, notwithstanding the diverse circumstances among the seventeen Plaintiff States and the District of Columbia and our many institutions of higher education, the Directive will impose grievous harms on us all as a result of its unexplained and abrupt change of policy; disregard of the continuing national emergency caused by the pandemic; unexplained casting aside of the reliance schools and students across the country placed on the Defendants’ prior accommodation “for the duration of the emergency”; and complete lack of any substantive consideration of or procedural concessions to the States’ and schools’ need for time to plan and implement measures to protect the health and safety of our communities in this crisis. It cannot stand.

B. Only Vacating the Rule in its Entirety Will Provide Complete Relief to the Plaintiff States and Avoid the Chaos and Uncertainty of a Patchwork of Immigration Regimes.

In the circumstances of this case, following the ordinary rule that unlawful agency rules should be vacated in their entirety is appropriate not only because of the nature of the legal

violation—an abrupt change to our immigration laws that the Constitution and Congress have decreed should be applied uniformly across the country—but also, relatedly, because such preliminary relief is necessary to afford complete relief for the Plaintiffs. In the absence of such relief, confusion and risk of error would result from a patchwork of different immigration regimes across the country, harming the Plaintiff States and their colleges and universities.

Vacating unlawful agency action in its entirety is particularly warranted in challenges to policies that cross state lines, like immigration policies. As the Ninth Circuit recognized when it affirmed such relief in the travel ban litigation, “even if limiting the geographic scope of the injunction would be desirable, the Government ha[d] not proposed a workable alternative form of the TRO that accounts for the nation’s multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States’ borders.” *Washington*, 847 F.3d at 1167; *accord Hawaii*, 859 F.3d at 788. *See also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1093 (2018) (discussing need for nationwide relief in cases involving issues that cross state lines, including immigration, clean air and water, tainted food, and defective products); *see also, e.g., In re E.P.A.*, 803 F.3d 804, 808 (6th Cir. 2015) (nationwide injunction of Clean Water Act regulation previously enjoined in only 13 states was appropriate, “consistent with Congress’s stated purpose of establishing a national policy,” to “restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime”), *abrogated on other grounds by Nat’l Ass’n of Manuf. v. Dep’t of Defense*, 138 S. Ct. 617 (2018).

These principles resound in the circumstances of this case, where enjoining the July 6 Directive in its entirety is necessary to give complete relief to Plaintiff States for at least three practical reasons. First, the Directive has thrown colleges and universities across the country into

confusion—and our students and prospective students as well. As outlined above, one of the harms to the Plaintiff States and their schools is that many of our more than 373,000 international students may never return to our schools if they are forced to leave the country now or denied entry for the fall semester. If the Court were to issue only a partial injunction, leaving the July 6 Directive in place in many states and rendering our nation’s immigration law non-uniform, the state of confusion created by Defendants will continue unabated for many of these students—and so too will harms to Plaintiff States. For example: If students fly into ports of entry in states not covered by the injunction on their way to schools in the Plaintiff States, would the students be admitted into the country? And would they be permitted to pursue CPT or OPT in a state not covered by the preliminary injunction? For prospective students, if they were to consider coming to the United States, should they apply only to schools in a state covered by the injunction, or more broadly? In the absence of complete relief, students will be deterred from choosing to come anywhere in the United States to study—with all the attendant harms to our States and schools described above. *See, e.g.*, Exh. 26, U. Mass. Decl. ¶¶ 32-33 (noting that “uncertainty, unevenness and imprecision in the application of immigration laws have a deterrent effect on students’ decisions to come to the United States for higher education”).²⁸

²⁸ *See also* Exh. 26, U. Mass. Decl. ¶ 32 (“The ability of the University’s vast and complex research programs to maintain the excellence for which they are known depend on the ability to attract and recruit top-tier international talent. In many domains, other countries (including Canada, Australia, China and the countries of the European Union) are simultaneously looking to attract the same people. If international students come to believe that their lives with us will be insecure, their ability to realize their investments in higher education unclear, it will not be long before they seek other places to develop their innovations.”); Exh. 27, Minn. State System Decl. ¶¶ 11, 19.

Second and relatedly, a patchwork of relief would create hardships for some students and their families that would ultimately have the effect of causing Plaintiff States to lose enrollment and lose out on competitive candidates in the future. For instance, if a graduate student studies in Massachusetts, but her spouse is a student in a neighboring state in which the July 6 Directive applies and cannot obtain an F-1 visa under the July 6 Directive, their family will be separated unless the student in Massachusetts disenrolls and leaves the country. *See* Exh. 26, U. Mass. Decl. ¶ 33.

Third and finally, if relief is not nationwide, the Plaintiff States will lose out on the rich diversity and special skills that international students bring to our country when they stay to work in the United States. A student who cannot continue her course of studies in a state where no preliminary relief is in effect also cannot contribute to the workforce our States, because the avenue for CPT or OPT work authorization would be foreclosed for a student who loses her F-1 visa. *See* 8 C.F.R. § 214.2(f)(10).

“[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Here, the only fair and workable preliminary injunction that provides the Plaintiff States with complete relief is to vacate the July 6 Directive in its entirety.

CONCLUSION

For the foregoing reasons, the Court should issue a temporary restraining order and preliminary injunction enjoining the Defendants from implementing the July 6 directive.

Respectfully submitted,

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**Pro hac vice motions will be forthcoming.*

CERTIFICATE OF SERVICE

I, Abigail B. Taylor, counsel for Plaintiffs, hereby certify that this document has been filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). On July 13, 2020, this document was delivered by hand and by email to:

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