

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
BOSTON DIVISION**

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE and
MASSACHUSETTS INSTITUTE OF
TECHNOLOGY,

Plaintiffs,

v.

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

Defendants.

Case No. 1:20-cv-11283-ADB

Leave to file granted July 13, 2020

**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND
70 OTHER HIGHER EDUCATION ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

Stephanie J. Gold
Susan M. Cook
Jessica L. Ellsworth
Kyle M. Druding
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5496
stephanie.gold@hoganlovells.com

Gregory F. Noonan (BBO# 651035)
HOGAN LOVELLS US LLP
125 High Street, Ste. 2010
Boston, MA 02110
(617) 371-1029
gregory.noonan@hoganlovells.com

Counsel for Amici Curiae

Dated: July 13, 2020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST.....	1
ARGUMENT.....	4
I. The Directive Ignores The Critical Contributions Of International Students	6
II. The Directive Fails To Consider The Unique, Institution-specific Challenges Facing American Colleges And Universities	12
CONCLUSION.....	15
ADDENDUM	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>Arizona v. United States</i> , 567 U.S. 387 (2012)	4
<i>Dep’t of Homeland Sec. v. Regents of Univ. of California</i> , 140 S. Ct. 1891 (2020)	6, 15
<i>Fisher v. Univ. of Texas at Austin</i> , 570 U.S. 297 (2013)	7
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	7
<i>Regents of Univ. of California v. Bakke</i> , 438 U.S. 265 (1978)	8
STATUTE:	
5 U.S.C. § 706(2)(A).....	6
EXECUTIVE MATERIAL:	
Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020)	14
OTHER AUTHORITIES:	
Stephanie Adeline <i>et al.</i> , <i>Tracking The Pandemic: Are Coronavirus Cases Rising Or Falling In Your State?</i> , WAMU Am. Univ. Radio (July 9, 2020), https://bit.ly/2BYaKfc	14
ACE, <i>Statement by ACE President Ted Mitchell on ICE Guidance on International Students</i> (July 6, 2020), https://bit.ly/3ef9zVM	7
Stuart Anderson, <i>Immigrants and Billion-Dollar Companies</i> , Nat’l Found. for Am. Policy (Oct. 2018), https://bit.ly/320LkbJ	9–10
Stuart Anderson, <i>Immigrant Nobel Prize Winners Keep Leading the Way for America</i> , Forbes (Oct. 14, 2019), https://bit.ly/2ZeUFe5	10

TABLE OF AUTHORITIES—Continued

	Page(s)
Kim Bellware <i>et al.</i> , <i>Coronavirus death toll in U.S. increases as hospitals in hot-spot states are overwhelmed</i> , Wash. Post (July 10, 2020), https://wapo.st/2W1VmW1	14
<i>Coronavirus Disease 2019 (COVID-19): Cases in the U.S.</i> , Ctrs. for Disease Control and Prevention (July 8, 2020), https://bit.ly/3iMOvcL	4
<i>Coronavirus in the U.S.: Latest Map and Case Count</i> , N.Y. Times (July 8, 2020), https://nyti.ms/2ChArHG	4
Jacquelyn Elias, <i>A New Policy Would Upend International Enrollments. Here Are Which Colleges Could Be Most Affected</i> , Chronicle of Higher Educ. (July 8, 2020), https://bit.ly/38K7OPn	11
Entangled Solutions, <i>COVID-19: Higher Education Resource Center</i> , https://bit.ly/2zafDAn (last visited July 13, 2020)	12
Adriana Gomez Licon & Lisa Marie Pane, <i>Hospitals in Florida, Texas and Arizona Are Almost at Capacity as Coronavirus Cases Surge</i> , Time (July 6, 2020), https://bit.ly/2AGgHwM	13–14
ICE, Broadcast Message No. 2003-01, <i>Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M nonimmigrant students</i> (Mar. 9, 2020), https://bit.ly/321UmF5	5
ICE, Broadcast Message No. 2007-01, <i>COVID-19 and Fall 2020</i> (July 6, 2020), https://bit.ly/38FT0Bx	5
ICE Student and Exchange Visitor Program, <i>COVID-19: Guidance for SEVP Stakeholders</i> (Mar. 13, 2020), https://bit.ly/3gLOAeT	4–5
Letter from Ted Mitchell, President, ACE, to Mike Pompeo, Secretary, U.S. Dep’t of State (Mar. 16, 2020), https://bit.ly/2ZOv0YK	15
Letter from Ted Mitchell, President, ACE, to Mitch McConnell, Majority Leader, U.S. Senate (Apr. 9, 2020), https://bit.ly/31XDek5	10
<i>International Student Economic Value Tool</i> , NAFSA: Ass’n of Int’l Educators, https://bit.ly/2W3cXNs (last visited July 13, 2020)	9
NAFSA, <i>Losing Talent 2020: An Economic and Foreign Policy Risk America Can’t Ignore</i> (Mar. 2020), https://bit.ly/31Zpgy0	9, 12
Nat’l Coll. Athletic Assoc., <i>NCAA Demographics Database: Demographics by Race/Ethnicity</i> , https://bit.ly/2AKjkO9 (last visited July 13, 2020)	8

TABLE OF AUTHORITIES—Continued

	Page(s)
News Release, New York University, <i>Statement from NYU President Andrew Hamilton on New ICE Policy Regarding International Students</i> (July 7, 2020), https://bit.ly/2ZV9l0S	7
Open Doors, <i>2019 Fast Facts: International Students in the United States</i> , Institute of Intl. Educ., https://bit.ly/2BTx0qH (last visited July 13, 2020)	10
Christina Paxson, Opinion, <i>College Campuses Must Reopen in the Fall. Here’s How We Do It.</i> , N.Y. Times (Apr. 26, 2020), https://nyti.ms/2WlEVS�	13
Press Release, U.S. Chamber of Commerce, <i>U.S. Chamber’s Donohue on ICE’s International Student Policy</i> (July 9, 2020), https://bit.ly/328Sx9q	7–8
Elizabeth Redden, <i>A Bleak Picture for International Education</i> , Inside Higher Ed (May 26, 2020), https://bit.ly/3iFVvZ7	10–11
U.S. Dep’t of the Treasury & Dep’t of Educ., <i>The Economics of Higher Education</i> (Dec. 2012), https://bit.ly/2OcX1Us	10
U.S. State Dep’t, FY2019 Report of the Visa Office (2020), https://bit.ly/38NVaPp	12

STATEMENT OF INTEREST

Amici are 71 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States.¹ More than a million students from around the globe attend the institutions represented by *amici*—public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions—alongside the many millions of U.S. students, in undergraduate, graduate, and professional degree programs. In this COVID-challenged moment in history, American higher education has a responsibility to all its students, to this nation, and to the world to ensure that its students on F-1 and M-1 nonimmigrant visas are minimally inhibited from participating in the educational experiences being offered this fall and beyond.

The government has declared that the price for such continued participation is a return to in-person learning, regardless of a university's geographic location or circumstances and regardless of the potential consequences for public health and safety during an evolving and uncertain global pandemic. As Plaintiffs have shown, such reckless and baseless government action does not comport with the tenets of administrative law.

Amicus curiae the American Council on Education (ACE) represents all higher education sectors, with more than 1,700 members reflecting the breadth and contributions of our nation's degree-granting colleges and universities. The following organizations join this brief:

- The Accreditation Council for Pharmacy Education;
- Accrediting Commission for Community and Junior Colleges;
- American Association of Colleges of Nursing;
- American Association of Colleges of Pharmacy;
- American Association of Collegiate Registrars and Admissions Officers;
- American Association of Community Colleges;

¹ No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief, and no party opposes its filing.

- American Association of State Colleges and Universities;
- American Association of University Professors;
- American Dental Education Association;
- American Indian Higher Education Consortium;
- American Speech-Language-Hearing Association;
- APPA: Leadership in Educational Facilities;
- Association of American Colleges and Universities;
- Association of American Law Schools;
- Association of American Medical Colleges;
- Association of American Veterinary Medical Colleges;
- Association of American Universities;
- Association of Catholic Colleges and Universities;
- Association of Chiropractic Colleges;
- Association of Governing Boards of Universities and Colleges;
- Association of Independent California Colleges and Universities;
- Association of Independent Colleges of Art & Design;
- Association of Independent Colleges and Universities in Massachusetts;
- Association of Independent Colleges and Universities of Pennsylvania;
- Association of Independent Colleges and Universities of Rhode Island;
- Association of Jesuit Colleges and Universities;
- Association of Public and Land-grant Universities;
- Association of Research Libraries;
- Association of Schools and Programs of Public Health;
- The College Board;
- College and University Professional Association for Human Resources;
- Commission on Independent Colleges and Universities in New York;
- The Common Application;
- Connecticut Conference of Independent Colleges;
- Council for Advancement and Support of Education;
- Council for Christian Colleges & Universities;
- Council for Higher Education Accreditation;
- Council of Graduate Schools;
- Council of Independent Colleges;
- Council on Governmental Relations;
- Educational Testing Service;
- EDUCAUSE;
- Federation of Independent Illinois Colleges and Universities;
- Higher Learning Commission;
- Independent Colleges of Indiana, Inc.;
- Independent Colleges of Texas;
- Independent Colleges of Washington;
- Institute of International Education;
- Law School Admission Council;
- Louisiana Association of Independent Colleges and Universities;

- Middle States Commission on Higher Education;
- Minnesota Private College Council;
- NAFSA: Association for International Educators;
- NASPA - Student Affairs Administrators in Higher Education;
- National Association for College Admission Counseling;
- National Association of College and University Business Officers;
- National Association of Diversity Officers in Higher Education;
- National Association of Independent Colleges and Universities;
- National Association of Student Financial Aid Administrators;
- National Collegiate Athletic Association;
- National Council of University Research Administrators;
- New England Commission of Higher Education;
- North Carolina Independent Colleges and Universities, Inc.;
- Northwest Commission on Colleges and Universities;
- Oregon Alliance of Independent Colleges & Universities;
- Phi Beta Kappa;
- Southern Association of Colleges and Schools Commission on Colleges;
- State Higher Education Executive Officers Association;
- University Risk Management and Insurance Association; and
- WASC Senior College and University Commission.²

Amici are deeply concerned that the Department of Homeland Security's (DHS's) July 6, 2020 Student Exchange Visitor Program guidance (the Directive) will inject chaos into higher education operations. It reverses course on a policy announced by DHS in March, and it does so arbitrarily, without adequate explanation, and without sufficient notice to affected institutions and students. If left unchecked, DHS's departure from established administrative-law norms will severely harm colleges, universities, and current and future international students alike, as well as all of us who benefit from their contributions to our society. It also will diminish the global standing and reputation of the United States as the leader in international education.

We are weeks away from the start of the fall semester. Our nation's 4,200 higher education institutions and over 25 million of their students have been directly affected by the pandemic. Colleges and universities are making critical decisions in the face of a resurgent

² The Addendum to this brief explains how to find more information about each one.

coronavirus: The U.S. tally to date is over 3,000,000 cases and 135,000 deaths, with an unprecedented 65,000 new daily cases.³ Having scrambled since March to deal with the fallout of the pandemic, higher education institutions now face additional chaos due to the Directive—including a 9-day ultimatum (currently 60 hours away) to confirm whether in-person classes will be held (or not). To say that the Directive is arbitrary and capricious would be an understatement. Given the immediate, irreparable, and far-reaching harms it will cause without so much as a hint of countervailing benefit, the agency’s unexplained change in position is all the more inexplicable. This Court should grant preliminary injunctive relief now.

ARGUMENT

America’s colleges and universities are among the finest in the world. They help preserve our democratic values, ensure the country’s economic strength, and contribute to our nation’s influence and global standing. A central reason for the excellence of our postsecondary institutions is their ability to attract and enroll talented, motivated, and curious students, whether born in this country or abroad. Without doubt, “the history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.” *Arizona v. United States*, 567 U.S. 387, 416 (2012). That preeminence is now being threatened by an ill-conceived and seemingly little-thought-through policy reversal about how to treat international students during the COVID-19 global pandemic. Back in March, DHS and U.S. Immigration and Customs Enforcement (ICE) issued guidance “concerning the COVID-19 situation” that expressly stated would be “in effect for the duration of the emergency.” ICE Student and Exchange Visitor Program, *COVID-19: Guidance for SEVP Stakeholders* 1–2 (Mar.

³ See *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, Ctrs. for Disease Control and Prevention (July 8, 2020), <https://bit.ly/3iMOvcL>; *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (July 8, 2020), <https://nyti.ms/2ChArHG>.

13, 2020).⁴ The guidance allowed F-1 and M-1 visa holders to participate in online education while remaining in the United States, in express recognition of the fluid situation and the need to address public health risks. *Id.*; *see also* ICE, Broadcast Message No. 2003-01, *Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M nonimmigrant students* 1 (Mar. 9, 2020).⁵ The public health emergency remains no less fluid and is, needless to say, not over. Nation- and worldwide COVID-19 cases are at an all-time high, and climbing.

In an instant, and without consultation or warning, DHS nevertheless reversed course, sending shockwaves throughout an already-anxious higher education community, which reverberated around the globe. Last Monday, the agency directed that “[s]tudents attending schools operating entirely online may *not* take a full online course load and remain in the United States” and colleges and universities that will be offering “*entirely online classes or programs . . . must* complete an operational change plan” two days from now. ICE, Broadcast Message No. 2007-01, *COVID-19 and Fall 2020* at 1–2 (July 6, 2020).⁶ That is, if colleges and universities decide the public health and safety of their campuses and communities counsels in favor of completely virtual courses in the fall, the cost of doing so—under DHS’s about-face—is that their international students will be subject to immediate removal from this country.

DHS flipped its position without explanation, without considering the catastrophic effects of the new policy, and without sufficient notice to affected schools and students. The Directive nonchalantly upends the careful, on-going, public-health-informed planning of higher education institutions and their students—even though flexibility has been, and needs to be, the cornerstone of planning as changing circumstances and public-health knowledge are balanced with a desire

⁴ Available at <https://bit.ly/3gLOAeT>.

⁵ Available at <https://bit.ly/321UmF5>.

⁶ Available at <https://bit.ly/38FT0Bx>.

to return to on-campus life as soon as it is safe to do so. The Directive subjects schools and students to a Hobson's choice: Risk health and safety by resuming in-person classes at any cost, or face the immediate expulsion of international students. Given the late hour of this lightning-strike announcement, many institutions will not have sufficient time to make any choice at all; they will simply suffer the removal of a vibrant component of their communities. DHS nowhere acknowledged, let alone adequately assessed, the weighty interests involved. That is textbook arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A).

Amici support Plaintiffs' request for preliminary injunctive relief and submit this brief to provide the Court with greater context about the logical gaps in DHS's recent pronouncement in light of the enormous harms that will befall colleges and universities in the absence of immediate judicial intervention.⁷ The Administration has simply failed to consider obvious and "noteworthy concerns" that a radical departure from previously prevailing immigration policy entails for higher education institutions, their students, and the country as a whole. *See, e.g., Dep't of Homeland Sec. v. Regents of Univ. of California*, 140 S. Ct. 1891, 1914 (2020). At bottom, the Directive is unjustifiable as a matter of basic administrative law. It must not stand.

I. The Directive Ignores The Critical Contributions Of International Students.

The Directive fails to take into account the chaos it will unleash. International students comprise a vibrant, inimitable strand of the rich tapestry that is modern American higher education. Their experiences, talents, and unique perspectives help create diverse, creative, and world-class student bodies. That in turn leads to a virtuous circle of increased domestic

⁷ International students will bear the brunt of the Directive absent preliminary injunctive relief. *Amici*, at this Court's direction, have not focused their submission on that issue but are deeply concerned about the enormous, immediate, and unconsidered hardships the Directive threatens for international students and their classmates, friends, families, and communities.

prosperity and the diffusion of American values worldwide. As New York University President Andrew Hamilton stated:

International students—who number some 1.1 million—have long been an integral part of US campuses. They contribute to the vibrancy of university education in the US, learn about US values, and bring diverse skills and knowledge to our communities. Our country’s universities routinely attract the best students from around the world, and they in turn help make discoveries, advance knowledge, and spur science, technology, and innovation.

News Release, New York University, *Statement from NYU President Andrew Hamilton on New ICE Policy Regarding International Students* (July 7, 2020)⁸; see ACE, *Statement by ACE President Ted Mitchell on ICE Guidance on International Students* (July 6, 2020) (Directive is “horrifying” and creates “confusion and complexity rather than certainty and clarity”).⁹

A central element of our higher education system’s success is its historic openness and diversity. That openness is evident in our tradition of enrolling and educating persons born outside the United States. Doing so provides important opportunities to those students and generates “educational benefits that flow from a diverse student body” that redound to all. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308 (2013). Campus diversity helps to create and maintain an “atmosphere which is most conducive to speculation, experiment, and creation.” *Id.* (internal quotation marks omitted). There is no substitute for the contributions of these students in creating an educational environment that will impart “the skills needed in today’s increasingly global marketplace” that “major American businesses have made clear . . . can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); see also Press Release, U.S. Chamber of Commerce, *U.S. Chamber’s Donohue on ICE’s International Student Policy* (July 9, 2020)

⁸ Available at <https://bit.ly/2ZV9l0S>.

⁹ Available at <https://bit.ly/3ef9zVM>.

(lamenting that the Directive “will inflict significant harm upon American colleges and universities, their students, the business community, and our economy”).¹⁰

Nor are the benefits limited to the classroom. International students play a vital role in extracurricular life. The value of “informal ‘learning through diversity’ ” and the “improved understanding and personal growth” inspired as a result flow from the “unplanned, casual encounters with roommates” to “student workers in the library” to “participants in class affairs or student government” to “teammates on a basketball squad.” *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (Powell, J.) (citation omitted). While U.S. student-athletes may return to campus and train together with appropriate precautions, the 20,000 international varsity student-athletes have been told by DHS that they do not count; they now face being forcibly separated by DHS from their teammates and coaches as well. Nat’l Coll. Athletic Assoc., *NCAA Demographics Database: Demographics by Race/Ethnicity*, <https://bit.ly/2AKjkO9> (last visited July 13, 2020). All will be worse off as a result.

The Directive’s disruptive effects on campus life will be widespread and far-ranging. For one thing, spurring a mass exodus of international students at this juncture poses obvious and substantial health risks, not only to the displaced students and the communities where they would be sent, but also domestically in light of the significant pressures the Directive puts on colleges and universities to begin in-person classes without regard for circumstances. If left in place, the Directive puts international students and institutions in an untenable position. Even for those students able to return safely to their home country, numerous practical and technological challenges to continuing studies online will ensue. Depending on individual circumstances, students will have to “flip” daily life to accommodate instruction with potentially double-digit

¹⁰ Available at <https://bit.ly/328Sx9q>.

time-zone differences, wrestle with limited or wholly unavailable internet access (or reliable electricity), suffer government censorship of critical resources and research tools, and face the prospect of civil unrest. Some students may be forced to discontinue their studies altogether as American online education may be prohibited in their home country. All of which will have untold ripple effects for the educational and social lives of American colleges and universities.

International students are a major economic driver in their own right. International students contributed \$41 billion to the U.S. economy and supported more than 458,000 jobs during the 2018–2019 academic year. *International Student Economic Value Tool*, NAFSA: Ass'n of Int'l Educators, <https://bit.ly/2W3cXNs> (last visited July 13, 2020). The Commonwealth of Massachusetts, long recognized for its world-class colleges and universities, saw more than 71,000 enrolled international students contribute more than \$3.2 billion and support more than 38,000 jobs during that time. *See id.* The delivery of higher education opportunities to international students is now the United States' fifth largest service-sector export. NAFSA, *Losing Talent 2020: An Economic and Foreign Policy Risk America Can't Ignore 1* (Mar. 2020).¹¹

While international students' contributions span all aspects of national life, from the artistic to the culinary to public service, the United States' historic ability to attract the best and brightest from around the world is an irreplaceable ingredient that fuels our scientific and technological progress and global commercial leadership. Immigrants account for more than half (55 percent) of American startup companies valued at \$1 billion or more, and are key members of management or product development in more than 80 percent of the same. Stuart Anderson, *Immigrants and Billion-Dollar Companies*, Nat'l Found. for Am. Policy (Oct.

¹¹ Available at <https://bit.ly/31Zpgy0>.

2018).¹² And since 2000, nearly 40 percent of American Nobel laureates in Chemistry, Medicine, and Physics have been immigrants. Stuart Anderson, *Immigrant Nobel Prize Winners Keep Leading the Way for America*, *Forbes* (Oct. 14, 2019).¹³

The loss of international students further poses acute harms to the operations of American colleges and universities, which will be especially hard felt at a time when budgets and resources are stretched to their breaking point. More than a million international students attended American colleges and universities in 2019—5.5 percent of total enrollment. Open Doors, *2019 Fast Facts: International Students in the United States*, Institute of Intl. Educ., <https://bit.ly/2BTx0qH> (last visited July 13, 2020). Even before the Directive, overall enrollment in the wake of COVID-19 was already estimated to “drop by 15%, including a projected decline of 25% for international students,” with an accompanying \$23 billion loss of revenue. *See* Letter from Ted Mitchell, President, ACE, to Mitch McConnell, Majority Leader, U.S. Senate (Apr. 9, 2020).¹⁴ With the Directive, overall enrollment will decline even more.

Such enrollment decline will have significant effects on university budgets and, in turn, on the U.S. economy, to which universities and colleges are a critical contributor. *See, e.g.*, U.S. Dep’t of the Treasury & Dep’t of Educ., *The Economics of Higher Education* 5 (Dec. 2012) (“In 2009, postsecondary institutions received approximately \$497 billion in total revenues (3.6 percent of GDP), including \$144 billion in federal grants and loans. They employed 3.7 million workers, 2.4 percent of the 154 million individuals in the labor force.”).¹⁵ Over one third of Moody’s-rated U.S. universities rely on international students for more than 10 percent of their total revenue and have already faced severe disruption as a result of COVID-19. Elizabeth

¹² Available at <https://bit.ly/320LkbJ>.

¹³ Available at <https://bit.ly/2ZeUFe5>.

¹⁴ Available at <https://bit.ly/31XDek5>.

¹⁵ Available at <https://bit.ly/2OcX1Us>.

Redden, *A Bleak Picture for International Education*, Inside Higher Ed (May 26, 2020).¹⁶ The University of Arizona—located in a current COVID-19 hot spot—had already projected a \$33.1 million revenue loss for the upcoming year, which included an expectation that it would experience an 80 percent drop in new international students and a 30 percent drop in continuing international students. *Id.* For others, the risks are greater still: Northeastern University had roughly 15,000 international students in the 2017–2018 academic year, which accounted for more than half (53.6 percent) of its total enrollment. Jacquelyn Elias, *A New Policy Would Upend International Enrollments. Here Are Which Colleges Could Be Most Affected*, Chronicle of Higher Educ. (July 8, 2020).¹⁷ For some smaller institutions, international student enrollment is as high as 70 percent. *See id.*

Especially in the context of the past few years, the Directive threatens the ability of *amici*'s institutions in the near and long term to attract the international students and scholars who are essential to the success of American educational institutions. Foreign students, faculty, and researchers come to this country because our institutions are rightly perceived as the destinations of choice compared to all others around the globe. With the stroke of a pen, the global standing of our nation and its preeminent higher educational system will needlessly suffer again from exclusionary policies that—contrary to long-held national values of openness and interconnection—single out international students and arbitrarily threaten their eligibility to collaborate, learn, and share their many talents at American colleges and universities.

Public and private leaders the world over have long come to the United States to be trained and educated. When they return home, they do so inculcated with American values of democracy, tolerance, education, and the rule of law, and they help to spread American ideals

¹⁶ Available at <https://bit.ly/3iFVvZ7>.

¹⁷ Available at <https://bit.ly/38K7OPn>.

and strengthen our country's influence and national security. These benefits are not preordained. “[A] competition for global talent [is] under way” and the United States’ share of that talent pool had already begun to level off and even decline in recent years, with a 10.8 percent decrease in new international student enrollments since Fall 2016 in the wake of a perceived deterioration of the “U.S. social and political environment” and international students’ increasingly “feeling unwelcome in the United States” and concerned for their “physical safety.” See NAFSA, *Losing Talent 2020*, *supra* at 2–6.; U.S. State Dep’t, *FY2019 Report of the Visa Office* Tbl. XVI (2020).¹⁸ Other countries are poised to capitalize on our loss of international-student enrollment. Absent a legitimate, articulable governmental interest to the contrary, there is no basis to further hamstring our national efforts in this global talent search.

The Directive erects an unjustified hurdle for unspecified policy reasons that will only make it harder for international students to continue their vital roles on campus and in our Nation’s economic life and will thus further diminish American interests at home and abroad. To counterbalance these obvious and enormous harms, the Government has failed to offer up any beneficial purpose served by its abrupt abandonment of the status quo. Nor could it have done so. Simply stated, there is none.

II. The Directive Fails To Consider The Unique, Institution-specific Challenges Facing American Colleges And Universities.

The global COVID-19 pandemic has upended life as we knew it, including for American colleges and universities. At the time this brief is being filed, more than 4,200 higher education institutions throughout the United States and over 25 million of their students have been directly affected by the pandemic. See Entangled Solutions, *COVID-19: Higher Education Resource Center*, <https://bit.ly/2zafDAn> (last visited July 13, 2020). Colleges and universities have been

¹⁸ Available at <https://bit.ly/38NVaPp>.

forced to close dorms and lock down campuses, instruct faculty and staff to work remotely, cancel sports and extracurricular activities, and move classes and graduations online. Nearly 200 institutions have already moved to change their admissions and academic requirements, such as by extending decision deadlines, waiving deposit fees, moving to test-optional admissions, and abandoning minimum grade requirements; over 550 have announced hiring and staffing changes such as freezes, furloughs, and layoffs; and 78 are doing both. *Id.*

Higher education decisionmakers are acutely focused on the fast-approaching start of classes for the upcoming year. The ability of universities and colleges to return to full operating capacities as soon as practicable is consequential for the national economy as a whole. *See, e.g.,* Christina Paxson, Opinion, *College Campuses Must Reopen in the Fall. Here's How We Do It.*, N.Y. Times (Apr. 26, 2020).¹⁹ Each higher education institution faces context-specific challenges in this respect. Some are public while others are private; some are residential and full time, others serve commuter or part-time students; some are urban, others rural; some are institutions of tens of thousands of people, others a few hundred or fewer; some offer four-year and graduate degrees, others two-year degrees and certificates; and some are guided by a religious mission or identity while others are nondenominational or secular.

There is no one size-fits-all solution to reopening, and all “plans” and “decisions” have asterisks. The best path forward at Arizona State or Rice or Fordham will not be the same as at Stanford or Central Florida or Bunker Hill Community College. As current trends suggest, geography will play a particularly salient role in whether, when, and how to resume in-person activities on any given campus. *Compare* Adriana Gomez Licon & Lisa Marie Pane, *Hospitals in Florida, Texas and Arizona Are Almost at Capacity as Coronavirus Cases Surge*, Time (July

¹⁹ Available at <https://nyti.ms/2WIEVSL>.

6, 2020)²⁰; with Stephanie Adeline *et al.*, *Tracking The Pandemic: Are Coronavirus Cases Rising Or Falling In Your State?*, WAMU Am. Univ. Radio (July 9, 2020).²¹ Given our constantly evolving understanding of COVID-19, colleges and universities need the administrative flexibility to fashion individual responses to the particular challenges they face moving forward. Some may be able to offer a full slate of in-person education, others will have to move completely online to virtual instruction only, and yet others will adopt a hybrid approach. Even within a single university system, different approaches may be warranted. These decisions, which are in many cases still being hashed out, must be responsive to constantly changing local circumstances and an institution's resources and capacities. Even when an institution has a plan for the Fall, it will need to be able to pivot rapidly to respond to pandemic-related developments and to mitigate health and safety risks. Colleges and universities need to be empowered to make informed, responsive, on-the-ground decisions.

Yet eliminating that flexibility in favor of in-person classes across the board—thereby potentially imperiling students, faculty, administrators, and all others in their orbits—appears to be the entire point of DHS's rescission of its previously prevailing COVID-19 policy for international students. We are now four months into a presidentially declared national public health emergency related to coronavirus. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). Daily infections in the United States are hitting their highest-ever numbers. Kim Bellware *et al.*, *Coronavirus death toll in U.S. increases as hospitals in hot-spot states are overwhelmed*, Wash. Post (July 10, 2020).²² Either by ignorance or design, the Directive presses our nation's higher education institutions to make immediate life-or-death decisions, locked in

²⁰ Available at <https://bit.ly/2AGgHwM>.

²¹ Available at <https://bit.ly/2BYaKfc>.

²² Available at <https://wapo.st/2W1VmW1>.

against a fast-ticking clock and constantly shifting public-health landscape. DHS’s callousness is nearly incomprehensible. And, operationally, it threatens to throw yet another spanner into an overworked higher education administrative engine under pressure from all sides. As with DHS’s policy reversal itself, there is no basis for that short fuse. Especially when one considers that colleges and universities have for months diligently sought—and have repeatedly been denied—clarification regarding how to restructure the services they provide to international students “[d]uring this uncertain time.” *See, e.g.*, Letter from Ted Mitchell, President, ACE, to Mike Pompeo, Secretary, U.S. Dep’t of State (Mar. 16, 2020).²³

* * *

DHS has closed its ears and turned a blind eye to these considerations. It also failed to grapple with—and ultimately adequately explain—its change of course. The Administrative Procedure Act demands more. While people must turn square corners when they deal with the government, “it is also true, particularly when so much is at stake, that ‘the Government should turn square corners in dealing with the people.’ ” *Dep’t of Homeland Sec.*, 140 S. Ct. at 1909 (quotation omitted). That has not happened here.

CONCLUSION

For all the foregoing reasons, preliminary injunctive relief is needed now.

²³ Available at <https://bit.ly/2ZOv0YK>.

Respectfully submitted,

/s/ Gregory F. Noonan

Gregory F. Noonan (BBO# 651035)
HOGAN LOVELLS US LLP
125 High Street, Ste. 2010
Boston, MA 02110
(617) 371-1029
gregory.noonan@hoganlovells.com

Stephanie J. Gold
Susan M. Cook
Jessica L. Ellsworth
Kyle M. Druding
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5496
stephanie.gold@hoganlovells.com

Counsel for Amici Curiae

Dated: July 13, 2020

ADDENDUM

ADDENDUM – LIST OF *AMICI CURIAE*

1. American Council on Education (ACE): More information about ACE can be found at: <https://www.acenet.edu>
2. The Accreditation Council for Pharmacy Education (ACPE): More information about ACPE can be found at: <https://www.acpe-accredit.org/>
3. Accrediting Commission for Community and Junior Colleges (ACCJC): More information about ACCJC can be found at: <https://accjc.org/>
4. American Association of Colleges of Nursing (AACN): More information on AACN can be found at: <https://www.aacnnursing.org/>
5. American Association of Colleges of Pharmacy (AACP): More information on AACP can be can be found at: www.aacp.org
6. American Association of Collegiate Registrars and Admissions Officers (AACRAO): More information about AACRAO can be found at: <https://www.aacrao.org/>
7. American Association of Community Colleges (AACC): More information about AACC can be found at: <https://www.aacc.nche.edu/>
8. American Association of State Colleges and Universities (AASCU): More information about AASCU can be found at: <https://aascu.org/>
9. American Association of University Professors (AAUP): More information about AAUP can be found at: <https://www.aaup.org/>
10. American Dental Education Association (ADEA): More information about ADEA can be found at: <https://www.adea.org/>
11. American Indian Higher Education Consortium (AIHEC): More information about AIHEC can be found at: <http://www.aihec.org/>
12. American Speech-Language-Hearing Association (ASHA): More information about ASHA can be found at: <https://www.asha.org/>
13. APPA: Leadership in Educational Facilities: More information about APPA can be found at: <https://www.appa.org/>

14. Association of American Colleges and Universities (AAC&U): More information about AAC&U can be found at: <https://www.aacu.org/>
15. Association of American Law Schools (AALS): More information about AALS can be found at: <https://www.aals.org/>
16. Association of American Medical Colleges (AAMC): More information about AAMC can be found at: <https://www.aamc.org/>
17. Association of American Veterinary Medical Colleges (AAVMC): More information about AAVMC can be found at: <https://www.aavmc.org/>
18. Association of American Universities (AAU): More information about AAU can be found at: <https://www.aau.edu/>
19. Association of Catholic Colleges and Universities (ACCU): More information about ACCU can be found at: <https://www.accunet.org/>
20. Association of Chiropractic Colleges: More information about the Association of Chiropractic Colleges can be found at: <https://www.chirocolleges.org/>
21. Association of Governing Boards of Universities and Colleges (AGB): More information about AGB can be found at: <https://agb.org/>
22. Association of Independent California Colleges and Universities (AICCU): More information about AICCU can be found at: <https://www.aiccu.edu>
23. Association of Independent Colleges of Art & Design (AICAD): More information about AICAD can be found at: <https://www.aicad.org/>
24. Association of Independent Colleges and Universities in Massachusetts (AICUM): More information about AICUM can be found at: <https://www.aicum.org>
25. Association of Independent Colleges and Universities of Pennsylvania (AICUP): More information about AICUP can be found at: <http://www.aicup.org/>
26. Association of Independent Colleges and Universities of Rhode Island (AICU *Rhode Island*): More information about AICU *Rhode Island* can be found at: <http://aicuri.org/>
27. Association of Jesuit Colleges and Universities (AJCU): More information about AJCU can be found at: <https://www.ajcunet.edu/>

28. Association of Public and Land-grant Universities (APLU): More information about APLU can be found at: <https://www.aplu.org/>
29. Association of Research Libraries (ARL): More information about ARL can be found at: <https://www.arl.org/>
30. Association of Schools and Programs of Public Health (ASPPH): More information about ASPPH can be found at: <https://www.aspph.org/>
31. The College Board: More information about The College Board can be found at: <https://www.collegeboard.org/>
32. College and University Professional Association for Human Resources (CUPA-HR): More information about CUPA-HR can be found at: <https://www.cupahr.org/>
33. Commission on Independent Colleges and Universities in New York (CICU): More information about can be found at: <https://cicu.org/>
34. The Common Application: More information on The Common Application can be found at: <https://www.commonapp.org/>
35. Connecticut Conference of Independent Colleges (CCIC): More information about CCIC can be found at: www.theccic.org
36. Council for Advancement and Support of Education (CASE): More information about CASE can be found at: <https://www.case.org/>
37. Council for Christian Colleges & Universities (CCCCU): More information about CCCC can be found at: <https://www.cccu.org/>
38. Council for Higher Education Accreditation (CHEA): More information about CHEA can be found at: <https://www.chea.org/>
39. Council of Graduate Schools (CGS): More information about CGS can be found at: <https://cgsnet.org/>
40. Council of Independent Colleges (CIC): More information about CIC can be found at: <https://www.cic.edu/>
41. Council on Governmental Relations (COGR): More information about COGR can be found at: www.cogr.edu

42. Educational Testing Service (ETS): More information about ETS can be found at: <https://www.ets.org/>
43. EDUCAUSE: More information about EDUCAUSE can be found at: <https://www.educause.edu/>
44. Federation of Independent Illinois Colleges and Universities (FIICU): More information can be found at: www.Federationedu.org
45. Higher Learning Commission (HLC): More information about HLC can be found at: <https://www.hlcommission.org/>
46. Independent Colleges of Indiana, Inc. (ICI): More information about ICI can be found at: www.icindiana.org
47. Independent Colleges of Texas (ICUT): More information about ICUT can be found at: <https://www.icut.org/>
48. Independent Colleges of Washington: More information about the Independent Colleges of Washington can be found at: <http://icwashington.org/>
49. Institute of International Education (IIE): More information about IIE can be found at: <https://www.iie.org>
50. Law School Admission Council (LSAC): More information about LSAC can be found at: <https://www.lsac.org/>
51. Louisiana Association of Independent Colleges and Universities (LAICU): More information about LAICU can be found at: <https://www.laicu.org>
52. Middle States Commission on Higher Education (MSCHE): More information about MSCHE can be found at: <https://www.msche.org/>
53. Minnesota Private College Council (MPCC): More information about MPCC can be found at: <https://www.mnprivatecolleges.org>
54. NAFSA: Association for International Educators (NAFSA): More information about NAFSA can be found at: <https://www.nafsa.org/>
55. NASPA - Student Affairs Administrators in Higher Education: More information about NASPA can be found at: <https://www.naspa.org/>

56. National Association for College Admission Counseling (NACAC): More information about NACAC can be found at: <https://www.nacacnet.org/>
57. National Association of College and University Business Officers (NACUBO): More information about NACUBO can be found at: <https://www.nacubo.org/>
58. National Association of Diversity Officers in Higher Education (NADOHE): More information about NADOHE can be found at: <https://www.nadohe.org/>
59. National Association of Independent Colleges and Universities (NAICU): More information about NAICU can be found at: <https://www.naicu.edu/>
60. National Association of Student Financial Aid Administrators (NASFAA): More information about NASFAA can be found at: <https://www.nasfaa.org/>
61. National Collegiate Athletic Association (NCAA): More information about NCAA can be found at: <http://www.ncaa.org/>
62. National Council of University Research Administrators (NCURA): More information about NCURA can be found at: <https://www.ncura.edu/>
63. New England Commission of Higher Education (NECHE): More information about NECHE can be found at: <https://www.neche.org/>
64. North Carolina Independent Colleges and Universities, Inc. (NCICU): More information about NCICU can be found at: <https://ncicu.org>
65. Northwest Commission on Colleges and Universities (NWCCU): More information about NWCCU can be found at: <http://www.nwccu.org>
66. Oregon Alliance of Independent Colleges & Universities (OAICU): More information about OAICU can be found at: <https://www.oaicu.org>
67. Phi Beta Kappa: More information about Phi Beta Kappa can be found at: <https://www.pbk.org/>
68. Southern Association of Colleges and Schools Commission on Colleges (SACSCOC): More information about SACSCOC can be found at: <https://sacscoc.org/>
69. State Higher Education Executive Officers Association (SHEEO): More information on SHEEO can be found at: <https://sheeo.org/>

70. University Risk Management and Insurance Association (URMIA): More information about URMIA can be found at: <https://www.urmia.org/home>

71. WASC Senior College and University Commission (WSCUC): More information about WSCUC can be found at: <https://www.wscuc.org/>

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the Court's ECF system on July 13, 2020, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent by mail to non-registered participants.

/s/ Gregory F. Noonan
Gregory F. Noonan