

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

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 F. 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.

Civil Action No. 1:20-cv-11283-ADB

Leave to File Granted 7/13/2020

**MEMORANDUM OF LAW OF AMERICAN PHYSICAL SOCIETY
AND OTHER PROFESSIONAL SOCIETIES AS *AMICI CURIAE* SUPPORTING
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION:
LEAVE TO FILE GRANTED 7/13/2020**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CORPORATE DISCLOSURE STATEMENT iv

STATEMENT OF *AMICUS CURIAE*.....1

I. INTRODUCTION1

II. ARGUMENT2

 A. The U.S. Dominance of Science and Technology Relies Heavily on Talented
 Scientists Who First Come to the United States as International Students, Which
 Significantly Furthers the Public Interest.2

 B. If Not Enjoined, the Rescission Will Undermine the Public Interest and Cause
 Irreparable Harm to the Nation’s Power, Influence, and Prestige in Science and
 Technology4

CONCLUSION.....8

CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

	Page(s)
CASES AND JUDICIAL ORDERS	
<i>Dep’t of Homeland Sec. v. Regents of the Univ. of California</i> , 140 S. Ct. 1891 (2020)	2
<i>Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	2
EXECUTIVE BRANCH DOCUMENTS	
U.S. Immigration & Customs Enforcement, <i>Broadcast Message No. 2003-01: Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students</i> (Mar. 9, 2020), https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf	4
U.S. Immigration & Customs Enforcement, <i>COVID-19: Guidance for SEVP Stakeholders</i> (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf	4
U.S. Immigration & Customs Enforcement, <i>Broadcast Message No. 2007-01: COVID-19 and Fall 2020</i> (July 6, 2020), https://www.ice.gov/doclib/sevis/pdf/bcm2007-01.pdf	1, 5
OTHER PUBLICATIONS, ARTICLES AND PUBLICLY AVAILABLE RESEARCH REPORTS	
Am. Anthropological Ass’n et al., <i>An Open Letter to the White House, Department of Homeland Security and Department of State</i> (July 8, 2020), https://www.ametsoc.org/index.cfm/ams/about-ams/ams-position-letters/multi-society-letter-opposing-sevp-modification-for-student-visas/	5
Am. Inst. of Physics, <i>Letter Report: Peril and Promise: Impacts of the COVID-19 Pandemic on the Physical Sciences</i> (2020), https://www.aip.org/sites/default/files/aipcorp/files/peril-and-promise-final.pdf	6
Am. Physical Soc’y, <i>APS Report: Economic Impact of Industrial Physics</i> (Jan. 2019), https://www.aps.org/programs/industrial/upload/APS-Report-Economic-Impact-of-Industrial-Physics.pdf	3
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CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Civil Procedure 7.1, all *amici curiae* state that they are non-profit corporations with no parent corporation and that no public company owns any interest in them.

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STATEMENT OF *AMICI CURIAE*

The American Physical Society, American Association for the Advancement of Science, American Institute of Physics, American Astronomical Society, American Meteorological Society, American Association of Physicists in Medicine, American Anthropological Association, American Mathematical Society, American Geophysical Union, American Society of Plant Biologists, Biophysical Society, Society of Vacuum Coaters, The Optical Society, Acoustical Society of America, American Society of Tropical Medicine and Hygiene, American Institute of Physics, American Astronomical Society, American Association for Dental Research, and Scientific Research Honor Society Sigma Xi (collectively, “*Amici*”) file this brief on behalf of their members who are directly affected by the U.S. Immigration and Custom Enforcement’s (“ICE”) July 6 Directive. *Amici* are nonprofit science, engineering, math, medical, and other professional membership societies and federations of members societies. Their members include international students pursuing science degrees in the United States, many of whom hold F-1 visas and are directly affected by the July 6 Directive that Plaintiffs seek to enjoin.

I. INTRODUCTION

Amici support Plaintiffs’ request and motion to this Court to enjoin Defendants from enforcing ICE’s July 6 Directive, which rescinds the COVID-19 exemption that permitted international students to remain active in the Student and Exchange Visitor Program (“SEVP”) if their universities switched to online or alternative remote instruction. *See* U.S. Immigration & Customs Enforcement, *Broadcast Message No. 2007-01: COVID-19 and Fall 2020* (July 6, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2007-01.pdf>. As Plaintiffs argue, ICE has failed to articulate any rationale sufficient to justify canceling the visas of international students whose universities shift to remote instruction during the COVID-19 pandemic. Pls.’ Mem. in Support of Mot. for TRO at 13, ECF 5. Because the agency’s policy change “entirely fail[s] to consider [an]

important aspect of the problem”—the impact on international students, universities, and the scientific community—the July 6 Directive is thus arbitrary and capricious. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020); *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *Amici* further contend that the July 6 Directive will wreak irreparable harm on these impacted parties, demonstrating that the preliminary injunction that Plaintiffs request are in the public interest.

Amici maintain that this rescission during an unabated pandemic in the United States will irreparably harm not only the students whose visas are canceled and the schools who lose these talented and promising students, but also will harm the reputation of the United States as the most desirable destination for the best and brightest budding science scholars. This loss of talented scientists will reduce quality and quantity in the trained technical workforce and reduce the innovations that they provide, and thus will harm the economy and our national security. Even if schools resume classes in order to not lose their international students, they will expose students and faculty to the virus, which could lead to the same outcome: a reduced trained technical workforce, which ultimately will lead to a reduced level of American innovation and success in science and the broader economy.

II. ARGUMENT

A. **The U.S. Dominance of Science and Technology Relies Heavily on Talented Scientists Who First Come to the United States as International Students, Which Significantly Furthers the Public Interest.**

Much of the pre-eminence of U.S. science is due to the nation’s outstanding colleges and research universities, which have attracted the best students worldwide to the United States for their undergraduate degrees and advanced studies. After graduation, many international students remain in the United States on other types of visas to contribute to scientific and technological innovation in the U.S. economy. “National security and economic vitality critically depend on

science and technology and strongly profit from contributions of foreign-born scientists and engineers”—scientists and engineers who often start their pathway as international students at universities here in the United States. APS Council, *APS Statement 03.1: Visa Rules and Government Procedures Hampering U.S. Science and Technology* (June 6, 2003), https://www.aps.org/policy/statements/03_1.cfm.

More than half of the Ph.D. students in science fields in the United States are international students, largely on F-1 visas. Beethika Khan et al., *The State of U.S. Science and Engineering 2020*, Nat'l Sci. Bd. & Nat'l Sci. Found. (Jan. 15, 2020), <https://nces.nsf.gov/pubs/nsb20201>. In the physical sciences, most students are hired by U.S. industry after graduation. Am. Physical Soc'y, *APS Report: Economic Impact of Industrial Physics* (Jan. 2019), <https://www.aps.org/programs/industrial/upload/APS-Report-Economic-Impact-of-Industrial-Physics.pdf>. About 70% of the international students in science fields who earn a Ph.D. in the United States continue to work and conduct research in the United States in science or technology positions in their specialized area. Nat'l Acad. of Sciences, *Rising Above the Gathering Storm, Revisited: Rapidly Approaching Category 5* at 41 (2010), <https://www.nap.edu/catalog/12999/rising-above-the-gathering-storm-revisited-rapidly-approaching-category-5>.

Research labs, educational institutions, and industry rely on talented international students to work in the United States for their careers, and many highly talented international students do so. These students enrich the U.S. economy, become part of the diverse American society, and contribute greatly to the country's pre-eminence in science and technology.

In 2018, immigrants founded more than half (50 of 91) of the privately-held billion-dollar startup companies in the United States, and 21 of these immigrants first came to the United States as international students. The total value of these companies in 2018 was \$248 billion, and they

created an average of more than 1,200 jobs per company, the “vast majority” of which were in the United States. Stuart Anderson, *NFAP Policy Brief*, Nat’l Found. for Am. Policy (2018), <https://nfap.com/wp-content/uploads/2019/01/2018-BILLION-DOLLAR-STARTUPS.NFAP-Policy-Brief.2018-1.pdf> (last visited July 10, 2020). The July 6 Directive challenged in this suit would, however, prevent such international students from pursuing an education in the United States. That ban would disrupt the pipeline of such talented and innovative scientists at the earliest stage, which would have a devastating impact on the scientific community in the United States for generations to come—an impact that will be felt unless the ban is decisively enjoined by entry of Plaintiffs’ requested preliminary injunction. Enjoining the July 6 Directive is no doubt in the public interest to avoid the significant and long-lasting adverse impact on continued U.S. global leadership in scientific and technological industries.

B. If Not Enjoined, the Rescission Will Undermine the Public Interest and Cause Irreparable Harm to the Nation’s Power, Influence, and Prestige in Science and Technology.

In March 2020, recognizing the “extraordinary nature of the COVID-19 emergency,” ICE implemented guidance permitting international students to remain active in SEVP if their universities switched to online or alternative remote instruction, creating a COVID-19 exemption to the requirement that international students take a certain number of in-person courses to participate in SEVP. See ICE, *Broadcast Message No. 2003-01: Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students* (Mar. 9, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf>; ICE, *COVID-19: Guidance for SEVP Stakeholders* (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf. But on July 6, 2020, ICE rescinded that sensible COVID-19 exemption and issued new guidance that would terminate the visas of international students whose universities implement remote instruction during the COVID-19

pandemic—regardless of whether the public health conditions at that university require a shift to online classes, and regardless of whether the shift to remote learning takes place at the start of the term or midway through the term. U.S. Immigration & Customs Enforcement, *Broadcast Message No. 2007-01: COVID-19 and Fall 2020* (July 6, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2007-01.pdf>.

Recognizing the impact that visa policies have on the U.S. scientific community, as well as broader economic and national security interests, *amici* have long “call[ed] on the United States Administration and Congress to maintain and implement appropriate and effective visa rules and government procedures that sustain science and technology[,] promote continuing international scientific and technological cooperation[,] and ensure the flow of people and knowledge needed to guarantee economic strength and national security.” APS Council, *APS Statement 03.1: Visa Rules and Government Procedures Hampering U.S. Science and Technology* (June 6, 2003), https://www.aps.org/policy/statements/03_1.cfm.

Amici’s support for Plaintiffs’ motion to enjoin the July 6 Directive reflects their views that the July 6 Directive “will not only cost the US the current cohort of future innovators now enrolled in US schools, but could permanently destroy one of America’s main competitive advantages: our ability to attract the world’s best and brightest to study here, work here, and ultimately create America’s industries and jobs of the future.” Am. Anthropological Ass’n et al., *An Open Letter to the White House, Department of Homeland Security and Department of State* (July 8, 2020), <https://www.ametsoc.org/index.cfm/ams/about-ams/ams-position-letters/multi-society-letter-opposing-sevp-modification-for-student-visas/>.

Exclusion of international students and scholars would significantly damage American excellence in science and technology. The successful reliance on top talent from around the world

to come to study in U.S. research universities is now under attack by numerous Executive Orders, regulations, and pronouncements that have restricted otherwise lawful immigration. “Recent policy decisions to restrict future immigration to the United States will make it even more difficult to attract the top-level foreign-born talent to the United States that we need to fill positions in the physical sciences throughout the research enterprise and the broader economy.” *See* Am. Inst. of Physics, *Letter Report: Peril and Promise: Impacts of the COVID-19 Pandemic on the Physical Sciences* (2020), <https://www.aip.org/sites/default/files/aipcorp/files/peril-and-promise-final.pdf>. The July 6 Directive follows on the heels of these actions, and it further exacerbates the damage they are inflicting on the scientific community and the public interest more generally. In this way, the July 6 Directive builds upon and aggravates the effect of these prior actions, which have already begun to undermine the long-standing pre-eminence of U.S. science in measurable ways.

The American Physical Society conducted surveys in 2019 to evaluate the applications of international students to more than 60 U.S. physics departments graduating 10 or more Ph.D. students per year. The study also surveyed more than 700 international students, including those who enrolled in U.S. institutions for graduate school, and those who chose not to come to the United States. Am. Physical Soc’y, *APS Survey Report: Attracting the Best Students in the World to U.S. Universities: Challenges and Opportunities* (Oct. 2019), <https://www.aps.org/policy/issues/upload/APS-Int-Students-Survey-Results.pdf>. These surveys found significant reductions in graduate applications from international students from 2017 to 2019. The reductions were particularly severe in schools such as large state universities, which collectively train more than 70% of the physics Ph.D. students in the United States. Applications from international students dropped by 22% at these schools in the past two years. *Id.*

The survey results indicate that the reasons for this dramatic decline are linked to the

Administration's restrictive immigration policies. Of those who chose not to apply to U.S. schools, 32% stated that the United States is now viewed as unwelcoming to international students. Furthermore, 85% said that they are more likely to apply to a school in a country that provides options to work there after graduation.

These data show the negative impact of the Administration's restrictive immigration policies in 2017–2019 prior to the issuance of the July 6 Directive. If not enjoined, this rescission would only broaden the chilling effect on U.S. universities' abilities to attract top scholars from around the world. This will in turn create a deficit in top talent graduating from U.S. schools, just at a time when we are facing a pandemic crisis that must be solved by advances in science and technology.

Because the July 6 Directive reflects hostility toward international students and creates uncertainty about the stability and security of their status in the United States, future students may choose to study in other countries rather than in the United States in even greater numbers due to perceived hostile policies and diminished science reputation here. They will not help fuel the high-tech startups of the future, as they have done in the past. This will have a negative impact on innovation in this country, damaging both the economy of the United States and its national security. Science, the economy, and national security all thrive when participation and its accompanying opportunities for innovation are not inhibited, but are instead open to the best and brightest from both the United States and abroad.

The loss to the United States will be to the advantage of other countries, including our main leading economic and geopolitical competitors. The other countries throughout the world who value highly science and education will benefit from the top talent that no longer comes to the United States as international students. As the United States becomes increasingly unwelcoming,

other countries gain the advantages that international students historically have given the United States. The July 6 Directive enhances this growing imbalance. The disruption in the pipeline of U.S. graduate students will cause irreparable harm to innovation in the United States, and accordingly its economy and its national security.

If universities decide in the face of the July 6 Directive to resume in-person classes in order to retain some of their best students, the results will be even more dire. Such a move would certainly affect all U.S. graduate students, including both domestic and international students, who may choose to drop out of U.S. graduate school rather than risk infection by taking in-person classes. Those who are most determined to continue their advanced scientific and technological studies will likely enroll in foreign universities where public health is not put at risk by the July 6 Directive. A move to re-open in-person classes at U.S. universities would also put University staff, faculty, and other employees at risk, further damaging the science and technology talent pool in the United States.

CONCLUSION

The July 6 Directive would rescind the sensible COVID-19 exemption to SEVP's in-person course requirement during the global public health crisis, and would instead terminate the visas of international students whose universities implement remote instruction during the COVID-19 pandemic. Rescission of the COVID-19 exemption potentially affects up to half of the science Ph.D. students in the United States, because about half are international students, predominantly on F-1 visas. Mandating in-person classes regardless of the public health situation at a particular campus or community will expose these students and their American citizen counterparts to COVID-19, whereas cancellation of in-person classes in favor of remote instruction will lead to cancellation of their visas. The broader harm of this rescission is to U.S. scientific innovation and

prestige. This country stands to lose the contributions talented students will otherwise make to scientific and technological innovation in this country, which energizes the economy. This would further damage U.S. prestige in science and harm our ability to attract the best scientists in the future, threatening our future economic growth and national security. Plaintiffs' motion for a preliminary injunction should be granted as clearly in the public interest.

Date: July 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July 2020, I electronically filed the foregoing Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

s/ Matthew S. Shapanka
Matthew S. Shapanka