

1 Lary Alan Rappaport (SBN 087614)
lrappport@proskauer.com
2 PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
3 Los Angeles, CA 90067
Telephone: (310) 284-5658
4 Facsimile: (310) 557-2193

5 Joseph C. O’Keefe*
jokeefe@proskauer.com
6 Andrew M. Sherwood*
asherwood@proskauer.com
7 PROSKAUER ROSE LLP
Eleven Times Square
8 New York, NY 10036
Telephone: (212) 969-3000
9 Facsimile: (212) 969-2900
*Pro hac vice application forthcoming

10 *Attorneys for Amici Curiae*

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

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

15 Plaintiffs,

16 v.

17 UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, et al.,

18 Defendants.

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

Hon. Jeffrey S. White

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

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

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
PRELIMINARY STATEMENT	1
INTEREST OF <i>AMICI CURIAE</i>	3
ARGUMENT	3
I. THE DHS RULE SUBSTANTIALLY RESTRICTS ELIGIBILITY FOR H-1B VISAS, WHICH IRREPARABLY HARMS ACADEMIC INSTITUTIONS’ ABILITY TO EMPLOY HIGHLY SKILLED FOREIGN WORKERS.....	3
A. The DHS Rule Substantially Narrows the Definition of a “Specialty Occupation.”	3
B. The DHS Rule Substantially Impairs <i>Amici</i> ’s Ability to Employ Highly Skilled Workers Across a Broad Range of Fields.	5
C. The DHS Rule Fundamentally Disrupts Academic Institutions’ Ability to Plan Curricula and Design Research Programs.	6
II. THE RULES WILL IRREPARABLY HARM <i>AMICI</i> AND THEIR EMPLOYEES.	7
A. If Not Enjoined, the DOL Rule Will Substantially Limit the Number of Highly Skilled Candidates for Critical Positions.	7
B. If Not Enjoined, the Rules Will Irreparably Harm <i>Amici</i> ’s Significant, Ongoing Research Projects, Including Critical COVID-19-Related Research.	10
C. If Not Enjoined, the Rules Will Irreparably Harm <i>Amici</i> ’s Ability to Educate the Nation’s Students.	11
D. If Not Enjoined, the Rules Will Irreparably Harm <i>Amici</i> ’s Abilities to Provide Healthcare to Communities.	12
III. THE RULES WILL IRREPARABLY HARM FOREIGN WORKERS WHO RELY ON H-1B VISAS WHILE AWAITING LAWFUL PERMANENT RESIDENCE IN THE UNITED STATES.	12
IV. THE RULES IGNORE <i>AMICI</i> ’S SUBSTANTIAL RELIANCE ON THE CURRENT VISA PROGRAMS.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

FEDERAL CASES

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016)..... 14

InspectionXpert Corp. v. Cuccinelli,
No. 19-cv-65, 2020 WL 1062821 (M.D.N.C. Mar. 5, 2020)..... 4

Nat’l Urban League v. Ross,
No. 20-cv-05799-LHK, 2020 WL 5739144 (N.D. Cal. Sept. 24, 2020) 15

RELX, Inc. v. Baran,
397 F. Supp. 3d 41 (D.D.C. 2019)..... 4

S.A. v. Trump,
363 F. Supp. 3d 1048 (N.D. Cal. 2018) 15

Dep’t Homeland Sec. v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020)..... 15

FEDERAL STATUTES

8 U.S.C. § 1101(a)(15)(H)(i)(b)..... 4

8 U.S.C. § 1184(i)(1) 4

STATE STATUTES

New York Labor Law § 194(1) 8

Mass. Gen. Laws. Ann. Ch. 149 § 105(A)..... 8

REGULATIONS

8 C.F.R. § 214.2(h)(4)(ii)(4) 4

Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 Fed. Reg.
63,918 (Oct. 8, 2020) passim

*Strengthening Wage Protections for the Temporary and Permanent Employment of
Certain Aliens in the U.S.*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) passim

OTHER AUTHORITIES

Chris Quintana, *US Colleges Scrambled to React to the Coronavirus Pandemic.
Now Their Very Existence is in Jeopardy*, USA TODAY, Mar. 20, 2020,
<https://perma.cc/DDF8-PEGB> 10

David Bier, *Backlog for Skilled Immigrants Tops 1 Million*, CATO Institute Mar.
30, 2020, <https://perma.cc/PD9W-2PQ6> 13

1 DOL Website, Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3),
2 <https://perma.cc/4G4B-29UU> 10
3 Foreign Labor Certification Data Center Online Wage Library,
4 <https://www.flcdatacenter.com> 8
5 Letter from American Council on Education to Nancy Pelosi and Kevin McCarthy,
6 U.S. House of Representatives, Sept. 25, 2020, <https://perma.cc/6V7Q-5VQ5> 10
7 Timothy Dall *et al.*, *Supply and Demand Analysis of the Current and Future US*
8 *Neurology Workforce*, NEUROLOGY, Apr. 13, 2013, [https://perma.cc/7VL7-](https://perma.cc/7VL7-SCQT)
9 [SCQT](https://perma.cc/7VL7-SCQT) 12
10 USCIS, *When to File Your Adjustment of Status Application for Family-Sponsored*
11 *or Employment-Based Preference Visas: October 2020*,
12 <https://perma.cc/DRC8-JSKP> 13
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

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

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

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

INTEREST OF AMICI CURIAE²

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

ARGUMENT

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

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

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

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

1 employer. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The term “specialty occupation” is defined by statute
 2 to mean “an occupation that requires . . . theoretical and practical application of a body of highly
 3 specialized knowledge, and . . . attainment of a bachelor’s or higher degree in the specific
 4 specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”
 5 8 U.S.C. § 1184(i)(1). Since December 1991, the definition of “specialty occupation” has not
 6 changed substantively:

7 Specialty occupation means an occupation which requires theoretical and practical
 8 application of a body of highly specialized knowledge in fields of human endeavor
 9 including, but not limited to, architecture, engineering, mathematics, physical
 10 sciences, social sciences, medicine and health, education, business specialties,
 accounting, law, theology, and the arts, and **which requires the attainment of a
 bachelor’s degree or higher in a specific specialty³**, or its equivalent, as a
 minimum for entry into the occupation in the United States.

11 8 C.F.R. § 214.2(h)(4)(ii)(4). Academic institutions and their international communities
 12 consistently have relied upon the plain meaning of this definition, in addition to well-settled law
 13 establishing that an H-1B position qualifies as an eligible “specialty occupation” even where the
 14 relevant position allows candidates to have earned degrees from more than one academic
 15 discipline. *See, e.g., InspectionXpert Corp. v. Cuccinelli*, No. 1:19-cv-65, 2020 WL 1062821, at
 16 *26 (M.D.N.C. Mar. 5, 2020) (USCIS’s “longstanding construction [] recognizes that a position
 17 can qualify as a specialty occupation even if it permits a degree in more than one academic
 18 discipline”); *RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 54 (D.D.C. 2019) (rejecting as “untenable”
 19 USCIS’s position under this administration that because different types of degrees would allow a
 20 candidate to be qualified for a “data analyst” position, the position cannot be specialized).

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

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

28 ³ All emphasis herein has been added unless otherwise noted.

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

10 85 Fed. Reg. at 63,964; *see id.* at 63,924–63,926.

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

13 The DHS Rule’s requirement that an H-1B visa holder must have what amounts to a
 14 degree in a sub-specialty directly related to the position will render many current employees
 15 ineligible for H-1B renewals. The Rule specifically will impact visa holders in fields such as
 16 bioinformatics, bioengineering, vaccine development, clinical education, health care, infectious
 17 disease drug discovery and development research, data science, information technology, computer
 18 science, management information systems, public policy, finance, and business. It will obviously
 19 impact any new and yet highly specialized fields of study, new positions within existing fields—
 20 especially those positions created because of technological innovation—and employees who
 21 earned degrees before a new industry existed. For example, one *amicus*’ School of Engineering
 22 employs a tenure-track Assistant Professor on an H-1B visa, who holds a Ph.D. in Transportation.
 23 Under the new definition of a “specialty occupation,” it is not clear if USCIS would approve an H-
 24 1B renewal for this professor, which jeopardizes the professor’s teaching and research programs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>Occupation⁶</u>	<u>Level 1</u>	<u>Level 2</u>	<u>Level 3</u>	<u>Level 4</u>
Biological Scientists (All Other Category)	\$42,890 to \$57,866	\$55,557 to \$81,557	\$68,203 to \$105,248	\$80,870 to \$128,939
Life Scientists (All Other Category)	\$37,024 to \$59,717	\$54,184 to \$88,483	\$71,323 to \$117,250	\$88,483 to \$146,016
Medical Scientists (Except Epidemiologists)	\$66,893 to \$90,979	\$88,982 to \$138,091	\$111,051 to \$185,182	\$133,141 to \$232,294
Civil Engineers, R&D	\$38,438 to \$64,605	\$60,070 to \$104,395	\$81,723 to \$144,165	\$103,355 to \$183,955
Electrical Engineers, R&D	\$28,870 to \$57,346	\$46,426 to \$83,803	\$63,981 to \$110,282	\$81,536 to \$136,739

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

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

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

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

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

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

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

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

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

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

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

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

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

1 COVID-19 and that was among the first to receive emergency use authorization from the state and
2 federal governments. Plaintiffs and some *amici* are also working to improve existing testing;
3 develop innovative testing methods that are faster, more accurate, and scalable; study new
4 methods for infection prevention; and create new technologies to facilitate contact tracing. *See*
5 *also* Shankar Decl., ECF 31-13 at ¶ 3; Wolford Decl., ECF 31-15 at ¶ 3. This significant COVID-
6 19-related research will likely be disrupted if members of vital research teams are required to
7 return to their countries of origin because of the Rules.

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

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

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

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

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

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

6 Some *amici* also use the H-1B visa programs to hire international doctors, nurses, dentists,
 7 and other medical professionals, who may not be available to treat patients in their communities
 8 because of the Rules. For example, a highly trained doctor and clinical Assistant Professor at an
 9 *amicus'* Medical School who specializes in treating migraines must renew their H-1B visa to work
 10 beyond April 30, 2021. The DOL Rule would require that the professor be paid a 15% increase
 11 over their existing salary. As a result, this institution may lose this valuable resource amid a
 12 severe national shortage of neurologists, including migraine specialists, which is expected to hit a
 13 shortfall of 19% by 2025.¹⁰ Another *amicus* institution employs several H-1B workers in clinical
 14 faculty positions, providing advanced medical training to residents and fellows while engaging in
 15 clinical care, often in a highly specialized area. This institution also employs several H-1B faculty
 16 and researchers with expertise spanning medicinal chemistry, virology, molecular biology,
 17 toxicology, pharmacology, immunology, and computational biology for HIV and AIDS research.

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

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

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

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

9 To take one illustrative example, an *amicus* institution employs an Associate Professor on
10 an H-1B visa who is paid a salary of approximately \$86,000, which is above the previous
11 prevailing wage of approximately \$80,000. DOL has set the new minimum wage at in excess of
12 \$140,000. Critically, having just received tenure and while currently mired in the permanent
13 residency process, the Associate Professor must rely on the renewal of their H-1B visa until they
14 can become a lawful permanent resident. This individual is an Indian national, and therefore is
15 subject to the processing backlogs for that country,¹³ despite being in the EB-1 preference
16 category and having been in H-1B status since 2013.

17 *Amici's* international employees have expressed their profound concerns regarding the
18 impact of the Rules on their ability to continue to live and work in the United States. Many of
19 *amicus's* H-1B workers fear having to return to their countries of origin and losing their positions
20 with their institutions. This would not only force many well-respected scholars to return to their
21 country of origin, but it would also force entire families to uproot their lives. Many members of
22

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

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

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

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

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

4 *Amici* and their employees have enormous reliance interests on the issuance of these visas.
5 These institutions and individuals have “organized themselves around the existing regulations”
6 and consistently have relied on the pre-existing regulations for over a decade. (Compl. ¶ 159.) In
7 seeking to immediately and dramatically change their positions with respect to these visas, DOL
8 and DHS “must . . . be cognizant that longstanding policies may have engendered serious reliance
9 interests that must be taken into account.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117,
10 2126 (2016) (citation omitted). The sweeping changes to these visa programs do not sufficiently
11 account for the widespread reliance that has been in place for over a decade.

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

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

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

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

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

11 Although the precise number is unknowable at the present time, we estimate that hundreds
12 of employees of *amici* currently working and living in the United States would not be eligible to
13 renew their visas because of the Rules. These employees would be forced to leave the country and
14 the lives they have worked so hard to create here. These employees, many of whom have
15 previously been approved for visas, undoubtedly have significant reliance interests. *See DHS v.*
16 *Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020). Where, as here, an agency’s prior policy
17 has engendered serious reliance interests, the agency must provide a more persuasive justification
18 for the change than what would normally suffice. *Nat’l Urban League v. Ross*, 2020 WL
19 5739144, at *42 (N.D. Cal. Sept. 24, 2020). Ultimately, “the greater the reliance interests, the
20 greater [DHS and DOL’s] obligation to take them into account.” *S.A. v. Trump*, 363 F. Supp. 3d
21 1048, 1085 n.115 (N.D. Cal. 2018). Here, the agencies have completely failed to consider the
22 significant reliance interests on behalf of both visa sponsors and visa holders. Instead, they
23 bypassed the baseline notice-and-comment process and rushed sweeping changes into a final rule.
24 Finally, if DHS and DOL had provided *amici* with formal notice and the opportunity to provide
25 comments, many *amici* would have filed comments explaining the irreparable injury that will flow
26 from these arbitrary and capricious rules. Having been denied that opportunity, *amici* appreciate
27 the opportunity to present their concerns to the Court.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

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

DATED: October 30, 2020

Respectfully submitted,

PROSKAUER ROSE LLP

By: /s/ Lary Alan Rappaport
Lary Alan Rappaport (SBN 087614)
lrappaport@proskauer.com
PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
Telephone: (310) 284-5658
Facsimile: (310) 557-2193

Joseph C. O’Keefe*
jokeefe@proskauer.com
Andrew M. Sherwood*
asherwood@proskauer.com
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Telephone (212) 969-3000
Facsimile: (212) 969-2900
**Pro hac vice* application forthcoming

Attorneys for Amici Curiae