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and DOES 1 through 50
13

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION AT SANTA ANA

17 Z.W., C.Y, X.Y., A.G., M.X., Z.L., W.R.,
and DOES 1 through 50,
18

19 Plaintiffs,

20 vs.

21 U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
22 CUSTOMS ENFORCEMENT; CHAD R.
WOLF, Acting Secretary, U.S. Department
23 of Homeland Security; MATTHEW
ALBENCE, Acting Director, U.S.
24 Immigration and Customs Enforcement,

25 Defendants.
26
27
28

Case No.

Assigned to:

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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1 **INTRODUCTION**

2 1. Less than one month after the Supreme Court held that the Executive
3 Branch must “turn square corners” before taking an action that profoundly disrupts the
4 lives of hundreds of thousands of individuals, the Executive Branch once again acted
5 recklessly and inexplicably to disrupt the lives of hundreds of thousands more. In
6 March 2020, as the coronavirus public health emergency exploded, Immigration and
7 Customs Enforcement (“ICE”), through its Student and Exchange Visitor Program
8 (“SEVP”), issued Guidance documents (the “March Guidance”) assuring international
9 students that, for “the duration of the [coronavirus] emergency,” they could continue
10 their studies in the United States even if their colleges or universities were offering
11 exclusively online classes due to the coronavirus pandemic. But then, on July 6,
12 Defendants abruptly and without notice reversed course, and issued a new Guidance
13 (the “July 6 Guidance”) requiring such students to leave the United States if, in light
14 of the ongoing crisis, their schools continued with online-only instruction. After a
15 public outcry and the filing of this action and others, Defendants announced their
16 intent to rescind the July Guidance and subsequently issued new guidance allowing
17 online-only instruction, but only for returning students and *only* for the fall 2020
18 semester – *not* for the duration of the emergency should it extend for the remainder of
19 the academic year. Plaintiffs continue to be at risk that Defendants may, at any time,
20 reinstate the July 6 Guidance, thus necessitating Plaintiffs’ continued pursuit of this
21 action.

22 2. The July 6 Guidance was a cruel and politically motivated directive that
23 upended the lives of foreign students who are lawfully present in this country and who
24 contribute immeasurably to the quality of education at the institutions they attend.
25 These students chose to come to the United States to pursue degrees in law, medicine,
26 engineering, and every other academic field. They wish to prepare themselves to lead
27 productive lives that serve and build community wherever they ultimately settle.

1 Access to our outstanding institutions of higher education is one of the greatest gifts
2 that the United States gives the world, and that gift is repaid many times over by the
3 contributions that foreign students make to the United States and to the world as a
4 whole by virtue of the learning they receive. Those contributions reflect their
5 intelligence, compassion, and hard work.

6 3. In the midst of the most dangerous pandemic of the last hundred years,
7 universities have reshaped their educational models to ensure the quality, continuity
8 and safety of their educational programs. Utilizing their educational expertise and
9 recognizing their paramount responsibility to the safety of the university community
10 and the community at large, leadership at these schools have reluctantly accepted the
11 judgments of our nation's leading public health experts and CDC guidelines and have
12 instituted remote learning and teaching strategies and regimens. It should go without
13 saying that these decisions have not been easy. But it should also be readily
14 recognized that a university's decision to go all or principally remote is one of life and
15 death. Universities are doing their part to flatten the curve and repel the deadly
16 coronavirus that thrives on crowded settings inside buildings, precisely the
17 circumstances of normal classroom teaching and university life. And until July 6,
18 universities were doing so in reasonable reliance on guidance that ICE itself had
19 provided in March 2020, and that promised a flexible approach of allowing students to
20 maintain their visas while schools attempted, in good faith and with timely notice to
21 ICE, to provide the best educational opportunities possible while fulfilling
22 indispensable obligations to preserve the health of their students and their
23 communities.

24 4. On July 6, ICE abruptly changed course 180 degrees, without explanation
25 or even acknowledgement. Its decision sought to punish foreign students because their
26 universities prioritized the health and safety of their academic and local communities
27 and of the nation by choosing to hold remote classes beginning in the fall term.

1 5. The July 6 Guidance offered no explanation whatsoever for the complete
2 reversal in policy. But the facts are that the President of the United States, beset by
3 falling poll numbers in a fast closing election year, has tweeted repeatedly that CDC
4 guidelines must be altered and schools must open in the fall no matter the incongruity
5 with fundamental public health principles and the sound, on-the-ground knowledge
6 and expertise of university officials as to the safest course for their students and
7 community. Indeed, on the day that the ICE message was issued, he tweeted that
8 “SCHOOLS MUST OPEN IN THE FALL!!!”¹ The next day, Acting Deputy
9 Secretary of Homeland Security Ken Cuccinelli, responding to a question about the
10 July 6 Guidance, explained the guidelines were “setting the rules . . . that will, again,
11 encourage schools to reopen.”²

12 6. ICE’s announcement concerning international students attending
13 institutions that did not offer in-person instruction, or who were not able to take the
14 in-person classes that were offered, is part and parcel of the President’s approach.
15 These guidelines, which adopted a one-size-fits-all approach to higher education, are
16 blunt. They did not reflect the intensely local nature of university decisions, nor did
17 they make exceptions for students at heightened risk from the novel coronavirus.
18 Instead, the guidelines were designed to force institutions of higher education to
19 reopen for the fall term, no matter the cost.

20 7. Institutions and students pushed back, and between July 8 and July 13
21 filed over a half dozen lawsuits in 18 states challenging and seeking to invalidate the
22 July 6 Guidance. Under pressure, Defendants again abruptly changed course and
23 announced during a July 14 court hearing in the United States District Court for the
24 District of Massachusetts that they would be rescinding and not implementing the July

25 _____
26 ¹ Donald J. Trump (@realDonaldTrump), Twitter (July 6, 2020, 2:40 PM EDT),
<https://twitter.com/realDonaldTrump/status/1280209946085339136?s=20>.

27 ² John Bowden, *Cuccinelli Says Rule Forcing International Students to Return Home Will 'Encourage Schools to*
Reopen', The Hill (July 7, 2020),
28 <https://thehill.com/homenews/administration/506248-cuccinelli-says-rule-forcing-international-students-to-return-home>.

1 6 Guidance, and instead would revert to the March Guidance. Additional guidance
2 followed on July 24 (the “July 24 Guidance”) and again on August 7 (the “August 7
3 Guidance”) stating students who held F-1 visas as of March 2020 could remain in the
4 United States for the fall 2020 semester if their schools offered only online courses.

5 8. But the July 24 Guidance and the August 7 Guidance have not mooted
6 this dispute. On their face, the July 24 Guidance and August 7 Guidance apply only to
7 the “fall school term” and conspicuously do not commit to keeping the March
8 Guidance in place for the duration of the coronavirus emergency, leaving students
9 guessing about their status for the remainder of the academic year if their schools
10 remain only online. Defendants have not stated when they will issue guidance for the
11 next semester (which starts in January), what criteria they will use, or what process
12 and notice will be provided in connection with any new rule. Moreover, they have
13 failed to acknowledge either in this litigation, or in other litigation, or in any public
14 forum, that their July 6 Guidance was an unlawful agency action that ignored the
15 significant reliance interests of international students. They have also failed to
16 commit to concrete steps that would ensure that they do not again arbitrarily and
17 capriciously reverse course this fall.

18 9. Defendants thus have conspicuously left themselves all the running room
19 they need to violate the law again this fall should it suit the political whim of the
20 moment. There is no reason to believe that they will not, again without notice or
21 explanation, abruptly revert to the July 6 Guidance this week, next week, or later in
22 the fall 2020 semester.

23 10. Plaintiffs are serious students whose lives were needlessly and cruelly
24 thrown into disarray by the July 6 Guidance. They remain at risk that Defendants,
25 without sufficient notice or regard for Plaintiffs’ health and reliance interests, will
26 attempt to expel them again, even if the coronavirus emergency is still ongoing.
27 Defendants’ conduct not only puts Plaintiffs at continuing risk of harm but is causing

1 Plaintiffs harm right now, insofar as it is interfering with their ability to plan for the
2 remainder of the academic year concerning their education, training programs, and
3 their lives as a whole.

4 11. This lawsuit seeks a declaration that the July 6 Guidance was improperly
5 issued in violation of the APA and Plaintiffs’ due process rights, and a directive that
6 Defendants administer the SEVP in accordance with the March Guidance throughout
7 the entire academic year and until such time as the coronavirus crisis abates, unless
8 replaced by a properly-promulgated agency rule. The government has nothing to lose
9 by giving orderly respect to the APA and students’ basic due process rights; the
10 foreign students, their universities and communities, and those who stand by the rule
11 of law, have everything.

12 **PARTIES**

13 12. Plaintiff Z.W. is a 25 year-old Chinese national entering his second year
14 of study at University of California Irvine School of Law in Irvine, California (“UCI
15 Law”). After learning about UCI Law’s remote learning transition, he entered into a
16 13-month lease for an apartment in Irvine with monthly rent of \$1,730 and security
17 deposit. He entered into the lease with the expectation that he would be able to
18 continue his education through distanced, remote learning. Z.W. was preparing to
19 apply for a CPT visa so he could intern over the next, 2L summer to further his legal
20 education. Similar to all plaintiffs who are Chinese nationals, he is deeply concerned
21 with the financial costs associated with returning to China. He has paid a deposit for
22 his apartment out of pocket, and does not know how he will manage to pay for a
23 return flight to China, or the associated costs of China’s current mandatory 14-day
24 quarantine. His education will also be essentially prematurely terminated or paused,
25 because of China’s prohibition on Google and VPN use, in addition to the 12- hour
26 time difference.

1 13. Plaintiff C.Y. is a 27 year-old Chinese national entering her second year
2 of law school at UCI Law. She currently lives in Irvine, California where she moved
3 in 2019 to enroll in her first year of law school. When UCI Law switched to online
4 classes in March 2020 and Defendants issued the March 13 Guidance, C.Y. believed
5 she would be able to continue her studies in the United States for the 2020-21
6 academic year regardless of how UCI Law choose to offer classes in the fall. So she
7 leased on-campus housing through spring 2021, and pre-paid rent at a total cost of
8 \$10,380. If she were to have to return to China at any point in this academic year, she
9 would not be able to recover that rent. Additionally, it would be prohibitively
10 expensive for C.Y. to return to China, as the price of airline ticket from Los Angeles
11 to China has increased several fold since the start of the pandemic and could easily
12 exceed \$10,000. Her family cannot afford to pay the price of her plan ticket back to
13 China, nor can she. It will also be cost-prohibitive to pay for the hotel room in which
14 she would currently be required to self-quarantine for 14 days after returning to China.
15 If she were forced to return to China, C. Y. also fears she will be exposed to the novel
16 coronavirus on the flight to China and become infected, as she heard happened to
17 more than a dozen people on a recent international flight to China. Once in China,
18 C.Y. would not be able to continue to take law school classes due to, among other
19 things, the unavailability in China of tools that UCI Law uses to facilitate online
20 learning, including Google products (e.g., Google Drive) and secure VPNs.
21 Additionally, the 15 to 16 hour time change would make it practically impossible for
22 her to engage in clinical programs in which she has enrolled and to engage in
23 important conferences with fellow students and professors. C.Y. does not feel safe
24 attending in-person classes due to the health risks and therefore planned to take all of
25 her courses online in the fall. The prospect of making C.Y. choose between a
26 potentially unsafe in-person class and a prohibitively costly emergency journey home
27

1 is causing her severe distress, which she will worries will negatively impact her
2 grades.

3 14. Plaintiff X.Y. is a 25-year-old Chinese national who has attended UCI
4 Law on an F-1 visa since 2018 and this fall, will be entering her third and final year at
5 UCI Law. In reliance upon the SVEP’s March guidance and UCI’s June statements
6 that the fall semester would be held remotely, X.Y. and her partner, a UCLA student,
7 entered into a 12-month lease for an apartment in Los Angeles. She also cancelled an
8 August trip to visit family at home in China because she anticipated complications,
9 including travel difficulties and the possibility of not being able to return to the United
10 States to finish her program, resulting from the pandemic. She thought it was safer to
11 stay in place. X.Y. is deeply concerned about the prospect of travel at a time of
12 increased risk of community transmission both nationally in the United States and
13 locally in Los Angeles. Her healthcare plan is effective through UCI enrollment, so
14 she doesn’t know if she would have healthcare coverage in China. X.Y. is concerned
15 she will have to drop out of school if she is forced to return to China, because
16 attending live-streamed classes would mean that X.Y. would need to attend school in
17 the middle of the night, and she would have no way to obtain required casebooks. The
18 process of applying for a permanent work visa from China, rather than while in the
19 U.S. as she had planned, will be considerably more difficult, too.

20 15. Plaintiff A.G. is a 25-year-old German national who has been attending
21 the University of Southern California Law School (“USC Law”) in Los Angeles,
22 California, on an F-1 visa, will be entering her third and final year. She lives in Los
23 Angeles, where she is responsible for a lease and is employed through the summer by
24 a law firm. Her responsibilities in the United States include being the sole familial
25 caretaker for her almost 90 year-old great aunt who lives in Los Angeles. A.G. drives
26 her to doctor’s appointments and goes grocery shopping for her. A.G. is nervous about
27 the prospect of having to fly if she were forced to return to Germany, where she would

1 need to live with her immediate family. She fears that the return flight will expose her
2 to the novel coronavirus and then put her family members at risk because of their high
3 risk for COVID-19 complications. Her father has four stents in his heart and her
4 mother has high blood pressure. She herself has no known pre-existing conditions, but
5 she would be unable to take advantage of her U.S. health insurance in Germany. If
6 forced to return to Germany, A.G. would have difficulties continuing her studies, as
7 she would need to take her classes in the middle of the night, due to the nine-hour time
8 difference, and textbooks may be difficult to obtain. If USC Law were to transition to
9 hybrid instruction, A.G. would not feel safe attending in-person classes.

10 16. Plaintiff M.X. is a 26-year-old Chinese national entering her second year
11 of study at UCI Law. Because of the exemption granted by ICE, and UCI's June
12 announcement of remote instruction in the fall, M.X. decided to plan for the upcoming
13 year by renewing her on-campus lease for a year, and has been paying rent under the
14 lease for several months. M.X. planned to continue her studies in the United States,
15 and planned to intern in the summer of 2021. In order to do so, she would need a CPT
16 visa. Her eligibility for the CPT visa, however, will be foreclosed if her F-1 visa is
17 terminated. She faces the additional financial burden of extremely expensive return
18 flights to China and expenses associated with China's current mandatory 14-day
19 quarantine. M.X. does not have the financial means to pay these required costs out of
20 pocket on such short notice. Similarly, it would be effectively impossible for her to
21 continue her studies while in China, due to the time difference and restrictions against
22 Google and VPN use, meaning she would not be able to attend or participate in school
23 even if the time zone were not an issue. If UCI were to offer in-person or hybrid
24 learning, M.X. would be reluctant to attend classes due to concerns about the risk of
25 infection in a classroom requiring physical attendance.

26 17. Plaintiff Z.L. is a 25 year-old Chinese national who lives in Los Angeles
27 and is enrolled as a PhD student at University of California, Los Angeles ("UCLA"),

1 focusing on cinema and media studies. She enrolled at UCLA in 2017 and holds an F-
2 1 visa. After UCLA switched to online operations in late March, Z.L. remained in the
3 United States because she did not want to risk her or her parents' health and safety by
4 traveling to China during a pandemic. She worries about returning to China because
5 traveling will place her at risk of contracting COVID-19, as she will be exposed to
6 people who may be infected with the virus at airports and inside the plane. If she were
7 forced to return to China, Z.L. would not be able to continue her studies for several
8 reasons. For instance, due to the 15-hour time difference between Los Angeles and
9 China, Z.L. will have to attend her online classes at unconventional times. For
10 example, Z.L. will have to call into a 1 p.m. Monday class at 4 a.m. on Tuesday,
11 Beijing time. Watching recorded classes is not an option for her because graduate-
12 level courses are designed to be centered around conversations and dialogue with
13 other students than lecture. Relying on class recordings would deprive her of
14 important opportunities to learn from and with her peers. Z.L. is concerned that taking
15 in-person classes will jeopardize her health, and has been planning to take all of her
16 fall 2020 courses online and, if necessary, do the same for the remainder of the
17 academic year. In China, Z.L. will not be able to access the print and digital media
18 resources she needs to complete her dissertation, and strict quarantine requirements
19 will likely impair her ability to study for her PhD qualifying exam. Failure of the
20 exam could jeopardize the funding she needs to complete the years-long program she
21 has undertaken. Z.L.'s housing situation is unsettled and if she returns to China she
22 will have to pay costs of storage for her belongings and car. Not knowing whether she
23 may have to leave the country on short notice or risk serious illness—or even death—
24 by attending in-person classes is keeping Z.L. tense and causing her great distress.

25 18. Plaintiff W.R. is a 26-year-old Chinese national entering his second year
26 of school at UCI Law School who currently lives near Irvine, California in San Juan
27 Capistrano. Several months ago in March, UCI Law announced its decision to conduct

1 remote instruction. Around that same time, W.R. received an exemption from ICE to
2 remain in the United States with his wife, who is a permanent resident alien living in
3 San Juan Capistrano and owns a business in the United States. If he is forced to return
4 to China, he will be separated from his wife. He will also suffer financial losses based
5 on decisions made in reliance on his ability to stay in the United States for his studies.
6 If he is required to return to China, W.R.'s financial burden will also be compounded
7 by the high cost of travel to China in the era of COVID-19, with average one-way
8 economy flights priced at close to \$10,000 (more than eight times the cost of a single
9 flight to China before the pandemic). Additionally, passengers arriving from outside
10 China currently are financially responsible for room and board associated with
11 China's mandatory 14-day quarantine, which would also be a financial hardship for
12 W.R. If he is required to return to China, W.R.'s legal education will not be able to
13 continue for all practical purposes. He will not be able to participate in classes,
14 important group, or conduct necessary research due to the 15 to 16 hour time zone
15 difference and China's strict ban against Google and VPN usage, both of which are
16 required to access the research databases and at UCI Law. W.R. will also be unable to
17 benefit from the student legal clinic in which he is enrolled for the upcoming school
18 year if he has to return to China. If he is required to attend in-person instruction, W.R.
19 is concerned for his health and safety due to threat of exposure to the novel
20 coronavirus.

21 19. Defendant United States Department of Homeland Security is a federal
22 agency of the United States.

23 20. Defendant United States Immigration and Customs Enforcement is a
24 division of the United States Department of Homeland Security.

25 21. Defendant Chad F. Wolf is the Acting Secretary of the United States
26 Department of Homeland Security. He is sued in his official capacity.

1 residents to avoid leaving their residences. At one point, 42 states instituted such
2 orders.³

3 30. On March 4, 2020, California Governor Gavin Newsom declared a state
4 of emergency in light of the COVID-19 pandemic.⁴

5 31. On March 9, the University of California at Berkeley suspended in-
6 person instruction.⁵

7 32. On March 10, the University of California campuses at Davis, Irvine, Los
8 Angeles, Riverside, and Santa Barbara followed suit, as did the University of Southern
9 California.⁶

10 33. On March 19, Governor Newsom announced a statewide stay-at-home
11 order.⁷ Among other things, this order forbade universities from continuing to operate
12 in-person classes, including the schools Plaintiffs attend.

13 34. While the order has been amended to loosen restrictions, the order could
14 be tightened again at any time.

15 35. COVID-19 infections are continuing to plague much of the country and
16 California in particular. Nationwide, over five million COVID-19 cases have been
17 diagnosed, and more than 165,000 people have died.⁸

18 36. Both in California and nationwide, the COVID-19 pandemic is worse
19 than at any point during the spring academic semester.

20 37. In recognition of the continuing threat COVID-19 posed to its students,
21 staff, and faculty, on June 23, the University of California, Irvine School of Law
22 (“UCI Law”) announced that all second- and third-year law students would only be

23 _____
24 ³ Jasmine C. Lee *et al.*, *See How All 50 States Are Reopening (and Closing Again)*, N.Y. Times (July 8, 2020),
<https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>.

25 ⁴ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

26 ⁵ <https://news.berkeley.edu/2020/03/09/as-coronavirus-spreads-uc-berkeley-suspends-in-person-instruction/>

27 ⁶ <https://www.latimes.com/california/story/2020-03-10/ucla-to-cancel-most-in-person-classes-until-early-april-to-protect-against-coronavirus>

28 ⁷ Executive Order N-33-20, Executive Dep’t State of California (March 19, 2020).

⁸ *Cases in the U.S.*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Aug. 14, 2020).

1 able to take on-line courses.⁹ That guidance has not changed, with instruction
2 scheduled to begin on August 17, 2020.

3 38. Likewise, on June 26, the University California at Berkeley Law School
4 (“Berkeley Law”) announced that it would conduct the fall 2020 term entirely
5 online.¹⁰ Berkeley Law determined that restrictions on the number of students in a
6 classroom and the requirement that classrooms be disinfected between classes would
7 make offering safe, in-person instruction infeasible. Online orientation for new
8 students has already taken place, and the fall semester is scheduled to commence on
9 Monday, August 17.

10 39. Schools in the University of California system are not alone in moving
11 some or all students fully online in the fall semester. More than 150 schools will now
12 offer exclusively online instruction to all students, including Harvard University,¹¹
13 Princeton University, the University of Southern California,¹² and the University of
14 Santa Clara, and over 700 other schools are offering most classes online.¹³ As of
15 August 7, over 700 schools have yet to announce their reopening plans.

16 40. Schools are right to be cautious. Public health leaders believe the United
17 States is still contending with the first wave of coronavirus infections,¹⁴ and there is
18 widespread concern that re-opening college campuses will cause the virus to spread
19 and endanger the lives of staff, faculty, students, and those who live in surrounding
20 communities.¹⁵ Indeed, the Pac-12 and Big 10 college athletic conferences recently
21 decided to postpone their 2020 fall seasons for football and other fall sports due to
22 concerns about student-athletes’ safety.

23
24 ⁹ <https://www.law.uci.edu/news/press-releases/2020/fall-2020-semester-planning-update-06232020.pdf>

¹⁰ <https://www.law.berkeley.edu/article/fall-instruction-memo-6-26-20/>

25 ¹¹ <https://www.bostonherald.com/2020/07/06/all-harvard-university-students-will-take-online-classes-this-fall-amid-coronavirus/>

26 ¹² <https://coronavirus.usc.edu/2020/07/01/7-1-letter-on-student-housing-and-course-schedules/>

¹³ <https://collegecrisis.shinyapps.io/dashboard/> (last accessed on Aug. 14, 2020)

27 ¹⁴ <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus>

28 ¹⁵ *See, e.g.,* <https://www.theatlantic.com/ideas/archive/2020/08/cancel-college/615064/>

1 41. Forecasts of continued virus spread through the winter coupled with
2 stringent state guidelines for reopening colleges and universities cast doubt on the
3 viability or likelihood that schools will be able to legally or safely offer in-person
4 classes after the conclusion of the fall 2020 term. For example, under August 7, 2020
5 draft guidance issued by the State of California, colleges and universities will not be
6 permitted to resume in-person classes unless local epidemiologic conditions meet
7 certain thresholds, testing resources are available and public health capacity exists to
8 respond to outbreaks, and the schools are able to implement extensive (and expensive)
9 social distancing and virus prevention protocols.¹⁶

10 **The F-1 Student Visa Program**

11 42. The United States has labeled students as “non-immigrants” and operated
12 a student visa program since at least 1921.¹⁷ Although the F-1 program has changed
13 over the years, millions of students have entered the country with F-1 visas since at
14 least 2000, as far back as public records are available.¹⁸

15 43. For the fall 2019 term, there were 44,485 international students in the
16 University of California (“UC”) system. 27,189 of those were undergraduate students,
17 and 17,295 were graduate students.¹⁹

18 44. According to a report published by ICE, the total number of Student and
19 Exchange Visitor Information System (“SEVIS”) records for active F-1 and M-1
20 students was 1,551,373 in the calendar year 2018. Asia remains the number-one
21 continent of origin for nonimmigrant students, with 1,165,483 student records. China
22 (478,732), India (251,290), and South Korea (88,867) sent the largest numbers of
23 students in both calendar years 2017 and 2018.²⁰

24
25 ¹⁶ <https://files.covid19.ca.gov/pdf/guidance-higher-education--en.pdf>

26 ¹⁷ <https://web.archive.org/web/20140205165423/http://www.iie.org/Who-We-Are/History>

27 ¹⁸ <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html>

28 ¹⁹ <https://www.universityofcalifornia.edu/infocenter/fall-enrollment-glance>

²⁰ <https://www.ice.gov/doclib/sevis/pdf/sevisByTheNumbers2018.pdf>

1 45. There were 145,564 Optional Practical Training (“OPT”) students in the
2 calendar year 2018, including 69,650 science, technology, engineering, and
3 mathematics OPT students.²¹ There were 151,525 curricular practical training
4 (“CPT”) students who reported working for an employer in the calendar year 2018, a
5 14-percent increase since 2017.²²

6 46. In 2018, California hosted 302,073 nonimmigrant students, 19.5 percent
7 of all nonimmigrant students in the United States, and more than any other state.²³

8 **Defendants’ Response to the COVID-19 Pandemic**

9 47. On March 9, 2020, ICE’s Student and Exchange Visitor Program
10 (“SEVP”) issued a Broadcast Message providing guidance on COVID-19 and its
11 implications for nonimmigrant F and M students (“March 9 Guidance”). In this
12 guidance, Defendants recognized that “SEVP-certified schools may need to adapt
13 their procedures and policies to address the significant public health concerns
14 associated with the COVID-19 crisis.” Defendants provided schools with a template
15 that schools could use to report those changes to SEVP. Defendants assured schools
16 and students, however, both that “SEVP is focused on ensuring that nonimmigrant
17 students are able to continue to make normal progress in a full course of study as
18 required by federal regulations,” and that “SEVP intends to be flexible with temporary
19 adaptations.” Defendants further recognize[d] that the COVID-19 crisis is fluid and
20 rapidly changing” and “[f]or that reason” assured schools that it was “leaving room
21 for schools to comply with state or local health emergency declarations.”

22 48. On March 13, 2020, President Donald J. Trump declared that COVID-19
23 had created a national emergency.²⁴ This emergency is ongoing.

24
25 ²¹ *Id.*

26 ²² *Id.*

27 ²³ *Id.*

28 ²⁴ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>

1 49. On March 13, 2020, as governors across the country began to sign stay-
2 at-home orders and many institutions of higher education began to switch to remote-
3 teaching options, the Defendants issued a follow-up to the March 9 Guidance (“March
4 13 Guidance”) addressing “inquiries” that SEVP had received about various “different
5 scenarios” a school or student might face, and instructing schools and students how
6 the transition to online classes would affect nonimmigrant students’ visa status.²⁵

7 50. The March 13 Guidance presented students with three scenarios they
8 might face: a complete school shutdown, a switch to online learning while the student
9 remained in the United States, and a switch to online learning while the student moved
10 outside of the United States.²⁶ In all three scenarios, Defendants assured students that
11 they would be able to remain in compliance with the terms of their visas.

12 51. Defendants assured students and schools that it would treat school
13 shutdowns the same way it treated “short-term breaks in the school calendar.”
14 International students would remain eligible for their visas if they “intend[ed] to
15 resume their course of study when classes resume.”²⁷

16 52. For institutions that switched to online education, and “[g]iven the
17 extraordinary nature of the COVID-19 emergency,” Defendants waived the limits for
18 online courses laid out in 8 C.F.R. §§ 214.2(f)(6)(i)(G) and 214.2(m)(9)(v).
19 Defendants waived these limits for both international students who remained in the
20 United States and those who chose to travel abroad during the period of online
21 instruction.²⁸ Defendants explained that these waivers would remain in place for “the
22 duration of the [COVID-19] emergency”

23 53. At the end of the March 13 Guidance, Defendants noted that “[d]ue to
24 “the fluid nature of this difficult situation, this guidance may be subject to change.”

25
26 ²⁵ https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf

27 ²⁶ *Id.*

28 ²⁷ *Id.*

²⁸ *Id.*

1 Nowhere in the March 13 Guidance, however, did Defendants suggest or even hint
2 that they intended to change the values that underlay the March 9 and March 13
3 guidance (together, the “March Guidance”), such as to abandon the “focus” they had
4 announced, just six days before, on “ensuring that nonimmigrant students are able to
5 continue to make normal progress in a full course of study.” March 9 Guidance.
6 Similarly, nowhere in the March 13 Guidance did Defendants suggest or hint that they
7 no longer “intend[ed] to be flexible with temporary adaptations” or would deny
8 schools “room ... to comply with state or local health emergency declarations.” March
9 9 Guidance. To the contrary, Defendants made clear that they planned to monitor
10 factual changes in the COVID-19 situation: “SEVP will continue to monitor the
11 COVID-19 situation and will adjust its guidance as needed.”

12 54. On March 20, 2020, ICE posted links to the March 9 and March 13
13 guidance documents on its website together with some sample Questions and Answers
14 geared to be helpful to students. One such Q and A read:
15 “Can nonimmigrant students participate in online classes?
16 “*SEVP is committed to remaining flexible* in allowing schools to make temporary
17 procedural adaptations *so nonimmigrant students can continue to make normal*
18 *forward progress* in their program of study. They can temporarily engage in distance-
19 learning, either from within the U.S. or outside the country, in light of COVID-19.
20 SEVP will provide updated guidance *as additional* information concerning the scope
21 and length of this situation becomes clearer.” (Emphasis added.)

22 55. For the four months following the release of the March 9 and March 13
23 Guidance, students and schools engaged in extensive efforts to plan for the fall
24 academic year, trusting that Defendants’ March Guidance, as reiterated in the other
25 communications, accurately reflected the approach that Defendants would take to the
26 visa status of international students during the COVID-19 emergency.

1 56. The nation’s COVID-19 emergency has continued. President Trump has
2 not withdrawn the declaration of a national state of emergency. In California, COVID-
3 19 infection and death rates have only climbed since the March Guidance was issued.

4 57. Yet on July 6, 2020, Defendants suddenly and without notice announced
5 a rollback of the exemptions put in place in the March Guidance.²⁹ This was done
6 despite the fact that the nation was still in the midst of the emergency, with COVID-
7 19 infection and death rates exceeding their March levels in many states, including in
8 California.

9 58. These guidelines (“July 6 Guidance”) required students whose
10 institutions choose to conduct the fall 2020 term entirely online to exit the United
11 States. The announcement stated that:

12 Nonimmigrant F-1 and M-1 students attending schools operating
13 entirely online may *not* take a full online course load and remain in the
14 United States. The U.S. Department of State will not issue visas to
15 students enrolled in schools and/or programs that are fully online for
16 the fall semester nor will U.S. Customs and Border Protection permit
17 these students to enter the United States. Active students currently in
18 the United States enrolled in such programs must depart the country or
19 take other measures, such as transferring to a school with in-person
instruction to remain in lawful status. If not, they may face
immigration consequences including, but not limited to, the initiation
of removal proceedings.³⁰

20 59. The July 6 Guidance also made clear that students whose in-person
21 classes were switched online partway through the term would be required to leave the
22 United States:

23 Schools should update their information in the Student and Exchange
24 Visitor Information System (SEVIS) within 10 days of the change if
25 they begin the fall semester with in-person classes but are later

26 ²⁹ [https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-](https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during)
27 [courses-during](https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during)
28 ³⁰ *Id.*

1 required to switch to only online classes, or a nonimmigrant student
2 changes their course selections, and as a result, ends up taking an
3 entirely online course load. Nonimmigrant students within the United
4 States are not permitted to take a full course of study through online
5 classes. If students find themselves in this situation, they must leave
6 the country or take alternative steps to maintain their nonimmigrant
7 status such as a reduced course load or appropriate medical leave.³¹

6 60. The July 6 Guidance further barred students whose institutions have gone
7 either hybrid or in-person from taking a fully online curriculum:

8 These schools must certify to SEVP, through the Form I-20,
9 “Certificate of Eligibility for Nonimmigrant Student Status,” certifying
10 that the program is not entirely online, that the student is not taking an
11 entirely online course load this semester, and that the student is taking
12 the minimum number of online classes required to make normal
13 progress in their degree program.

13 61. Nowhere in the July 6 Guidance did Defendants state that the COVID-19
14 emergency had ended (it had not), whether as a formal or a factual matter. Indeed, the
15 July 6 Guidance was entirely silent on “the COVID-19 situation” that Defendants had
16 earlier said they were planning to monitor and would make the basis of any change in
17 guidance.

18 62. Nowhere in the July 6 Guidance did Defendants acknowledge their prior
19 commitment, in the March 9 Guidance, to allow international students “to make
20 normal progress in a full course of study,” “to be flexible with temporary
21 adaptations,” or allow schools “room ... to comply with state or local health
22 emergency declarations.”

23 63. Nowhere in the July 6 Guidance did Defendants give any consideration
24 to the reliance that international students and schools may have placed, in making
25 their respective plans for the coming academic year, on the March 9 and March 13
26

27 ³¹ *Id.*

1 guidance documents, on the nation's longstanding commitment to the F-1 Visa
2 program, and on the expectation that any changes Defendants would announce to the
3 March 9 and 13 Guidance would reflect a good-faith assessment of materially changed
4 circumstances in light of the values expressed in those documents.

5 64. The July 6 Guidance thus reflected a complete but unacknowledged
6 repudiation of the approach Defendants laid out on March 9 and March 13 to
7 addressing the implications of the COVID-19 pandemic for holders F-1 and M-1
8 visas.

9 65. The July 6 Guidance also failed to address numerous important issues
10 that any reasoned decision maker would consider. For example, the July 6 Guidance
11 did not include an exception for students who cannot attend classes because they are at
12 an elevated risk to COVID-19 due to pre-existing health conditions, nor did it contain
13 an exception for students living with family members or roommates who are at an
14 elevated risk to COVID-19.

15 66. The July 6 Guidance also failed to include an exception for students who
16 are forced into online classes because the state institutes a stay-at-home order that
17 shuts down their educational institution.

18 67. The July 6 Guidance also did not include an exception for students who
19 cannot access the internet in their country of origin, for students who cannot safely
20 travel or who cannot travel at all to their country of origin, or for students who fear
21 suffering injury or death if they return to their country of origin.

22 68. In summary, the July 6 Guidance completely abandoned, without
23 explanation, both the substantive guidance Defendants provided on March 9 and
24 March 13 and the approach Defendants announced they would take to considering any
25 changes to that guidance. The July 6 Guidance also ignored the public-health-
26 informed decisions of schools and government officials to limit or cease in-person
27 teaching. It did not include a safety valve for even the worst coronavirus outbreaks. It

1 did not allow for any of the flexibility necessary to safely manage an increasingly
2 dangerous pandemic. The July 6 Guidance did nothing but mandate the expulsion of
3 students from the United States because of circumstances outside of the students'
4 control, no matter the consequences for the students, the schools, or the country.

5 69. When issuing the July 6 Guidance, the Defendants did not provide an
6 explanation for their departure from the March 9 and March 13 guidance documents.
7 But on July 7, Ken Cuccinelli, the Senior Official Performing the Duties of the
8 Deputy Secretary of Homeland Security (“DHS”) and the Senior Official Performing
9 the Duties of the Director of the United States Citizenship and Immigration Services
10 (“USCIS”), made clear his views about students enrolled in online courses, or enrolled
11 at institutions offering only online courses. “There isn’t a reason for a person holding
12 a student visa to be present in the country . . . they don’t have a basis to be here. . . . I
13 don’t frankly follow why a student visa holder would be here if their school isn’t
14 functioning.”³²

15 70. On July 6, at 2:40 p.m. Eastern Time, President Donald Trump tweeted
16 his support for the opening of schools by stating, “SCHOOLS MUST OPEN IN THE
17 FALL!!!”³³

18 71. President Trump continued to pressure other institutions beyond
19 universities to open in the fall by threatening to cut funding otherwise.³⁴

20 72. At 4:11 p.m., he accused the Democratic Party and the presidential
21 candidate Joe Biden of supporting closure of schools for political reasons and not
22 health reasons.³⁵

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24
25

³² <https://www.mediaite.com/tv/watch-ken-cuccinelli-and-cnns-brianna-keilar-battle-in-absurd-20-minute-debate-on-immigration-covid-and-confederate-flags/>

26 ³³ <https://twitter.com/realDonaldTrump/status/1280209946085339136>

27 ³⁴ <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html>

28 ³⁵ <https://twitter.com/realDonaldTrump/status/1280232979781111808>

In Response to Lawsuits, Defendants Suddenly Change Course For Fall 2020

1
2 73. Soon after the July 6 Guidance was issued, students and universities and
3 states attorneys general filed over a half-dozen lawsuits in 18 states to challenge the
4 legality of the July 6 Guidance, including this lawsuit brought on behalf of seven
5 student Plaintiffs.

6 74. As the cases progressed and TROs were being sought, Defendants again
7 abruptly changed the rules for international students. During a court hearing in the
8 United States District Court for the District of Massachusetts on July 14, counsel for
9 Defendants suddenly announced they would rescind the July 6 Guidance and its
10 implementation.

11 75. Although the announcement impacted the lives of hundreds of thousands
12 of international students, Defendants did not accompany it with a formal statement of
13 rescission or any express acknowledgement that the July 6 Guidance was both
14 unlawful and legally indefensible. Defendants also declined to issue any explanation
15 or offer any principled basis for their abrupt reversal. Defendants even refused to
16 confirm that the March Guidance would remain in effect for the duration of the
17 coronavirus emergency.

18 76. Instead, on the next day (July 15), ICE deleted from its website the July 6
19 Broadcast Message from the “Guidance Documents” and a related July 7 FAQ from
20 the “Frequently Asked Questions” sections of the site. But Defendants did not
21 disseminate any other information about the policy change to students through any
22 official channels. Visitors to the ICE website hoping to find out more, for example,
23 still saw a press release dated July 6 describing the July 6 Guidance, even though the
24 lengthy documents describing that guidance had been removed.

25 77. It wasn’t until July 24 that Defendants finally informed students and
26 schools in any detail about the changed policy. In a Broadcast Message accompanied
27 by FAQs and a press release (together, the “July 24 Guidance”), Defendants clarified

1 that for the fall 2020 semester, “active nonimmigrant students” may remain in the U.S.
2 to engage in a full course of study if their school offers only online instruction.

3 However, the same policy would not apply to students outside of the country who
4 were not enrolled in a program of study as of March 9, 2020 and whose schools were
5 offering only online classes.³⁶ The July 24 Guidance says nothing about what students
6 can expect to happen for the balance of the academic year (e.g., semesters or quarters
7 beginning in January 2021), should their schools offer only online classes.

8 78. On August 7, 2020, Defendants issued another FAQ, “Frequently Asked
9 Questions for SEVP Stakeholders about COVID-19, Last Updated: Aug. 7, 2020,”
10 (the “August 7 Guidance”) which incorporated the July 24 Guidance for fall 2020.
11 The August 7 Guidance also announced the “rescission” of answers to a handful
12 questions that appeared in the July 6 Guidance. However, none of the rescinded
13 answers addressed the gravamen of the July 6 Guidance: whether F-1 visa holders
14 could remain in the U.S. if their schools did not offer in-person classes.³⁷ The August
15 7 Guidance also failed to address students’ fates for the balance of the academic year.
16 Instead of offering assurances that the March Guidance would remain the policy
17 during the pandemic, the August 7 Guidance conceded explicitly that it is “subject to
18 change.”

19 79. In short, nothing prevents Defendants from abandoning the August 7
20 Guidance on a whim. By failing to acknowledge that the July 6 Guidance was
21 unlawful, to formally rescind the July 6 Guidance, or to make any express
22 commitment (let alone a binding one) to keep the March Guidance in place for the
23 duration of the pandemic emergency, Defendants have kept the door open to
24 reinstating the July 6 Guidance at any time and for any reason.

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27 ³⁶ See <https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf>.

³⁷ <https://www.ice.gov/doclib/coronavirus/covid19faq.pdf>.

1 **The Impact of Uncertainty About the Academic Year on International Students**

2 80. Plaintiffs attend schools that are offering only online classes to all
3 students, or at least to all international students on F-1 visas.

4 81. Based on the Defendants' guidance in March 2020 confirming they could
5 remain in the U.S. to continue their studies online "throughout the duration of the
6 emergency," Plaintiffs secured housing and made other advance commitments for the
7 2020-21 academic year.

8 82. Plaintiffs have no assurances, however, that Defendants will allow them
9 to remain in the U.S. for the remainder of the academic year -- or even through the fall
10 2020 semester. If they are forced to leave the country at the conclusion of the fall
11 2020 semester, or even before that time should Defendants abruptly change the rules
12 without warning or valid explanation yet again, Plaintiffs will be ripped from their
13 communities and their academic programs. Their carefully-laid financial, health,
14 employment, immigration, and personal plans -- made under the assumption that
15 Defendants would not revoke the March Guidance for the "duration of the
16 emergency" -- will be upended.

17 *Housing*

18 83. Some Plaintiffs have signed leases and acquired housing under the
19 assumption that they would be present in the United States for the academic year. If
20 these Plaintiffs are forced to leave the United States during the academic year, they
21 will either have to break their leases and lose their security deposits, which would
22 result in a loss to their credit score, or lose money by continuing to pay rent until the
23 end of the lease term.

24 84. Plaintiffs will likewise have to procure housing in their country of origin.
25 While some Plaintiffs may be able to live with family, others have no safety net in that
26

1 country, and will be forced to find housing with adequate internet connections and
2 access to study space with little notice, perhaps before they leave the United States.

3 85. When some Plaintiffs relocated to the United States to enter their
4 respective academic programs, they brought all of their belongings and livelihoods.
5 Because they justifiably expected to remain in the United States for years of
6 education, they did not build a safety net in their countries of origin. They terminated
7 their housing, sold their furniture, and gave away the belongings that they could not
8 bring with them to the United States. These Plaintiffs do not have a ready-made home
9 in their respective home countries.

10 *Travel*

11 86. The COVID-19 pandemic affects countries worldwide. Multiple
12 countries have shut down their borders and banned all transnational flights. Others
13 have specifically barred flights from the United States. If Plaintiffs are forced to
14 suddenly leave the country without adequate warning, they may not be able to find
15 flights back to their home countries.

16 87. Even if each Plaintiff is able to find a flight itinerary that will eventually
17 take her home, the limited availability of international flights will mean that their
18 itineraries will likely include multiple stops over different continents.

19 88. Multi-city itineraries are not simply inconvenient. They pose health risks.
20 As an airline passenger, the Plaintiff would spend hours in a confined space
21 surrounded by shared surfaces - exactly the kind of prolonged exposure that creates
22 substantial risk of contracting the novel coronavirus. This is in addition to the added
23 risks associated with airports, whether it be standing in security lines or waiting at the
24 gate to board an aircraft.

25 89. Such an itinerary is also exorbitantly, perhaps prohibitively, expensive.
26 As noted above, airfare may exceed \$10,000 – especially given the need to book on
27 short notice. In addition, for students returning to countries, such as China, that have

1 imposed a quarantine on incoming travelers, the students would have to pay for 14
2 days' lodging while they quarantine.

3 90. The financial and logistical challenges that Plaintiffs face multiply for
4 international students with dependents.

5 *Health Risks*

6 91. Forcing students to return to their countries of origin does more than put
7 them at increased risk of exposure to the novel coronavirus during transit. In order to
8 accommodate the course schedule and participate in extracurricular activities,
9 plaintiffs, some of whom will not be given the option of asynchronous class
10 participation, will be forced to maintain irregular sleep schedules.³⁸ These sleep
11 schedules will put students at a disadvantage compared to their peers, which poses a
12 particular harm to plaintiff in classes that are graded on a curve.

13 92. Plaintiffs would also be burdened with health insurance costs. Many
14 Plaintiffs have already paid for their 2020–21 health insurance plans through their
15 university—plans that will do nothing for them in their country of origin. These
16 Plaintiffs may need to buy health insurance in their home countries. Foregoing health
17 insurance during the pandemic is not a realistic nor preferred option for Plaintiffs.
18 However, given the costs associated with health insurance and the price of their now-
19 useless American insurance, Plaintiffs may go uncovered.

20 *Education Inequities*

21 93. If Plaintiffs are forced to return to their home countries, it could be
22 difficult or impossible for them to participate fully in classes and complete the
23 academic year. Students in different time zones would be forced to choose between
24 attending online classes in the middle of the night or watching recorded classes.³⁹

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26 ³⁸ <https://www.tandfonline.com/doi/full/10.1080/09291016.2015.1103942>; <https://mail.google.com/mail/u/1/#inbox/FMfcgwxwJWjBjvRFDqNrMVnNJctWDiNWW?projector=1&messagePartId=0.1>

27 ³⁹ See, e.g., Kelsey J. Griffin, *Hundreds of Harvard Law Students Criticize Plans for Online Fall Semester*, Harv.
28 *Crimson* (June 17, 2020, 9:11 PM), <https://www.thecrimson.com/article/2020/6/17/hls-online-fall-semester/>.

1 Students watching recordings will be harmed because they cannot ask questions
2 during class, participate in class discussion, or otherwise have a visible presence. But
3 students who attempt to participate as the class occurs must stay alert for two to three
4 hours of lecture at inopportune times, often in the middle of the night. Either way,
5 students will be put at a substantial disadvantage compared to their classmates taking
6 the same class during normal hours.

7 94. Forcing Plaintiffs to return to their countries of origin will severely limit
8 their practical learning opportunities. In law school, meeting and communicating with
9 clients, supervisors, and team members constitute a large part of clinical experience.
10 While any remote learning complicates these experiences, substantial time differences
11 like those faced by Plaintiffs make them almost impossible. For example, students
12 enrolled in legal clinical programs often have trouble scheduling meetings with clients
13 even when the all reside in the same city; these meetings simply will not occur when
14 the student attorney and the client must contend with a 16-hour difference.

15 95. The same applies to pro bono opportunities, many of which involve client
16 intake interviews or group work. Limiting international students' pro bono
17 opportunities will disadvantage them, as some law schools confer graduation honors
18 based on the number of pro bono hours completed.⁴⁰

19 96. For some Plaintiffs, participating in online classes in their countries of
20 origin may not be an option at all. Internet access, which is absolutely necessary for
21 remote learning, is not guaranteed in some countries. Some countries have restricted
22 internet access while others, like Ethiopia,⁴¹ block it altogether. Without adequate
23 internet access, students cannot take online classes at all.

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25
26 ⁴⁰ See, e.g., *Pro Bono Program Code and Guidelines*, UCI Law, <https://www.law.uci.edu/about/public-service/public-interest/probono/program-guidelines.html> (last visited July 8, 2020).

27 ⁴¹ Bethlehem Feleke, *Internet Cut Off in Ethiopia amid Outcry over Death of Singer-Activist*, CNN (June 30, 2020, 2:59
28 PM), <https://www.cnn.com/2020/06/30/africa/ethiopia-singer-killing-sparks-protest-intl/index.html>.

1 97. Other countries heavily monitor internet activity and curtail access to
2 some resources. Beyond potentially exposing students to government harassment
3 because of the contents of their studies, these restrictions will make it difficult or
4 impossible for students in these countries to continue their studies.

5 98. China, for example, limits access to Google web products.⁴² Many
6 schools, including UC Irvine, use Google products like Gmail and Google Drive to
7 communicate and collaborate on academic and clinical assignments – and this is even
8 more true now that teaching has moved online. If students cannot access these
9 resources, they will be locked out of their education.⁴³

10 *Immigration Consequences*

11 99. The July 6 Guidance prevented students whose schools will operate
12 entirely online from applying for Curricular Practical Training and Optional Practical
13 Training (“OPT”) visa programs. CPT allows international students to work in their
14 field of study while they are enrolled in their academic program.⁴⁴ OPT allows
15 students to work in the United States for one year after graduation.⁴⁵ To be eligible for
16 OPT, students must have been enrolled in school full-time for one year, maintain valid
17 F-1 status, and be physically present in the United States at the time of application.⁴⁶
18 Cancelling the F-1 visa or forcing international students to return to their countries of
19 origin will make these students ineligible for CPT and will prevent them from
20
21

22 ⁴² <https://www.businessinsider.com/major-us-tech-companies-blocked-from-operating-in-china-2019-5>

23 ⁴³ Virtual Private Networks (“VPNs”), the typical solution to internet tracking and restrictions imposed by authoritarian
24 regimes, are heavily restricted in China. Because only government-approved VPNs are accessible, the VPN does nothing
25 to secure against government intrusion. See <https://www.techradar.com/news/coronavirus-sees-china-crack-down-on-vpns>. And, in plaintiffs’ experience, the VPNs which are available so severely throttle internet speeds that video chat –
26 necessary to participate in online courses – is almost impossible to use.

27 ⁴⁴ *F-1 Curricular Practical Training (CPT)*, Berkeley Int’l Office,
28 <https://internationaloffice.berkeley.edu/students/employment/cpt> (last visited July 8, 2020).

⁴⁵ *Optional Practical Training (OPT) for F-1 Students*, U.S. Citizenship & Immigration Servs.,
<https://www.uscis.gov/opt> (last updated Apr. 22, 2020).

⁴⁶ *Id.*; see also *F-1 Optional Practical Training (OPT)*, Berkeley Int’l Office,
<https://internationaloffice.berkeley.edu/students/employment/opt> (last visited July 8, 2020).

1 applying to OPT. No changes were made to the restrictions for CPT and OPT
2 programs in the July 24 Guidance or August 7 Guidance.

3 100. Some international students have applied for permanent resident status,
4 better known as the green card, and are waiting for approval. Plaintiffs are concerned
5 that the new SEVP rule may extend the waiting time for students who must leave the
6 United States because their schools will operate entirely online.

7 *Inequities in Employment Opportunities*

8 101. Because of the risks associated with COVID-19, law schools across the
9 nation have postponed to January their On-Campus Interviews (“OCI”), a yearly event
10 where law firms travel to law school campuses to interview and recruit students for
11 summer associate positions and eventual full-time employment. OCI is a competitive
12 and important process for students.

13 102. If the July 24 Guidance is not extended beyond the fall 2020 semester (or
14 if it is revoked during the fall semester), Plaintiffs will need to leave the country and
15 will not be able to physically attend or fully participate in OCI.

16 103. If schools decide to hold virtual OCI, Plaintiffs have to interview in the
17 middle of the night and compete against domestic students who are interviewing in
18 normal business hours.

19 104. Furthermore, employers will easily be able to identify the immigration
20 status of Plaintiffs. By simply asking about the time zone or city that Plaintiffs are in,
21 employers can filter out international students among their interviewees. Due to the
22 additional cost and precarious nature of sponsoring foreign nationals, some employers
23 may avoid hiring international students for summer associate positions.⁴⁷

24
25
26 _____
27 ⁴⁷ The disadvantages imposed to international students who are not participating in OCI are similar to Plaintiffs’
28 disadvantages. The students will still have to interview in odd hours via Zoom and will indirectly disclose their
immigration status.

CLAIMS FOR RELIEF

Count 1: (Violation of Administrative Procedure Act, 5 U.S.C. §706)

Defendants’ Issue of the July 6 Guidance was Arbitrary and Capricious Both Because It Failed Adequately to Consider the Reliance Interests of Millions of F-1 and M-1 Visa Holders and Because It Failed to Provide a Reasoned Explanation.

105. Plaintiffs incorporate the allegations contained in the preceding paragraphs.

106. The APA requires this Court to “hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). Agency action must be the result of reasoned analysis. *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mu. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

107. This standard applies even when an agency is altering existing guidance. When an agency changes course, the agency must “be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016).

108. As noted above, the United States has a long history of inviting international students to study as “non-immigrants” pursuant to a student visa program. International students admitted to well-established and high-quality institutions, such as those in the UC system, often have multiple options available to them. They choose to come study in the United States in reliance on the integrity of the visa program and the expectation that their student visas will remain valid as long as they are committed to their studies at their academic institutions.

109. The March 9 and March 13 guidance documents set forth a reasonable framework for addressing the implications of COVID-19 for F-1 and M-1 visas, as well as for updating the guidance in light of changes to the COVID-19 situation. The July 6 Guidance failed to identify any material changes to the COVID-19 situation

1 that had occurred since March 13, and ignored entirely the approach and rationale
2 underlying the March 9 and March 13 guidance documents.

3 110. The July 6 Guidance ignored the assurances Defendants have made to
4 hundreds of thousands of students for well over twenty years that, as long as they
5 remain in compliance with their academic programs, they will be able to remain in the
6 United States at the institutions where they study.

7 111. The July 6 Guidance also ignored the reasonable reliance that students
8 and schools alike placed in the approach to reconciling the impact of COVID-19 on F-
9 1 and M-1 visa requirements set forth in the March 9 and March 13 guidance
10 documents.

11 112. The Supreme Court has recently emphasized that agencies modifying a
12 previous policy are “required to assess whether there were reliance interests,
13 determine whether they were significant, and weigh any such interests against
14 competing policy concerns.” *Department of Homeland Security v. Regents of Univ. of*
15 *California* 591 U.S. ____ (slip op., at 26) (2020).

16 113. The July 6 Guidance was arbitrary and capricious because it failed to
17 consider these important reliance interests. Revoking international students’ visas
18 when students have done everything in their power to remain in compliance with U.S.
19 immigration law in the midst of a pandemic—and after Defendants announced at the
20 outset of the pandemic that the United States would honor these visas during the
21 pandemic despite the shift to online classes—disregarded the reliance interests of
22 these students in maintaining their visa status and their ability to continue studying in
23 the United States. The long history of the United States’ F-1 visa program, together
24 with the March 13 Guidance, created a reasonable and justifiable expectation among
25 students that they could maintain their visa status so long as they progressed in their
26 particular course of study in whatever way that course of study was offered by their
27 academic institution.

1 114. The reliance interests of F-1 visa holders extend further still. As
2 discussed above, Plaintiffs have executed leases worth thousands of dollars for the
3 upcoming school year. Many have paid for expensive health insurance plans that are
4 now useless. Many will be forced to store or abandon property in the United States if
5 they are required to exit the country on short notice or mid-way through the academic
6 year. Many would not have paid tens of thousands of dollars in tuition to American
7 universities had they known they could not be present in the country for the full 2020-
8 21 academic term.

9 115. This reliance was justifiably premised on Defendants' March 9 and
10 March 13 Guidance. For example, the March 13 Guidance advised F-1 Visa holders
11 that the spring 2020 exemptions from online learning restrictions would exist "in
12 effect for the duration of the emergency."

13 116. Apart from the failure to address reliance interests, an agency's failure to
14 provide "reasoned analysis" for this sudden change in policy is "arbitrary, capricious,
15 an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C.
16 §706(2)(a). Here, the July 6 Guidance failed to offer any reasonable consideration of
17 the painful consequences of the Guidance for students, schools, and communities. For
18 example, the Guidance contain no discussion of the implications of this new policy for
19 public health, of the status of the COVID-19 situation and how it was different in July
20 than March in a way that was material for this guidance, or of how and why the
21 guidance better served the purposes of the F-1 visa program, such as allowing
22 "students to make normal forward progress in their studies," than did the March
23 guidance. The July 6 Guidance lacked even an acknowledgment of, let alone a
24 justification for, the extraordinary human suffering it would have caused.

25 117. The Defendants' voluntary and unexplained decision to change the July 6
26 Guidance does not mean they can avoid adjudication of the APA violations because
27 there are no procedural or other safeguards to ensure Defendants won't arbitrarily

1 revert to the July 6 Guidance, nor have Defendants provided a rationale for their
2 changed practices that would ensure the arbitrary and capricious manner in which they
3 sought to effect the forced removal of Plaintiffs and other international students
4 through the July 6 Guidance will not happen again.

5 118. For these reasons and others, the July 6 Guidance must be declared to
6 have been issued in a manner that was “arbitrary, capricious, an abuse of discretion, or
7 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

8 **Count II: (Violation of Administrative Procedure Act, 5 U.S.C. §§ 553,706)**

9 **The July 6 Guidance Violates the APA’s Notice-And-Comment Requirements.**

10 119. Plaintiffs incorporate the allegations contained in the preceding
11 paragraphs.

12 120. The APA requires this Court to hold unlawful and set aside any agency
13 action taken “without observance of procedure required by law.” 5 U.S.C.
14 § 706(2)(D).

15 121. The APA, 5 U.S.C. § 553, requires that any agency desiring to implement
16 a rule go through the process of notice-and-comment in order to give the agency the
17 benefit of the expertise of those most impacted by the potential rule-making.

18 122. The July Guidance did not go through any such process. Instead, DHS
19 stated it planned to “publish the procedures and responsibilities in the Federal Register
20 as a Temporary Final Rule.”⁴⁸

21 123. The July 6 Guidance formalized a reversal of previous ICE guidance and
22 thus is subject to notice and comment requirements. It is not an interpretive rule that
23 could be issued without notice and comment requirements. *Mt. Diablo Hospital Dist.*
24 *v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988).

25
26
27 ⁴⁸ <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during>

1 124. DHS has failed to provide any “good cause” that would justify bypassing
2 the notice and comment period. 5 U.S.C. §553 (b)(3)(B). The good cause exception is
3 only available to agencies if the agency has “good cause” to believe the process would
4 be “impracticable, unnecessary, or contrary to the public interest.” *Western Oil & Gas*
5 *Ass’n v. U.S. Environmental Protection Agency*, 633 F.2d 803, 810 (9th Cir. 1980).

6 125. The agency never “published reasons for thinking” the good cause
7 applied to the rules in question. *Id.*

8 126. DHS has failed to demonstrate how threatening to deport over one
9 million students in the middle of a global pandemic could possibly qualify as good
10 cause.

11 127. The Defendants’ voluntary and unexplained decision to change the July 6
12 Guidance does not mean they can avoid adjudication of the APA violations because
13 there are no procedural or other safeguards to ensure Defendants won’t arbitrarily
14 revert to the July 6 Guidance, nor have Defendants provided a rationale for the
15 changed practices that would ensure the arbitrary and capricious manner in which
16 Defendants sought to effect the forced removal of Plaintiffs and other international
17 students through the July 6 Guidance will not happen again.

18 128. By promulgating the July 6 Guidelines without notice and comment, ICE
19 violated 5 U.S.C. § 553 and § 706. The modifications it announced should be declared
20 unlawful.

Count III: (Violation of the Due Process Clause of the Fifth Amendment)

**The July 6 Guidance Deprive Plaintiffs of Their Visa Status
Without Due Process of Law.**

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3 129. Plaintiffs reallege and incorporate by reference each and every allegation
4 contained in the preceding paragraphs.

5 130. Due process protections extend to “all ‘persons’ within the United States,
6 including [non-citizens], whether their presence here is lawful, unlawful, temporary,
7 or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Nonimmigrant students
8 are lawfully present in this country.

9 131. Nonimmigrant students have significant liberty and property interests,
10 protected by the Due Process Clause, in their visas and/or access to educational
11 programs to which they have been admitted and in which they have invested time,
12 energy, and money. The “very essence” of due process is the “protection of the
13 individual against arbitrary action.” *Board of Regents of State Colls. v. Roth*, 408 U.S.
14 564, 584 (1972). The July 6 Guidance was so arbitrary, both in substance and the
15 manner in which it was implemented, that it threatened to unlawfully deprive
16 Plaintiffs of their constitutionally protected liberty and property interests.

17 132. Defendants’ voluntary and unexplained decision to change the July 6
18 Guidance does not mean they can avoid adjudication of the due process violations
19 because there are no procedural or other safeguards to ensure Defendants will not
20 arbitrarily revert to the July 6 Guidance, nor have Defendants provided a rationale for
21 their changed practices that would ensure the July 6 policy will not be reinstated.

22 133. Provisions of the July 24 and August 7 Guidance that limit their
23 applicability to the fall 2020 terms also threaten to deprive Plaintiffs of their due
24 process rights as Defendants could again implement a policy without due process
25 protections that would force students to leave the country if their classes are offered
26 only online.

1 134. As a result of the foregoing constitutional violations, Plaintiffs will suffer
2 irreparable injury.

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiffs respectfully seek the following relief:

- 5 1. A declaration that the policy announced in the July 6 Guidance was
- 6 unlawful and unlawfully promulgated;
- 7 2. Permanent injunctive relief preventing Defendants from re-enacting or
- 8 enforcing the policy announced in July 6 Guidance, or promulgating it as a Final Rule;
- 9 3. Declaratory and/or injunctive relief requiring Defendants to administer
- 10 the SEVP program in accordance with the March Guidance throughout the academic
- 11 year and for the duration of the COVID-19 emergency, unless replaced by a legally-
- 12 sufficient agency rule promulgated through appropriate procedures, including notice
- 13 and comment;
- 14 4. An order requiring Defendants to modify the July 24 Guidance and
- 15 August 7 Guidance consistent with the foregoing;
- 16 5. An order awarding Plaintiffs their costs and attorneys' fees; and/or
- 17 6. Any and all other such relief as the Court may deem appropriate.

18
19 DATED: August 14, 2020

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** Filer attests that all signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.