

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

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

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 20-cv-11283-ADB

**LEAVE TO FILE GRANTED
ON JULY 10, 2020 [Dkt. 32]**

**AMICUS CURIAE BRIEF OF THE PRESIDENTS' ALLIANCE ON HIGHER
EDUCATION AND IMMIGRATION REPRESENTING
180 HIGHER EDUCATION INSTITUTIONS IN SUPPORT OF PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER**

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STATEMENT OF *AMICUS CURIAE*

The Presidents’ Alliance on Higher Education and Immigration files this brief on behalf of 180 of its members deeply concerned with—and impacted by—Immigration and Customs Enforcement’s (ICE) July 6 directive. These members specifically include:

- Adelphi University
- Adler University
- Agnes Scott College
- Arizona State University
- Augsburg University
- Augustana College
- Austin Community College District
- Bates College
- Beloit College
- Bennington College
- Bentley University
- Berkshire Community College
- Boston Architectural College
- Boston University
- Bowdoin College
- Bryn Mawr College
- Butler University
- Cal State Long Beach
- California Institute of Integral Studies
- California Institute of the Arts
- California Lutheran University
- California Polytechnic State University
- California State Polytechnic University Pomona
- California State University
- California State University Northridge
- California State University San Marcos
- California State University, Bakersfield
- California State University, Chico
- California State University, East Bay
- California State University, Fresno
- California State University, Fullerton
- California State University, Los Angeles
- California State University, Monterey Bay
- California State University, Sacramento
- California State University, San Bernardino
- California State University, Stanislaus
- Calvin University
- Carleton College
- Central Washington University
- Chapman University
- Charles R. Drew University of Medicine and Science
- Christian Brothers University
- Claremont Graduate University
- Claremont McKenna College
- Clark University
- Colby-Sawyer College
- College of the Holy Cross
- Colorado College
- Colorado State University System
- Community Colleges of Spokane
- Converse College
- Cornell College

- Davidson College
- Dickinson College
- Drexel University
- Eastern Michigan University
- Emerson College
- Foothill-De Anza Community College District
- Fordham University
- Franklin & Marshall College
- Gettysburg College
- Gonzaga University
- Goucher College
- Greenfield Community College
- Grinnell College
- Guilford College
- Hamilton College
- Harper College
- Hartwick College
- Haverford College
- Heidelberg University
- Howard Community College
- Illinois Institute of Technology
- Ithaca College
- Kenyon College
- Knox College
- La Sierra University
- Lafayette College
- Lake Forest College
- Lawrence University
- Lehigh University
- Lenoir-Rhyne University
- Lewis & Clark College
- Loma Linda University
- Loyola Marymount University
- Loyola University Chicago
- Macalester College
- Manhattan College
- Manhattanville College
- Maryland Institute College of Art
- Mercyhurst University
- Mills College
- Minnesota State University Moorhead
- Montgomery College
- Mount Holyoke College
- MSU Denver
- New Mexico Institute of Mining & Technology
- Northampton Community College
- Northern Essex Community College
- Northern Illinois University
- Northern Virginia Community College
- Oakland University
- Oberlin College
- Oregon State University
- Pace University
- Pacific Lutheran University
- Pacific Oaks College & Children's School
- Palo Alto University
- Pima Community College
- Pitzer College
- Pomona College
- Portland Community College
- Queens University of Charlotte
- Ramapo College of New Jersey
- Reed College
- Regis University
- Rhode Island School of Design
- Rhodes College
- Rochester Institute of Technology
- Roosevelt University
- Rose-Hulman Institute of Technology
- Rutgers University-Newark
- San Diego State University
- San Jose State University

- Santa Clara University
- Sarah Lawrence College
- Saybrook University
- School of Visual Arts
- Scripps College
- Seattle Pacific University
- Seattle University
- Seton Hall University
- Simmons University
- Sonoma State University
- Springfield College
- St. Catherine University
- St. Edward's University
- St. John's University NY
- St. Lawrence University
- State Center Community College District
- Stevens Institute of Technology
- TCS Education System
- The Chicago School of Professional Psychology
- The College of Wooster
- The New School
- The Ohio State University
- The University of Oklahoma
- Trinity University
- Trinity Washington University
- University of Dayton
- University of Denver
- University of La Verne
- University of Maryland Baltimore
- University of Miami
- University of Michigan - Dearborn
- University of Michigan-Flint
- University of Nevada, Las Vegas
- University of New Hampshire
- University of North Texas
- University of Oregon
- University of Puget Sound
- University of San Diego
- University of San Francisco
- University of the People
- University of the Sciences in Philadelphia
- University of the Southwest
- University of Utah
- Utah State University
- Vassar College
- Virginia Wesleyan University
- Wabash College
- Wake Forest University
- Warren Wilson College
- Washington and Lee University
- Wayne State University
- Weber State University
- Western Oregon University
- Western Washington University
- Wheaton College (Massachusetts)
- Whitman College

INTRODUCTION

The Presidents' Alliance on Higher Education and Immigration files this *amicus curiae* brief on behalf of 180 of its members. These institutions represent a diverse array of small and large, public and private institutions throughout the nation. They are each dedicated to bettering the lives of their students and communities, including during the current COVID-19 global pandemic. Though diverse in faith, academic mission, geography, and size, these institutions are deeply concerned with and impacted by ICE's July 6 directive.

Higher education institutions have tackled countless challenges to continue delivering the high-quality education their students deserve while protecting their students, faculty, and staff in the midst of a global pandemic. Almost on a dime, America's institutions moved students out of physical classrooms and into virtual ones, adjusting to the realities of education socially distanced. From early on, ICE recognized the problem facing F-1 visa holders and, in March 2020, advised institutions and students that "for the duration of the emergency," F-1 visa holders could attend classes remotely and retain their visa status.

Institutions and students alike took ICE at its word. Over the next four months, higher education institutions invested substantial resources in planning for the 2020 academic year. They created task forces, consulted with experts, surveyed students, faculty, and staff, hosted town halls, and, at the end of the day, devised the very best solution they could given their particular institutions' circumstances. Some decided to instruct entirely online; others carefully crafted hybrid models to allow some virtual and some in-person instruction; and yet others decided to conduct entirely in-person instruction with a contingency plan for online instruction if circumstances deteriorated.

What is abundantly clear is that the right response for the nation’s largest public university system in California is different from the right response for a private liberal arts college in Pennsylvania or a downtown public university with commuter students. Yet all of these institutions’ plans were made with ICE’s policy in mind—that international students could retain their visa status regardless the ultimate instructional format. F-1 visa holders relied on ICE’s word too; they paid tuition, signed leases, and readied themselves for the upcoming academic year, whether it be in-person or virtual instruction.

The Covid-19 emergency no doubt continues. Recent data indicates that there are more new infections at present on a daily basis than in March¹—when ICE stated that its guidance would last “for the duration of the emergency.”

But, on July 6, ICE blindsided the whole of higher education, substantially reversing course from the March 2020 guidance. Now, even though the emergency is as pressing as ever, ICE would mandate that F-1 visa holders whose instruction would occur only on online must leave the country. ICE’s abrupt policy change guts the enormous reliance interests of higher education institutions and their students—all of whom planned for the fall 2020 semester based on ICE’s earlier confirmation that its March 2020 position would remain so long as the “emergency” continued.

Indeed, America’s higher education institutions planned their 2020 academic year in a way that, in each institution’s judgment, struck the optimal balance for continuing to educate students while keeping everyone safe. ICE cannot, consistent with the Administrative Procedures Act (APA), simply cast aside its prior judgment

¹ Will Feuer, *U.S. Reports Record Single-Day Spike of 63,200 New Cases of Coronavirus*, CNBC.com (July 10, 2020), <https://perma.cc/PT9Y-K3BH>.

after it engendered such substantial reliance by institutions and their students. Accordingly, the Presidents' Alliance and the universities it represents support the Plaintiffs' request that the Court temporarily restrain and, ultimately, permanently enjoin Defendants from enforcing the July 6 directive.

ARGUMENT

I. HIGHER EDUCATION INSTITUTIONS RELIED HEAVILY ON THE GOVERNMENT'S FLEXIBILITY IN PLANNING FOR THE 2020 ACADEMIC YEAR IN LIGHT OF COVID-19.

A. Higher education institutions invested substantial resources in planning their response to COVID-19 in reliance on the government's flexibility.

The details of each higher education institutions' plans² for the 2020 academic year are as unique as the institution and custom-tailored to respond to the particular challenges each institution faces.³

1. The California State University (CSU) system, the largest and most ethnically and economically diverse four-year higher education system in the country, announced on May 12, 2020, that it intended to pursue a primarily virtual fall 2020. With 23 campuses and 482,000 students to coordinate in the CSU system, a decision had to be made as soon as possible to allow sufficient time to implement the plan. After consulting with academic researchers and public health experts who predicted seasonal waves of coronavirus through early 2021, CSU decision makers thought "it would be irresponsible' to postpone a decision on in-person classes until summer, only to be

² Below, the Presidents' Alliance on Higher Education and Immigration provides information that has been directly reported to it by members who have asked to be identified as supporting this submission.

³ See *Here's a List of Colleges' Plans for Reopening in the Fall*, The Chronicle of Higher Education (Apr. 23, 2020, updated July 9, 2020), <https://perma.cc/BXP2-26YJ>.

forced to retreat hastily to remote learning in the fall.”⁴ Thus, because of its size, the CSU system had to sacrifice flexibility for certainty.

Over the summer, the CSU system has engaged in ongoing, data-driven planning; consultation with university stakeholders; and additional training and professional development to ensure its faculty and staff can deliver a rich educational experience through virtual instruction. The CSU system has also given individual campuses responsibility for evaluating reopening policies and to determine appropriate exceptions for in-person learning experiences, e.g., science laboratory classes, senior capstone projects, clinical nursing experiences, or studio time for performing and visual arts students, to the extent that such experiences can satisfy rigorous safety standards.

2. Across the country, Dickinson College, a private liberal arts college in Carlisle, Pennsylvania, established committees, at first a general planning committee to address health, safety, and liability risks and an academic planning committee to develop protocols to maintain the school’s academic rigor and integrity, and later, an emergency management committee. Approximately 75 people are actively involved in planning on a weekly, if not daily, basis. The committees have been hard at work since March, hosting at least five virtual town halls, countless brainstorming sessions, and conducting surveys of students, faculty, and staff. For Dickinson, a traditionally 100% residential learning environment, shifting to a remote-learning environment involves massive transformation; the decisions around whether and how to return to its residential learning model involve careful planning. All told, this complex effort has cost an estimated \$2 million to ready the campus for the fall semester.

⁴ Shawn Hubler, *Fearing a Second Wave, Cal State Will Keep Classes Online in the Fall* (Mar. 12, 2020), <https://perma.cc/DJ3B-NS5K>.

3. Metropolitan State University of Denver (MSU Denver), a public university in downtown Denver, created a task force as soon as leadership realized the virus would impact the United States and well before any cases reached its community in March 2020. MSU Denver's task force met with internal and external stakeholders to evaluate different responses well before it became apparent the campus would have to shut down in-person instruction. MSU Denver's response focused first on supporting students through the transition to online instruction and then shifted focus to planning for the 2020 academic year's safe and gradual return to campus.

As a commuter campus serving many nontraditional students, MSU Denver had to plan for the complexity of students living in multiple urban jurisdictions and relying on public transportation. Many students also face uncertain family obligations to their parents, their own children, or extended family members. Through many hours of work and incurring of significant expenses, MSU Denver developed a mixed approach to classes that could accommodate some in-person courses with added online offerings.

4. The University of Utah likewise invested substantial resources in planning for the 2020 academic year. The University engaged with leaders at the State, system, and university levels and captured input from administrators, health care experts, deans, department chairs, faculty, student-government bodies, trustees, alumni, and donors. The school surveyed faculty and students, hosted town halls, dean meetings, academic leadership meetings, and working groups, consulted with athletic conference peers, engaged with national advising groups, and worked with state government.

As with fellow institutions, the University of Utah had to address complexities unique to its campus. Missionaries returning from abroad faced tight timeframes to decide whether to enroll in university or redeploy. The US vice presidential debate is

also scheduled to occur on campus in October 2020, necessitating a plan for online instruction during that week for courses that would otherwise have been in person.

5. The Stevens Institute of Technology, a private research university in Hoboken, New Jersey, also faced its own set of challenges; international students make up one-third of its total student body and 61% of its graduate student body. The Stevens Institute started planning in March 2020 with an effort centralized in the President's Cabinet, which worked closely with the Board of Trustees, President's Leadership Council, faculty governance bodies, academic divisions, and departments. The Stevens Institute gathered data through surveys, town halls, brainstorming sessions, expert assessments, and consulting with external bodies and groups with interest in the university. For the Stevens Institute, addressing the complexities facing its international students is critical; with such a large volume of international students, inability to continue educating these students would be devastating.

These members are not alone. Numerous Presidents' Alliance members shared the complex, comprehensive processes they employed to ensure a safe and effective 2020 academic year. These institutions have undertaken these efforts at considerable expense. *E.g.*, Augsburg University (estimated \$1.7 million in incurred costs); Beloit College (estimated \$15 million financial burden); California Institute of the Arts (estimated \$5 million in additional expenses for fall); Central Washington University (facing extensive financial burden); Colorado State University system (estimated \$35 million future financial burden); Emerson College (millions invested in its response); Haverford College (incurred expenses of \$5–10 million); Mount Holyoke College (estimated \$2.5 million financial burden); Northern Illinois University (estimated incurred costs of \$45 million); Northern Virginia Community College (facing potential

loss of \$9.9 million in tuition from F-1 students); Pace University (millions of dollars in losses); Rutgers-University Newark (provided \$10 million in emergency support to students); Trinity Washington University (\$1 million in costs); Trinity University (significant amounts invested).

B. Higher education institutions relied on the continuing contributions of international students to their campuses.

It is beyond cavil that international students make immense contributions to campuses nationwide. These students foster the diversity integral to every student's education, enhance schools' intellectual competitiveness, contribute to schools' athletic and other co-curricular and extracurricular programs, and economically benefit their schools and neighboring communities.

1. The Supreme Court has repeatedly acknowledged "the educational benefits that flow from student body diversity." *Fisher v. Univ. of Tex. at Austin*, 570 U.S.297, 310 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). The Court has observed that a diverse student body "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Grutter*, 539 U.S. at 330 (citation omitted). Such benefits translate into educational benefits too, as "numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330 (citation omitted). Indeed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.*

These observations apply with equal force to the value international students

add to campuses. As Pace University President Marvin Krislov has described, learning alongside international students provides substantial benefits to campuses and fellow students. Doing so fosters a “better understanding of international issues, foreign affairs, and immigration issues”; “provides opportunities for unique cross-cultural experiences”; and “forces students to confront different interpersonal and communication styles, which makes them better active listeners and critical thinkers.”⁵

2. International students also contribute to a school’s intellectual competitiveness. United States colleges no doubt compete to attract top talent that are the right fit for their institution. Succeeding at this endeavor begets future success and also benefits the institution in other ways. For example, studies have found that a 10% increase in an institution’s international graduate students correlates with a 4.5% increase in patent applications.⁶ These striking figures illustrate that international students are a vital component in a university’s research function.

American institutions also must compete against institutions across the globe. Success in the global market for international students also benefits the US education system generally. Desire for a US education has long marked the United States as a world leader in education. Attracting top students to study in our nation’s institutions has long helped foster international cooperation, grown our knowledge economy, and fueled innovation.⁷ But global competition for these students has only intensified.⁸ For the fall 2019 academic year, institutions cited global competition for the first time as

⁵ Marvin Krislov, *Why International Students Are Good for Colleges, Universities and America*, Forbes (Mar. 22, 2019), <https://perma.cc/4CGT-FTJJ>.

⁶ Niall Hagerty, *Where We Are Now: The Presence and Importance of International Students to Universities in the United States*, 4 J. of Int’l Students 223, 226–27 (2014).

⁷ See, e.g., NAFSA, *Restoring U.S. Competitiveness for International Students and Scholars* 3 (June 2006), <https://perma.cc/87TC-87N3>; NAFSA, *Losing Talent 2020: An Economic and Foreign Policy Risk America Can’t Ignore* (Mar. 2020), <https://perma.cc/Y4GH-7KQZ>.

⁸ Hagerty, *supra* note 6, at 229–30.

among the top two reasons for institutions' declining international enrollment (the first being visa concerns).⁹ The global education market will continue on, with international students remaining integral components of any academic institution. The question is whether these students will pursue their education in the United States, where America can reap the benefits—or whether they will attend overseas, to the advantage of foreign nations.¹⁰

3. International students also make substantial economic contributions to their schools and their greater communities. International students pay tuition.¹¹ And they contribute more broadly to the American economy. A leading estimate indicates that international students contributed \$41 billion and supported 458,290 jobs during the 2018–2019 academic year.¹² Here in Massachusetts, international students contributed \$3.2 billion to the Commonwealth's economy and supported 38,799 jobs in the same period.¹³ Indeed, NAFSA estimates that for every seven international students, three U.S. jobs are created from spending in higher education, accommodations, dining, retail, transportation, telecommunications, and health insurance.¹⁴

The July 6 directive would have devastating practical consequences. To underscore the source of these losses, using Census data, Professor Tom K. Wong of the

⁹ See Jodi Sanger & Julie Baer, *Fall 2019 International Student Enrollment Snapshot Survey*, Institute for International Education 6 (Nov. 2019), <https://perma.cc/8XWC-B22B>.

¹⁰ See, e.g., NAFSA, *Losing Talent*, *supra* note 7 (detailing the achievements of six international students with US educations, including an award-winning computer scientist, NASA engineer, female seaplane captain, nonprofit founder, a 35-under-35 innovator, and executive director of a nonprofit).

¹¹ Hagerty, *supra* note 6, at 225–26; Max Larkin, “I Couldn’t Believe My Eyes”: International Students Blindsided by ICE Rule Change, NPR (July 8, 2020), <https://perma.cc/QE84-EEEN>; Miriam Jordan, et al., *Trump Visa Rules Seen as Way to Pressure Colleges on Reopening*, New York Times (July 7, 2020), <https://perma.cc/9SVV-7W8P>.

¹² NAFSA, *NAFSA International Student Economic Value Tool: National* (visited July 10, 2020), <https://perma.cc/2VBB-Z5FM>.

¹³ NAFSA, *Massachusetts Benefits from International Students* (visited July 9, 2020), <https://perma.cc/P3KC-QC2K>.

¹⁴ *Id.*

U.S. Immigration Policy Center estimates the losses that would be caused by the July 6 directive. This data demonstrates that upwards of 576,087 international students (261,118 undergraduate and 314,969 graduate students) have completed only one year of their degree and may now be unable to complete the remaining years.¹⁵ Of these, at least 46,936 are enrolled in medical, health, and science fields essential to battling the COVID-19 pandemic.

The July 6 directive would impose dire consequences—academic, social, and economic, among others—on higher education institutions across the country. It must be swiftly enjoined.

C. Higher education institutions relied on continued ability to educate international students.

These institutions developed their 2020 academic year plans with great care, and at considerable expense, each calling on its expertise, experience, and considered judgment to strike an optimal balance for the school and its students. These institutions relied on ICE’s March 2020 directive that schools would retain flexibility to tailor their responses and that online-learning requirements would be relaxed “for the duration of the emergency.” *See* March 13 Guidance, Dkt. 6-2.

This is especially so for international students who decided to remain on campus or had remained in the United States following the outbreak of the crisis.¹⁶ Institutions fully expected such students to return for the 2020 academic year on the same terms as any other student. Indeed, ensuring international students’ continued enrollment and participation is of central importance to all these institutions.

¹⁵ *See* Presidents’ Alliance on Higher Education and Immigration, *International Students Affected by ICE COVID-19 Guidance for Fall 2020* (July 10, 2020), <https://bit.ly/3ehEJfo>.

¹⁶ *See, e.g.*, Andrea Adelson, *Abrupt Shutdown Leaves NCAA’s International Student-Athletes with Limited Choices*, ESPN (Apr. 10, 2020), <https://perma.cc/B43X-DUL9>.

But, on July 6, ICE blindsided schools and students with a directive that came far too late. Institutions had already invested substantial resources, polled their students, faculty, and staff, consulted experts, gathered data, and carefully considered (and, for many, finally decided) how to proceed. Unsurprisingly, some schools decided to proceed with instruction; others to instruct entirely online; and yet others carefully tailored hybrid models to allow some courses in particular need of in-person instruction to be conducted. Yet all recognized a need for flexibility for individuals and also as COVID-19 circumstances change.

Nonetheless, for those international students who had stayed on campus or in the United States, waiting out the summer so they could restart school, ICE demanded that these students either leave the country or transfer schools unless they would receive in-person instruction. This, despite some institutions' announced plans to conduct instruction entirely online and others' plans that would not offer in-person instruction for the particular courses the student needed. It also interferes with plans to let students choose for themselves whether to attend in person. And it even upended plans for institutions intending for in-person instruction with contingency plans for online-only instruction should local COVID-19 circumstances abruptly change.¹⁷

The Court should grant temporary injunctive relief so that all of these very substantial reliance interests are not instantly gutted. Schools must have certainty that the status quo will continue—or, at the very least, that there is a considered, orderly process whereby institutions may design their policies and curriculum. The July 6 directive must be immediately enjoined.

¹⁷ See, e.g., Letter from President Will Dudley to W&L Students, Faculty and Staff, Washington & Lee University (July 9, 2020), <https://perma.cc/P8Y9-KQCE>.

II. INTERNATIONAL STUDENTS RELIED HEAVILY ON THEIR INSTITUTIONS' PLANNING FOR THE 2020 ACADEMIC YEAR.

International students too relied on their institutions' reopening plans and the government's stated policy of giving schools the flexibility to address the complexities inherent in educating students during a global pandemic without jeopardizing students' F-1 visas or presence in the United States.

Relying on their continued ability to study in the United States, international students remained in the United States,¹⁸ paid tuition,¹⁹ and signed leases.²⁰ They prepared for research in campus labs.²¹ They ensured their own personal safety under flexible school policies, like the student from India with asthma whose university decided to give students the option to participate in-classroom or online.²²

And they avoided planning for the challenges they might face if forced to return to their home countries. Some of these challenges are logistical, like the absence of any flights home.²³ Others are life-threatening, like the substantial civil unrest in Venezuela.²⁴ Some challenges threaten to eliminate access to education entirely, like loss of critical scholarships²⁵ or lack of access to reliable electricity or internet connection for online learning.²⁶ Others make benefitting from their promised US education extremely difficult, like trying to attend a synchronous online course

¹⁸ Adelson, *supra* note 16.

¹⁹ Jordan, *supra* note 11.

²⁰ Larkin, *supra* note 11; Jordan, *supra* note 11.

²¹ Larkin, *supra* note 11.

²² *Id.*

²³ Michael Elsen-Rooney, "Panic and Chaos": NYC International Students, Colleges React to new ICE Rule on Remote Learning, New York Daily News (July 7, 2020), <https://perma.cc/8MRC-XGNX>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Sammy Westfall, "Xenophobic Harassment": International Students React to the US' New Visa Rule, Vice (July 8, 2020), <https://perma.cc/7J29-SNXY>.

occurring in Boston at 4 p.m. at 3 a.m. in Vietnam,²⁷ or missing out on campus research opportunities, extracurricular activities, or socially distanced social activities. Some are patently absurd, like forcing a student who has lived most of her life in the US with her family to return to a country she left as a child.²⁸

III. ICE’S GUIDANCE IGNORES THE SUBSTANTIAL RELIANCE INTERESTS OF HIGHER EDUCATION INSTITUTIONS AND THEIR INTERNATIONAL STUDENTS.

As explained above, higher education institutions and their international students relied considerably on the government’s grant of flexibility to schools to strike the optimal balance between satisfying educational objectives while protecting the health of students, faculty, and staff and complying with state and local laws. But ICE’s Guidance on its face appears to ignore school and student reliance on the flexibility that ICE professed in March 2020 would last “for the duration of the [COVID-19] emergency.” March 13 Guidance.

The July 6 directive on its face violates the APA, as Plaintiffs have explained (Compl., Dkt. 1; Mem. ISO Mot. for TRO, Dkt. 5 at 9–15). Its text and timing confirm that the government “entirely fail[ed] to consider ... important aspect[s] of the problem” (*Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) and failed to provide a reasoned explanation for its decision (*Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019)).

Indeed, these APA mandates apply with additional force where, as here, an agency changes course. *See FCC v. Fox Television Stations*, 556 U.S. 502, 514–16 (2009). An agency must offer an even “more detailed justification” when “[1] its new

²⁷ Larkin, *supra* note 11.

²⁸ Jordan, *supra* note 11.

policy rests upon factual findings that contradict those which underlay its prior policy; or [2] when its policy has engendered serious reliance interests that must be taken into account.” *Id.* at 515. In such circumstances, the Supreme Court holds, it is arbitrary and capricious to “ignore” or “disregard” such matters. *Id.*; see also *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (“When an agency changes course, as DHS did here, it must ‘be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.’” (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016))).

Both circumstances apply here, and both were ignored or disregarded.

First, the March 13 Guidance professed that its policy was “for the duration of the emergency.” All seem to agree the emergency remains ongoing,²⁹ but ICE’s policy has inexplicably changed.

Second, for the reasons the institutions have outlined at length above, ICE’s March 13 policy engendered serious reliance interests that must be taken into account. Nothing in the July 6 directive evidences any consideration for the complex, comprehensive, and expensive processes institutions employed to reach decisions on how to proceed with the 2020 academic year. And nothing in the July 6 directive evidences any consideration for international students’ reliance on the March 13 guidance and their schools’ judgment. Rote disregard for institutions’ and international students’ reliance interests is by definition arbitrary and capricious. *FCC*, 556 U.S. at 515; *Dep’t of Homeland Sec.*, 140 S. Ct. at 1913.

²⁹ See *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020); General Order 20-2, *In re: Coronavirus Public Emergency* (D. Mass. Mar. 12, 2020).

CONCLUSION

For the reasons stated above and in Plaintiffs' motion, the Court should enjoin Defendants from enforcing the July 6 directive temporarily and, ultimately, permanently.

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Respectfully submitted,

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