

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

GUILFORD COLLEGE, *et al.*,

Plaintiffs,

v.

KIRSTJEN NIELSEN, *et al.*,

Defendants.

Civil Action No. 1:18-cv-00891-LCB-JEP

**BRIEF *AMICI CURIAE* OF INSTITUTIONS OF HIGHER EDUCATION
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Amici strongly support Plaintiffs’ Motion for Preliminary Injunction and Partial Summary Judgment. As discussed further in this brief, absent an injunction, the Department of Homeland Security’s (“DHS”) Policy Memorandum regarding the calculation of unlawful presence will have destructive and harmful consequences for international students and scholars, and the U.S. institutions with which they are associated. *Amici*—collectively, “Institutions of Higher Education”—are more than sixty diverse institutions of higher education from across twenty-four states and the District of Columbia:

Adler University, Amherst College, Arizona State University, Barnard College, Bennington College, Boston University, Brown University, Bucknell University, California Community Colleges Board of Governors, California Institute of Technology, Case Western Reserve University, Christian Brothers University, Clark University, Columbia University, Cornell College, Cornell University, Dartmouth College, Drexel University, Duke University, Eastern Michigan University, Emerson College, Emory University, Franklin & Marshall College, George Washington University, Georgetown University, Gettysburg College, Goucher College, President and Fellows of Harvard College, Illinois Institute of Technology, Macalester College, Manhattanville College, Massachusetts Institute of Technology, Menlo College, Middlebury College, Mills College, Mount Holyoke College, New York University, Northeastern University, Northwestern University, The Pennsylvania State University, Pomona College, Princeton

University, Rhode Island School of Design, Rhodes College, Rice University, Rochester Institute of Technology, Roosevelt University, Rutgers University-Newark, Sarah Lawrence College, Smith College, Southeastern University, Stanford University, Swarthmore College, Trinity Washington University, Tufts University, University of Denver (Colorado Seminary), University of Michigan, University of Pennsylvania, University of San Diego, University of Southern California, University of Utah, Vanderbilt University, Washington University in St. Louis, Wellesley College, Williams College, and Yale University.¹

American institutions of higher education offer educational opportunities that attract students, researchers, and professors from around the globe. And in return, these international students and scholars meaningfully contribute to every educational community, from large public and private universities to smaller liberal arts and community colleges. The benefits brought by international students and scholars are noteworthy, enhancing our academic communities specifically and the American system of higher education more broadly.

Most important, international students and scholars add immeasurable value to the educational environment of all host institutions. Visiting researchers and professors

¹ Pursuant to Local Rule 7.5(d), this brief has not been authored, in whole or in part, by counsel to any party in this case. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici*, its members, or its counsel, contributed money that was intended to fund preparation or submission of this brief.

contribute specialized knowledge, exceptional talent, and valuable experiences that drive innovation and improve the academic communities of which they are a part. And students from foreign countries bring a diversity of viewpoints—on matters academic and otherwise—that improves educational outcomes and campus life for all students. The benefits of international study extend far beyond the academy, however, and reach the wider society in the form of significant economic and technological developments. In short, the international students and scholars at our colleges and universities are a key reason why the United States is the world’s leading destination for higher learning.

All of these various benefits stem from the U.S. visa programs through which international students and scholars enter the country. For decades, F, J, and M visas have provided a crucial means of facilitating international access to American higher education, which in turn thrives due in no small part to its ability to attract the very best students and faculty, wherever they may reside. The effectiveness of these visa programs depends on their stable and orderly administration. The new DHS Policy Memorandum regarding the calculation of unlawful presence, however, introduces significant and destructive uncertainty.² Under the new Policy Memorandum, which operates as a *de facto* rule,

² See First Am. Compl., Ex. A (Dkt. No. 14-1).

international students and scholars are deprived of any meaningful notice and opportunity to avoid potential 3- or 10-year bars for reentry into the United States.

This change in long-settled expectations will harm international students and scholars, American institutions of higher education, and the American economy. Under the new rule, some international students and scholars will face reentry bans for technical and administrative errors of which they were unaware. Others will be forced to leave the country and interrupt their studies for extended periods while discretionary decisions are made regarding their status. For all international students and scholars, studying and researching in the United States will become more challenging. Whether they are forced to leave or simply choose to study elsewhere, international students and scholars will take their myriad benefits with them. Moreover, America will become a less attractive destination for international students and scholars, thus making it more difficult for American institutions to continue attracting and recruiting the best international talent.

This brief details the benefits of international scholarship and the harms to U.S. higher education that will flow from the new DHS policy. *Amici* Institutions of Higher Education respectfully urge the Court to grant the Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment.

ARGUMENT

I. Tens of Thousands of International Students and Scholars Attend U.S. Institutions Under the F, J, and M Visa Programs.

Higher education is widely recognized as one of the United States' most "crucial exports."³ For the past several decades, the United States has been the leading destination for international students.⁴ As reported by Immigration and Customs Enforcement, there were 1,019,333 student-visa recipients in this country as of March 2018, from 229 countries and every inhabited continent.⁵ By comparison, the United Kingdom, the second most popular destination, typically welcomes less than half that number.⁶

³ Dick Startz, *Sealing the Border Could Block One of America's Crucial Exports: Education*, Brookings Institution, Jan. 31, 2017, <https://www.brookings.edu/blog/brown-center-chalkboard/2017/01/31/sealing-the-border-could-block-one-of-americas-crucial-exports-education/>.

⁴ See, e.g., Press Release, Inst. for Int'l Educ., *Number of International Students in the United States Reaches New High of 1.09 Million* (Nov. 13, 2018), <https://www.iie.org/Why-IIE/Announcements/2018/11/2018-11-13-Number-of-International-Students-Reaches-New-High/>.

⁵ Student and Exchange Visitor Program, *SEVIS by the Numbers: Biannual Report on International Student Trends* 4, 7 (2018), <https://www.ice.gov/doclib/sevis/pdf/byTheNumbersApr2018.pdf> (hereinafter "SEVIS Report").

⁶ *Education: Outbound Internationally Mobile Students by Host Region*, UNESCO, <http://data.uis.unesco.org/Index.aspx?queryid=172/> (last visited Dec. 18, 2018).

Most international students studying in the United States enter through F or M visas. These visas are specifically designed to enable different categories of students and scholars to enter and reside in the United States in pursuit of academic endeavors. The F-1 student visa allows international students to enter the United States as full-time students at an accredited college, university, or other academic institution.⁷ The United States issued 393,573 F-1 visas in 2017.⁸ International students pursuing vocational or other nonacademic programs can enter the United States under an M-1 student visa.⁹ Over 9,000 M-1 visas were issued in 2017.¹⁰ In total, over 1.2 million students were pursuing degrees at American institutions of higher education under F-1 and M-1 visas as of March 2018.¹¹ These international students are distributed geographically in roughly equal portions across the country.¹²

⁷ *Students and Employment*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/> (last visited Dec. 11, 2018).

⁸ *Nonimmigrant Visas Issued by Classification*, U.S. Dept. State, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf> (last visited Dec. 11, 2018).

⁹ *Students and Employment*, *supra* note 7.

¹⁰ *Nonimmigrant Visas Issued by Classification*, *supra* note 8.

¹¹ SEVIS Report, *supra* note 5, at 3.

¹² *Id.* at 18.

Over 65% of the international students in higher education are seeking bachelor's or master's degrees.¹³ As of March 2018, there were 402,293 international students enrolled in bachelor's degree programs, and another 383,142 students pursuing a master's degree.¹⁴ The most popular areas for study are business, engineering, and computer science.¹⁵ A smaller but significant percentage of students—12.4%—are pursuing doctoral degrees, with the majority concentrating in engineering, physical science, and the biological and biomedical sciences.¹⁶ Indeed, international graduate students comprise a substantial proportion of the students enrolled in many technical programs.

In addition to F-1 and M-1 visas for students, the United States also offers J-1 visas for “individuals approved to participate in work-and-study-based exchange visitor programs.”¹⁷ Established by the State Department to facilitate cultural and educational exchange, the J-1 visa program covers a wide range of activities, including au pairs, camp counselors, interns, and primary education teachers, among others.¹⁸ Of particular

¹³ *Id.* at 4.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 4, 6.

¹⁷ *J-1 Visa Basics*, Exchange Visitor Program, <https://j1visa.state.gov/basics/> (last visited Dec. 18, 2018).

¹⁸ *Id.*

importance to institutions of higher education are the J-1 programs for visiting professors and research scholars. In 2017, there were 36,363 such international researchers and professors in the United States.¹⁹

II. Higher Education Benefits Tremendously from the Visa Program.

The entire academic community greatly benefits from the intelligence, expertise, and energy brought to campuses by international students and scholars on F, J, and M visas. As Angel Cabrera, president of George Mason University, recently wrote in the *Washington Post*, international students “contribute to talent pools in critical disciplines . . . and enrich our campuses intellectually and culturally.”²⁰ President Cabrera’s views are widely shared. Across the country, university leaders have echoed his sentiments, issuing public statements on the importance of international students.²¹ International students and scholars at our institutions enhance diversity, conduct research

¹⁹ *Participant and Sponsor Totals*, Exchange Visitor Program, <https://j1visa.state.gov/basics/facts-and-figures/participant-and-sponsor-totals-2017/> (last visited Dec. 18, 2018).

²⁰ Angel Cabrera, Perspective, *Make America Welcoming to International Students Again*, *Wash. Post*, Nov. 13, 2018, <https://www.washingtonpost.com/education/2018/11/13/make-america-welcoming-international-students-again/>.

²¹ See, e.g., Alia Wong, *Should America’s Universities Stop Taking So Many International Students?*, *Atlantic*, Jun. 28, 2018, <https://www.theatlantic.com/education/archive/2018/06/international-students/563942/> (quoting Carol Christ, Chancellor, University of California, Berkeley; Peter Salovey, President, Yale University; Daniel Porterfield, Former President, Franklin & Marshall College; and Jack DeGoia, President, Georgetown University).

and teaching programs, and help sustain the United States' position as a world leader in higher education.

a. International Students Contribute to Campus Diversity, a Key Component of the Educational Experience.

The Supreme Court has time and again noted the myriad benefits that a diverse student body yields for institutions of higher education. *First*, the Court has recognized “the educational benefits that flow from student body diversity,” *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 540 U.S. 297, 310 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))—namely, the deeper understanding students and professors achieve when an issue or problem is analyzed by individuals who bring differing perspectives and backgrounds to the question. *See also Grutter*, 539 U.S. at 330 (noting that the “educational benefits that diversity is designed to produce . . . [are] substantial”). *Second*, “enrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’” *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (quoting *Grutter*, 539 U.S. at 328, 330). While this obviously has a direct benefit to students, it also is a key component in creating a dynamic and integrated campus environment. *Third*, and “[e]qually important, student body diversity promotes learning outcomes, and better

prepares students for an increasingly diverse workforce and society.” *Fisher II*, 136 S. Ct. at 2210 (internal quotation marks omitted).

The Supreme Court’s observations in this respect apply equally to international students and scholars. As the then-president of *amicus* Harvard University recently wrote, in the wake of the Administration’s travel ban, “[o]ur robust commitment to internationalism is not an incidental or dispensable accessory. It is integral to all that we do, in the laboratory, in the classroom, in the conference hall, in the world.”²² Other *amici* agree. For instance, *amicus* Duke University’s institutional statement of its commitment to diversity and inclusion explains that “collective success depends on the robust exchange of ideas—an exchange that is best when the rich diversity of our perspectives, backgrounds, and experiences flourishes. . . . [and when] all members of the community feel secure and welcome”²³ Likewise, the board of *amicus* Amherst College states that it will “continue to affirm the importance of inclusiveness among our student body, our faculty, and our staff. . . . because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; [and] because teaching and learning at their best are conversations with persons other than

²² Drew Gilpin Faust, *We Are All Harvard*, Harv. U., Jan. 29, 2017, <https://www.harvard.edu/president/news/2017/we-are-all-harvard/>.

²³ *Diversity and Inclusion*, Duke U., <https://inclusive.duke.edu/> (last visited Dec. 18, 2018).

ourselves about ideas other than our own.”²⁴ And *amicus* Rutgers University-Newark includes in its strategic plan the goal that “[d]iversity must be ‘unpacked’ as a nuanced construct of modern life and social experience, and then its multi-faceted impact recognized as an enormous asset to scholarship, pedagogy, civic life, and community well-being.”²⁵ These are but three examples of many.

International students play a significant role in fostering the inclusive and diverse atmosphere we strive to create on campus. These students’ incredible diversity of backgrounds and ethnicities “fuels innovation and creativity”²⁶ and improves the educational experience for every student, foreign and domestic. As Marjorie Zatz, Vice Provost and Graduate Dean of the University of California, Merced, has written, not only do “[i]nternational students put a human face on the world beyond our borders,” but their diversity also offers tangible benefits to their peers.²⁷ Cross-cultural engagement allows

²⁴ *Trustee’s Statement on Diversity*, Amherst C., Jan. 20, 2018, <https://www.amherst.edu/amherst-story/diversity/trustee-s-statement-on-diversity/>.

²⁵ Rutgers U., *Rutgers University-Newark: Where Opportunity Meets Excellence* 32 (2014), http://www.newark.rutgers.edu/sites/default/files/run_strategic_plan_-final.pdf.

²⁶ NAFSA, *Restoring International Competitiveness for International Students and Scholars* 3 (2006), http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf.

²⁷ Marjorie Zatz, *International Students Creating an American Legacy*, *Diverse Issues Higher Educ.*, Oct. 23, 2018, <https://diverseeducation.com/article/130127/>.

students “to shed stereotypes, explore new perspectives, and gain intercultural skills” in real, quantifiable ways.²⁸ And Provost Zatz’s commonsense observation finds support in the academic literature: a 2013 study found that “substantial international interaction was positively correlated with U.S. students’ perceived skill development in a wide range of areas,” including language skills, acquisition of new knowledge, formulation of creative ideas, synthesis of information, and the use of technology.²⁹

The international student visa program is vital for fostering these cross-cultural interactions. For the more than 90% of American students who do not themselves study abroad, “having international classmates, lab partners, or roommates may be their only opportunity to connect with other cultures.”³⁰ Importantly, too, those international classmates return home having established enduring relationships with U.S. students, and with a greater understanding of American culture and values. Indeed, J-1 program

²⁸ Kavita Pandit, *International Students and Diversity: Challenges and Opportunities for Campus Internationalization*, in *International Students and Scholars in the United States* 131, 131 (H. C. Alberts et al. eds., 2013).

²⁹ Jiali Luo & David Jamieson-Drake, Examining the Educational Benefits of Interacting with International Students, 3 *J. Int’l Students* 85, 91, 96 (2013), <https://files.eric.ed.gov/fulltext/EJ1056457.pdf>.

³⁰ Rebecca Prinster, *International Students Provide Colleges a Mutually Beneficial Relationship*, *Insight*, June 28, 2016, <http://www.insightintodiversity.com/international-students-provide-colleges-a-mutually-beneficial-relationship/>.

administrators in the State Department call for exchange visitors to “return to their home country . . . to share their exchange experiences.”³¹

b. International Students and Scholars Are Critical to America’s Research Excellence and Undergraduate Instruction, Especially in the STEM Fields.

International students and scholars have helped America’s colleges and universities become world leaders in essential fields of research that drive innovation and benefit society. Indeed, according to the National Foundation for American Policy, thirty-three of the eighty-five Americans who have received Nobel Prizes in chemistry, medicine, and physics since 2000—nearly 40%—have been immigrants to this country.³²

International student attendance also allows American colleges and universities to expand their academic offerings, thus broadening the educational opportunities available to everyone.³³ This dynamic is particularly evident in the STEM fields, where graduate-level enrollment by domestic students is particularly low, at least in part because “Americans don’t see the need for an advanced degree when there are so many professional

³¹ *J-1 Visa Basics: Common Questions*, Exchange Visitor Program, <https://j1visa.state.gov/basics/common-questions/> (last visited Dec, 18, 2018).

³² Stuart Anderson, *Immigrants Keep Winning Nobel Prizes*, *Forbes*, Oct. 8, 2017, <https://www.forbes.com/sites/stuartanderson/2017/10/08/immigrants-keep-winning-nobel-prizes/>.

³³ See Stephanie Saul, *As Flow of Foreign Students Wanes, U.S. Universities Feel the Sting*, *N.Y. Times*, Jan. 2, 2018, <https://nyti.ms/2DSYBnk/>.

opportunities waiting for them.”³⁴ Nine in ten undergraduate computer science students are Americans,³⁵ for example, but computer science graduate programs have not enrolled a majority of their students domestically since 1995.³⁶ Given these postgraduate enrollment numbers, at some schools “there are not enough domestic students alone in certain fields” to support a full range of advanced research and professorships.³⁷ In this context, positions at the graduate-student and junior-instructor levels are frequently filled by international students.³⁸

In such situations, international graduate students are an important component of the program’s or department’s research efforts, and they contribute significantly to the education of undergraduate students. In turn, this “high level of international students allows U.S. universities to attract and retain faculty,” particularly in STEM fields.³⁹ Because “[s]cience is international, and scientific talent is today a global resource,” in order

³⁴ Nick Wingfield, *The Disappearing American Grad Student*, N.Y. Times, Nov. 3, 2017, <https://nyti.ms/2zb2H96/>.

³⁵ *Id.*

³⁶ Nat’l Found. for Am. Policy, *The Importance of International Students to American Science and Engineering* 4 tbl.2 (2017), <https://nfap.com/wp-content/uploads/2017/10/The-Importance-of-International-Students.NFAP-Policy-Brief.October-20171.pdf>.

³⁷ *Id.* at 2.

³⁸ *See* Wingfield, *supra* note 34.

³⁹ Nat’l Found. for Am. Policy, *supra* note 36, at 2.

for a university to pursue “any competitiveness strategy[, it] must include measures to attract and retain foreign talent in science and engineering.”⁴⁰ Just as international students’ “enrollment in under-enrolled science courses often makes the difference for a school’s ability to offer those courses,”⁴¹ “in many cases, it is foreign scientists who teach the courses that we want American students to take.”⁴² Quite simply, “[g]raduate education as we know it could not function without international students.”⁴³

III. International Study and Scholarship Benefits the Larger U.S. Economy.

International students and scholars bring significant benefits to the U.S. economy. The National Association of Foreign Student Advisors (“NAFSA”) estimates that international students contributed \$39 billion to the U.S. economy during the 2017-2018 academic year.⁴⁴ The same study found that the economic activity of international students supported more than 455,000 American jobs across a number of economic sectors,

⁴⁰ NAFSA, *An International Education Policy for U.S. Leadership, Competitiveness, and Security* 3 (2006), https://www.nafsa.org/uploadedFiles/toward_an_international_1.pdf.

⁴¹ NAFSA, *In America’s Interest: Welcoming International Students: Report of the Strategic Task Force on International Student Access* 6 (2003), https://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/in_america_s_interest.pdf.

⁴² NAFSA, *supra* note 40, at 3.

⁴³ NAFSA, *supra* note 41, at 6.

⁴⁴ *NAFSA International Student Economic Value Tool*, NAFSA, http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool/ (last visited Dec. 18, 2018).

including accommodation, dining, retail, communication, transportation, and health insurance.⁴⁵ In forty-two states, international students alone are directly responsible for upwards of 0.10% of GDP.⁴⁶

Beyond these immediate economic benefits, international students and scholars play critical roles in the scientific and technical advancements that drive economic growth. According to one study, the work of foreign graduate students has a demonstrable increase on patent applications and grants.⁴⁷ Specifically, economic models estimate that a 10% rise in the ratio of foreign graduate students to total graduate students results in a 5.1% increase in patent grants.⁴⁸ International students and scholars also continue to contribute to the U.S. economy beyond their periods of enrollment. For example, in a study of American startup companies valued at \$1 billion or more, it was found that nearly one-

⁴⁵ *Id.*

⁴⁶ Patrick Barta et al., *How International Students are Changing U.S. Colleges*, Wall St. J., <http://graphics.wsj.com/international-students/>.

⁴⁷ See generally Gnanaraj Chellarj et al., *The Contributions of International Graduate Students to US Innovation*, 16 Rev. Int'l Econ. 444 (2008).

⁴⁸ *Id.* at 454.

quarter of such businesses had a founder who first came to the United States as an international student.⁴⁹

IV. The New Rule for Calculating Unlawful Presence Will Harm International Students and Scholars, as Well as American Higher Education.

The contributions of international students and scholars are made possible by the stable and orderly administration of the F, J, and M visa programs. Recent changes, however, threaten the stability of these programs and the benefits they make possible. Dating from 1997, when the concept of “unlawful presence” was first introduced in legislation, the United States Customs and Immigration Services (“USCIS”) had implemented a clear and objective policy regarding its application to holders of F, J, and M visas. Under this rule, the visa holder did not begin to accrue unlawful presence time until the day *after* the date of any official determination that the visa holder was “out-of-status.”⁵⁰ This method of calculation provided everyone with a clear notice of when the unlawful presence clock began ticking, and it afforded F, J, and M visa holders time either to cure their status or to leave the United States before the imposition of any reentry ban.

The DHS’s new “backdating” pronouncement introduces considerable uncertainty into the calculation of unlawful presence and needlessly exposes international students and

⁴⁹ Stuart Anderson, Nat’l Found. for Am. Policy, *Immigrants and Billion-Dollar Companies 2* (2018), <https://nfap.com/wp-content/uploads/2018/10/2018-BILLION-DOLLAR-STARTUPS.NFAP-Policy-Brief.2018.pdf>.

⁵⁰ See First Am. Compl., Ex. D (Dkt. No. 14-4).

exchange visitors to devastating reentry bans. Rather than calculating time from the date of the definitive status determination, the new rule allows any DHS officer to set a retroactive start date for unlawful presence, from the date he or she determines the student to have fallen “out-of-status.” This new rule will harm international students and scholars, as well as the institutions which host them.

a. The New Rule Will Harm International Students and Scholars.

The backdating rule introduces significant uncertainty and punishes students for reasons that are frequently beyond the students’ control. In some cases, students and exchange visitors can fall out-of-status due to unwitting clerical and technical errors, often of someone else’s making. In many cases, the infraction will not be discovered (or determined, as the F, M, and J regulations are not always clear and may be subject to varying interpretations) until the individual reapplies for another immigration benefit, such as an optional practical training allowance or an H-1B visa.

The Policy Memorandum thus confronts international students and exchange visitors with severe and disproportionate penalties for any regulatory violation—including technical errors unrelated to any bad-faith intention to exploit the applicable visa program. In such cases, under the new Policy Memorandum, the student or scholar will often not even know that she is accumulating unlawful presence time, and many will have accrued sufficient time to trigger mandatory 3- or 10-year reentry bans without any notice or opportunity to depart the country or otherwise correct the offending error. A ban, in turn, could have devastating immediate consequences for a student’s course of study and would

outright bar the student from reentering the U.S. for any reason—even for business purposes, or to see a child—for a period of years.

Even for the students who are not immediately subject to a reentry ban, the new rule imposes severe harms that impair their studies. Under the prior policy, when international students did become aware of a potential issue, they were able to make corrections and request reviews and adjustments, without fearing the accrual of unlawful presence. Under the new Policy Memorandum, however, they cannot do so, and they face difficult choices as a result. International students can stay in the country while they seek review and run the risk of accruing additional unlawful presence time, or they can interrupt their studies and leave the country while the issue is being resolved. Furthermore, they may also have to choose either to refrain from activities that their applicable visa regulations may (but do not clearly) prohibit, or to engage in such activities and run the risk that a single DHS officer adopts a restrictive interpretation of the rules that results in a reentry ban.⁵¹ Either way, the new rule unfairly harms international students and scholars and imposes unnecessary burdens on their studies and research.

b. The New Rule Will Diminish the United States’ Ability to Compete for International Students and Scholars.

For the reasons outlined above, the DHS’s new backdating rule will likely result in fewer international students, scholars, and instructors contributing to our communities.

⁵¹ See First Am. Compl., Ex. A, at 4 n.7 (Dkt. No. 14-1).

This decline in international student enrollment and in engagement with international researchers and professors will have a detrimental effect on the system of higher education in the United States. The loss in diversity will deprive campus communities of perspectives that will be impossible to replace, and the loss of graduate students is likely to decrease the number of undergraduate courses in critical STEM fields.

More generally, the new rule will also harm the competitive position of the United States in the international market for higher education. The contributions of international students and scholars play a critical part in making American higher education “the envy of the world,” in the words of Secretary of Education Betsy DeVos.⁵² Indeed, “openness to people and ideas from around the world is a longstanding strength of the American environment for innovation,” and this very openness has helped make the United States the global leader in higher education.⁵³ In the latest London *Times* ranking of international universities, seventeen of the top twenty-five and twenty-four of the top fifty schools were American.⁵⁴ Though many countries have world-class flagship institutions, the United

⁵² Betsy DeVos, Sec’y of Educ., Remarks to Federal Student Aid Training Conference, Nov. 27, 2018, <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-warns-looming-crisis-higher-education/>.

⁵³ Nat’l Acad. of Scis. et al., *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future* 467 (2007).

⁵⁴ *World University Rankings 2019*, Times Higher Educ. World U. Rankings, <https://www.timeshighereducation.com/world-university-rankings/2019/world->

States “still dominate[s]” any list of academic powerhouses,⁵⁵ and with more than 4,300 degree-granting post-secondary institutions, students coming to this country have options unmatched by any other destination.⁵⁶ The preeminence of American colleges and universities is due in no small part to institutions’ determination to attract the brightest and most committed students and scholars, wherever they may be found.

But, in an increasingly globalized world, American institutions of higher education face fierce competition. Foreign students “have choices,” and “in this very sophisticated, very competitive market for the first time, we have real competition.”⁵⁷ As of today international students continue to make this country the global leader in higher education, but the gap is closing. The United States’ “market share has dropped from 23% in 2000 to 16% in 2012,” with China, Canada, Britain, and Russia all vying for the same pool of

ranking#!/page/0/length/25/locations/US/sort_by/rank/sort_order/asc/cols/stats/ (last visited Dec. 18, 2018).

⁵⁵ Susan Adams, *An Expert List of the World’s Best Universities*, Forbes, Sept. 26, 2018, <https://www.forbes.com/sites/susanadams/2018/09/26/an-expert-list-of-the-worlds-best-universities/>.

⁵⁶ See *Digest of Education Statistics*, Nat’l Cent. Educ. Stat. tbl.317.20, https://nces.ed.gov/programs/digest/d17/tables/dt17_317.20.asp (last visited Dec. 18, 2018).

⁵⁷ Nick Anderson & Susan Svrluga, *What’s the Trump Effect on International Enrollment? Report Finds New Foreign Students Are Dwindling*, Wash. Post, Nov. 13, 2018, <https://wapo.st/2FIU2Yd/> (quoting Allan E. Goodman, Pres. & CEO, Inst. of Int’l Educ.).

talent.⁵⁸ Even more worrying, “[f]or the first time in decades, foreign student numbers in the country are not only *not growing* substantially, they have actually *declined*.”⁵⁹ In just the past academic year, “the roster of new international students at colleges and universities fell more than 6 percent.”⁶⁰ As a result, the extraordinary environment that has long drawn scholars from around the world is “now at risk.”⁶¹

The new backdating rule will likely reinforce a growing perception among potential international students that the United States is no longer as hospitable to foreign students as it once was.⁶² In a 2017 survey of 2,104 international students in 150 different countries who had recently made inquiries at one or more U.S. colleges or universities, almost a third stated that the “current political climate” had decreased their interest in studying in the United States.⁶³ Concerns over immigration policy were among the leading causes for this

⁵⁸ Jason Lane, *US Losing Its Dominance in Global Higher Education Market*, Conversation, Oct. 14, 2015, <http://theconversation.com/us-losing-its-dominance-in-global-higher-education-market-46721/>.

⁵⁹ *US Student Visa Data the Latest Indicator of International Enrolment Trends*, ICEF Monitor, May 23, 2018, <http://monitor.icef.com/2018/05/us-student-visa-data-the-latest-indicator-of-international-enrolment-trends/> (emphasis original).

⁶⁰ Anderson & Svrluga, *supra* note 57.

⁶¹ NAFSA, *supra* note 40, at 3.

⁶² See, e.g., Benjamin Wermund, *Trump Blamed as U.S. Colleges Lure Fewer Foreign Students*, Politico, Apr. 23, 2018, <https://www.politico.com/story/2018/04/23/foreign-students-colleges-trump-544717>.

⁶³ Pamela Kiecker Royall, EAB, *Effect of the Current Political Environment on International Student Enrollment: Insights for U.S. Colleges and Universities* 6 (2017),

alarming decrease in interest. Of the students who expressed decreased interest, more than half (55.7%) identified “visa restrictions for international students” as the reason.⁶⁴ Similarly, more than half (54.6%) responded that their interest in studying in the United States had decreased because they were “worried about travel restrictions for international students.”⁶⁵ Policies such as the DHS’s backdating rule are tarnishing the United States’ reputation as the world’s leader in higher education. By decreasing international interest in American higher education, this new rule will impede the exchange of ideas and knowledge that allows our academic institutions to flourish, while undermining visa programs that are proven to strengthen our country’s political and economic position on the global stage.

CONCLUSION

The American higher education system is the world’s leading destination for international students and scholars. These foreign students, researchers, and professors make critically important contributions to academic communities across the country. The presence of international voices adds invaluable diversity to our campus communities, and foreign graduate students and instructors enable us to offer STEM courses that would

https://www.eab.com/-/media/EAB/Technology/Royall-and-Company/Undergrad-Enrollment/Effect-of-the-Current-Political-Environment-on-International-Student-Enrollment_v3%20 (last visited Dec. 18, 2018).

⁶⁴ *Id.* at 9.

⁶⁵ *Id.* at 10.

otherwise be unavailable to American undergraduates. All these benefits and others are threatened, however, by the new change to the calculation of “unlawful presence” for F, J, and M visas. Rule changes such as this make the United States a less welcoming place for international study and have a demonstrable impact on international interest in American higher education. Consequently, the new rule will be detrimental to both our institutions and the larger American economy, and we urge the Court to grant the Plaintiffs’ Motion for Preliminary Injunction and Partial Summary Judgment.

Dated: December 21, 2018

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Forthcoming

WORD COUNT CERTIFICATION (LR 7.3(D))

The body of this brief, including headings and footnotes, contains 4,929 words.

Dated: December 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I electronically filed the foregoing Brief *Amici Curiae* of Institutions of Higher Education in Support of Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment with the Clerk of the Court for the United States District Court for the Middle District of North Carolina by using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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