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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THE STATE OF CALIFORNIA,

Plaintiff,

v.

**U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; CHAD F.
WOLF, in his official capacity as Acting
Secretary of the United States Department
of Homeland Security; and MATTHEW
ALBENCE, in his official capacity as Acting
Director of U.S. Immigration and Customs
Enforcement,**

Defendants.

Case No. 4:20-cv-04592-JST

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 19, 2020
Time: 2:00 p.m.
Dept: Courtroom 6 – 2nd Floor
Judge: Honorable Jon S. Tigar
Trial Date: None Set
Action Filed: July 9, 2020

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE THAT ON August 19, 2020, at 2:00 p.m. or as soon thereafter as it may be heard before the Honorable Jon S. Tigar, Plaintiff State of California (Plaintiff or the State) will and does hereby move the Court pursuant to Fed. R. Civ. P. 65 for a preliminary injunction prohibiting Defendants from implementing and enforcing the July 6 Directive that rescinds its earlier March 13 Guidance. That Guidance exempted F-1 and M-1 nonimmigrant student and vocational visa holders from regulations, which limit students' ability to enroll in online courses, during the novel coronavirus (COVID-19) emergency. The July 6 Directive violates the Administrative Procedure Act (APA) because it is arbitrary and capricious, 5 U.S.C. § 706(2)(A), and was issued without notice and comment, 5 U.S.C. § 553(b). This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the declarations, the Request for Judicial Notice, and any other written or oral evidence or argument as may be presented. While the motion is being noticed for August 19, 2020, Plaintiff respectfully requests that the hearing be held on July 22, 2020 per the Stipulation filed by the parties.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff brings this motion to seek necessary provisional relief to stop the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) (collectively, Defendants) from implementing the unlawful July 6 Directive, which forces international students to attend in-person courses under the threat of deportation and pressures institutions of higher education (IHEs) to substantially expand in-person learning in the midst of an escalating pandemic, with imminent deadlines imposed by Defendants beginning on July 15. International students should not be compelled to sacrifice their wellbeing so that they can remain in the U.S. and IHEs should not have to sacrifice the wellbeing of their students to continue serving them and lose the flexibility to function online in the interest of public health. Defendants agreed with this uncontroversial position in March, when they issued guidance permitting international students to take a full online course load. *See* Req. for Jud. Notice (RJN) Ex. 1 (March 13 Guidance). Now,

1 four months—and over 3 million confirmed COVID-19 cases in the U.S.—later, Defendants have
2 abruptly changed their mind. RJN Ex. 2 (July 6 Directive). This reversal is not only cruel, but it
3 was made in violation of the APA.

4 Since March 2020, COVID-19 has profoundly transformed everyday life in the United
5 States. Broad sectors of society have been forced to shut down or severely limit in-person
6 functions in order to stop the spread of the highly contagious disease. IHEs across the country,
7 including California IHEs, the California State University (CSU) and California Community
8 Colleges systems (collectively, California IHEs), are confronted with the unprecedented
9 challenge of carrying out their academic missions while protecting the health of their campus
10 communities in compliance with local and state public health directives. To meet the crisis,
11 California IHEs moved quickly to online learning and limited in-person courses where COVID-
12 19 could more easily be spread.

13 At the beginning of the pandemic, Defendants recognized these challenges, and issued the
14 March 13 Guidance exempting international students for “the duration of the emergency” from
15 federal regulations that limit, and in some cases fully prohibit, them from taking online courses.
16 RJN Ex. 1. Since March 13, the national emergency has not subsided. Rather, in recent weeks, as
17 businesses and other sections of society have reopened, cases have surged across the country to
18 the highest levels of the entire pandemic. With the expectation that their students’ visas would not
19 be jeopardized by online classes since the country remains very much in the “duration of the
20 emergency,” California IHEs carefully crafted fall 2020 programs that are predominately online
21 with limited in-person course offerings.

22 Inexplicably, on July 6—just weeks before the start of fall semester and on a date, at that
23 point, had marked the highest number of new COVID-19 cases in the U.S. since the start of the
24 pandemic—Defendants issued the July 6 Directive rescinding the March 13 Guidance. Per the
25 Directive, international students enrolled in a full course of online study must either leave the
26 U.S., transfer to a school where they can attend courses in-person (assuming such an option
27 exists), or be subject to removal. RJN Ex. 2. The shift in policy, per Defendants, reflected that the
28

1 prior exemption was issued during the “height of the [COVID-19] pandemic,” indicating their
 2 view that the COVID-19 pandemic is receding. RJN Ex. 2. This is simply untrue.

3 Defendants’ reversal is the epitome of the arbitrary and capricious conduct that the APA
 4 prohibits. Defendants utterly ignored the harm to students and IHEs as a result of their abrupt
 5 rescission of the March 13 Guidance. Additionally, the July 6 Directive runs counter to the
 6 evidence before Defendants—namely, the reality of the surging COVID-19 pandemic. Indeed,
 7 given the exigency of the pandemic, Defendants failed to provide a reasonable justification for
 8 changing the policy. Beyond that, Defendants failed to comply with the procedural requirements
 9 of the APA, depriving IHEs, students, and public health officials, of the ability to weigh-in on an
 10 action that will have serious health, financial, educational, and immigration consequences.

11 The July 6 Directive will irreparably harm the IHEs and their students. The July 6 Directive
 12 will impose serious administrative and financial burdens on the IHEs, and worse, the California
 13 IHEs could lose up to 32,000 international students, who greatly contribute to those institutions’
 14 diversity, research, and academic missions. These international students must make impossible
 15 choices: risk their health to stay in the U.S., uproot their lives to depart, or be subject to removal.
 16 For these reasons, Plaintiff respectfully requests that the Court grant Plaintiff’s motion to prevent
 17 the unconscionable injuries that will result from Defendants’ new policy.

18 **BACKGROUND**

19 **I. THE PANDEMIC HAS FORCED A DRAMATIC SHIFT TOWARD ONLINE LEARNING**

20 COVID-19 is an ongoing crisis that has far-reaching implications globally, and especially
 21 in the U.S., where it has not yet been contained. On March 4, 2020, California Governor Gavin
 22 Newsom proclaimed a State of Emergency for the State of California in response to COVID-19.
 23 RJN Ex. 4. On March 13, the President issued a Proclamation declaring the COVID-19 pandemic
 24 a national emergency. 85 Fed. Reg. 15,337 (Mar. 18, 2020). Since that time over 3.2 million
 25 Americans have been infected and more than 134,000 have died, the most in the world. RJN Ex.
 26 5, 6. In California alone, more than 320,000 people have become infected, and 7,017 have died.
 27 RJN Ex. 7. With no vaccine or therapeutic treatment available, forecasts project that between
 28

1 157,216 to 244,540 people in the U.S. could die by November 1, 2020.¹

2 It is widely accepted that COVID-19 is easily transmitted and spreads mainly from person
3 to person, through respiratory droplets produced when an infected person coughs or sneezes, or
4 when an individual is speaking, shouting, or singing. Watt Decl. ¶¶ 9, 11. Crowded indoor spaces,
5 where there is close contact can particularly increase the risk of the disease's spread. *Id.* ¶¶ 12,
6 23. Accordingly, the U.S. Centers for Disease Control and Prevention (CDC) and the California
7 Department of Public Health (CDPH) have emphasized that physical distancing, i.e., staying
8 home as much as possible and remaining six feet from others when outside your home, is a core
9 tool to curbing COVID-19. RJN Ex. 8; Watt Decl. ¶ 10. Following this advice, on March 19,
10 Governor Newsom issued the first statewide stay-at-home order in the country. RJN Ex. 9.

11 Around that same time, the IHEs switched to almost exclusively online learning for the
12 spring 2020 semester. Wrynn Decl. ¶ 7; Hetts Decl. ¶ 12; Miner Decl. ¶ 10; Rodriguez ¶ 12;
13 Vuriden Decl. ¶ 9; Cornner Decl. ¶ 9; Hope Decl. ¶ 9; Knox Decl. ¶ 9. On short notice, the IHEs
14 were required to invest significant resources to ensure the success of an entirely online program.
15 Wrynn Decl. ¶¶ 8, 9; Hetts Decl. ¶ 12; Cornner Decl. ¶ 9; Knox Decl. ¶ 11. For instance, CSU
16 coordinated the instruction of over 70,000 courses, provided online instruction resources to
17 faculty, and distributed laptops and tablets to students who needed them. Wrynn Decl. ¶ 8. The
18 Chancellor's Office of the California Community Colleges system has been working to provide
19 internet services and computers at no or reduced cost for students who need them. Hetts Decl.
20 ¶ 19. As the public health risks associated with in-person education persisted, California IHEs
21 have continued to hold virtually all courses online in summer 2020. Wrynn Decl. ¶ 10; Hetts
22 Decl. ¶ 13; Miner Decl. ¶ 11; Rodriguez ¶ 12; Cornner Decl. ¶ 9; Knox Decl. ¶ 9. The California
23 IHEs' actions are consistent with current CDC guidance that in areas with substantial community
24 spread, IHEs should "consider extended in-person class suspension," RJN Ex.12. (IHE
25 preparedness) and that "virtual-only learning options" have the lowest risk of spread. RJN Ex. 11.

26 The rate of COVID-19's spread has, in fact, increased in recent weeks, coinciding with the

27 _____
28 ¹ Institute for Health Metrics and Evaluation at the University of Washington, COVID-19
Projections, <https://tinyurl.com/IHMEprojections> (last updated July 7, 2020).

1 reopening of businesses and public spaces throughout the country. Up until June 27, April 28
 2 represented the peak of the pandemic in the U.S. with 38,509 confirmed cases on that day. The
 3 U.S. has seen more than 40,000 confirmed cases every day, except one, since June 27, with
 4 66,281 cases on July 12, representing, thus far, the new peak of the pandemic. RJN EX. 6.
 5 Because California is also experiencing a surge in cases, on July 13, Governor Gavin Newsom
 6 ordered the closure of most non-essential sectors in most of the state. RJN Ex. 10.

7 **II. CALIFORNIA IHES ACTED IN RELIANCE ON THE MARCH 13 GUIDANCE**

8 Recognizing that requiring international students to attend in-person courses during a
 9 pandemic is unsafe and incompatible with public health guidance, on March 13, the Student and
 10 Exchange Visitor Program (SEVP) division within ICE issued guidance, RJN Ex. 1, exempting
 11 international students from federal regulations that restrict F-1 students from taking more than
 12 one online course and restrict M-1 students from taking any online courses.² 8 C.F.R.
 13 §§ 214.2(f)(6)(i)(G), 214.2(m)(9)(v). In this March 13 Guidance, SEVP specifically addressed the
 14 scenario where a “school temporarily stops in-person classes but implements online or other
 15 alternate learning procedures and the nonimmigrant student remains in the United States.” *Id.*
 16 SEVP directed these students to “participate in online or other alternate learning procedures and
 17 remain in active status in SEVIS [Student and Exchange Visitor Program].” *Id.* SEVP further
 18 declared that, “[g]iven the extraordinary nature of the COVID-19 emergency, SEVP will allow F-
 19 1 and/or M-1 students to temporarily count online classes towards a full course of study in excess
 20 of the limits of 8 C.F.R. § 214.2(f)(6) and 8 C.F.R. § 214.2(m)(9)(v).” *Id.*

21 The March 13 Guidance stated that the exemption for online learning would be in effect
 22 “**for the duration of the emergency.**” *Id.* (emphasis added). And, per the Guidance, Defendants
 23 would adjust it “as needed” as they “continue to monitor the COVID-19 situation.” *Id.*
 24 Essentially, through the March 13 Guidance, Defendants expressed that they would be following
 25 a rational policy: students and IHES grappling with a global pandemic beyond their control would
 26 not be penalized for complying with public health directives.

27 _____
 28 ² The in-person requirements for F-1 students, provided in 8 C.F.R. § 214.2(f)(6)(i)(G), only
 apply to students who are taking courses for credit or classroom hours.

1 Indeed, up until the July 6 Directive, all of Defendants’ guidance indicated that SEVP’s
 2 requirements, and adjustments thereto, would be commensurate with the trajectory of the
 3 pandemic. In its first COVID-19 related guidance, a March 9 Broadcast Message, Defendants
 4 recognized “schools may need to adapt their procedures and policies to address the significant
 5 public health concerns associated with the COVID-19 crisis,” and assured that they “intend[] to
 6 be flexible with temporary adaptations” due to COVID-19. RJN Ex. 13. Defendants also issued
 7 guidance on June 4 that, while indicating that fall plans would be forthcoming, also expressed that
 8 any changes would be tied to “the fluid nature” of the COVID-19 crisis. RJN Ex. 14. That
 9 guidance also discussed the fact that “some students may find it difficult to return home during
 10 the COVID-19 emergency because of diminished travel options.” *Id.*

11 In reliance on the March 13 Guidance that international students would be exempted from
 12 in-person class requirements for the “duration of the emergency,” and in consideration of the
 13 worsening pandemic, California IHEs made plans to primarily offer online classes for the fall
 14 2020 semester to ensure the safety of their campus communities during the COVID-19 pandemic.
 15 Wrynn Decl. ¶¶ 11, 17; Hetts Decl. ¶ 14; Miner Decl. ¶ 11; Adams Decl. ¶ 9; Vurdien Decl. ¶ 10;
 16 Cornner Decl. ¶ 13; Hope Decl. ¶ 10; Knox Decl. ¶ 12. The California community colleges
 17 convened a working group to assess the threat of COVID-19 on the system and make
 18 recommendations on whether and when campuses should reopen to students. Hetts Decl. ¶ 13.
 19 Individual districts in the community colleges system also tracked the spread of the virus in their
 20 localities and considered local and state stay-at-home orders in order to determine what method of
 21 instruction would be safest for the campus. Miner Decl. ¶¶ 12, 16; Adams Decl. ¶¶ 10, 11;
 22 Vurdien Decl. ¶ 11; Cornner Decl. ¶ 10; Hope Decl. ¶ 9-10; Knox Decl. ¶ 13. This careful
 23 planning led to most community colleges planning to offer primarily online courses but for very
 24 limited exceptions. Miner Decl. ¶ 11; Rodriguez Decl. ¶ 20; Vurdien Decl. ¶ 10; Cornner Decl.
 25 ¶¶ 11-12; Hope Decl. ¶ 10; Knox Decl. ¶ 12.

26 Likewise, CSU administrators have spent countless hours planning campus specific
 27 education plans that safeguard the health and safety on their campuses. Wrynn Decl. ¶¶ 11-12, 14,
 28 17. Similar to the community colleges, CSU will have a “hybrid” program, whereby most

campuses will operate approximately 90% online. *Id.* ¶ 16. In May 2020, the CSU published guidance for the fall semester so that faculty and staff would have sufficient time to make necessary preparations to deliver a rich, but remote, educational experience. *Id.* ¶ 14.

III. DEFENDANTS TERMINATED THE IN-PERSON LEARNING EXEMPTION DURING AN ESCALATING PUBLIC HEALTH CRISIS

Although the COVID-19 pandemic in the U.S. has worsened since the March 13 directive, on July 6, 2020, SEVP changed its policy to declare that the earlier exemptions provided for F-1 and M-1 students “during the height of the [COVID-19] crisis will be modified for the fall 2020 semester.” RJN Ex. 2. SEVP stated that because schools have started to reopen, in its view, “there is a concordant need to resume the carefully balanced protections implemented by Federal regulations.” *Id.* SEVP claims that the change “balance[s] public health concerns against the varied approaches that schools and universities are taking” in response to COVID-19, but it does not address the risk of transmission that is presented by expanded in-person learning or the escalating nature of the public health crisis. RJN Ex. 3.

According to the July 6 Directive, those “[s]tudents attending schools operating entirely online may **not** take a full online course load and remain in the United States.” RJN Ex. 2. (emphasis in original). If an international student attends a school that has shifted to an entirely online program due to COVID-19, or cannot enroll in in-person courses due to their limited availability (or a student’s disabilities or health concerns), the student must either: (a) transfer to a school with in-person learning; (b) leave the U.S.; or (c) “face immigration consequences including, but not limited to, the initiation of removal proceedings.” *Id.* The U.S. Department of State will not issue visas to students enrolled in a program that is fully online, and the U.S. Customs and Border Protection will not allow students to enter the U.S. if they are enrolled in a school that is fully online. *Id.*

While F-1 students attending a higher education institution adopting a hybrid model with a mixture of online and in-person classes may be permitted to take more than one class or three credit hours online and still retain their status, that exemption does not apply to F-1 students in English language training programs or to any M-1 students. *Id.* As discussed *supra*, because

IHEs have decided for public health purposes to offer only a small percentage of their classes in-person, and even then, only for certain subject matter areas, many F-1 students may not be in a position to take any in-person class due to capacity restrictions. Moreover, there is no safe harbor for IHEs operating in the “hybrid” model that decide to switch to online-only classes in the middle of the semester should the public health crisis demand it. In that instance, the students are “not permitted to take a full course of study through online classes,” and students “must leave the country or take alternative steps to maintain their nonimmigrant status such as transfer to a school with in-person instruction.” *Id.* The July 6 Directive further states that students enrolled at IHEs “whose schools of enrollment are only offering online classes” can maintain their active visa status residing abroad, indicating that students enrolled at IHEs with hybrid-programs (i.e., not offering *only* online classes) *cannot* maintain their status from abroad, even if they are enrolled in only online courses. RJN Ex. 2

The July 6 Directive states that DHS will be publishing a Temporary Final Rule “in the near future,” without any indication that DHS or ICE will engage in notice and comment at any point. *Id.* Nonetheless, the practical effects of this new policy are immediate. IHEs that plan to operate entirely online are required to inform ICE of their plans by July 15, while all other IHEs must inform ICE of their plans to operate solely in-person classes, delayed or abbreviated sessions, or hybrid plans by August 1. By August 4, IHEs are required to update and reissue new Forms I-20 to each F-1 or M-1 student enrolled in the IHEs during the fall 2020 semester. *Id.* If a F-1 student takes in-person classes, in order to retain their status, under the new policy, the higher education institution must certify on the Form I-20 that: (a) the school’s program is not entirely online; (b) the student is not taking an entirely online course load; and (c) the student is taking the minimum number of online classes required to make normal progress in the degree program. *Id.*

IV. THE JULY 6 DIRECTIVE’S IMPACT ON CALIFORNIA IHEs AND STUDENTS

A. The July 6 Directive Harms California IHEs

The July 6 Directive harms IHEs in at least three significant ways: (1) IHEs must devote substantial resources to ensuring international students can retain their statuses, which requires

1 expansion of in-person learning despite health risks; (2) California IHEs now have new
2 administrative burdens; and (3) California IHEs' missions are frustrated.

3 **1. The July 6 Directive Disrupts Long Completed Fall 2020 Plans**

4 The July 6 Directive was issued only weeks before the fall semester was to start, after
5 California IHEs had already extensively planned for fall online learning programs in reliance of
6 the March 13 Guidance. Now that Defendants have rescinded that Guidance, California IHEs are
7 pressured to reconfigure their fall plans so that their international students can enroll in at least
8 one in-person class, because their initial falls would be too limited. Wrynn Decl. ¶ 21; Hetts Decl.
9 ¶¶ 16-17; Miner Decl. ¶ 16; Rodriguez Decl. ¶ 20; Vurdien Decl. ¶¶ 12, 14, 23; Cornner Decl.
10 ¶¶ 14, 17; Hope Decl. ¶¶ 10, 11, 13; Knox Decl. ¶ 23. California IHEs are thus considering
11 whether they should add in-person classes or expand the capacity of existing in-person fall classes
12 to ensure that these students can stay enrolled and within lawful status. Wrynn Decl. ¶ 21; Hetts
13 Decl. ¶¶ 16-17; Miner Decl. ¶¶ 15-16 Rodriguez Decl. ¶ 20; Vurdien Decl. ¶ 23; Cornner Decl.
14 ¶ 14; Hope Decl. ¶ 13. This would be extremely difficult to do, however, because at many
15 schools, budgets have been finalized, fall registration has commenced, and instructors have been
16 assigned to courses; and schools must resubmit plans for how to safely deliver in-person courses.
17 Wrynn Decl. ¶ 22; Vurdien Decl. ¶ 14; Cornner Decl. ¶ 14; Hope Decl. ¶ 12. Indeed, COVID-19
18 presents a major obstacle, because California IHEs must comply with physical distancing
19 protocols and purchase personal protective equipment (PPE) for faculty, staff, and students.
20 Wrynn Decl. ¶ 21; Rodriguez Decl. ¶ 20; Vurdien Decl. ¶ 11; Hope Decl. ¶ 13. The logistical
21 planning required to implement a new fall plan at this point would be extremely burdensome.

22 More importantly, the expansion of in-person classes is accompanied by the definite risk of
23 exposing people to COVID-19. RJN Ex. 11, 12; Watt Decl. ¶ 23; Rodriguez Decl. ¶ 21; Adams
24 Decl. ¶ 11; Vurdien Decl. ¶ 18; Cornner Decl. ¶¶ 14, 16; Hope Decl. ¶ 13; Knox Decl. ¶ 19.
25 Given that the disease is spread through close contact and actions such as speaking, students, staff
26 members, or instructors risk contracting the disease through expanded in-person learning. Watt
27 Decl. ¶¶ 9, 23. The risk is especially acute given that the rate of COVID-19 is escalating in
28

California such that there is already limited space at local hospitals. Hetts Decl. ¶ 14; Adams Decl. ¶ 10; Vurdien Decl. ¶ 18; Cornner Decl. ¶ 16; Watt Decl. ¶ 18. Relatedly, the July 6 Directive does not give IHEs flexibility to pivot to an online-only system if conditions worsen—which, given the current trajectory, is foreseeable—for if they do, their students would be left with the prospect of immediate departure or deportation, RJN Ex. 2.

2. The July 6 Directive Imposes Substantial Administrative Burdens

California IHEs have and will continue to expend significant administrative effort to mitigate the harms resulting from the July 6 Directive. Van Cleve Decl. ¶ 8; Hetts Decl. ¶¶ 15, 17; Miner Decl. ¶ 16; Rodriguez Decl. ¶¶ 18, 20; Vurdien Decl. ¶¶ 14-16; Cornner Decl. ¶ 14; Knox Decl. ¶¶ 16-17. Just weeks before the fall semester is scheduled to begin, California IHEs have had to divert their attention to analyzing the impact of the July 6 Directive and identifying its applicability to their students, while simultaneously fielding inquiries from concerned students. Van Cleve Decl. ¶ 8; Hetts Decl. ¶ 15; Miner Decl. ¶ 14; Rodriguez Decl. ¶ 18; Cornner Decl. ¶ 14; Knox Decl. ¶ 16. In addition, the July 6 Directive requires California IHEs to comply with new, onerous—and imminent—SEVIS reporting requirements of re-issuing Forms I-20 to *all* of its international students by August 4, 2020. Van Cleve Decl. ¶ 11; Miner Decl. ¶ 17; Rodriguez Decl. ¶ 18; Vurdien Decl. ¶ 17; Cornner Decl. ¶ 15; Hope Decl. ¶ 14; Knox Decl. ¶ 18. Within a matter of weeks, staff must review each international student’s record to ensure that they are enrolled in at least one in-person course, and monitor that enrollment on SEVIS. Van Cleve. Decl. ¶ 11. As an example of how time consuming this will be, Santa Monica College anticipates that this task alone will “require 19 full-time staff members to work a combined 570 overtime hours.” Rodriguez Decl. ¶ 18.

3. The July 6 Directive Frustrates the Diversity and Educational Missions of the California Higher Education Institutions

Potentially thousands of IHEs’ international students may be unable to comply with the July 6 Directive because they cannot feasibly enroll in the limited in-person course offerings. *See e.g.*, Miner Decl. ¶ 11; Rodriguez Decl. ¶ 28. This means that they will be forced to either transfer, depart the U.S. and resume their studies from their home country, or be deported. Either

way, it is likely that the California IHEs will lose many international students. This will be a crushing blow to the California IHEs' missions to serve diverse individuals from local, national, and global communities without regard to race, ethnicity, national origin, or immigration status. Hetts Decl. ¶¶ 8, 23 & Ex. A; Wrynn Decl. ¶ 23; Miner Decl. ¶ 8; Rodriguez Decl. ¶ 9; Vurdien Decl. ¶ 20; Cornner Decl. ¶ 8; Knox Decl. ¶ 8. International students hail from all over the world and enrich the educational experiences of all students and faculty by contributing their diverse life experiences and perspectives. Wrynn Decl. ¶ 18; Hetts Decl. ¶ 11; Miner Decl. ¶¶ 7, 9; Rodriguez Decl. ¶ 10; Vurdien Decl. ¶ 8; Cornner Decl. ¶ 7; Hope Decl. ¶¶ 7-8; Knox Decl. ¶ 7. The removal of these students necessarily makes these systems less diverse, which is a loss to the IHEs and their student bodies. Hetts Decl. ¶ 23; Vurdien ¶ 20; Hope Decl. ¶ 16; Knox Decl. ¶ 15.

Moreover, the July 6 Directive deprives California IHEs of the scholarship of international students, thereby harming their institutional missions and denying the community of their innovations and research. *See* Cal. Educ. Code § 66010.4(a)(3), (b). As just a few examples of students who would likely be unable to continue their studies under the July 6 Directive: one student researches diseases such as diabetes, Parkinson's, pneumonia and other immune related disorders, which is of critical import to COVID-19 developments; another student has collaborated with U.S. NASA Joint Propulsion Laboratory (JPL) on sustainable energy research; and one student focuses on cyber security and tutors college athletes. Winner Decl. ¶ 15.

Finally, the July 6 Directive will cause IHEs to suffer substantial financial losses due to the loss of international students who will likely dis-enroll, either because they are transferring or they decide not to continue their studies from abroad. Miner Decl. ¶ 18; Rodriguez Decl. ¶ 24; Vurdien Decl. ¶ 19; Cornner Decl. ¶ 17; Hope Decl. ¶ 15; Knox Decl. ¶ 20. CSU stands to lose over \$260 million in tuition fees due to dis-enrollment of international students who are unable to comply with the Directive. Wells Decl. ¶ 7. The California Community College system projects a loss of up to approximately \$83 million in tuition and related fees. Hetts Decl. ¶ 10. This hit to revenue comes at a time when California IHEs' resources are strained to respond to the disruption caused by COVID-19, as well as state budget shortfalls. Wells Decl. ¶ 7; Hetts Decl. ¶ 22; Rodriguez Decl. ¶ 24; Vurdien Decl. ¶ 19; Hope Decl. ¶ 15. All tuition revenue is reinvested

1 towards operational costs associated with the school, including staff salaries, as well as programs
 2 and services available to the student body as a whole. Wells Decl. ¶ 7; Hetts Decl. ¶ 21;
 3 Rodriguez Decl. ¶ 22. Dis-enrollment thus extends far beyond a financial loss, and affects the
 4 types of courses, educational program, services, and instruction IHEs are able to offer to all of its
 5 students, international and domestic. Rodriguez Decl. ¶ 22.

6 **B. The July 6 Directive Harms International Students at Great Personal and**
 7 **Financial Cost**

8 The July 6 Directive penalizes international students for taking a full online course load,
 9 despite the fact that many have no other choice due to in-person capacity limits, limited course
 10 offerings in specific majors, or their underlying health issues. The Directive's impacts on these
 11 students' lives and wellbeing are vast and severe. Students have reported feeling alarm, fear,
 12 anxiety, and confusion due to the Directive. Rodriguez Decl. ¶ 27; Hope Decl. ¶ 18; Knox Decl.
 13 ¶¶ 16, 22; Winner Decl. ¶ 15; Kodur Decl. ¶ 25.

14 *First*, many international students relied on the March 13 Guidance as assurance that their
 15 status was not in jeopardy due to their IHE's decision to cease virtually all in-person classes for
 16 the duration of the emergency. Rodriguez Decl. ¶¶ 25-27 Vurdien Decl. ¶ 21. In reliance on that
 17 Guidance, students signed leases in the U.S. expecting to continue to remain in the country while
 18 completing their online instruction. Rodriguez Decl. ¶ 26; Winner Decl. ¶ 11; Kodur Decl. ¶ 25.
 19 Now these students are being forced to uproot their lives and leave the U.S. or be subject to
 20 removal, and breach leases and other financial commitments they made under the assumption that
 21 they would be able to continue online coursework and remain in lawful status. Rodriguez Decl.
 22 ¶¶ 26-27; Hope Decl. ¶ 18. At the same time, in reliance on the March 13 Guidance, some
 23 students may have traveled back their home countries to continue online learning. Rodriguez
 24 Decl. ¶¶ 25, 28; Vurdien Decl. ¶ 21; Cornner Decl. ¶ 18. If these students are enrolled in hybrid
 25 programs, such as those at the California IHEs, and remain abroad taking an online course load,
 26 they may lose their status under the Directive. RJN Ex. 2. Thus, the July 6 Directive could have a
 27 perverse effect—forcing the IHEs' students who are already abroad to come back to the U.S. to
 28 take in-person courses, which may prove difficult for these students due to travel restrictions and

1 presents the same public health concerns as forcing students to leave the U.S.

2 *Second*, students have expressed deep reservations about enrolling in courses with in-
 3 person components, as they fear contracting COVID-19, which could cause long-lasting physical
 4 harm, or fatal consequences. Rodriguez Decl. ¶ 27; Kodur Decl. ¶ 23. The July 6 Directive makes
 5 no exception to students with underlying conditions, for whom COVID-19 is especially
 6 dangerous. RJN Ex. 2.

7 *Third*, students who return to their home countries face the exorbitant financial costs and
 8 the health risk associated with traveling during a global pandemic, when international travel
 9 options are severely limited. Hetts Decl. ¶ 20; Miner Decl. ¶ 21; Rodriguez Decl. ¶¶ 26-27;
 10 Vurdien Decl. ¶ 22; Hope Decl. ¶ 18; Knox Decl. ¶ 22; Winner Decl. ¶¶ 12-13, 15; Kodur
 11 Decl. ¶¶ 19-20, 22, 24-25. For example, the second largest group of international students at the
 12 CSU are from India, but there are currently no flights available from the U.S. to India. Wrynn
 13 Decl. ¶ 19. A ticket to China right now is \$7,000. Rodriguez Decl. ¶ 27. Yet, if students are
 14 unable to timely depart the country, they risk being placed in removal proceedings.

15 Relatedly, for many students, continuing their education abroad is unfeasible. Students
 16 may not have access to laptop devices or a free, uncensored, internet connection. Miner Decl.
 17 ¶ 22; Rodriguez Decl. ¶ 26; Winner Decl. ¶¶ 9, 15; Kodur Decl. ¶¶ 17-19, 25. Still others fear
 18 returning to home countries where they do not currently have any place to live and where they
 19 could face famine or had escaped abusive situations. Rodriguez Decl. ¶¶ 26-27; Winner Decl. ¶
 20 15. Generally, students forced to depart will lose the educational opportunities attendant with
 21 their residing in the U.S. For instance, F-1 students would be denied the opportunity to participate
 22 in a pre-completion internship or other experiential learning opportunities. Wrynn Decl. ¶ 20;
 23 Miner Decl. ¶ 23; Rodriguez Decl. ¶ 29; Hope Decl. ¶ 18.

24 *Finally*, the July 6 Directive is accompanied by the threat of serious immigration
 25 consequences for failure to comply—namely, initiation of removal proceedings. RFJ directive_.
 26 When an individual is ordered removed, they are inadmissible into the U.S. for ten-years. 8
 27 U.S.C. § 1182(a)(9)(A)(ii). Even if not ordered removed, if the student fails to maintain status
 28 while residing in the U.S. that student will be accruing unlawful presence, which can bar an

individual from entry for many years. *Id.* § 1182(a)(9)(B)(i). A failure to maintain status while residing in the U.S. can also render a person ineligible for adjustment of status in the future. *Id.* § 1255(c)(8). These harsh consequences may befall students, who, through no fault of their own, cannot attend in-person courses and also cannot leave the U.S.

LEGAL STANDARD

A preliminary injunction is appropriate when the plaintiffs establish that they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in plaintiffs' favor, and an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). A preliminary injunction is "often dependent as much on the equities of [the] case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). "[S]erious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction," so long as the other preliminary injunction factors are met. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotations omitted).

ARGUMENT

I. PLAINTIFF IS LIKELY TO SUCCEED ON ITS APA CLAIMS

A. The July 6 Directive is Arbitrary and Capricious

Defendants' rescission of the in-person learning exemption for F-1 and M-1 students must be set aside under the APA as an agency action that is "arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under the APA, an agency must engage in "reasoned decisionmaking," by "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983). Courts find agency actions to be arbitrary and capricious if the agency has, among other things, "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* at 43. In addition, when changing policy, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*

1 *v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Any one of these defects would be
 2 sufficient for setting aside Defendants’ rescission of the COVID-19 in-person learning
 3 exemptions as arbitrary and capricious. Here, all of these defects exist.

4 **1. Defendants Failed to Consider Important Aspects of the Problem**

5 Defendants’ one-paragraph explanation in the July 6 Directive of the rescission of the
 6 COVID-19 in-person learning exemptions only reflects two considerations: (a) that the in-person
 7 learning exemptions were granted “during the height” of the pandemic, which Defendants,
 8 presumably (and incorrectly) believe has passed; and (b) that there is a “need to resume the
 9 carefully balanced protections implemented by federal regulations” as “many institutions across
 10 the country reopen.” RJN Ex. 2. The July 6 Directive and the documents that were released
 11 contemporaneously with the Directive, however, shows no consideration by Defendants of the
 12 litany of problems that ensue from the agency’s actions. *See State Farm*, 463 U.S. at 43.

13 To start, Defendants have not at all considered how the March 13 Guidance “engendered
 14 serious reliance interests” for IHEs and students based on that Guidance’s representation that the
 15 COVID-19 in-person learning exemptions would be in effect for the duration of the pandemic.
 16 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox Televisions*, 556
 17 U.S. at 515). California IHEs relied on those representations as they spent months creating plans
 18 to predominantly hold cases online. Wrynn Decl. ¶ 17; Miner Decl. ¶ 13; Rodriguez Decl. ¶ 16;
 19 Vurdien Decl. ¶ 12; Cornner Decl. ¶ 13; Hope Decl. ¶ 11; Knox Decl. ¶ 14. Because of the March
 20 13 Guidance, California IHEs were able to safeguard the health and safety of their students,
 21 faculty, and staff, without concern that international students will suffer immigration
 22 consequences as a result of these online learning plans. *Id.* The IHEs also made decisions on
 23 course offerings and budgeting based on the expectation that international students will remain
 24 enrolled while IHEs hold classes online during the pandemic. Wrynn Decl. ¶ 17; Rodriguez Decl.
 25 ¶ 16; Vurdien Decl. ¶ 13; Cornner Decl. ¶ 13; Hope Decl. ¶ 12; Knox Decl. ¶ 14. Meanwhile,
 26 students presently in the U.S. acted in reliance of the representations in the March 13 Guidance
 27 by enrolling in classes, entering leases, or interviewing for jobs or internships on the expectation
 28

1 that they could continue their study in the U.S. irrespective of whether their school offers in-
 2 person instruction during the pandemic. Rodriguez Decl. ¶ 26; Hope Decl. ¶ 12; Winner Decl. ¶
 3 11, 15; Kodur Decl. ¶ 25. Other international students traveled to their home countries, relying on
 4 the representations of the March 13 Guidance that they could take their classes online while
 5 residing abroad. Rodriguez Decl. ¶ 25, 28; Vurdien Decl. ¶ 21; Cornner Decl. ¶ 18. Now these
 6 students must attempt to travel back to the U.S. to take classes in-person if they are enrolled at an
 7 IHE with a “hybrid” fall plan or they could lose their visa status.

8 The Supreme Court’s recent decision in *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct.
 9 1891 (2020), is instructive. In that case, the Court determined that before terminating the Deferred
 10 Action for Childhood Arrival (DACA), a program which “conferred no substantive rights” and
 11 provided only temporary benefits, DHS was required to consider the reliance interests of: (a)
 12 DACA recipients; (b) the IHEs where DACA recipients studied or taught; and (c) the state and
 13 local governments that benefitted from DACA recipients contributions to tax revenue. *Id.* at
 14 1913-14. Likewise here, as discussed above, IHEs and international students developed reliance
 15 interests based on the representations in the March 13 Guidance that those students could
 16 continue to enroll in online classes for “the duration of the emergency” notwithstanding the
 17 ordinary in-person learning regulatory requirements. *See supra* 15-16. Defendants were “required
 18 to assess whether there were reliance interests, determine whether they were significant, and
 19 weigh any such interests against competing policy concerns.” *Regents*, 140 S.Ct. at 1915. There
 20 is no indication that Defendants conducted that analysis, making the rescission of the COVID-19
 21 in-person learning exemptions arbitrary and capricious on that basis alone. *See id.*

22 Defendants independently failed to meaningfully consider public health effects. While an
 23 FAQ document claims that the new policy “carefully balance[s] public health concerns” and
 24 “[t]he health and safety of all students is of the utmost importance,” none of the documents
 25 contemporaneously issued with the July 6 Directive even mention the substantial public health
 26 risks posed by conducting expansive in-person learning. RJN Ex. 7; *see also* RJN Ex. 15. The
 27 documents further fail to consider that the public health crisis has escalated since the in-person
 28 learning exemptions were first instituted on March 13. RJN Exs. 5-7. While Defendants claim

that the policy change is intended to “minimiz[e] the risk of transmission of COVID-19,” RJN Ex. 2, the July 6 Directive increases the risk of transmission to international students and other travelers by forcing both: (a) students within the U.S. to travel to their home country in the middle of the pandemic; or (b) students abroad to come back to the U.S. to take in-person courses if their IHEs are offering them, so that they can retain their status. Watt Decl. ¶ 24. The agency documents also fail to consider the impact of forcing international students with underlying health conditions to attend in-person classes, even though for them exposure to COVID-19 could be fatal. *See id.* ¶ 23. Even if Defendants purport to have considered health impacts generally, their “explanation in no way addresses the[se] special vulnerability[ies]” to public health created by Defendants’ pressure for greatly expanded in-person learning. *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585, at *16 (9th Cir. July 6, 2020) (asylum rule’s failure to account for the “vulnerability of unaccompanied minors” is arbitrary and capricious).

Defendants have further shown no consideration of the following problems raised by the July 6 Directive:

- The July 6 Directive creates an unprecedented administrative burden on IHEs of having to re-issue Form I-20s to all of their international students within a matter of weeks. Van Cleve Decl. ¶ 11; Miner Decl. ¶ 17; Rodriguez Decl. ¶ 18; Vurdien Decl. ¶ 17; Cornner Decl. ¶ 15; Hope Decl. ¶ 14; Knox Decl. ¶ 18.
- The inevitable departure of international students from the U.S. as a result of the July 6 Directive would result in a loss of enrollment, and thus, a loss of tuition dollars that support the entire student body at a time when IHEs are facing severe budget cuts. Wells Decl. ¶ 7; Hetts Decl. ¶ 22; Miner Decl. ¶ 18; Rodriguez Decl. ¶ 24; Vurdien Decl. ¶ 19; Cornner Decl. ¶ 17; Hope Decl. ¶ 15; Knox Decl. ¶ 20.
- The loss of international students would significantly undermine the diversity and academic and research missions of these IHEs. Hetts Decl. ¶ 23; Vurdien ¶ 20; Hope Decl. ¶ 16; Knox Decl. ¶ 15.
- Some international students who are forced to leave the U.S. as a result of the July 6 Directive will be unable to do so due to U.S. and foreign travel restrictions,

potentially subjecting those students to immigration consequences if they remain in the U.S. Wrynn Decl. ¶ 19; Hetts Decl. ¶ 20; Miner Decl. ¶ 21; Rodriguez Decl. ¶¶ 26-27; Vurdien Decl. ¶ 22; Hope Decl. ¶ 18; Knox Decl. ¶ 22; Winner Decl. ¶ 13, 15; Kodur Decl. ¶¶ 19-20, 22; *see also* RJN Exs. 16-25.

- Similarly, some international students abroad may not be able to come back to the U.S. to take in-person courses at “hybrid” schools, because of these same travel restrictions, thus jeopardizing their status. Hetts Decl. ¶ 20; Miner Decl. ¶ 19; Rodriguez Decl. ¶ 25, 28; Vurdien Decl. ¶ 21; Cornner Decl. ¶ 18.
- Students who are forced to leave the U.S. because of their IHEs’ predominately online programs may not be able to continue their education in their home countries, since those students may be without internet connectivity in their home country, and will face the challenge of having to take classes in far divergent time zones. Miner Decl. ¶ 22; Rodriguez Decl. ¶ 26; Winner Decl. ¶¶ 9, 15; Kodur Decl. ¶¶ 17-19, 25.
- The July 6 Directive will interrupt the education of many international students who are close to earning their degree, which can have devastating consequences on their ability to pursue future professional opportunities. Wrynn Decl. ¶ 20; Miner Decl. ¶ 23; Rodriguez Decl. ¶ 29; Hope Decl. ¶ 18; Winner Decl. ¶¶ 10-11, 15.

Defendants’ failure to consider any one of these significant problems is enough to find the rescission arbitrary and capricious. *Regents*, 140 S. Ct. at 1913 (DHS’s failure “alone” to consider a more narrow rescission of DACA was enough to “render[] [the] Acting Secretary[‘s] decision arbitrary and capricious”).

2. Defendants’ Explanation for the Rescission Runs Counter to the Evidence Before the Agency

ICE’s primary reasoning for rescinding the exemptions—that those exemptions were granted at the “height” of the pandemic—indicates ICE has determined that the pandemic is dissipating, and thus, believes IHEs should reopen. RJN Ex. 2. The Acting Deputy Secretary of Homeland Security Ken Cuccinelli recently acknowledged that this was the purpose of the

1 rescission. RJN Ex. 26. That reasoning does not comport with reality, or even the federal CDC's
 2 currently applicable guidance for IHEs. RJN Exs. 11, 12.

3 As discussed *supra*, the rate of positive cases has spiked dramatically across the country.
 4 Between March 13, when the exemptions were granted, and June 26, there was no day in which
 5 there were 40,000 or more new confirmed COVID-19 cases in the U.S. RJN Ex. 6. Since June 27,
 6 there has not been one day in which there were *less than* 40,000 new confirmed COVID-19 cases.
 7 *Id.* On July 6, the day that Defendants rescinded the exception, there were 57,186 confirmed
 8 cases, ***the highest amount of new cases at that point since the start of the pandemic.*** *Id.* Cases
 9 have continued to increase since July 6, and more concerning, there has been an increase in
 10 deaths attributable to COVID-19, which tends to follow an increase in positive cases. *Id.*
 11 Although California has been cautious in its reopening, it, like the rest of the country, has
 12 experienced a spike in new cases and deaths over the past several weeks. RJN Ex. 7.

13 Health experts report hospitals across the country being “overwhelmed” as a result of this
 14 surge.³ The Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony
 15 Fauci said that these “disturbing” trends show that the U.S. was “not in total control” of the virus,
 16 and anticipated that the U.S. could see over 100,000 new confirmed COVID-19 cases per day.
 17 RJN Ex. 27. These recent spikes coincide with the reopening of businesses and public spaces,
 18 prompting health experts, including Dr. Fauci, to advise that further reopenings should be
 19 “pause[d]” in communities experiencing a surge in new confirmed COVID-19 cases. RJN Ex. 28.

20 This “evidence . . . contradicts the agencies’ conclusion” that the COVID-19 pandemic is
 21 easing, and that this is an appropriate time to expand in-person learning at IHEs. *E. Bay*
 22 *Sanctuary Covenant*, 2020 WL 3637585, at *13. Indeed, these facts all dictate *against* a policy
 23 that seeks to pressure IHEs to conduct more in-person learning. *Greater Yellowstone Coal., Inc. v.*
 24 *Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (overturning agency decision where “considerable
 25 data . . . point[ed] in the opposite direction” of the agency’s decision). Since Defendants have not
 26

27 ³ Madeline Holcombe, *Expert warns the US is approaching ‘one of the most unstable times in the*
 28 *history of our country’*, CNN Health (July 11, 2020), [https://www.cnn.com/2020/07/11/health/us-](https://www.cnn.com/2020/07/11/health/us-coronavirus-saturday/index.html)
[coronavirus-saturday/index.html](https://www.cnn.com/2020/07/11/health/us-coronavirus-saturday/index.html).

(and cannot) provide a “rational connection between the facts found and the choice made,” the agency action must be set aside. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

3. The July 6 Directive Fails to Provide a Sufficient Explanation to Justify the Rescission’s Change in Policy

Moreover, the rescission of the COVID-19 in-person learning exemptions departs from the agency’s past practice without a sufficient explanation. When an agency changes a policy, it must “show that there are good reasons for the new policy.” *Fox Television*, 556 U.S. at 515. Where, as is the case here, the prior policy engendered “serious reliance interests,” an agency must provide “a more detailed justification than what would suffice for a new policy created on a blank slate.” *Id.* Defendants’ suggestion that the exemptions in the March 13 Guidance are no longer necessary because they were issued at the “height of the pandemic” cannot be justified by the record before the agency. *See supra* 18-20. Defendants’ other conclusory justifications, including that the rescission of the exemptions is “need[ed] to resume the carefully balanced protections implemented by federal regulations” or that it “carefully balance[d] public health concerns” without explanation, falls “short of the agency’s duty to explain why it deemed it necessary to overrule its previous position.” *Encino Motorcars*, 136 S.Ct. at 2126.

B. Defendants Did Not Comply with Notice and Comment Procedures

Under the APA, the court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D). The APA requires that agencies comply with notice and comment procedures prior to the issuance of a substantive rule. *Id.* § 553(b). Notice and comment requirements do not apply if an agency is issuing an “interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice,” or if the agency establishes that there was “good cause” for it to find that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(b)(A),(B). Neither circumstance is present here.

First, the July 6 Directive is a substantive rule for which the APA’s procedural requirements apply because it has “the force and effect of law.” *Chrysler Corp. v. Brown*, 441

U.S. 281, 303 (1979) (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)); accord. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). A substantive rule “narrowly limits administrative discretion” or creates a “binding norm” so that “upon application one need only determine whether a given case is within the rule's criterion.” *Colwell v. HHS*, 558 F.3d 1112, 1124 (9th Cir. 2009) (quoting *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013-14 (9th Cir. 1987)) (emphasis omitted).

Here, the July 6 Directive was written in “mandatory terms” and imposes immediate obligations on both international students and IHEs. *Colwell*, 558 F.3d at 1125. As discussed *supra*, the Directive compels IHEs to imminently undertake administrative actions that were not required per the March 13 Guidance, and have never been required in the past. See e.g. Van Cleve Decl. ¶ 11; Rodriguez Decl. ¶ 18. The force and effect of the July 6 Directive will also be felt by the international students, who now must either risk their health by attending in-person courses to maintain their status, depart the U.S. to continue studies at online-only IHEs in their home countries, or face deportation. There is no indication in the Directive that enforcing officials have the discretion to determine whether a student “is within the rule’s criterion”—rather, the Directive is clear that students cannot maintain their status if they cannot comply with these requirements. *Colwell*, 558 F.3d at 1124 (quoting *Mada-Luna*, 813 F.2d at 1014). Tellingly, Defendants’ themselves appear to appreciate the substantive nature of the July 6 Directive, stating that they would be publishing its requirements in a forthcoming, but yet to be issued, Temporary Final Rule in the federal register, though this also will not be subject to notice and comment before taking effect. See RJN Ex. 2.

Second, Defendants have not established—nor even articulated—that there is good cause to circumvent rulemaking procedures. In order for the good cause exception to apply, the agency must “incorporate[] the finding and a brief statement of reasons therefore in the rules issued.” 5 U.S.C. § 553(b)(A),(B). The July 6 Directive contains no such statement, and that in itself renders the exception inapplicable. Even if Defendants had included this statement, Defendants cannot “overcome [the] high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement,” because they would face no harm if the March 13 Guidance remained in

place during a notice and comment period. *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (the exception only applies when “delay would do real harm.”) (internal quotations omitted). There is no exigency requiring students to imminently attend in-person courses or depart the U.S while the pandemic reaches levels unseen when the March 13 directive was issued. In the meantime, notice and comment would have given IHEs, students, faculty, and staff, the opportunity to weigh-in on an action that has profound health, educational, and financial impacts.

II. PLAINTIFF SATISFIES THE REMAINING FACTORS FOR A PRELIMINARY INUNCTION

A. Plaintiff Will Suffer Irreparable Harm

The July 6 Directive will have an immediate and detrimental impact on California IHEs’ missions and commitment to serving all student populations, and their limited financial resources at a time they are experiencing unprecedented disruptions as a result of the COVID-19 pandemic. The State has a strong interest in the well-being of its students, who are undeniably harmed by the rescission. *See Washington v. Trump*, 847 F.3d 1151, 1159, 1169 (9th Cir. 2017) (states suffered irreparable injuries due, in part, to injuries to university students stemming from a ban restricting foreign nationals from seven countries from entering the United States).

As discussed *supra*, Defendants’ actions threaten international students’ ability to continue their education, sometimes when they are just units away from graduation, which has life-altering personal and professional consequences from which are difficult to recover. *See e.g.*, Wrynn Decl. ¶ 20; Winner Decl. ¶¶ 10-11, 15. This “loss of opportunity to pursue one’s chosen profession constitutes irreparable harm.” *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). The emotional and psychological injuries to students grappling with the sudden and unexpected threat to their visa status and professional future, also constitute irreparable harm. Rodriguez Decl. ¶ 27; Winner Decl. ¶ 15.; *see Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 710 (9th Cir. 1988); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015).

While the majority of California IHEs plan to offer a small portion of in-person courses this fall, these courses likely are not numerous enough to meet the in-person enrollment

1 requirements of all international students, and the plans to offering limited in-person planning did
 2 not account for the unexpected July 6 directive. *See e.g.*, Wrynn Decl. ¶ 21; Hetts ¶ 16-17. The
 3 loss of these students would impair Plaintiff’s investment in its international students and the
 4 academic and research missions of the IHEs, including their mission to enrich their student bodies
 5 with a diversity of perspectives—injuries which are irreparable. *See e.g.*, Wrynn Decl. ¶ 23; Hetts
 6 Decl. ¶¶ 8, 23; *see also Washington*, 847 F.3d at 1159, 1168-69 (injuries to “teaching and
 7 research missions” of universities constituted substantial and irreparable injuries); *Regents of the*
 8 *Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018), *rev’d in part on unrelated*
 9 *grounds, Regents*, 140 S. Ct. 1891 (2020 (university and entity plaintiffs “demonstrated that they
 10 face irreparable harm as they begin to lose valuable students . . . in whom they have invested” and
 11 harm to their “organization interests” from DACA rescission).

12 Additionally, injuries to “sovereign interests and public policies” are irreparable. *Kansas*
 13 *v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). The California Legislature established
 14 policies designed to make public higher education systems accessible to international students.
 15 *See, e.g.*, Cal. Educ. Code § 66015.7(a) (all IHEs in California are encouraged to
 16 “develop...programs that support...the exchange of Californians and international students and
 17 scholars”). California has created programs to provide specialized support and services to its
 18 international students, reflecting the commitment to provide a welcoming environment for those
 19 individuals. *See, e.g., id.* § 66015.7; *see also, Vurdien Decl.* ¶ 8 Hope Decl. ¶ 8. Those
 20 investments are undermined if current international students cannot continue their education, or
 21 prospective students are dissuaded from applying or attending due to the July 6 Directive.

22 In order to avoid the irreparable harm caused by losing their international students,
 23 California IHEs would have to add additional in-person classes which come with the cataclysmic
 24 risk of COVID-19 exposure, which would also irreparably harm the State. Adams Decl. ¶ 11;
 25 Watt Decl. ¶ 23; *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1074 (N.D. Cal. 2018)
 26 (finding irreparable harm from agency rule that “will have substantial detrimental effects on
 27 public health”). Whatever choice California IHEs make, they will be harmed. *See Am. Trucking*
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1 *Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009) (forcing a Hobson's choice
2 on a party is irreparable harm).

3 The decisions made in the next few weeks by international students and California IHEs
4 will have irreparable consequences on their campus communities, including the immediate loss of
5 valued students and/or the public health risk of exposure to COVID-19. In this situation, "[a]
6 delay, even if only a few months, pending trial represents precious, productive time irretrievably
7 lost." *Chalk*, 840 F.2d at 710.

8 **B. The Public Interest Weighs Heavily in Favor of Provisional Relief**

9 The final two *Winter* factors – balance of the equities and the public interest – merge where
10 the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In assessing these factors,
11 courts consider the impacts of the injunction on nonparties as well. *See League of Wilderness*
12 *Def./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014).
13 The public interest in curbing the COVID-19 pandemic weighs overwhelmingly in favor of an
14 injunction here. As discussed *supra*, the COVID-19 pandemic is worsening *daily* in the U.S.,
15 including in California. The July 6 Directive threatens mass exposure to COVID-19 by
16 compelling IHEs to expand in-person learning, and forcing students to attend courses in-person or
17 travel to their home countries. *See e.g.*, Watt Decl. ¶ 24; Kodur Decl. ¶ 24; Hope Decl. ¶ 13;
18 Miner Decl. ¶ 16; Rodriguez Decl. ¶ 21. Preventing the illness, or death, of an innumerable
19 amount of people in the State, nation, and worldwide is in the public interest.

20 Supporting students' education is also in the public interest. *Meyer v. Nebraska*, 262 U.S.
21 390, 400 (1923) ("The American people have always regarded education and acquisition of
22 knowledge as matters of supreme importance which should be diligently promoted."). Many
23 international students invested years in their educations in the U.S., and the July 6 Directive
24 deprives them of the opportunity to complete their studies. *See e.g.*, Winner Decl. ¶¶ 11, 15;
25 Kodur Decl. ¶ 13, The loss of international students' invaluable global perspective will reduce the
26 quality of all students' education. *See e.g.*, Rodriguez Decl. ¶ 10; Hope Decl. ¶ 8; Knox Decl. ¶
27 18. Fiscally, the loss of tuition from their disenrollment forces IHEs to make difficult choices
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1 about courses and student services to cut for all students. *See e.g.*, Wells Decl. ¶ 9; Hetts Decl. ¶
2 21.

3 The public interest is further served by preserving the status quo. *Chalk.*, 840 F.2d at 704.
4 The March 13 Guidance is the status quo, *i.e.*, “the last uncontested status that preceded the
5 parties’ controversy.” *Dep’t of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.*,
6 448 F. 3d 1118, 1124 (9th Cir. 2006). Nearly 24 CSUs and 114 community colleges prepared for
7 predominantly online instruction in reliance of that March 13 Guidance. *See e.g.*, Wrynn Decl. ¶
8 11; Rodriguez Decl. ¶ 16. And countless students relied on the March 13 Guidance in making
9 their plans for the fall semester. *See e.g.*, Rodriguez Decl. ¶ 25; Wrynn Decl. ¶ 19.

10 While the July 6 Directive has already created chaos and inflicted harm on international
11 students and IHEs alike, Defendants are in “no way harmed by issuance of a preliminary
12 injunction which prevents the [federal government] from enforcing restrictions likely to be found
13 [unlawful].” *See Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal
14 citations omitted). Here, an injunction prevents Defendants from enforcing an action that violates
15 the APA. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (“The public interest is served by
16 compliance with the APA . . .”). An injunction would only require Defendants to permit the same
17 exemptions for the “duration of the emergency” that it provided in the March 13 Guidance.
18 Preventing Defendants from enforcing their unlawful and arbitrary rescission of those exemptions
19 in the middle of an escalating pandemic weighs sharply in favor of provisional relief.

20 CONCLUSION

21 For the foregoing reasons, Plaintiff requests this Court grant its Motion.
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1 Dated: July 13, 2020

Respectfully Submitted,

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 **THE STATE OF CALIFORNIA,**

12 Plaintiff,

13 v.
14

15 **U.S. DEPARTMENT OF HOMELAND**
16 **SECURITY; U.S. IMMIGRATION AND**
17 **CUSTOMS ENFORCEMENT; CHAD F.**
18 **WOLF, in his official capacity as Acting**
19 **Secretary of Department of Homeland**
20 **Security; and MATTHEW ALBENCE, in**
21 **his official capacity as Acting Director of**
22 **U.S. Immigration and Customs**
23 **Enforcement,**

24 Defendants.
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Civil Case No. 4:20-cv-04592-JST

**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

On July 13, 2020, Plaintiff State of California (Plaintiff) filed a Motion for Preliminary Injunction (Motion) and a hearing on that Motion was held. The Court has considered the Motion and documents filed therewith, all of the papers on file in this action, and the evidence and arguments presented at the hearing, and hereby GRANTS Plaintiff's Motion. The Court finds that each of the necessary elements for issuing a preliminary injunction is met. In particular, the Court finds Plaintiff is likely to prevail on the merits of its claims that Defendants' actions in the U.S. Immigration and Customs Enforcement (ICE) document dated July 6, 2020, entitled "Broadcast Message: COVID-19 and Fall 2020" (July 6 Directive) to rescind COVID-19 in-person learning exemptions for F-1 and M-1 nonimmigrant violates the Administrative Procedure Act and should be set aside as arbitrary, capricious, or otherwise not in accordance with law; absent a preliminary injunction; Plaintiff would be likely to suffer irreparable injuries; the balance of the equities favor Plaintiff; and the requested relief is in the public interest.

PRELIMINARY INJUNCTION

Now, therefore, it is hereby ORDERED that:

Defendants U.S. Department of Homeland Security, ICE, Chad F. Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, and Matthew Albence, in his official capacity as Acting Director of ICE (collectively, Defendants), and Defendants' officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them, ARE HEREBY RESTRAINED AND ENJOINED from committing, or performing directly and indirectly, any and all of the following acts during the pendency of this action, including with respect to California higher education institutions and the students attending those schools:

1. Rescinding the in-person learning exemptions for F-1 and M-1 nonimmigrant students set forth in the ICE document dated March 13, 2020, entitled "COVID-19: Guidance for SEVP Stakeholders," for the duration of the COVID-19 pandemic;
2. Implementing, imposing, or enforcing the requirements on higher education institutions and F-1 and M-1 nonimmigrant students set forth in the July 6 Directive,

1 or any rule or regulation that seeks to enforce or impose those or substantially similar
2 requirements, for the duration of the COVID-19 pandemic; and

3 3. Taking any immigration action, including but not limited to revoking,
4 provisionally revoking, or cancelling visa status; denying entry; considering a full
5 online course load to be a violation of F-1 or M-1 nonimmigration visa status; or
6 initiating removal or deportation proceedings against any F-1 or M-1 nonimmigrant
7 student, for the duration of the COVID-19 pandemic, for failure to satisfy in-person
8 learning requirements set forth in 8 C.F.R. §§ 214.2(f)(6)(i)(G) and 214.2(m)(9)(v).
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10 **IT IS SO ORDERED.**
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12 Dated: _____
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15 _____
16 The Honorable Jon S. Tigar
17 United States District Court Judge
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