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

CHAMBER OF COMMERCE OF  
 THE UNITED STATES OF  
 AMERICA, et al.,  
  
 Plaintiffs,  
  
 v.  
 UNITED STATES DEPARTMENT  
 OF HOMELAND SECURITY, et al.,  
  
 Defendants.

Case No. 20-cv-07331-JSW  
  
**BRIEF OF *AMICI CURIAE*  
 LEADING BUSINESS  
 ORGANIZATIONS AND  
 COMPANIES IN SUPPORT OF  
 PLAINTIFFS’ MOTION FOR  
 PRELIMINARY INJUNCTION TO  
 STAY AGENCY ACTION OR FOR  
 PARTIAL SUMMARY JUDGMENT**  
  
 Date: November 23, 2020  
 Time: 10:00 A.M.  
 Judge: Hon. Jeffrey S. White  
 Ctrm.: 5

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## SUMMARY OF ARGUMENT

1  
2 The H-1B visa program provides tremendous benefits to the U.S. economy and  
3 U.S. workers. Numerous economic studies demonstrate that the presence in the  
4 United States of these high-skilled employees fuels innovation, increases  
5 productivity and the size of the U.S. economy, and—most important—creates  
6 additional jobs and higher wages for U.S. workers.

7 The new DHS and DOL Rules will dramatically reduce U.S. businesses' ability  
8 to hire these skilled foreign workers—one senior DHS official estimated that they will  
9 render ineligible more than *one-third* of petitions for H-1B visas. That will  
10 significantly reduce the economic benefits provided by the H-1B program, stunt the  
11 U.S. economy's recovery from the pandemic, and lead to greater reliance by U.S.  
12 companies on operations outside of the United States—inflicting long-term damage  
13 to our Nation's economic growth.

14 Defendants cannot demonstrate the “good cause” required to finalize rules  
15 without prior notice and comment, as they did with respect to the DHS and DOL  
16 Rules. They rely on the overall unemployment rate at the onset of the pandemic, but  
17 most H-1B employees work in the information technology sector, where the  
18 unemployment rate is extremely low, and there is a long-recognized lack of U.S.  
19 workers to fill available jobs. It is that low unemployment rate demonstrating a lack  
20 of available workers that is relevant here—as this Court expressly recognized in its  
21 Order granting a preliminary injunction barring enforcement of Presidential  
22 Proclamation 10052's ban on the entry of H-1B workers.

23 Finally, the new Rules will irreparably injure companies and the entire U.S.  
24 economy by forcing businesses to discharge current employees—disrupting ongoing  
25 projects and imposing significant costs, and in some cases forcing companies to  
26 transfer work to locations outside the United States.

## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are 46 leading U.S. companies and business organizations — identified in the Appendix to this brief—representing and working with key sectors of the U.S. economy. Together, *amici* and their members employ millions of Americans and contribute significantly to our country’s economy.

*Amici* have deep experience with the H-1B visa program and its very significant benefits to individual companies, the U.S. economy, and U.S. workers. The rules challenged in this case—Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 Fed. Reg. 63,918 (Oct. 8, 2020) (DHS Rule), and Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL Rule)—dramatically constrict the standards for issuing H-1B visas. These Rules will bar many foreign-born scientists, engineers, developers of emerging technology, and other highly skilled workers from obtaining an H-1B visa and as a result will make it much more difficult for *amici* to hire the employees they need to compete in the global economy. Because the new Rules will also apply to any extension or amendment of H-1B status, *amici* also face the tremendous business disruption of having to terminate the employment of critical members of their workforce. *Amici* file this brief to inform the Court about the harm that the Rules will inflict on their businesses and the resulting adverse consequences for our Nation’s economic recovery and future economic competitiveness.

## INTRODUCTION

Since 1952, U.S. businesses—and the entire U.S. economy—have benefited from highly skilled and motivated workers from abroad who work temporarily in the United States through nonimmigrant visa programs established by Congress. These initiatives, in particular the H-1B visa program, play a critical role in driving American economic growth and innovation by attracting the world’s best talent—



1 automotive engineers, environmental scientists, biomedical researchers, software  
2 developers, budget and management analysts, among many other professions—at a  
3 time when U.S. businesses need the most talented workers in order to prevail in a  
4 highly competitive global market. U.S. businesses as a result have been able to lead  
5 the world in a variety of sectors, including business innovation, technology, security  
6 and risk management, data management and protection, and medicine.

7 The H-1B visa program is one of the only visa categories that allows U.S.  
8 businesses to recruit and employ highly skilled, non-U.S. professionals on an open-  
9 market basis.<sup>1</sup> It provides temporary visas and employment authorization for  
10 “specialty” occupations.<sup>2</sup> Specialty occupations typically require “theoretical and  
11 practical application of a body of highly specialized knowledge” and a “bachelor’s or  
12 higher degree.”<sup>3</sup> Although the minimum educational requirements for an H-1B  
13 specialty occupation is a bachelor’s degree (or its equivalent), more than 60% of  
14 approved H-1B petitions in FY 2019 were for professionals with a master’s degree or  
15 higher.<sup>4</sup>

16 In addition, the employer must certify to the Department of Labor that it will  
17 pay its H-1B employee, at a minimum, the greater of “the actual wage level paid by  
18 the employer to all other individuals with similar experience and qualifications for the  
19 specific employment in question” or “the prevailing wage level for the occupational  
20 classification in the area of employment.”<sup>5</sup> Congress has closely overseen the H-1B  
21  
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23 <sup>1</sup> See, e.g., U.S. Dep’t of State, Bureau of Consular Affairs, *Directory of Visa Categories* (last visited  
24 Oct. 28, 2020), <https://bit.ly/3mALWLV>.

25 <sup>2</sup> 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

26 <sup>3</sup> 8 U.S.C. § 1184(i)(1).

27 <sup>4</sup> U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation*  
*Workers, Fiscal Year 2019 Annual Report to Congress* (Mar. 5, 2020), <https://bit.ly/37QkBkM>.

28 <sup>5</sup> 8 U.S.C. § 1182(n)(1)(A)(i).

1 program, making multiple revisions since 1990.<sup>6</sup>

2 This program provides tremendous benefits to the U.S. economy and U.S.  
3 workers. The injection into the U.S. labor force of a relatively small number of highly  
4 skilled professionals (fewer than 600,000 individuals) generates billions of dollars in  
5 gross domestic product, creates millions of additional jobs, and produces significant  
6 increases in the wages of U.S. workers.

7 Indeed, these H-1B workers provide services that have become a critical focus  
8 of America’s efforts in response to the COVID-19 pandemic. Information technology  
9 professionals have allowed our businesses to continue operating while employees  
10 work from home, supported distant learning for schools and universities, and provided  
11 an increasing array of online services to American consumers. Healthcare workers  
12 stand on the front lines of the crisis, providing patient care and engaging in vital  
13 research to drive the development of effective testing, containment measures, and  
14 vaccines.

15 The new DHS and DOL Rules will dramatically reduce U.S. businesses’ ability  
16 to hire foreign-born employees. That will reduce jobs for U.S. workers and inflict  
17 long-term damage on our Nation’s economic growth.

18 Defendants did not seek notice and comment on the new Rules before issuing  
19 them in final form, contending that the economic impact of the pandemic provided  
20 “good cause . . . that notice and public procedure thereon are impracticable,  
21 unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). The “good  
22 cause” standard imposes a substantial burden—and Defendants’ arguments here fall  
23 far short of satisfying that test.

24 To begin with, the new Rules make very significant changes in the H-1B

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26 <sup>6</sup> See 105 Stat. 1747, *et seq.* (Dec. 12, 1991) (corrections to the 1990 Act); 110 Stat. 3009, *et seq.*  
27 (Sept. 30, 1996) (miscellaneous amendments); 114 Stat. 1251, *et seq.* (Oct. 17, 2000) (American  
28 Competitiveness in the Twenty-first Century Act); 118 Stat. 3353, *et seq.* (Dec. 8, 2004) (H-1B Visa  
Reform Act of 2004).

1 program that will have dramatic impacts on the U.S. economy and individual  
2 companies. Given that reality, Defendants should have issued proposed rules and  
3 sought comment from interested persons—particularly because the public record  
4 makes clear that Defendants have been contemplating changes to the H-1B program  
5 for a number of years. This simply is not an issue that arose suddenly as the result of  
6 an unforeseen event.

7 Defendants rely on the overall unemployment rate at the onset of the pandemic,  
8 claiming that it shows that reductions in the program are urgently needed because  
9 U.S. workers are available to fill these jobs. That is wrong. Most H-1B employees  
10 work in the information technology sector, where the unemployment rate is extremely  
11 low, and there is a long-recognized lack of U.S. workers to fill available jobs. It is  
12 that low unemployment rate demonstrating a lack of available workers, not the overall  
13 unemployment rate, that is relevant here—as this Court expressly recognized in its  
14 Order granting a preliminary injunction barring enforcement of Presidential  
15 Proclamation 10052’s ban on the entry of H-1B workers.

16 Finally, the new Rules will inflict irreparably injury on U.S. companies and the  
17 entire U.S. economy. They will prevent companies from hiring high-skilled workers  
18 needed to fill critical jobs in the sectors that drive the growth of our economy. In  
19 addition, they will force businesses to discharge current employees—disrupting  
20 ongoing projects and imposing significant costs, and in some cases resulting in the  
21 transfer of work to locations outside the United States.

22 Accordingly, the Court should grant the preliminary injunction and bar  
23 Defendants from enforcing the new Rules.

1 **ARGUMENT**

2 **THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION BARRING**  
3 **THE NEW RULES FROM TAKING EFFECT.**

4 **A. The H-1B Program Provides Tremendous Benefits to the U.S.**  
5 **Economy and U.S. Workers.**

6 Congress initially enacted the H-1B visa program—and has intervened  
7 repeatedly to refine the program—in order to benefit the U.S. economy. Study after  
8 study demonstrates that the program does just that: H-1B visa holders contribute  
9 significantly to U.S. innovation and economic growth, and they are an essential source  
10 of workers for positions that otherwise would go unfilled due to the lack of qualified  
11 U.S. workers. Indeed, far from taking jobs away from U.S. workers, the economic  
12 contribution made by H-1B employees working within the United States creates  
13 numerous additional jobs that are filled by U.S. workers.

14 The lion’s share (more than ninety percent) of H-1B applications involve  
15 science, technology, engineering, and mathematics (STEM) occupations.<sup>7</sup> That is not  
16 surprising—our nation leads the world in science and technology innovation, and all  
17 businesses increasingly depend on information technology and data management.

18 These H-1B workers play an important role in the innovation that drives the  
19 U.S. economy. As the Cato Institute recently explained in summarizing the findings  
20 of a number of recent economic studies:

21 Highly skilled migrants on H-1B visa[s] . . . directly increase the  
22 production of knowledge through patents, innovation, and  
23 entrepreneurship. These effects are localized and diffuse throughout the  
24 country.<sup>8</sup>

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25 <sup>7</sup> Neil G. Ruiz, Pew Research, *Key Facts About the U.S. H-1B Visa Program* (Apr. 27, 2017),  
26 <https://pewrsr.ch/3jC9TAR>.

27 <sup>8</sup> Alex Nowrasteh, *Don’t Ban H-1B Workers: They Are Worth Their Weight in Innovation*, Cato at  
28 Liberty (May 14, 2020), [perma.cc/SMW4-UUJT](https://perma.cc/SMW4-UUJT).

1 The federal government itself has recognized these very same benefits.<sup>9</sup>

2 H-1B workers also improve U.S. productivity. A 2015 economic study found  
3 that an increased number of H-1B visa holders in a city generates productivity gains—  
4 the growth in H-1B workers “explained between one-third and one-half of the average  
5 [Total Factor Productivity] growth during” 1990-2010.<sup>10</sup> And another study  
6 concluded that eliminating the H-1B program would significantly reduce GDP,  
7 confirming the benefits to the overall economy resulting from the H-1B program.<sup>11</sup>

8 Without H-1B workers, these benefits would be lost because there are not  
9 enough U.S. workers with STEM knowledge to satisfy U.S. companies’ continually  
10 increasing demand for employees with these skills. To take just one example of this  
11 high demand, software developers and software quality assurance analysts and testers  
12 are among the fastest growing occupations in the United States, with approximately  
13 300,000 new jobs projected over the next ten years.<sup>12</sup>

14 Unemployment rates are very low for STEM occupations, signaling that  
15 demand for employees to fill these positions exceeds the supply.<sup>13</sup> Moreover, studies  
16 consistently find that there are insufficient U.S. workers to meet the demand.<sup>14</sup> For  
17

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18 <sup>9</sup> See, e.g., Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with  
19 STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,048  
(Mar. 11, 2016) (collecting authorities).

20 <sup>10</sup> Giovanni Peri, Kevin Shih, Chad Sparber, *STEM Workers, H-1B Visas, and Productivity in US*  
21 *Cities*, J. of Labor Economics S225, S250-252 (July 2015), <https://bit.ly/2HM7HcZ>.

22 <sup>11</sup> Michael E. Waugh, *Firm Dynamics and Immigration: The Case of High-Skilled Immigration*,  
23 *High-Skilled Migration to the United States and Its Economic Consequences*, Nat’l Bureau of Econ.  
24 *Research* 205 (May 2018), <https://www.nber.org/system/files/chapters/c13843/c13843.pdf>.

24 <sup>12</sup> U. S. Dep’t of Labor, Bureau of Labor Statistics, *Fastest Growing Occupations* (last modified  
25 Sept. 1, 2020), <https://www.bls.gov/emp/tables/fastest-growing-occupations.htm>.

25 <sup>13</sup> National Foundation for American Policy, NFAP Policy Brief, *Employment Data for Computer*  
26 *Occupations* (May 2020), <https://bit.ly/2PugvEA>.

27 <sup>14</sup> See, e.g., Deloitte & The Manufacturing Institute, *The jobs are here, but where are the people?:*  
28 *Key findings from the 2018 Deloitte and The Manufacturing Institute skills gap and future of work*  
*study 2* (2018), [perma.cc/W2ND-RRLB](https://perma.cc/W2ND-RRLB); *id.* at 3 fig. 2; New American Economy Research Fund,

1 example, thirteen STEM jobs were posted online for each unemployed STEM worker  
2 in 2016—roughly 3 million more jobs than the number of available qualified  
3 professionals available to fill them.<sup>15</sup>

4 Indeed, the entire premise of the new Rules is false: far from taking  
5 employment opportunities away from U.S. workers, multiple economic studies  
6 demonstrate that the presence of H-1B workers *increases* jobs for U.S. workers:

- 7 • The “presence of H-1B visa holders” is “associated with lower  
8 unemployment rates and faster earnings growth among college  
9 graduates, including recent college graduates.”<sup>16</sup> Just a single percentage  
10 point increase in the share of H-1B workers in a specific occupation  
11 reduces the unemployment rate of other workers by 0.2%.<sup>17</sup> And the 1%  
12 increase in H-1B workers boosts the earnings growth rate in related  
13 occupations by about 0.1% to 0.26%, which means higher wages for U.S.  
14 workers.<sup>18</sup>
- 15 • Similarly, each percentage point increase in H-1B-authorized STEM  
16 employees in a city’s workforce increased wages of U.S. workers by  
17 between 3% and 8%.<sup>19</sup>
- 18 • A 2013 study on the macroeconomic effects of an expansion of the H-  
19 1B program found that an increase in H-1B visas would lead to an  
20 estimated 1.3 million new jobs and add approximately \$158 billion to  
21

22 \_\_\_\_\_  
23 *Sizing Up the Gap in our Supply of STEM Workers: Data and Analysis* (Mar. 29, 2017),  
24 <https://bit.ly/2HInlWV>.

25 <sup>15</sup> *Sizing Up the Gap*, *supra* n.14.

26 <sup>16</sup> Madeline Zavodny, National Foundation for American Policy, *The Impact of H-1B Visa Holders*  
27 *on the U.S. Workforce* (May 2020), <https://bit.ly/34GM4Up>.

28 <sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Peri, et al., *supra* n.10, at S246-247 and Table 6.



1 gross domestic product by 2045.<sup>20</sup>

- 2 • Yet another study found that an increase of 100 H-1B workers in a state  
3 produced “an additional 183 jobs” for U.S. workers.<sup>21</sup>

4 As a survey of relevant economic studies concluded, “[a]rguments that [these] highly  
5 skilled, temporary foreign workers are freezing out [U.S.] workers are rebutted by the  
6 best available empirical evidence.”<sup>22</sup>

7 The benefits of the H-1B program are indisputable. It enables U.S. businesses  
8 to fill essential jobs that otherwise would remain vacant because there simply are not  
9 enough STEM-qualified U.S. workers to meet the ever-increasing demand. It  
10 enhances the competitiveness of the U.S. economy by fueling innovation and  
11 productivity. And it increases job opportunities and wage levels for U.S. workers.  
12 Indeed, extensive economic research demonstrates that *more*, not fewer, H-1B visas  
13 produces positive economic outcomes for U.S. workers and the national economy.

14 **B. The New Rules Will Impede America’s Economic Recovery and**  
15 **Inflict Long-Term Damage on U.S. Competitiveness.**

16 The inevitable, and expressly intended, effect of the new Rules—which will  
17 quickly be realized if they are not enjoined—is to dramatically reduce the number of  
18 H-1B-authorized employees in the United States. That means the loss of the  
19 significant economic benefits discussed above, which will make it more difficult for  
20 the Nation to recover from the economic harm wrought by the pandemic and, in  
21 addition, permanently damage America’s competitiveness.

22 Those economic benefits will instead be transferred to other countries, making  
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24 <sup>20</sup> Frederik R. Treyz, et al., Regional Economic Models Inc., *Key Components of Immigration*  
25 *Reform* 14 & Table 2 (July 17, 2013), <https://bit.ly/3kE6cMb>.

26 <sup>21</sup> Madeleine Zavodny, Amer. Enterprise Institute for Public Policy Research & Partnership for a  
New American Economy, *Immigration and American Jobs* 4 (Dec. 2011), <https://bit.ly/37TFBHI>.

27 <sup>22</sup> American Immigration Council, *The H-1B Visa Program: A Primer on the Program and Its*  
28 *Impact on Jobs, Wages and the Economy* 4 (Apr. 2020) (surveying studies).

1 them more competitive in the global economy at the same time that the United States  
2 becomes less competitive. That is because companies will not leave these jobs vacant,  
3 but instead will hire individuals in locations where they can find employees with the  
4 needed STEM qualifications.

5 A widely cited empirical study confirms this conclusion: “foreign affiliate  
6 employment increased as a direct response to increasingly stringent restrictions on H-  
7 1B visas” imposed in 2004.<sup>23</sup> Companies in the U.S. were *more likely* to open foreign  
8 affiliates in new countries in response to the reduced availability of H-1B visas.<sup>24</sup>  
9 Attempts to reduce the number of H-1B workers, such as those imposed in 2004,  
10 therefore inevitably will “have the unintended consequence of encouraging firms to  
11 offshore jobs abroad.”<sup>25</sup>

12 This transfer of high-skilled jobs to other countries is most pronounced “among  
13 R&D-intensive firms.”<sup>26</sup> U.S. multinationals not only increased the absolute levels  
14 but also the share of their total foreign employment, primarily moving jobs to three  
15 countries: Canada, with its close proximity and more flexible high-skilled  
16 immigration policies, as well as India and China, which are rich in high-skilled human  
17 capital.<sup>27</sup>

18 The impact on innovation will be especially significant. One quarter of global  
19 research and development in STEM fields takes place in the United States, the largest  
20 percentage for any nation—and the share of R&D performed in the U.S. has been on  
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23 <sup>23</sup> Britta Glennon, National Bureau of Economic Research, *How Do Restrictions on High-Skilled*  
24 *Immigration Affect Offshoring? Evidence from the H-1B Program* 28 (July 2020),  
25 <https://bit.ly/39XDscO>; see also William Olney & Dario Pozzoli, *The Impact of Immigration on*  
26 *Firm-Level Offshoring*, Dept. of Econ., Williams College (June 13, 2019), <https://bit.ly/3a36loa>.

27 <sup>24</sup> Glennon, *supra* n.23, at 28.

28 <sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



1 the rise during the past decade.<sup>28</sup> Almost three-quarters (73%) of all development  
 2 research in the U.S. is performed by private-sector businesses, 80% of that by U.S.  
 3 multinational companies. And studies demonstrate that H-1B employees play an  
 4 important role in this work—for example, U.S. companies that employ many H-1B  
 5 workers file more U.S. patents than those that do not.<sup>29</sup>

6 Faced with the inability to hire high-skilled employees in the United States,  
 7 companies will be forced to relocate R&D activities to other nations. That will harm  
 8 the U.S. economy: “if skilled foreign-born workers are at a US firm’s foreign affiliate  
 9 instead of in the US, the innovative spillovers that they generate will go to another  
 10 country instead.”<sup>30</sup>

11 **C. The Economic Impact of the COVID-19 Pandemic Does Not**  
 12 **Support—But Rather Weighs Heavily Against—the New Rules.**

13 Defendants attempt to justify their bypass of the APA’s notice and comment  
 14 requirements by claiming that the increase in unemployment resulting from the  
 15 COVID-19 pandemic necessitates urgent action to reduce the number of H-1B  
 16 workers—asserting that those jobs would then be filled by U.S. workers. DHS Rule,  
 17 85 Fed. Reg. at 63,938-63,940; DOL Rule, 85 Fed. Reg. at 63,898-63,902. That  
 18 contention is false for multiple reasons, and the agencies therefore cannot establish  
 19 the “good cause” needed to circumvent the notice and comment process.

20 *First*, as just discussed, the H-1B program expands the U.S. economy and  
 21 increases job opportunities. Making the rules immediately effective will therefore  
 22 exacerbate the adverse effects of the pandemic rather than ameliorate them.

23 *Second*, Defendants have been planning to issue these regulations for years.  
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25 <sup>28</sup> National Science Foundation, *Research and Development: U.S. Trends and International*  
 26 *Comparisons* (Jan. 15, 2020), <https://bit.ly/2Puq8mK>.

27 <sup>29</sup> Nowrasteh, *supra* n.8.

28 <sup>30</sup> Glennon, *supra* n.23, at 29.

1 Plaintiffs’ Motion at 10-12, Dkt. No. 31. This fact significantly undermines their  
2 claim of good cause for dispensing with notice and comment procedures—especially  
3 given the very significant consequences of the new Rules.

4 *Third*, Defendants invoke the overall unemployment rate in April, at the  
5 beginning of the pandemic. DOL Rule, 85 Fed. Reg. at 63,899; see also DHS Rule,  
6 85 Fed. Reg. at 63,940. That contention is doubly flawed.

7 To begin with, that overall rate has declined significantly—from 14.7% in April  
8 2020 to 7.9% in September 2020.<sup>31</sup> The level remains unacceptably high, but is not  
9 at all unprecedented, as Plaintiffs explain. Plaintiffs’ Motion at 12, Dkt. No. 31.

10 More importantly, the overall unemployment rate is not the relevant metric.  
11 The vast majority of H-1B visa holders work in computer occupations.<sup>32</sup> And the  
12 unemployment rate in the U.S. for individuals in computer occupations *declined* in  
13 the first several months of the COVID pandemic, from 3% in January 2020 to 2.8%  
14 in April, and further still to 2.5% in May.<sup>33</sup> It has remained relatively stable through  
15 September 2020.<sup>34</sup> That is not surprising, because the pandemic has dramatically  
16 increased reliance upon technology by consumers and businesses—and companies  
17 therefore have a pressing need for workers in computer-related positions.

18 Indeed, this Court has already recognized that overall unemployment rates are  
19 irrelevant to the H-1B program. In granting a preliminary injunction barring  
20 implementation of Presidential Proclamation 10052’s ban on the entry of H-1B  
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22 <sup>31</sup>U.S. Bureau of Labor Statistics, *Civilian Unemployment Rate* (last visited Oct. 28, 2020),  
23 <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm>.

24 <sup>32</sup> Stuart Anderson, *New Trump H-1B Visa Restrictions Will Harm Companies*, Forbes (June 23,  
25 2020), <https://bit.ly/2Dhf3TQ>; see also DHS Rule, 85 Fed. Reg. at 63,922 (observing that “there has  
26 been a 75 percent increase in the proportion of IT workers in the population of H-1B approved  
27 petitions – from 32 percent in FY 2003 to 56 percent in FY 2019.”).

28 <sup>33</sup> Anderson, *supra* n.32.

<sup>34</sup> National Foundation for American Policy, *Employment Data for Computer Occupations for  
January to September 2020* at Table 1 (Sept. 2020) (3.5%), <https://bit.ly/37Pbr8h>.

1 workers, the Court determined that “[t]he statistics regarding pandemic-related  
2 unemployment actually indicate that unemployment is concentrated in service  
3 occupations and that large number of job vacancies remain in the area most affected  
4 by the ban, computer operations which require high-skilled workers . . . . These jobs  
5 are simply not fungible.” *Nat’l Ass’n of Mfrs. v. DHS*, 2020 WL 5847503, at \*3 (N.D.  
6 Cal. Oct. 1, 2020).

7 In sum, there simply is no basis for Defendants’ claim that the general  
8 unemployment levels from Spring 2020 provide good cause for dispensing with the  
9 notice and comment process.

10 **D. The Rules Will Inflict Irreparable Harm on Large Numbers of U.S.**  
11 **Businesses.**

12 The new Rules dramatically constrict the H-1B visa program, with immediate  
13 effect. Companies that currently employ H-1B workers will suffer significant—and  
14 irreparable—adverse consequences. Issuance of a preliminary injunction is therefore  
15 warranted.

16 H-1B visas are available to highly skilled workers “who [are] coming  
17 temporarily to the United States to perform services . . . in a specialty occupation.” 8  
18 U.S.C. § 1101(a)(15)(H)(i)(b). The statute defines “specialty occupation” as “an  
19 occupation that requires . . . theoretical and practical application of a body of highly  
20 specialized knowledge, and . . . attainment of a bachelor’s or higher degree in the  
21 specific specialty (or its equivalent) as a minimum for entry into the occupation in the  
22 United States.” 8 U.S.C. § 1184(i)(1).

23 As Plaintiffs explain, the DHS Rule rewrites the regulatory definition of  
24 “specialty occupation” in a manner that makes it much more difficult for a job to  
25 qualify. Complaint ¶¶ 92-99, Dkt. No. 1. For example, requiring an engineering  
26 degree for a software development position would no longer be sufficient to qualify  
27 that position as a “specialty occupation”; rather, the employer would have to require  
28

1 a degree in a relevant engineering sub-specialty.

2 But in fast-moving fields such as information technology, categories of degree  
3 specialization established by academic institutions often do not correlate to the skills  
4 needed for particular jobs. For example, there is no single narrow subspecialty degree  
5 for data science; rather, data scientists normally graduate with mathematics, statistics,  
6 or computer science degrees.<sup>35</sup> And employers often need workers with a mix of  
7 skills because innovation generally results from applying multi-disciplinary expertise  
8 to create a new product or solve a problem.

9 Moreover, in other areas, where a particular degree is not “always” a  
10 prerequisite for employment, the DHS rule would also eliminate eligibility. Essential  
11 occupations such as clinical laboratory scientists,<sup>36</sup> and industrial safety and health  
12 engineers<sup>37</sup> could well become ineligible for H-1B classification, notwithstanding  
13 significant shortages of such workers at a time when their contribution is so clearly in  
14 the national interest.

15 Finally, the DHS Rule will have a particularly dramatic impact on companies  
16 that provide data management services at customer locations by limiting H-1B visas  
17 to one year. 85 Fed. Reg. at 63,965; Compl. ¶ 98, Dkt. No. 1.

18 The consequence of DHS’s new approach, therefore, will be a dramatic  
19 contraction in the number of positions eligible for H-1B workers. Indeed, the second-  
20 highest ranking DHS official estimated that *fully one-third of H-1B petitions would*  
21 *become ineligible*. Hughes Decl. Ex. 15, Dkt. No. 31-31.

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24 <sup>35</sup> Sarah Royster, Bureau of Labor Statistics, *Working With Big Data* 8, Occupational Outlook  
Quarterly (Fall 2013), <https://www.bls.gov/careeroutlook/2013/fall/art01.pdf>.

25 <sup>36</sup> O\*NET OnLine, *Summary Report for: 29-2011.00 – Medical and Clinical Laboratory*  
26 *Technologists* (last updated Aug. 18, 2020) (64% have a bachelor’s degree or higher, less than the  
“always” standard of the DHS Rule), <https://www.onetonline.org/link/summary/29-2011.00>.

27 <sup>37</sup> O\*NET OnLine, *Summary Report for: 17-2111.01 – Industrial Safety and Health Engineers* (last  
28 updated Aug. 18, 2020) (55% have a bachelor’s degree or higher), <https://bit.ly/34FBsVq>.

1 Most significantly, the new DHS Rule does not apply only to new H-1B visa  
2 applications—it also applies to renewals of existing visas, which must occur every  
3 three years and in some cases more often. If the employee’s position does not qualify  
4 under DHS’s new, restrictive standards, that employee would no longer be eligible  
5 for a visa and, therefore, his or her employment would have to be terminated.

6 There are approximately 583,000 individuals working in the United States  
7 under H-1B visas.<sup>38</sup> Based on the DHS official’s estimate of the effect of the new  
8 Rule, U.S. companies could be required to dismiss a large number of these employees  
9 over the next several years—and beginning immediately, depending on when  
10 particular current visas expire.

11 Requiring dismissal of current employees inflicts huge costs and disruption to  
12 American businesses. These businesses have made significant investments in  
13 research and development, manufacturing, design and development of products and  
14 systems, and provision of consumer and merchant services, based on their ability to  
15 employ H-1B workers with highly specialized skills. Delivery of new products and  
16 services will be delayed significantly if the companies were required to recruit,  
17 develop, and ultimately substitute other employees (assuming that employees with the  
18 necessary qualifications even could be found).

19 The alternative options for U.S. companies are to consider moving employees  
20 or operations to new locations abroad. That would force companies to bear the cost  
21 and disruption of launching or expanding facilities abroad. For the U.S. economy,  
22 there will be significant adverse consequences as jobs, consumer spending, tax  
23 revenue, and the byproducts of innovation all move away from the United States.

24 The costs and disruption imposed will be particularly burdensome because they  
25 would occur in the midst of a pandemic, when companies’ operations are already  
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27 <sup>38</sup> U.S. Citizenship and Immigration Services, *H-1B Authorized-to-Work Population Estimate 1*  
28 (Sept. 30, 2019), <https://bit.ly/34CRZtC>.

1 under tremendous stress. And the consequences too would be particularly severe:  
2 interruption of new product roll-outs, upgrades, supply chain, and production efforts  
3 that often are related to the unprecedented demand for technology and services—such  
4 as telemedicine, work from home, and distance learning—resulting from the  
5 pandemic’s impact on businesses and consumers.

6 Implementation of the new Rules would thus inflict significant and irreparable  
7 harm that can only be prevented by issuance of a preliminary injunction.

8 **CONCLUSION**

9 Plaintiffs’ Motion for Preliminary Injunction or Motion for Partial Summary  
10 Judgment should be granted.

11 DATED: October 30, 2020

Respectfully submitted,

12  
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Attorneys for *Amici Curiae*

\**Pro Hac Vice* to be filed

**APPENDIX: *AMICI CURIAE***

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6. BSA | The Software Alliance
7. Caliber Home Loans, Inc.
8. Consumer Technology Association
9. Context Logic, Inc. d/b/a Wish
10. Cummins Inc.
11. Dropbox, Inc.
12. eBay Inc.
13. Engine Advocacy
14. Ernst & Young LLP
15. Facebook, Inc.
16. FWD.us Education Fund, Inc.
17. GitHub, Inc.
18. Google LLC
19. Hewlett Packard Enterprise
20. HP Inc.
21. HR Policy Association
22. Internet Association

- 1 23.Knotel
- 2 24.LinkedIn Corporation
- 3 25.Microsoft Corporation
- 4 26.Motor & Equipment Manufacturing Association
- 5 27.Nova Credit
- 6 28.OfferUp Inc.
- 7 29.Partnership for a New American Economy Action Fund
- 8 30.PayPal Holdings, Inc.
- 9 31.Postmates
- 10 32.Rackspace U.S., Inc.
- 11 33.Semiconductor Industry Association
- 12 34.SHRM (Society for Human Resource Management)
- 13 35.Software and Information Industry Association
- 14 36.Spotify USA Inc.
- 15 37.SurveyMonkey Inc.
- 16 38.TechNet
- 17 39.TechNexus
- 18 40.The Nielsen Company
- 19 41.TPG Global, LLC
- 20 42.TripAdvisor LLC
- 21 43.Twitter Inc.
- 22 44.VMWare, Inc.
- 23 45.Workday, Inc.
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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT  
OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 20-cv-07331-JSW

**[PROPOSED] ORDER GRANTING  
UNOPPOSED ADMINISTRATIVE  
MOTION OF LEADING BUSINESS  
ORGANIZATIONS AND  
COMPANIES FOR LEAVE TO  
FILE AN *AMICUS* BRIEF IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION TO STAY AGENCY  
ACTION OR FOR PARTIAL  
SUMMARY JUDGMENT**

Date: November 23, 2020

Time: 10:00 A.M.

Judge: Hon. Jeffrey S. White

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**[PROPOSED] ORDER**

The matter comes before the Court on the unopposed administrative motion of leading business organizations and companies for leave to file an *amicus* brief in support of Plaintiffs’ Motion for Preliminary Injunction to Stay Agency Action or for Partial Summary Judgment (Dkt. 31). Having considered the unopposed administrative motion, it is ORDERED that the administrative motion is GRANTED.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

\_\_\_\_\_

Hon. Jeffrey S. White  
United States District Judge