Attorneys General of the District of Columbia, Massachusetts, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin

October 26, 2020

The Honorable Chad Wolf
Acting Secretary of Homeland Security
United States Department of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

Mr. Tony H. Pham
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Re: Comment Regarding Notice of Proposed Rulemaking, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 85 FR 60526 (Sept. 25, 2020), DHS Docket No. ICEB–2019–0006, RIN 1653-AA78

We, the Attorneys General of the District of Columbia, Massachusetts, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin (the "States") submit these comments to oppose the Department of Homeland Security's ("DHS") Proposed Rule: *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, Notice of Proposed Rulemaking ("NPRM"), 85 Fed. Reg. 60,526, DHS No. ICEB–2019–0006 (published Sept. 25, 2020).

In 2018, DHS admitted more than two million international students, exchange visitors, and representatives of foreign media to the United States. A year later, the U.S. Assistant Secretary of State for Educational and Cultural Affairs recognized and celebrated the critical contributions of that population and encouraged further expansion: "We are happy to see the continued growth in the number of international students in the United States . . . . [W]e want even more students in the future to see the United States as the best destination to earn their degrees. International exchange makes our colleges and universities more dynamic for all

students."[1] Now, in 2020, the federal government seeks to impose drastic and burdensome restrictions on international students, exchange visitors, and foreign media without adequate legal or factual basis and on an expedited timeline that reflects outright disregard for the rule of law. The Proposed Rule, if finalized, would permanently injure American educational institutions and State economies by discouraging or outright preventing students and exchange visitors from pursuing educational opportunities in the United States.

I. Background

The United States has long employed a Duration of Status framework for academic students on F visas, exchange visitors on J visas, and representatives of foreign information media on I visas. Beginning in 1979, Duration of Status has permitted visitors in these categories to remain in the United States for the period of time that they are complying with the terms of their respective visas. Accordingly, and critically for any educational pursuit, particularly those that take several years and require hundreds of thousands of dollars in tuition, that framework has provided students and exchange visitors with the certainty that they could remain enrolled for long enough to obtain their degrees. Duration of Status also has other benefits, including providing significant savings to the American taxpayer by obviating the need for the federal government to process hundreds of thousands of applications on behalf of those seeking to extend their stays in the United States.

Under the Proposed Rule, DHS would end Duration of Status entirely. Instead, international students, exchange visitors, and representatives of the foreign media would be admitted for a fixed period of time. The initial visa terms for many international students and exchange visitors would be limited to just two years. Per the NPRM, the two-year limitation applies to: (1) individuals who were born in or are citizens of Iran, North Korea, Sudan, and Syria; (2) citizens of 55 countries that, according to DHS data, have a student and exchange visitor visa overstay rate exceeding 10 percent;[2] (3) *all* international students who attend institutions that do not participate in E-Verify, a web-based system that participating employers can use to assess employees' eligibility to work in the United States; and (4) circumstances where "the DHS Secretary determines that U.S. national interests warrant" such a limitation. Even if none of these criteria apply, students and exchange visitors, regardless of the length of their course of study, would be limited to a four-year visa.

Additionally, the NPRM would impose new restrictions on students' ability to extend their stay in the United States beyond their initial visa period. Students would be required to

[1] *Number of International Students Hits All-Time High*, Institute of International Education (Nov. 18, 2019), https://www.iie.org/Why-IIE/Announcements/2019/11/Number-of-International-Students-in-the-United-States-Hits-All-Time-High

[2] According to DHS, these countries include Afghanistan, Benin, Bhutan, Burkina Faso, Burma, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo-Brazzaville, Congo-Kinshasa, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, Haiti, Iraq, Kenya, Kosovo, Kyrgyzstan, Liberia, Libya, Malawi, Mali, Mauritania, Moldova, Mongolia, Nepal, Niger, Nigeria, Papua New Guinea, the Philippines, Rwanda, Samoa, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Syria, Tajikistan, Tanzania, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vietnam, Yemen, and Zambia.

obtain documentation from their educational institution supporting an extension and receive approval from U.S. Citizenship and Immigration Services ("USCIS"). USCIS would grant the extension only when "additional time needed is due to a compelling academic reason, documented medical illness or medical condition, or circumstance that was beyond the student's control." The Proposed Rule would also impose a 24-month limit on students in language training programs.

II. The Comment Period and Potential Effective Date Are Procedurally Deficient

On September 25, 2020, DHS published the NPRM, proposing to fundamentally overhaul regulations governing international students, exchange visitors, and representatives of foreign media. Despite these sweeping changes, the NPRM allowed for just 30 days for public analysis and comment. Nowhere in the 73-page proposal did the Department attempt to justify such an abbreviated time period. Accordingly, on October 6, 2020, a coalition of 21 State Attorneys General submitted a request to extend the comment period for, at a minimum, an additional 45 days. At 6:12 p.m. on October 26, 2020 – the day of the comment deadline – the Department denied that request without explanation.

The Department's rush to close the comment period and finalize the NPRM is fatally flawed. The Administrative Procedure Act ("APA") and the Executive Branch's longstanding application of the APA's requirements make clear that an abbreviated 30-day comment period fails the APA's notice-and-comment requirements for reasoned agency decision-making. The APA requires that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c). For more than two and a half decades, executive agencies have followed a presumption that a minimum of sixty days is necessary to provide the public with a meaningful opportunity to comment on proposed agency regulations: Executive Order 12,866 provides that "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." *Regulatory Planning & Review*, Exec. Order 12,866, § 6(a)(1) (Sept. 30, 1993); *see also Improving Regulation & Regulatory Review*, Exec. Order 13,563 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."). There is no reasoned justification for a 30-day comment period here, especially when the White House Office of Management and Budget itself has determined that the proposal is a "significant regulatory action" in that it would have "an annual effect on the economy of $100 million or more, or adversely affect[] in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities." 85 Fed. Reg. at 60,560.

By proceeding at this speed, the Department betrays a lack of interest in receiving and incorporating comments from the public. Providing stakeholders with just a few weeks to consider and provide input on massive regulatory changes regarding issues of great importance does a disservice to the rule of law and to the American people.

Beyond the sprint to close the comment period, the NPRM, incredibly, appears to "assume[] that the proposed rule would go into effect in 2020." 85 Fed. Reg. at 60,530. Again, this pace suggests the Department's objective is to finalize the Rule as quickly as possible, with no legitimate justification for doing so. Finalizing the Rule in a matter of months, and during the middle of the school year, would significantly disrupt the American educational system. Though the NPRM provides certain protections for those currently on F and J visas, it also restricts all student and exchange visas to a period of no more than four years after the Rule's effective date. 85 Fed. Reg. at 60,540. At a minimum, students who have been admitted to and have recently begun, for example, PhD programs that often require six years or more to complete, will be faced with an impossible decision – hope, without reasonable assurances from DHS, that they will be granted the Extension of Status they need to complete their programs, or end their studies and return to their home countries with their lives upended and tens of thousands of dollars in lost tuition.

Additionally, if the Rule goes into effect mere months after it was proposed, prospective international students will be forced to reassess an entirely new educational landscape when deciding whether to apply for and enroll in American higher education programs. Applications for the vast majority of higher education programs are due in the first few months of 2021. If finalized in 2020 or early 2021, the Rule would upend the decision-making process for those students. Weeks or even days before the Rule's effective date, students would have been considering the prospect of American education with the assurance that, if they satisfied the requirements of pre-existing regulations, they would be able to earn a degree. But the sudden implementation of the Rule would radically change that calculus. Faced with the prospect of being unable to complete a program in two or four years, many students would, reasonably, decide not to apply to study in the United States at all. The result would be disastrous for the diverse, globalized education American students need to thrive in the 21st century, and for the colleges and universities that reasonably relied upon pre-existing regulations to craft budgets and educational programming, including the public colleges and universities in the undersigned states.

It would be nearly impossible for American educational institutions to comply with an effective date in the near future. In addition to the serious issues described above, the NPRM proposes to restrict all international students to two-year visas if their educational institution does not adopt E-Verify. Beyond the dubious rationale and legal support for such a requirement, it would require, at a minimum, several months to implement.

III. The Proposed Rule Is Arbitrary and Capricious and Therefore Violates the Administrative Procedure Act

Under the APA, agencies are required to consider the relevant information and evidence and provide a reasoned explanation for their actions. *Schurz Commc'ns v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must show that it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."). When an agency action is arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law, it will be held invalid and vacated. 5 U.S.C. § 706(2)(A).

The Proposed Rule is arbitrary and capricious, and therefore cannot withstand scrutiny under the APA, on several grounds, including faulty logic, defective data, and tenuous reasoning.

A. The Department's Basis for Ending Duration of Status Is Illogical.

Duration of Status has been in effect for 41 years for students on F visas and 35 years for exchange visitors on J visas. 85 Fed. Reg. at 60,528. The rationale supporting Duration of Status is just as or more substantive today than it was when it was first extended to those groups. Duration of Status was created due to the "large number of nonimmigrant students in the United States" in 1979 and "the need to continually process their Extension of Status applications." *Id.* Adopting Duration of Status "would facilitate the admission of nonimmigrant students, provide dollar and manpower savings to the Government, and permit more efficient use of resources." *Id.* "Academic students or exchange visitor[s] generally maintain[] lawful status by complying with the conditions of [their respective] program[]s." *Id.* at 60,533. Provided they comply with those terms, they are, in turn, provided with the certainty they need to pursue and obtain a particular degree.

While previous regulations pointed to just 224,030 student and exchange visitors in 1979 as a reason to *create* Duration of Status[3], here, the NPRM points to the presence of more than a million students and visitors as a reason to *end* it. 85 Fed. Reg. at 60,532. Accordingly, the NPRM creates the exact issues the Government sought to address when it initiated Duration of Status. The NPRM admits that "the proposed changes could decrease nonimmigrant student enrollments in the United States with corresponding increased enrollments in other English-speaking countries." 85 Fed. Reg. at 60,573. Though the NPRM does not explain *why* enrollment could decrease, it is almost certainly because the burdens imposed by the Rule – particularly the two- and four-year visa limitations – create serious doubt as to whether a student who begins a particular program will be able to complete it.

Additionally, the NPRM acknowledges that it would result in a massive uptick in applications for Extension of Status when DHS *already* cannot process such applications in a timely fashion. The NPRM projects that USCIS will need to adjudicate *364,060 new extension requests annually by 2024* and 300,954 in 2025 and later years. *Id.* at 60,568. Currently, applications at the California Service Center to extend or change status take 8.5 to 11 months to process for F students and 15 to 19.5 months for J exchange visitors.[4] Those numbers would be far greater should the Proposed Rule go into effect.[5]

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[3] Chad Haddal, *Foreign Students in the United States: Policies and Legislation*, Congressional Research Service, https://fas.org/sgp/crs/misc/RL31146.pdf (last updated Jan. 31, 2008).

[4] *Check Case Processing* Times, U.S. Citizenship and Immigration Services, https://egov.uscis.gov/processing-times/ (last visited Oct. 26, 2020).

[5] The proposed Rule would also come at significant expense to both students – hundreds of thousands of whom would need to apply for one or multiple Extensions of Status at a cost of approximately $1,000 per application – and to the American taxpayer who would foot the bill for the additional employees DHS would need to hire to process those applications.

The NPRM also fails to appreciate the extent to which current systems dovetail with Duration of Status to regularly collect student information and monitor progress. The Student and Exchange Visitor Information System ("SEVIS") is utilized by nonimmigrant students and their dependents on F visas and nonimmigrant exchange visitors on J visas in conjunction with their educational institutions. These groups use SEVIS to comply with myriad reporting requirements imposed by the federal government. Students must apply for and institutions must certify their acceptance via SEVIS. While in country, students and exchange visitors must take measures to maintain their lawful status, including taking a full course of study.[6] Institutions must appoint a principal designated school official (PDSO) and designated school officials (DSOs) who utilize SEVIS for various reporting requirements including updating forms when material changes occur, regularly registering student records and reporting changes in student information, and petitioning for recertification of the institution every two years.[7] These requirements on students, exchange visitors, and institutions are substantial and obviate the need to create the fixed visa limitations proposed in the NPRM.

DHS did not even consider maintaining Duration of Status despite the compelling reasons to do so. Instead, the NPRM merely explains why it considered and rejected other fixed time limitations, such as a one-year maximum on certain visas. 85 Fed. Reg. at 60,538. But it could have accomplished its stated objective of "provid[ing] pre-defined time periods for immigration officers to evaluate whether a nonimmigrant has maintained his or her status," *id.* at 60,543, *without* imposing fixed time limitations. Indeed, DHS could have kept Duration of Status in place while devising other means, in addition to Student Exchange Visitor Program requirements, to regularly assess whether student and exchange visitors are meeting program requirements. Students and exchange visitors could, for example, be required to submit additional documentation and/or meet with DHS officials at some juncture during their Duration of Status period. Setting two and four-year maximums on these visas is an arbitrary, unnecessary, and unduly burdensome means of meeting DHS's stated objective.

B. The Department Fails to Recognize the Extent to Which Fixed Visa Limitations Will Result in a Decline in Applications and Enrollment.

The NPRM provides a lengthy list of severe time restrictions on international students and exchange visitors. Among them, DHS seeks to impose a two-year maximum visa limitation on students and exchange visitors from four countries designated as state sponsors of terrorism – Iran, North Korea, Syria, and Sudan – as well as 55 other countries with an alleged visa overstay rate in excess of 10 percent. The NPRM also proposes to limit *all* international students on F visas to a maximum visa term of two years if their educational institution does not participate in E-Verify. Even if a student is not from a country designated as a state sponsor of terrorism, not from a country with an alleged overstay rate in excess of 10 percent, not subject to the two-year limit as a result of the Secretary's unilateral catch-all provision, *and* is attending an institution that participates in E-Verify, that student would, nonetheless, be subject to a four-year maximum visa limitation. And the NPRM caps language training programs to a lifetime aggregate of two

[6] *Maintaining Status*, Department of Homeland Security, https://studyinthestates.dhs.gov/students/maintaining-status.
[7] *What to Know About SEVP Certification*, Department of Homeland Security, https://studyinthestates.dhs.gov/schools/get-started/what-to-know-about-sevp-certification.

years with no option to extend a stay. If implemented, these draconian measures will impose a variety of lasting harms.

In the 2018 calendar year, 53.2% of all international students, more than 700,000 in total, were enrolled in Bachelor's or Doctoral programs – programs with a *minimum* duration of four years.[8] Thus, students subject to the two-year limitation, and, in some cases, the four-year limitation, would be applying for and enrolling in programs with no reasonable assurance that they will be permitted to complete them. Given the risk involved, it is more than likely that significant numbers of students will not apply for those programs at all.

The NPRM expressly acknowledges these realities. The Department cautions that certain time limitations "would introduce significant confusion, make [students'] stay[s] unpredictable, and so potentially discourage some students from pursuing their studies in the United States." 85 Fed. Reg. at 60,538. That rationale is precisely why the limitations in the Proposed Rule, particularly for those enrolled in programs of durations that extend beyond the visa period, are arbitrary and capricious.[9] If students have no reasonable expectation of completing a degree, they will not enroll. The resulting losses for colleges and universities – both financial and educational – as well as to State economies will be immense.

C. The Empirical Bases for Imposing Two-Year Visa Limitations Are Inherently Flawed.

a. The Department's Data Reflects a Decrease in Student and Exchange Visitor Overstays.

The Department's justification for the Proposed Rule is belied by its own data. DHS proposes to, in part, impose a two-year maximum visa on countries with an alleged visa overstay rate in excess of 10 percent. The NPRM cites the historical growth in F, J, and I visas (unsurprising given population growth and an increasingly globalized economy) to support the need for stricter regulation. But the NPRM fails to note that the number *and* percentage of student and exchange visa overstays has declined every year since at least 2016. As reflected in the table on the following page, in 2016, there were 79,818 alleged student and exchange overstays. Three years later, in 2019, that number fell by 32% to 60,311. The downward trend reflects *increased* compliance with existing regulations under a Duration of Status framework. Moreover, the overall percentages of overstays are de minimis and fail to provide a reasoned rationale for such sweeping and disruptive changes.

[8] *2018 Student and Exchange Visitor Program Report*, Department of Homeland Security, https://www.ice.gov/doclib/sevis/pdf/sevisByTheNumbers2018.pdf.

[9] This is not merely speculative. Washington's state universities and colleges have already reported that their international students, families, and partners are expressing bewilderment and disappointment about the many restrictions and barriers that the Proposed Rule would impose. They anticipate that the NPRM would have a significant chilling effect as international students would be less likely to seek a U.S. education and would instead pick other destinations for overseas study, including Australia, Canada, and the United Kingdom.

Overstay statistics for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)[10]

	Total Overstays	**Total Overstay Rate**
2016	79,818	5.48%
2017	68,983	4.15%
2018	68,593	3.73%
2019	60,311	3.09%

b. The Department Relies Upon Flawed Data to Impose a Two-Year Visa Limit on Students and Exchange Visitors from 55 Countries.

DHS also relies upon flawed data to support its proposed restrictions. The NPRM proposes to limit student visas to a maximum of two years if a country's total student and exchange visitor overstay rate exceeded 10 percent in the previous fiscal year. That rate is determined by adding "Suspected In-Country Overstays" and "Out-of-Country Overstays" and dividing that number by the number of "Expected Departures." Suspected In-Country Overstays are defined as "individuals for whom no departure was recorded." Out-of-Country Overstays are defined as "individuals whose departure was recorded after their authorized period of admission expired." By its own terms, DHS admits that this data is unreliable. The "In-Country Overstay" data is, by definition, "*suspected*." That is, DHS does not *know* whether an individual has overstayed their visa, whether they have continued to live in the United States under some other legal status (i.e. a valid non-student visa), or whether DHS failed to accurately record their departure from the country.

DHS is well aware of these issues. A 2017 Center for Migration Report found that "slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded."[11] As identified by the National Foundation for American Policy in 2018, "the overstay problem appears to be an issue of matching up student data rather than actual overstays."[12] That finding is supported by the data. For example, "the 'suspected in-country overstay' rate for student and exchange visitors in FY 2018 dropped from 2.11% to 0.84% 12 months later, according to DHS, with the rate declining every three months. This means DHS systems catch up and correctly identify people as lawfully in the country or having already left the United States as time passes. In addition, to the extent the problem of overstays exists, it solves itself over time."[13] That decline is readily apparent in the table below.

[10] As discussed below, these figures are inherently flawed and represent a mere snapshot in time. As DHS data catches up and as time elapses, the overstay figures decline drastically.
[11] Robert Warren, *DHS Overestimates Visa Overstays for 2016: Overstay Population Growth Near Zero for the Year*, Journal on Migration and Human Security, https://cmsny.org/publications/jmhs-dhs-visa-overstays/.
[12] *International Students and DHS Data*, National Foundation for American Policy (Sept. 2020), https://nfap.com/wp-content/uploads/2020/09/Analysis-of-DHS-Data-on-International-Students.NFAP-Policy-Brief.September-2020-1.pdf.
[13] *Id.*

DHS FY 2018 "Suspected In-Country Overstay" Trend for F-1 Students and Exchange Visitors[14]

Admission Type	Expected Departures	Visitors FY 2018 Report	3 Months Later (as of 12/31/18)	6 Months Later (as of 3/31/19)	9 Months Later (as of 6/30/19)	12 Months (as of 9/30/19)
Student and Exchange Visitors	1,840,482	38,881 (2.11%)	29,980 (1.63%)	24,869 (1.35%)	18,505 (1.01%)	15,525 (0.84%)

Furthermore, the NPRM states that it will rely upon data from "Table 4, Column 6" of its Overstay Report to determine whether a country exceeds the proposed 10 percent threshold. 85 Fed. Reg. at 60,534 n. 87. The data in that column reflects DHS's assessment of the overstay rate for those on F, J, *and* M visas. M visas, which are reserved for those engaging in vocational studies, are unchanged by the NPRM. Yet, DHS data on M visas, thousands in number, arbitrarily appear to be part of the equation that determines whether students on F and J visas are subject to the two-year visa limitation.

DHS cannot point to these admittedly unreliable statistics as a basis for a problem in need of a solution, let alone for the sweeping new restrictions on international students imposed by the Proposed Rule.

c. The NPRM Would Subject Certain Students and Exchange Visitors to a Two-Year Visa Limit Based on Statistically Insignificant Data.

The data DHS relies upon to impose the two-year restriction is not only fundamentally flawed, it is also utilized in a manner that is inherently unreliable. In several instances, the total number of students from countries that exceed DHS's proposed 10 percent overstay threshold is simply too small to justify visa limitations. For example, according to DHS data from 2019, 10 of the 55 countries with total overstays in excess of 10 percent had fewer than 100 students in the United States. All potential students from those countries – Cabo Verde, Central African Republic, Djibouti, Eritrea, Guinea-Bissau, Samoa, Somalia, Tonga, and Tuvalu – would be ineligible for four-year visas based on the alleged overstays of a tiny handful of students.[15] Tuvalu is perhaps the most egregious example. In 2019, six students from that nation on F, J, or M visas were expected to depart the United States. One allegedly did not. Because the resulting total overstay rate is 16.67 percent, under the NPRM *all* potential students from Tuvalu would

[14] *Id.* at 2.

[15] According to DHS, the total number of alleged F, M, or J overstays from these ten countries in 2019 was 116, representing just 0.2 percent of all alleged overstays in those categories. Yet, countries representing a far higher percentage of overall overstays are not subject to the two-year maximum. For example, according to DHS data, 11,030 students or exchange visitors from China overstayed visas in 2019. Though that represents 18.3 percent of all alleged overstays, Chinese students are not limited to two-year visas under the NPRM.

have no reasonable assurance that they could complete a four-year program in the United States. DHS cannot reasonably limit visas on the sole basis of such small data sets.[16]

d. The NPRM Proposes to Rely Upon a Single Year of Data to Impose Restrictions on 55 Countries.

Additionally, DHS provides no justification for why it is reasonable for it to rely on a single year of data to impose the visa limitations it proposes. The NPRM states that, "[a]liens who are citizens of countries with a student and exchange visitor total overstay rate of greater than 10 percent *according to the most recent DHS Entry/Exit Overstay report*" will be subject to a maximum admission period of up to two years. 85 Fed. Reg. at 60,543 (emphasis added). Nowhere does the NPRM explain how or why reliance on a single year's data is sensible or reliable. Nor does it explain that it considered and rejected other approaches. Countries may fall below the 10 percent threshold depending on the method employed. For example, under DHS's proposal, students and exchange visitors from Samoa and Zambia would be ineligible for visas longer than two years because the alleged overstay rates from those countries exceeded 10 percent in 2019. But if the Department utilized a two-year average – including data from both 2019 and 2018 – their overstay rate would fall below the 10 percent threshold.

e. The Rule Seeks to Punish International Students if Educational Institutions Do Not Adopt an Unrelated Employment Program.

The NPRM seeks to link participation in an employment-oriented immigration program – E-Verify – to international students' ability to obtain a visa for more than two years. The link is confounding. E-Verify, by DHS's own definition, "is a web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States."[17] Its connection to regulations governing international *students* – not domestic *employers* – in the United States, is tenuous at best. Yet, DHS attempts to establish the unfounded connection based upon a "belie[f]" that schools that participate in E-Verify are more likely to comply with laws and regulations pertaining to international students. 85 Fed. Reg. at 60,545. The Proposed Rule cites to no evidentiary support for this supposition.

Congress has never mandated the use of E-Verify for all employers and DHS cites to no authority that enables it to effectively impose such a requirement on American colleges and universities. DHS also fails to detail how it would support the theoretical expansion of E-Verify by offering, for example, financial and technical support to educational institutions. That effort would be massive in scope, particularly given that 28 States do not currently mandate use of the program and that, as expressly noted in the NPRM, just 20 percent of the educational services industry currently participates in E-Verify. 85 Fed. Reg. at 60,565.

[16] The Proposed Rule's various restrictions and the subsequent expected decline in international enrollment make it more likely that the Department's 10 percent threshold could be triggered as even a small number of overstays would have an outsized effect on that percentage.

[17] *Verify Employment Eligibility (E-Verify)*, Department of Homeland Security, https://www.dhs.gov/how-do-i/verify-employment-eligibility-e-verify.

In any event, limiting international students to two-year visas in the absence of their institution's adoption of E-Verify would cause significant disruption in the American education system. Again, students would have no reasonable expectation of being able to complete programs longer than two years. As a result, enrollment would fall and institutions and State economies would suffer the consequences.

The E-Verify requirement is misplaced in the context of the instant NPRM, without legal authority, and, if imposed, would have severe consequences.

D. The Four-Year Visa Limitations Are Similarly Flawed.

Under the NPRM, all students and exchange visitors are at least subject to a maximum visa of four years. DHS asserts that this time limit "best aligns with the normal progress these students should be making" and that it "is based on the general structure of post-secondary education in the United States." 85 Fed. Reg. 60,538. But the Proposed Rule fails to acknowledge that a clear majority of students enrolled in four-year programs, including international students and Americans alike, do not attain a degree in that timeframe. According to the National Center for Education Statistics, just 41 percent of full-time college students earn a bachelor's degree in four years, and 59 percent earn a bachelor's degree in six years.[18] Students are unable to complete degrees in four years due to countless legitimate reasons – they change majors, transfer schools, or have to leave school to earn tuition money or to take care of a loved one.[19] If Americans, rather than international students, were functionally required to complete programs within four years, they would rightfully decry such a limit as willfully ignorant of the time it takes for the average student to graduate. The same critique applies to the NPRM. The vast majority of international students come to the United States to earn a degree. But the NPRM forces those students to walk a regulatory tightrope for 48 months. The smallest misstep, resulting in a delay of a mere semester, could completely derail a student's academic career, at a cost of tens or hundreds of thousands of dollars.

Additionally, the four-year maximum applies to undergraduate and graduate students alike. Yet the median amount of time needed to complete, for example, a doctoral program is far longer than four years.

Median time to degree of doctorate recipients, by broad field of study: 2018[20]

Physical sciences and earth sciences	6.3 years
Engineering	6.7 years
Life sciences	6.8 years

[18] *Postsecondary Graduation Rates*, National Center for Education Statistics, https://nces.ed.gov/programs/raceindicators/indicator_red.asp (last updated Feb. 2019).
[19] This is particularly true at public colleges and universities whose student bodies disproportionately face challenges outside of the classroom. At the University of Massachusetts Boston, 24 percent of undergraduate students complete a degree within four years. That number more than doubles with a six-year timeframe.
[20] *Path to the doctorate*, Survey of Earned Doctorates (2018), https://ncses.nsf.gov/pubs/nsf20301/report/path-to-the-doctorate.

Mathematics and computer sciences	6.8 years
Psychology and social sciences	7.8 years
Other non-science and engineering fields	9.2 years
Humanities and arts	9.4 years
Education	11.9 years

The NPRM incorrectly suggests that an insignificant number of international students are engaged in programs longer than four years in duration. At the University of Vermont, 104 out of 139, or 75 percent of all international graduate students were enrolled in programs that are longer than four years. At the Colorado School of Mines, 243 out of the 419 international graduate students, or 58 percent, are enrolled in such programs. At the University of Maryland, College Park, 1,602 of the 2,859 international graduate students, including 125 students that would be subject to two-year visas, are pursuing degrees that require more than four years of study. And at Yale University, 34 percent of international students in the Fall of 2019 were studying at the PhD level.

Similar to the effect of a two-year visa limit on students contemplating four-year bachelor's programs, the four-year limit disincentivizes international graduate students from beginning programs with no reasonable assurance that they will be able to complete them. As such, the NPRM would have a specific and drastic impact on PhD enrollment in the United States. International students represent a significant number of doctoral students. In the 2018-2019 school year, 132,581 international students were enrolled in American doctoral programs.[21] International doctoral students in the University of Minnesota system represent 11 percent of *all* doctoral students enrolled in programs that have a duration of four or more years. More than 23 percent of all graduate students attending public institutions of higher education in Illinois are from outside the United States, including 4,389 international students engaged in doctoral programs of a minimum of four years.

In some instances, international students represent an outsized share of students in particular programs. For example, in 2018, international students represented an astounding 37 percent of science and engineering doctoral students in the United States.[22] At the University of Wisconsin-Milwaukee, 75 percent of Engineering PhD students were from outside of the United States, as were 49 percent of Chemistry and 65 percent of Economics PhDs. At public colleges and universities in New Jersey, students who are not citizens of the United States represent 53 percent of graduates of science, technology, engineering, and math programs. At the University of Massachusetts Medical School, 30 percent of its Biomedical Sciences PhD students are international. These students' contributions include efforts to stem the current global health pandemic as they learn and serve in research labs on the forefront of solving the COVID-19 crisis. And at the University of Connecticut, Master's degrees in Financial Risk Management and

[21] *International Students Data*, Open Doors Report (2019), https://opendoorsdata.org/data/international-students/academic-level/.
[22] *U.S. Doctorate Awards*, Survey of Earned Doctorates (2018), https://ncses.nsf.gov/pubs/nsf20301/report/u-s-doctorate-awards#citizenship.

Business Analytics are heavily populated with international students. These programs and countless others would need to be completely restructured with a decline in enrollment.

Graduate students subject to the two-year maximum would be even more unlikely to apply for and enroll in programs longer than two years in duration. These students would likely need DHS approval for *multiple* Extension of Stay applications to finish most doctoral programs, and at least one extension to complete a juris doctorate or medical degree. For example, 27 graduate students at the University of Hawaii at Manoa who would be subject to a two-year visit limit under the NPRM are enrolled in programs that require more than four years of study. The risk of an extension denial is simply too great to warrant enrollment, particularly when international students have less restrictive options available in other countries.

IV. The Rule Would Directly and Significantly Impact American Educational Institutions and State Economies

The NPRM would acutely affect the quality of education in the United States, educational institutions, including public colleges and universities, as well as State economies. These harms would permanently alter the landscape of American higher education.

A. The Rule Would Diminish American Students' Quality of Education.

The Rule would also cause multifaceted harm to schools' academic, extracurricular, and cultural communities and their overall missions as a result of diminishment in international student enrollment. International students and exchange visitors bring rich and diverse viewpoints, interests, and skillsets, which they share in classrooms, research projects, on-campus jobs, clubs, and other extracurricular activities, as well as in everyday social interactions with other students, faculty, and staff. Research shows that American students appreciate the different perspectives that international students bring to class, and, equally, international students stated that they benefit too from this cross-national interaction. Students shared that they gained knowledge and skills needed for effective intercultural communication; improved ability to reflect on their own culture; developed leadership and problem-solving skills; and engaged with course content utilizing multiple perspectives.[23]

At an institution like the University of the District of Columbia ("UDC") – D.C.'s only public university and an Historically Black Institution – more than 20 percent of international undergraduate and nearly half of its international graduate students are from countries that, under the Proposed Rule, would be subject to the two-year visa limit based on the alleged overstay rate. Many of those students are from the 36 Sub-Saharan African countries that DHS has placed in that category. Similarly, 143 out of the 396 international undergraduate students at the University of New Mexico and 219 of the 793 international undergraduate students at the University of Wisconsin-Milwaukee are from countries that allegedly exceed the overstay threshold. These

[23] Yefanova, D., Montgomery, M.L., Woodruff, G., Johnstone, C. & Kappler, B., *Instructional Practices Facilitating Cross-National Interactions in Undergraduate Classes*, Journal of International Students, (2017).

students enrich the educational experience of all students, bring diverse cultural perspectives, and are integral parts of the fabric of their institutions.

If international students and exchange visitors are effectively forced to pursue their studies outside of the United States – either as a result of the restrictions imposed by the Rule or because of a perceived hostility toward international students – American students and institutions will lose out on their numerous contributions. As a result, American students will be less prepared and less able to compete in an increasingly globalized economy.

B. The Rule Would Significantly Impact the Budgets of American Educational Institutions.

As detailed above and as expressly contemplated by the Rule itself, every expectation would be that, if the Rule goes into effect, international student enrollment in American institutions would sharply decline. The financial losses would be particularly acute for public institutions because international students often pay higher out-of-state tuition rates. Those higher rates enhance public universities' ability to serve lower-income in-state students by reducing the amount of tuition they are required to pay. For example, in 2019, international students contributed $272 million in tuition to New Jersey public institutions of higher education. In the University of Minnesota system, international students contributed an estimated $137 million in tuition, including more than $7 million from students from countries with alleged overstay rates in excess of 10 percent. More than 3,000 international students attend undergraduate and graduate programs at the University of Connecticut. Those students contributed more than $85 million in tuition in 2019. The State University of New York (SUNY) projects the Rule could lead to an annual loss of tuition and associated revenue totaling $422 million for New York State's public universities.[24] Washington's state universities and colleges currently have more than 13,000 international students enrolled. Those students paid more than $330 million in tuition during the 2019-2020 academic year, including approximately $26 million from countries that allegedly exceeded DHS's 10 percent overstay threshold.[25]

These contributions are particularly critical during a time of declining enrollment, much of it because of COVID-19. According to the National Student Clearinghouse Research Center, 629 institutions reported an average decline in Fall 2020 undergraduate enrollment of 2.5 percent and an overall decline in higher education enrollment of 1.8 percent.[26] The number of

[24] Letter from SUNY Chancellor Dr. Jim Malatras to Ms. Sharon Hageman Acting Regulatory Unit Chief, Office of Policy and Planning, USCIS (Oct. 26, 2020) at 2.

[25] Additionally, Vietnam is one of the top ten countries with students attending California State University institutions, which, in Fall 2020, had more than 14,000 international students enrolled. As Vietnam had an alleged overstay rate in 2019 of 11.2 percent, all students from that nation would be limited to initial visas of just two years in duration.

[26] Danielle Douglas Gabriel, *College enrollment takes a hit this fall amid coronavirus*, Washington Post (Sept. 24, 2020, 12:01 a.m.), https://www.washingtonpost.com/education/2020/09/24/college-enrollment-coronavirus/. Due to COVID-related travel bans and public health policies, enrollment has declined even more significantly at many institutions, including Virginia Tech, where enrollment is down 12 percent in Fall 2020 compared to Fall 2019. International students, who contributed an estimated $110 million in tuition in the 2019-2020 school year to Virginia Tech, help institutions avoid drastic cuts to educational programming.

international students dropped more precipitously than nearly every other category – 11.2 percent. The NPRM would only hasten that decline, starving institutions of the funding to effectively operate.

The NPRM would also impose direct costs on educational institutions in that it would, at a minimum, require school officials to aid students in completing the regular Extension of Status applications contemplated by the Proposed Rule. Institutions would have to divert valuable, limited resources to assist international students in completing those applications. Washington's state institutions estimate that time spent in connection with those applications would total 10 hours per student.

C. The Rule Would Negatively Affect State Economies.

The NPRM poses a significant risk to the health of State economies, particularly during a time of decreased tax revenue and high unemployment. According to the U.S. Department of Commerce, international students contributed $44.7 billion to the U.S. economy in 2018 and, according to the NAFSA Association of International Educators, supported 458,290 jobs.[27] In addition to tuition, international students and exchange visitors rent apartments and houses from local landlords; purchase food from grocery stores and restaurants; frequent retail stores; and make entertainment and leisure purchases. The financial effects of international students are felt in every State. For example, in the District of Columbia, 12,545 international students contribute $587.4 million to the local economy. In the State of Washington, international students contributed $956.1 million during the 2018-2019 academic year and supported 8,818 jobs.[28] In Colorado, international students contribute $500 million annually to the State economy, making education Colorado's fifth largest export and supporting more than 6,000 jobs. International students at California Community Colleges spend approximately $450 million annually for living expenses while attending college, including approximately $281 million in food and housing, $40 million in books and supplies, $33 million in health insurance, and $92 million in personal, transportation and other expenses. Virginia Tech alone supported 2,210 jobs during the 2018-2019 academic year. Similarly, international students studying at SUNY schools contribute nearly $750 million in economic activity and are supporting 7,685 jobs.[29] A significant decline in international enrollment, when the economy is already struggling, would result in additional job losses and declines in sorely needed tax revenue.

V. The Proposed Rule Conflicts with Relevant Statutes and Regulations

The Proposed Rule also conflicts with statutory dictates pertaining to students on F visas. Under 8 U.S.C. § 1101(a)(15)(F)(i), the F visa requires that an international student be "qualified to pursue a full course of study" and enter the country "solely for the purpose of pursuing such a course of study" at a qualifying college, university, or other academic institution. By setting

[27] NAFSA Economic Value Statistics (2018-19), https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2.
[28] *The United States Benefits from International Students*, NAFSA (2018-19), https://www.nafsa.org/sites/default/files/media/document/isev-2019.pdf.
[29] Letter from SUNY Chancellor Dr. Jim Malatras to Ms. Sharon Hageman Acting Regulatory Unit Chief, Office of Policy and Planning, USCIS (Oct. 26, 2020) at 2.

inflexible and arbitrary two-year and four-year limitations on the duration that many students may study in the United States, the Proposed Rule conflicts with this clear congressional mandate to allow students to "pursue a full course of study" – from beginning to end – by means of an F visa. As discussed previously, because many degree programs cannot be completed in four years, and most cannot be completed in two years, the Proposed Rule would authorize F visas for students under conditions that make it difficult or impossible for them to "pursue a full course of study." For example, the Proposed Rule limits language training programs to a lifetime aggregate of two years (including breaks and an annual vacation), with no option to apply for an extension of stay. In reality, language programs may vary in length and can extend far beyond two years to complete. For other types of programs, the Proposed Rule allows for an extension of stay *only* for "compelling academic reason, documented medical illness or medical condition, or circumstance that was beyond the student's control." This extraordinarily narrow exception fails to ensure that a student on an F visa will be allowed to complete their degree and would disallow many students on an F visa from "pursu[ing] a full course of study."

Section 1101(a)(15)(F)(i) further instructs that a student's institution must report to the Attorney General "the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn…." 8 U.S.C. § 1101(a)(15)(F)(i). The information to be collected includes "the date of the alien's termination of enrollment and the reason for such termination (including graduation, disciplinary action or other dismissal, and failure to re-enroll)." 8 U.S.C. § 1372(c)(1)(h). The requirements to notify the federal government about an event that results in the end of a student's studies (i.e. graduation, disciplinary action, dismissal, or failure to re-enroll) lends further support to the argument that F visa admissions should be governed not by arbitrary time limits, but by a student's participation in their course of study. The Proposed Rule, by contrast, imposes an artificial fixed end date that is contrary to the statute and congressional intent.

The Proposed Rule's baseless limitations on how long certain individuals may study in the United States is also at odds with existing portions of 8 CFR 214. The result will be internally incoherent and contradictory regulations.

8 CFR 214.2 (f)(6)(i) provides that the "[s]uccessful completion of the full course of study must lead to the attainment of a specific educational or professional objective." This regulation recognizes that inherent in a "full course of study" is the opportunity to successfully complete that course of study by, for example, graduating or otherwise attaining a specific educational objective. The Proposed Rule, by contrast, will admit many students for brief and inflexible periods of time, regardless of whether it is even possible to successfully complete a degree or otherwise attain a particular objective during that period. The result for many students will be uncertainty, at best, as to whether they will be able to complete their degree or otherwise reach their academic goals.

The regulations also define a college or university as "an institution of higher learning which awards recognized associate, bachelor's, master's, doctorate, or professional degrees." 8 CFR 214.2 (f)(6)(ii). This regulatory definition plainly contemplates the *awarding* of degrees. For vocational or business programs, a school seeking to accept F visa students must specifically

"submit evidence that its courses of study are accepted as fulfilling the requirements for the attainment of an educational, professional, or vocational objective, and are not avocational or recreational in character." 8 CFR 214.3 (c). For private schools that are not accredited by a nationally recognized accrediting body, the schools "must submit evidence that it confers upon its graduates recognized bachelor, master, doctor, professional, or divinity degrees, or if it does not confer such degrees that its credits have been and are accepted unconditionally by at least three such institutions of higher learning…." In contrast, the Proposed Rule contemplates specific time periods that are unrelated to the time that it might take to complete a degree, leading to an internally contradictory regulatory scheme.

VI. The Acting Secretary Lacks the Legal Authority to Promulgate the Rule

Beyond the various procedural defects, arbitrary and capricious reasoning, and conflicts with existing law, the Secretary's legal authority to issue these regulations is in serious doubt. As recently as August 14, 2020, the U.S. Government Accountability Office ("GAO") concluded that Acting DHS Secretary Chad Wolf and Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security Kenneth Cuccinelli were named to those positions by an invalid order of succession.[30] Kirstjen Nielsen resigned as Secretary of DHS on April 10, 2019. The Homeland Security Act of 2002 provides a means for an official to assume the title of Acting Secretary pursuant to a designation of further order of succession by the Secretary. However, the GAO concluded that upon the resignation of Secretary Nielsen, the express terms of the then-existing designation required the Director of the Cybersecurity and Infrastructure Security Agency to assume that title instead of the person who did, Commissioner of Customs and Border Protection (CBP) Kevin McAleenan. As such, the Office wrote, "the subsequent appointments of Under Secretary for Strategy, Policy, and Plans, Chad Wolf and Principal Deputy Director of U.S. Citizenship and Immigration Services (USCIS) Ken Cuccinelli were also improper because they relied on an amended designation made by Mr. McAleenan."

Subsequently, a federal court in Maryland concluded that plaintiffs were likely to succeed on their claim that eighteen final DHS rules were invalid under the APA because "Wolf filled the role of Acting Secretary without authority" and "promulgated the challenged rules [] 'in excess of …authority,' and not 'in accordance with the law.'" *Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020). Mr. Wolf remains Acting Secretary today. Per the GAO report and the reasoning in *Casa de Maryland*, he continues to lack the authority to issue rules, including those at issue in this Comment.

VII. Conclusion

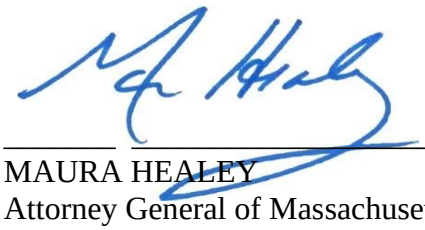
We urge DHS to reconsider the Proposed Rule as it is, at a minimum, procedurally deficient, arbitrary and capricious, and contrary to law. DHS does not present any facts that justify the need to dramatically increase restrictions on international students and exchange visitors; rather, available evidence suggests the contrary. At no point does the Department

[30] *Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security*, Government Accountability Office (Aug. 14, 2020), https://www.gao.gov/products/B-331650#mt=e-report.

demonstrate that it considered the multitude of costs and harms this rulemaking would have on the States or to the American educational system. For all the above reasons, we urge the Department to withdraw the Proposed Rule in its entirety.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia



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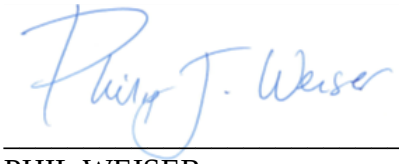

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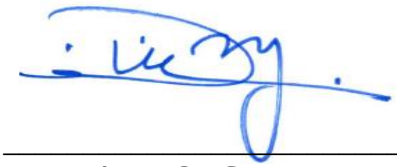

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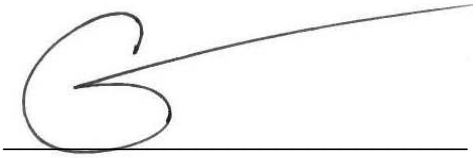

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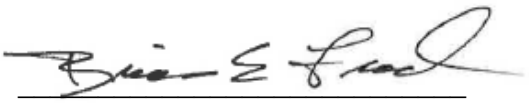

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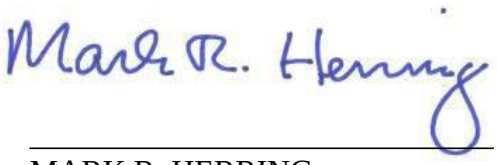

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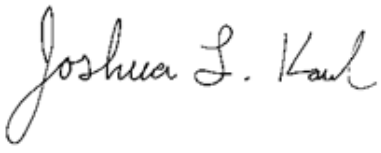

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