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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO/OAKLAND DIVISION

19 THE REGENTS OF THE UNIVERSITY OF  
20 CALIFORNIA, a California Corporation,

21 Plaintiff,

22 v.

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

28 Defendants.

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Case No. 3:20-cv-04621-JSW

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

**[Filed Concurrently with Supporting  
Declarations, Request for Judicial Notice,  
Proposed Order, Motion to Shorten Time]**

Date: July 22, 2020  
Time: 2:00 p.m.  
Ctrm: TBD  
Judge: TBD

Complaint filed: July 10, 2020

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION..... 2

II. FACTUAL BACKGROUND ..... 3

    A. COVID-19 ..... 3

    B. ICE’s Initial COVID-19 Response ..... 5

    C. The University of California’s COVID-19 Response..... 6

    D. The Loss of International Students and Harm to the University. .... 10

    E. Students’ Reliance on ICE’s March 13 Guidance ..... 11

    F. ICE’s Sudden and Arbitrary Re-imposition of In-Person Education Requirements  
        During the COVID-19 Emergency ..... 12

III. LEGAL STANDARD ..... 13

IV. ARGUMENT ..... 14

    A. THE REGENTS ARE LIKELY TO SUCCEED ON THE MERITS..... 16

        1. The Regents Are Likely to Prevail on the First Cause of Action Under  
            the APA Because the July 6 Directive is Arbitrary and Capricious..... 16

            a. The Directive Failed to Offer a Reasonable Explanation for  
                ICE’s Policy Reversal. .... 17

            b. The Directive Failed to Consider Important Aspects of the  
                Problem, Including the Reliance of Plaintiff and Its Students on  
                the March 13 Guidance. .... 18

            c. Defendants Failed to Explain Any Basis for the Directive. .... 20

        2. The Regents Will Likely Prevail on Its Second APA Cause of Action,  
            Because the Directive is a Substantive Rule that Did Not Comply with  
            the APA’s Notice and Comment Requirements..... 22

    B. THE REGENTS AND ITS STUDENTS ARE LIKELY TO SUFFER  
        IRREPARABLE HARM..... 23

    C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH  
        HEAVILY IN FAVOR OF A PRELIMINARY INJUNCTION ORDER..... 24

V. CONCLUSION ..... 25

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Cases**

*Alliance for the Wild Rockies v. Cottrell*,  
632 F.3d 1127 (9th Cir. 2011) .....13, 25

*Amerijet Int’l, Inc. v. Pistole*,  
753 F.3d 1343 (D.C. Cir. 2014).....20, 21

*Butte Env’tl. Council v. U.S. Army Corps of Eng’rs*,  
620 F.3d 936 (9th Cir. 2010) ..... 16

*Chrysler Corp. v. Brown*,  
441 U.S. 281 (1979)..... 23

*Ciox Health, LLC v. Azar*,  
435 F. Supp. 3d 30, 66 (D.D.C. 2020) ..... 23

*Citizens to Preserve Overton Park, Inc. v. Volpe*,  
401 U.S. 402 (1971)..... 16

*Colwell v. Dep’t of Health & Human Servs.*,  
558 F.3d 1112 (9th Cir. 2009) ..... 23

*Dep’t of Commerce v. New York*,  
139 S. Ct. 2551 (2019) ..... 21

*Dep’t of Homeland Security v. Regents of the Univ. of Cal.*,  
No. 18-587, 2020 WL 3271746 (U.S. June 18, 2020) ..... *passim*

*Encino Motorcars, LLC v. Navarro*,  
136 S. Ct. 2117 (2016) ..... 14, 15, 16, 17

*Enyart v. Nat’l Conference of Bar Examiners, Inc.*,  
630 F.3d 1153 (9th Cir. 2011) ..... 24

*FCC v. Fox Telev’n Stns., Inc.*,  
556 U.S. 502 (2009)..... 17

*Franklin v. Massachusetts*,  
505 U.S. 788 (1992)..... 16

*Humane Soc’y of U.S. v. Locke*,  
626 F.3d 1040 (9th Cir. 2010) ..... 15

*Jicarilla Apache Nation v. U.S. Dep’t of the Interior*,  
613 F.3d 1112 (D.C. Cir. 2010).....14, 17

1 *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton,*  
 2 752 F.3d 755 (9th Cir. 2014) ..... 24

3 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.,*  
 4 463 U.S. 29 (1983)..... 16

5 *Nat’l Ass’n of Home Builders v. Norton,*  
 6 340 F.3d 835 (9th Cir. 2003) ..... 23

7 *Nat’l Res. Def. Council v. EPA,*  
 8 643 F.3d 311 (D.C. Cir. 2011)..... 23

9 *Northwest Env’tl. Def. Ctr. v. Bonneville Power Admin.,*  
 10 477 F.3d 668 (9th Cir. 2007) ..... 15

11 *Perez v. Mortg. Bankers Ass’n,*  
 12 575 U.S. 92 (2015)..... 18

13 *Pimentel v. Dreyfus,*  
 14 670 F.3d 1096 (9th Cir. 2012) ..... 13

15 *Republic of the Philippines v. Marcos,*  
 16 862 F.2d 1355 (9th Cir. 1988) ..... 13

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 18 887 F.2d 966 (9th Cir. 1989) ..... 23

19 *SEC v. Chenery Corp. (“Chenery II”),*  
 20 332 U.S. 194..... 23

21 *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co.,*  
 22 240 F.3d 832 (9th Cir. 2001) ..... 13

23 *Winter v. Nat. Res. Def. Council,*  
 24 555 U.S. 7 (2008)..... 13

25 **Statutes**

26 5 U.S.C. § 553..... 3, 15, 23

27 5 U.S.C. § 706(2)(A)..... 3, 14, 16

28 5 U.S.C. § 706(2)(D)..... 3, 14, 23

Administrative Procedure Act ..... *passim*

1  
2  
3  
4  
5  
6  
7  
8  
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10  
11  
12  
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14  
15  
16  
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20  
21  
22  
23  
24  
25  
26  
27  
28

**Other Authorities**

Federal Rule of Civil Procedure 65(b) ..... 1

*U.S.: Latest Map and Case Count, N.Y. Times,*  
<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last  
visited July 10, 2020) ..... 4

1                    **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2                    PLEASE TAKE NOTICE that on July 22, 2020, at 2 p.m. or as soon thereafter as counsel  
 3 may be heard, at the United States District Court for the Northern District of California,  
 4 Courtroom 6, 2nd Floor, 1301 Clay Street, Oakland, California, Plaintiff The Regents of the  
 5 University of California (“The Regents”) will, and hereby does, move for a preliminary injunction  
 6 against Defendants United States Department of Homeland Security, Acting Secretary of  
 7 Department of Homeland Security Chad F. Wolf, United States Immigration and Customs  
 8 Enforcement, and Acting Director of U.S. Immigration and Customs Enforcement Matthew  
 9 Albence (“Defendants”), pursuant to Federal Rule of Civil Procedure 65(b).

10                    The Regents seeks a preliminary injunction prohibiting Defendants from implementing the  
 11 July 6, 2020 memorandum issued by defendant U.S. Immigration and Customs Enforcement  
 12 (“ICE”) (“the Directive”), ECF No. 1 at 30,<sup>1</sup> and from promulgating the announced policy as a  
 13 Final Rule. The Directive announced a reversal of prior ICE policy regarding COVID-19-related  
 14 exemptions to 8 C.F.R. § 214.2(f)(6)(i)(G) with respect to in-person learning requirements for  
 15 nonimmigrant students who are studying in this country pursuant to F-1 visas.

16                    Plaintiff seeks an order enjoining Defendants, their officers, employees, and agents, from  
 17 implementing or enforcing the July 6, 2020 Directive. Plaintiff so moves on the basis that it will  
 18 demonstrate that: (1) it is likely to succeed on the merits of its claims under the Administrative  
 19 Procedure Act (“APA”), 5 U.S.C. §§ 706, 553; (2) Plaintiff and its F-1 visa students are likely to  
 20 suffer irreparable harm absent provisional relief; and (3) the balance of equities and the public  
 21 interest weigh heavily in favor of maintaining the status quo existing prior to the issuance of the  
 22 Directive. Plaintiff’s Motion is based upon this Notice of Motion and Motion; the Memorandum  
 23 of Points and Authorities; the currently available administrative record; the supporting Alcocer,  
 24 Beck, Byington, Christ, Deas, Schooley, and Wakimoto Declarations and exhibits thereto filed in  
 25 support of Plaintiff’s Motion for a Temporary Restraining Order (ECF Nos. 4-1 to 4-9);<sup>2</sup> the

26 \_\_\_\_\_  
 27 <sup>1</sup> The Directive is attached to the Request for Judicial Notice (“RJN”) as Exhibit A.

28 <sup>2</sup> The Regents has agreed to proceed with this Motion for a Preliminary Injunction, in lieu of its  
 Motion for a Temporary Restraining Order, which was filed on July 10, 2020. ECF No. 4.

1 supporting Does 1 to 4 and Iyengar Declarations and exhibits thereto filed concurrently herewith;  
 2 the Request for Judicial Notice; the proposed Preliminary Injunction, and such further evidence  
 3 and argument as the Court may consider.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 The University of California—renowned as the nation’s premier public university system  
 7 and as a world-class academic and research powerhouse and a key contributor to the California  
 8 economy and social fabric—has long welcomed international students seeking to pursue unrivaled  
 9 educational opportunities and, ultimately, their most cherished dreams. These students contribute  
 10 to rich intellectual discourse across all disciplines, including in the University system’s prized  
 11 science, technology, engineering, and mathematics (STEM) departments, thereby also  
 12 contributing to the University’s mission of delivering and supporting world-class teaching and  
 13 research, as well as to California’s vibrant economy. For decades, the United States’ “F-1” visa  
 14 program for international, non-immigrant students has made all this possible.

15 In March 2020, faced with the unprecedented COVID-19 pandemic, The Regents moved  
 16 swiftly to transition the University’s ten campuses to remote teaching to protect the health and  
 17 safety of their students and faculty, while continuing to meet its core mission of providing a  
 18 world-class education. Also recognizing the unprecedented nature of the pandemic, defendant  
 19 United States Immigration and Customs Enforcement (“ICE”), an agency within defendant the  
 20 Department of Homeland Security (“DHS”), issued an exemption to a preexisting regulation that  
 21 required international students on F-1 visas to attend classes in person if they wished to remain in  
 22 this country. ICE’s March 13, 2020 Guidance (the “March 13 Guidance”) provided critical  
 23 assurances that international students could maintain their F-1 visa status while attending classes  
 24 on-line “for the duration of the [COVID-19] emergency.” *See* Request for Judicial Notice  
 25 (“RJN”), Ex. B at 1.

26 Without warning, on July 6, 2020, Defendants announced that they would largely rescind  
 27 the COVID-19 exemption for students on F-1 visas and require such students whose universities  
 28 had transitioned to an online-only curriculum to transfer to an institution offering in-person

1 classes, or leave the United States. This Directive also effectively bars continuing students on F-1  
 2 visas who have already left this country from re-entering the United States, if they intend to take a  
 3 full online course load in Fall 2020. This arbitrary, capricious, and procedurally defective agency  
 4 action now forces The Regents to confront an untenable choice: to put its international students in  
 5 immediate jeopardy of having to abandon their studies and leave the country or take steps to  
 6 retain them by increasing the number of in-person courses offered for Fall 2020, thereby  
 7 increasing the risk that its students, faculty, and staff will be exposed to the virus.

8 The Regents therefore seeks a preliminary injunction order to enjoin Defendants from  
 9 implementing the Directive. That Directive is not only unjust and unwise, but it violates the  
 10 Administrative Procedure Act's ("APA") prohibition against agency action that is "arbitrary,  
 11 capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.  
 12 § 706(2)(A). Agency action, like the Directive, purporting to have the force of law must be both  
 13 reasonable and reasonably explained. Defendants also failed to satisfy the APA's notice-and-  
 14 comment requirements for agency action that substantively affects rights or obligations, in  
 15 violation of 5 U.S.C. § 553. *See* 5 U.S.C. § 706(2)(D) (authorizing the court to set aside agency  
 16 action taken "without observance of procedure required by law"). The Regents, therefore, is likely  
 17 to succeed on the merits. Further, it and its students will suffer irreparable harm absent relief.  
 18 Finally, the balance of equities and the public interest strongly weigh in its favor. Accordingly,  
 19 this Court should grant provisional relief enjoining Defendants from enforcing the Directive,  
 20 thereby preserving the status quo pending adjudication of the University's claims.

## 21 **II. FACTUAL BACKGROUND**

### 22 **A. COVID-19**

23 As the year began, the terms "novel coronavirus" and "COVID-19" meant nothing to most  
 24 Americans. That soon changed. Since late 2019, when scientists first identified the novel  
 25 coronavirus, or SARS-CoV-2, the virus that causes COVID-19 has spread to nearly every corner  
 26 of the world: There are more than 12 million confirmed cases of the disease, and more than half a  
 27  
 28



1 million people have died from it. Leading the pack is the United States, where there have now  
 2 been more than 3.1 million confirmed cases and over 133,000 COVID-19-related deaths.<sup>3</sup>  
 3 Moreover, because there is no vaccine for COVID-19, the forecast is grim. *See* ECF No. 4-3  
 4 [Decl. of Carrie L. Byington] (“Byington Decl.”) ¶ 9. Epidemiologists predict that the domestic  
 5 death toll from COVID-19 will exceed 200,000 by November. In California alone, there have  
 6 been more than 320,000 confirmed cases and over 7,000 deaths.<sup>4</sup> Across the United States, more  
 7 than 3.3 million people have been infected to date, and at least 135,000 have died from the virus.<sup>5</sup>

8 Certain basic facts about COVID-19 are not genuinely in dispute. For some, it causes  
 9 symptoms requiring hospitalization or that are life-threatening. ECF No. 4-2 [Decl. of Michael  
 10 Beck] (“Beck Decl.”) ¶ 7. In the most severe cases, the virus is fatal. *Id.* Overwhelming evidence  
 11 indicates that the most likely means of transmission is through close contact, especially indoors.  
 12 *Id.* ¶¶ 10-13. In light of these facts, state and local governments have implemented the only  
 13 measures that reasonably can limit community spread of the virus—issuance of shelter-in-place  
 14 orders, physical (social) distancing, closure of businesses and other venues where people may  
 15 gather, diligent and regular sanitization and hygiene, and, where possible, contact tracing. *See id.*  
 16 ¶¶ 7-11. Governor Newsom announced a state of emergency in California on March 4, and the  
 17 President of the United States declared a national emergency on March 13. RJN, Exs. C, D.<sup>6 7</sup>  
 18 Yet the rate of infection today is considerably higher than it was in March. *See* Beck Decl. ¶ 15.

19  
 20 <sup>3</sup> *See Coronavirus in the U.S.: Latest Map and Case Count*, *N.Y. Times*,  
 21 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited July 10,  
 2020).

22 <sup>4</sup> Department of Public Health, State of California, *Covid-19 by the Numbers* (July 13, 2020),  
 23 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-  
 24 19%20by%20the%20Numbers](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers).

25 <sup>5</sup> The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, (July 13, 2020,  
 26 2:19 P.M. E.T.), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

27 <sup>6</sup> Executive Department, State of California, *Proclamation of a State of Emergency* (March 4,  
 28 2020), [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-  
 Proclamation.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf).

<sup>7</sup> The White House, *Proclamation on Declaring a National Emergency Concerning the Novel  
 Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020),  
[https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-  
 concerning-novel-coronavirus-disease-covid-19-outbreak](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak).

1           **B. ICE’s Initial COVID-19 Response**

2           The federal government issues F-1 visas to international students who attend accredited  
 3 American universities or other academic institutions on a full-time basis. 8 C.F.R. § 214.2(f). The  
 4 requirements for F-1 visa holders are set forth in 8 C.F.R. § 214.2. That regulation states, in  
 5 relevant part, that the student must take a full course of study and that no more than “one class or  
 6 three credits” per semester or quarter may be counted toward the full course of study if the class is  
 7 taken “on-line or through distance education.” 8 C.F.R. §§ 214.2(f)(5)(i), 214(f)(6)(i)(G).  
 8 However, in its initial response to the pandemic, ICE recognized the need for flexibility with  
 9 respect to these requirements. In particular, on March 9, 2020, ICE’s Student and Exchange  
 10 Visitor Program (“SEVP”) issued guidance (“March 9 Guidance”) advising that “SEVP-certified  
 11 schools may need to adapt their procedures and policies to address the significant public health  
 12 concerns associated with the COVID-19 crisis.” RJN, Ex. E at 1.<sup>8</sup> In issuing the guidance, ICE  
 13 stated that it was “focused on ensuring that nonimmigrant students are able to continue to make  
 14 normal progress in a full course of study” and that it would be “flexible with temporary  
 15 adaptations,” while further recognizing that “the COVID-19 crisis is fluid and rapidly changing.”  
 16 *Id.* Further, ICE’s March 9 Guidance contemplated the necessity of “leaving room for schools to  
 17 comply with state or local health emergency declarations.” *Id.*

18           Just days later, on March 13, 2020, ICE issued further “Guidance for SEVP Stakeholders”  
 19 (“March 13 Guidance”) which provided, in relevant part:

20           If a school closes temporarily but offers online instruction or another alternative  
 21 learning procedure, nonimmigrant students should participate in online or other  
 22 alternate learning procedures and remain in active status in SEVIS.... Given the  
 23 extraordinary nature of the COVID-19 emergency, SEVP will allow F-1 and/or M-  
 24 1 students to temporarily count online classes towards a full course of study in  
 25 excess of the limits stated in 8 CFR 214.2(f)(6)(i)(G).... This temporary provision  
 26 is only in effect for the duration of the emergency and in accordance with the  
 27 procedural change documents filed in a timely manner to SEVP.

28           <sup>8</sup> *Broadcast Message: Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M nonimmigrant students* (March 9, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf> (“March 9 Guidance”) at 1.

1 RJN, Ex. B at 1.<sup>9</sup> Further, according to its express terms, this Guidance applied to F-1 visa  
 2 holders “even if they have left the United States and are taking the online classes from  
 3 elsewhere.” *Id.* at 1-2.

#### 4 C. The University of California’s COVID-19 Response

5 Founded in 1868, the University of California was founded upon a simple but audacious  
 6 idea: California should establish a great public university available to all—one that would serve  
 7 equally the children of immigrants and settlers, landowners and barons.<sup>10</sup> More than 150 years  
 8 later, the University today is one of the world’s premier educational systems, comprising ten  
 9 campuses and educating more than 285,000 undergraduate and graduate students annually.<sup>11</sup> True  
 10 to its founding principle, the University continues to be available to all—including approximately  
 11 37,500 F-1 visa students from across the globe. ECF No. 4-4 [Decl. of Carol T. Christ] (“Christ  
 12 Decl.”) ¶ 2.

13 Consistent with federal, state, and local guidance on preventing the spread of COVID-19,  
 14 and consistent with the March 9 and March 13 Guidances, the University undertook, with  
 15 substantial investment of time and resources,<sup>12</sup> to transition its academic curricula to remote  
 16 instruction in March 2020. Since then, the University has engaged in careful, deliberate, and  
 17 iterative planning processes, prioritizing the health and safety of its entire academic community  
 18 and that of the surrounding communities, while also continuing to fulfill its mission of providing  
 19 world-class educational opportunities to all its students. Christ Decl. ¶¶ 2-6, ECF Nos. 4-5, 4-6  
 20 [Ex. A, B to Christ Decl.]; *see also* ECF No. 4-8 [Decl. of Robert T. Schooley] (“Schooley  
 21 Decl.”) ¶ 15; Byington Decl. ¶¶ 4-6. The University made substantial investment in online

22 <sup>9</sup> *See COVID-19: Guidance for SEVP Stakeholders*,  
 23 [https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance\\_3.13.20.pdf](https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf) at 1 (“March 13 Guidance”).

24 <sup>10</sup> *See* <https://www.universityofcalifornia.edu/news/university-california-born> (last visited July 9,  
 25 2020).

26 <sup>11</sup> *See Fall Enrollment at a Glance (2019)*, University of California,  
 27 <https://www.universityofcalifornia.edu/infocenter/fall-enrollment-glance> (last visited July 9,  
 28 2020).

<sup>12</sup> ECF No. 4-1 [Decl. of David Alcocer] (“Alcocer Decl.”) ¶ 10. The University of California estimates that if the July 6 Directive takes effect, the cost in additional expenses to the University is likely to be in the millions of dollars. *Id.* ¶ 10.

1 solutions, *see* Alcocer Decl. ¶ 10, in part based on its reliance on ICE’s March 13 Guidance that  
 2 international students would not thereby be precluded from maintaining their F-1 visa status  
 3 during the COVID-19 crisis and that the exemption would remain “in effect for the duration of  
 4 the emergency.” RJN, Ex. B at 1. That emergency continues to this day and likely will for the  
 5 foreseeable future.

6 The University has devoted considerable thought, effort, and resources to determine how  
 7 best to advance its educational mission while protecting its students, faculty, and staff amidst the  
 8 pandemic. The University and each campus have monitored state and local government data,  
 9 recommendations, and directives regarding COVID-19 response and have abided by applicable  
 10 reopening requirements and shelter-in-place restrictions. *See, e.g.*, Beck Decl. ¶¶ 6; Christ Decl.  
 11 ¶¶ 6, 16 & Ex. A; Byington Decl. ¶¶ 4-5; Schooley Decl. ¶¶ 3-4, 7-8; ECF No. 4-7 [Decl. of  
 12 Deborah Deas] (“Deas Decl.”) ¶¶ 4-7.

13 The University and its campuses have also formed numerous working groups and task  
 14 forces to assess and proactively plan responses to potential scenarios resulting from the  
 15 pandemic.<sup>13</sup> *See, e.g.*, Byington Decl. ¶¶ 4-6; Christ Decl. ¶¶ 4-9; Schooley Decl. ¶¶ 4, 15; Deas  
 16 Decl. ¶¶ 3-5; ECF No. 4-9 [Decl. of Roger Wakimoto] (“Wakimoto Decl.”) ¶¶ 4-5; Beck Decl.  
 17 ¶¶ 4-6. For example, in February, researchers at UC San Diego (“UCSD”) developed a dynamic  
 18 compartmental transmission model of COVID-19 to simulate spread among the campus  
 19 community to provide a quantitative framework for pandemic response planning; they concluded  
 20 that the University must limit large-scale gatherings, including in classrooms, and limit the  
 21 density of on-campus housing. Schooley Decl. ¶¶ 6-7. Between April and June, UC Riverside’s

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22  
 23 <sup>13</sup> To take but one campus, UC Berkeley’s response has been coordinated by *nine* committees.  
 24 Christ Decl. ¶ 4. One such committee, the Public Health and Testing Advisory Committee, is  
 25 chaired by Dr. Nicholas Jewell, Emeritus Professor of Biostatistics in the UC Berkeley School of  
 26 Public Health and includes infectious disease experts, public health epidemiologists, physicians,  
 27 scientists with expertise in diagnostic testing, and data scientists. *Id.* Between May and June 2020,  
 28 this committee evaluated all options for providing a healthy and effective learning environment  
 for the 2020-21 year, from full remote instruction to return to mostly in-person instruction. *Id.* ¶ 8.  
 On June 17, the committee issued its report recommending that “[t]o the extent that any classes  
 occur in person” in Fall 2020, such classes should be limited to “26 [individuals] or under  
 (including instructors).” The report also explained that “remote access will likely be required for  
 most if not all classes because at-risk participants may not be able to attend in person.” *Id.* at ¶ 9.

1 (“UCR’s”) Instructional Continuity Working Group, comprising of faculty, staff, and students,  
 2 evaluated options for providing a healthy and effective teaching environment for the 2020-21  
 3 academic year. Deas Decl. ¶ 4. UCR’s response to the pandemic is coordinated among ten  
 4 faculty-led working groups, including public health, budget and finance, student services  
 5 continuity, student health assistance, instructional continuity, testing, and instructional  
 6 technology. *Id.* ¶ 6. UCLA’s Emergency Management Planning Group began working on  
 7 UCLA’s COVID-19 response in February 2020. *See* Beck Decl. ¶¶ 2, 7-8. UCLA’s efforts  
 8 include its “Back to School” campus-wide working group, and regular consultation between  
 9 UCLA Health’s infectious control experts, officials from other UC campuses, and officials with  
 10 the LA County Department of Public Health. *See* Beck Decl. ¶¶ 4-6; Wakimoto Decl. ¶¶ 4-5, 8.

11 At the system-wide level, the University has created a Testing and Tracing Task Force,  
 12 which includes subject matter experts, administrators, and faculty, and staff from across the  
 13 University. Beck Decl. ¶ 9; Christ Decl. ¶ 7. The Task Force has emphasized that, for all UC  
 14 campuses, “[t]he cornerstone of mitigation will be decreasing normal campus population density,  
 15 in order to decrease interactions that may result in person-to-person transmission of the virus.”  
 16 Christ Decl. ¶ 9; *see also id.* at Ex. B. Beginning in March 2020, the Council of the Vice  
 17 Chancellors of Research also began holding weekly meetings to provide guidance regarding the  
 18 impact of the pandemic on university research. Wakimoto Decl. ¶ 4. And, on May 22, 2020,  
 19 recognizing the need to dramatically transform on-site operations, The Regents released the  
 20 “University of California Consensus Standards for Operation of Campus and ANR Locations in  
 21 Light of the SARS-CoV-2 Pandemic.” Christ Decl. ¶ 6, Ex. A.

22 Following months of study and consultation with epidemiologists, medical experts, and  
 23 industry experts, all ten campuses created plans for their Summer and Fall 2020 curricula based  
 24 on the status of COVID-19 in their specific geographic locations. *See, e.g., id.* ¶ 5 (UC Berkeley);  
 25 Beck Decl. ¶¶ 4-8 (UC Los Angeles); Deas Decl. ¶¶ 15, 20 (UC Riverside); Schooley Decl.  
 26 ¶¶ 13-16 (UC San Diego). The campuses have dramatically transformed their approach to  
 27 instruction for Fall 2020 in particular: In reliance on the March 13 Guidance and informed by the  
 28 May 22, 2020 Consensus Standards, UC Berkeley announced that the Fall semester would be

1 online with only limited in-person classes. Christ Decl., ¶ 11. UC Davis plans to offer most  
2 courses remotely; UC Irvine courses will be remote with minimal exceptions; UCLA is currently  
3 all-remote, but anticipates 15% to 20% of courses will be in-person or in a hybrid format; and UC  
4 San Diego hopes for 30% in person classes, with 70% remote or hybrid. *See, e.g.*, Deas Decl.  
5 ¶¶ 12-15; Beck Decl. ¶¶ 8, 11; Wakimoto Decl. ¶ 9; Schooley Decl. ¶ 16. Thus, classes will be  
6 remote in Fall 2020 for most courses and students. Even those courses with limited in-person  
7 instruction will also allow for remote attendance. Christ Decl. ¶ 6; Deas Decl. ¶ 15. To implement  
8 these recommendations, the campuses expended further time and resources developing a class  
9 schedule that accounted for the number and nature of courses and whether they would be held  
10 entirely online or in person. *See, e.g.*, Christ Decl. ¶ 12; Schooley Decl. ¶¶ 13-14; Deas Decl.  
11 ¶¶ 15, 20. These plans are subject to change, based on new information that infections are now  
12 surging in California and elsewhere. *See, e.g.*, Byington Decl. ¶ 15; Schooley Decl. ¶ 16;  
13 Wakimoto Decl. ¶ 9.

14         These precautions have been put in place with additional specific consideration for the  
15 University faculty and others with pre-existing health conditions. Christ Decl. ¶ 17. For example,  
16 the average UC Berkeley faculty member is 52 years old, with many faculty members over the  
17 age of 65. Christ Decl. ¶ 17(d). While every human is at risk from COVID-19, older adults are at  
18 the highest risk for severe illness or death. Byington Decl. ¶ 7.

19         UC Berkeley, like all other UC campuses, has spent months preparing for the Fall  
20 semester. *See, e.g.*, Christ Decl. ¶ 16; Deas Decl. ¶ 20; Schooley Decl. ¶ 15. For example, at UC  
21 Berkeley, Fall semester enrollment began on July 8, 2020, and UC Berkeley students report back  
22 to campus in a few weeks for classes beginning on August 26, 2020. Christ Decl. ¶ 16. Other UC  
23 campuses offer undergraduate classes starting in September, and student enrollment in these  
24 classes has already begun. *See* Schooley Decl. ¶ 16. At this point, it would be extremely difficult  
25 for the campuses to develop a revised educational plan that would enable all international students  
26 to maintain their visas under the Directive. Deas Decl. ¶ 20; Christ Decl. ¶ 16; *see also* Schooley  
27 Decl. ¶¶ 15-16. In addition to the University's determinations regarding the risk of reopening or  
28 adding more in-person instruction, it is an unfair and unnecessary drain on already strained public

1 resources to require the University to upset months of planning for the Fall semester within a  
2 matter of mere weeks.

3 **D. The Loss of International Students and Harm to the University.**

4 The loss of international students enrolled at the University will have substantial adverse  
5 effects. Nearly 30% of UC Berkeley’s graduate students and 50% of its engineering graduate  
6 students are international students potentially affected by the Directive. Christ Decl. ¶ 17; *see also*  
7 Deas Decl. ¶ 21(b). These graduate students perform critical research roles and serve as teaching  
8 assistants. Christ Decl. ¶ 17. The loss of these students would have significantly detrimental  
9 effects on UC Berkeley’s ability to carry out its instruction of undergraduates.<sup>14</sup> *Id.* The  
10 University’s research mission also depends on numerous international partnerships and  
11 collaborations, which in turn depend on the recruitment and enrollment of the best and brightest  
12 students from across the world, particularly in the science, technology, engineering, and  
13 mathematics (“STEM”) disciplines. Christ Decl. ¶ 18; *see also* Schooley Decl. ¶ 20(b). Even a  
14 semester-long disruption in the University’s ability to conduct significant STEM research would  
15 have detrimental effects on it as an international research university.<sup>15</sup> *Id.* Further, the loss of  
16 diversity at the University should international students be forced to withdraw will have a  
17 negative pedagogical impact on all students, who will be deprived of the diversity of perspectives  
18 and experience that enrich the learning environment. Christ Decl. ¶ 17; *see also* Deas Dec. ¶ 21(d);  
19 Schooley Decl. ¶¶ 20(d), 21(g).

20 \_\_\_\_\_  
21 <sup>14</sup> Tuition paid by international students is significant to UC’s finances. Christ Decl. ¶ 17.  
22 International undergraduates at the University accounted for approximately \$1.1 billion in tuition  
23 and fee receipts in the 2019-20 school year. Alcocer Decl. ¶ 5. Tuition and fees attributable to  
24 international graduate students account for an additional \$350 million. *Id.* ¶ 6. This financial  
25 shortfall cannot easily be recouped by enrolling other students, particularly due to the difference  
26 in tuition between in-state and out-of-state students. *Id.* ¶ 9. These negative financial impacts also  
27 affect UC’s ability to support financial aid and to undertake infrastructure improvements across  
28 campuses. *Id.*

<sup>15</sup> Representative research at UC Berkeley that relies in significant part on the enrollment of  
international students includes, *inter alia*, a project for the U.S. Army in which UC Berkeley  
students are conducting cutting-edge research related to drone technology and a research program  
developing projection algorithms to predict COVID-19 cases, hospitalizations, ICU admissions,  
and ventilator needs at the county and hospital level throughout the United States. In each case,  
the loss of international students with discrete and unique skillsets would create extensive delays  
unacceptable to UC’s partners and to society writ large. Christ Decl. ¶ 18.

1 As a result, the Directive forces University campuses to choose between losing numerous  
 2 international students who bring immense benefits to the academic community or taking  
 3 burdensome steps to provide in-person instruction that increases risks to the health of the  
 4 University's students, faculty, and staff. Christ Decl. ¶ 21; Deas Decl. ¶ 27; Schooley Decl. ¶ 22.  
 5 Each University campus would be forced to increase the number of in-person classes available,  
 6 thereby increasing the risk of exposure to the COVID-19 virus to other community members,  
 7 including the faculty required to lead those in-person classes as well as the staff needed to support  
 8 them. *See, e.g.*, Christ Decl. ¶ 21. Further, to comply with the Directive, the University will be  
 9 required to reissue thousands of Form I-20 documents for the F-1 visa holders across each of its  
 10 campuses. *Id.* at ¶ 17. At UC Berkeley alone, this will require hundreds of staff hours to complete.  
 11 *Id.*

#### 12 E. Students' Reliance on ICE's March 13 Guidance

13 As a result of the University's response to the COVID-19 pandemic, which relied in part  
 14 on the March 13 Guidance, all University students in effect have relied on the March 13 Guidance  
 15 in planning to attend the University this Fall. International and U.S.-based students alike have  
 16 taken out loans and made housing arrangements or moved home for the Fall semester anticipating  
 17 that their studies would resume through remote instruction. *See* Decl. of Doe No. 2 ("Doe No. 2  
 18 Decl.") ¶ 8; Decl. of Doe No. 3 ("Doe No. 3 Decl.") ¶ 7;<sup>16</sup> *see also* Decl. of Kavitha Iyengar  
 19 ("Iyengar Decl.") ¶ 8. Many international students have returned to their home countries in  
 20 reliance on the government's instruction that their studies could resume online. Many of those  
 21 students are now unable to return to the United States because of travel restrictions, the  
 22 government's refusal to re-issue visas and, now, the government's insistence that universities  
 23 certify that their instruction will proceed in person. *See, e.g.*, Christ Decl. ¶ 19. Other students  
 24 who have remained in the United States will be forced to leave under the Directive and will be  
 25 forced to break leases and pay resulting penalties. *Id.*; *see also* Doe No. 1 Decl. ¶ 10; Doe No. 2  
 26

27 <sup>16</sup> This Motion for Preliminary Injunction is accompanied by a Motion for Does 1 to 4 to Proceed  
 28 Under Pseudonyms, filed concurrently herewith.



1 Decl. ¶ 8; Doe No. 3 Decl. ¶ 7.

2 Practically, it is too late for any student to transfer to another university, mere weeks  
3 before the start of the semester, especially international students who must find a university in this  
4 country that can certify its intent to offer a mostly in-person curriculum despite the significant  
5 health risks involved in doing so. Even if students wanted to transfer, it is also unlikely that there  
6 would be sufficient alternative in-person programs in the country for all international students  
7 given the specialized nature of many students' studies and the ongoing pandemic. *See* Doe No. 1  
8 Decl.; Doe No. 2 Decl. ¶¶ 6-8; *see also* Deas Decl. ¶ 23; Iyengar Decl. ¶ 6.

9 Moreover, international students face emotional and psychological trauma from the  
10 sudden and unanticipated disruption to their ability to pursue their education in the United States,  
11 the inability to participate in U.S.-based practical training opportunities (e.g. internships) which  
12 will further negatively impact their professional prospects, violence and poverty afflicting their  
13 home countries, and being forced to return to home country living situations without reliable,  
14 high-speed internet access necessary for remote instruction. *See, e.g.*, Doe No. 1 Decl. ¶¶ 8-10;  
15 Doe No. 2 Decl. ¶¶ 6-8; Doe No. 4 Decl. ¶¶ 6; *see also* Christ Decl. ¶ 19; Schooley Decl. ¶ 21.

16 **F. ICE's Sudden and Arbitrary Re-imposition of In-Person Education**  
17 **Requirements During the COVID-19 Emergency**

18 Despite the President's continuing national emergency declaration and the March 13  
19 Guidance's express statement that its exemption from the in-person class requirement would  
20 remain "in effect for the duration of the [COVID-19] emergency," on July 6, 2020, ICE suddenly  
21 and arbitrarily reversed its course, stating:

- 22 1) recipients of F-1 visas are no longer permitted to "take a full online course load and  
23 remain in the United States";
- 24 2) "[a]ctive students currently in the United States enrolled in such programs must depart  
25 the country or take other measures, such as transferring to a school with in-person  
26 instruction to remain in lawful status or potentially face immigration consequences"  
27 such as the initiation of removal proceedings;
- 28 3) no new F-1 visas would issue to students planning to enroll in programs that will be  
fully online for the fall semester;
- 4) "students attending schools offering a hybrid model – that is, a mixture of online and

1 in person classes – will be allowed to take more than one class or three credit hours  
 2 online,” provided that for each such student, the school certifies by August 4, 2020,  
 3 “within 21 business days of publication” of the Directive, “that the school is not  
 4 operating entirely online, that the student is not taking an entirely online course load  
 for the fall 2020 semester, and that the student is taking the minimum number of  
 online classes required to make normal progress in their degree program.”

5 RJN, Ex. A.

6 The Directive also re-characterizes ICE’s March 13 Guidance, stating that the earlier  
 7 guidance “instituted a temporary exemption regarding the online study policy for the *spring and*  
 8 *summer* semesters.” *Id.* at 1 (emphasis added). Nothing in the March 13 Guidance, however,  
 9 suggests any such temporal limit. To the contrary, it explicitly stated it would remain “in effect  
 10 for the duration of the emergency.” RJN, Ex. B at 1. Nowhere in the Directive or accompanying  
 11 News Release, *id.*, Ex. F, does ICE provide any justification for the reversal of policy, nor is there  
 12 any indication that the government undertook any consideration or analysis of relevant factors  
 13 such as the impact of the reversal on the health and safety of university students, faculty, and  
 14 staff, the effect on public health for the communities surrounding every academic institution  
 15 affected by the policy change, or the justifiable reliance on the March 13 Guidance by universities  
 16 and students in planning for the Fall 2020 term. The Directive also contains no acknowledgement  
 17 of the ongoing—indeed, rapidly-worsening—COVID-19 pandemic.

### 18 III. LEGAL STANDARD

19 A preliminary injunction may properly issue where the plaintiff establishes that (1) it is  
 20 “likely to succeed on the merits,” (2) it is “likely to suffer irreparable harm in the absence of  
 21 preliminary relief,” (3) “the balance of equities” tips in its favor, and (4) an “injunction is in the  
 22 public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)  
 23 (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). In certain cases, “serious  
 24 questions going to the merits” and a hardship balance that tips sharply toward the plaintiff can  
 25 support the issuance of a preliminary injunction, assuming the other two *Winter* elements are met.  
 26 *Alliance for the Wild Rockies*, 632 F.3d at 1132. Serious questions “need not promise a certainty  
 27 of success, nor even present a probability of success, but must involve a fair chance of success on  
 28

1 the merits.” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (internal  
 2 citations omitted). Under the Ninth Circuit’s “sliding scale” approach, “the elements of the  
 3 preliminary injunction test are balanced, so that a stronger showing of one element may offset a  
 4 weaker showing of another.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (internal  
 5 citations omitted).

#### 6 **IV. ARGUMENT**

7 This case arises under the Administrative Procedure Act, which requires that the Court set  
 8 aside agency action that is, *inter alia*, arbitrary and capricious, otherwise unlawful, or taken  
 9 without observing procedure required by law. *See* 5 U.S.C. § 706(2)(A), (D). ICE’s July 6  
 10 Directive fails under the APA standard in at least two general respects: it is both (i) arbitrary and  
 11 capricious for lack of any reasoned explanation and for failure to consider factors plainly relevant  
 12 to such a significant reversal of policy, and (ii) defective because ICE failed to provide the public  
 13 advance notice of its proposed action or any opportunity to comment on it before finalization.

14 The July 6 Directive is arbitrary, capricious, or otherwise unlawful on at least three  
 15 separate grounds. *First*, ICE failed to offer in or with the Directive any reasoned explanation for  
 16 its sudden reversal of the March 13 Guidance—which ICE had stated expressly would extend “for  
 17 the duration of the emergency.” When the government reverses its own earlier policy, it must  
 18 “acknowledge and provide an adequate explanation for its departure from established precedent,  
 19 and an agency that neglects to do so acts arbitrarily and capriciously.” *Jicarilla Apache Nation v.*  
 20 *U.S. Dep’t of the Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (internal citations omitted); *see*  
 21 *also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (agency departure from  
 22 prior policy impermissible without “explaining its changed position”); *Dep’t of Homeland Sec. v.*  
 23 *Regents of the Univ. of Cal.*, No. 18-587, 2020 WL 3271746 (U.S. June 18, 2020) (“*Regents*”), at  
 24 \*14-15.

25 *Second*, ICE failed to consider important aspects of the problem, including: (1) the health  
 26 risks associated with its new policy; the burden on universities of having to certify thousands of  
 27 F-1 students as complying with the Directive’s strictures regarding in-person instruction, all by  
 28 August 4, when most students will not yet have committed to their classes; (2) the impact of the

1 reversal on the finances of, and other costs that must be borne by, universities, due to the loss of  
 2 tuition from F-1 students who disenroll or from having now to provide safe in-person instruction  
 3 and certify that each student engaged in a hybrid program that meets the Directive's requirements;  
 4 and (3) the many reliance interests, both of the University and its F-1 students, that ICE's now  
 5 abandoned March 13 Guidance engendered. An agency must grapple with such issues when it  
 6 issues a substantive rule affecting the rights or obligations of individuals or entities.<sup>17</sup> *See Encino*  
 7 *Motorcars*, 136 S. Ct. at 2124-2126.

8 *Third*, ICE failed to articulate any rational connection between the facts it found and the  
 9 choice it made. *See Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687  
 10 n.15 (9th Cir. 2007); *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010).

11 Further, the July 6 Directive is fatally flawed, because it is a substantive rule affecting the  
 12 rights and obligations of the University and its students, and the promulgation of which required  
 13 ICE to first give notice to the public of its intent to adopt the rule, and provide any interested  
 14 person with an opportunity to comment before the Directive was finalized. 5 U.S.C. § 553(b). It  
 15 did not do that and, therefore, the July 6 Directive is unlawful for failure to follow the rulemaking  
 16 procedure required by the APA.

17 On both claims, Plaintiff is likely to succeed on the merits. The other preliminary  
 18 injunction requirements are likewise readily satisfied. As the supporting declarations make  
 19 abundantly clear, the University of California system stands to suffer substantial and irreparable  
 20 harm absent a preliminary injunction preserving the status quo. The balance of equities also  
 21 weighs heavily in favor of injunctive relief: Plaintiff and its students will be injured immediately  
 22 and irreparably under the Directive, while the United States stands to lose nothing if the Directive  
 23 is enjoined. After all, a preliminary injunction would merely maintain the status quo the  
 24 government itself instituted, responsibly, in its March 13 Guidance, which it stated at the time  
 25

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26 <sup>17</sup> ICE concedes its July 6 Directive is intended to operate as a final rule. The Directive itself  
 27 states that the "U.S. Department of Homeland Security plans to publish the procedures and  
 28 responsibilities in the below Broadcast Message [the July 6 Directive] in the near future *as a*  
*Temporary Final Rule in the Federal Register.*" RJN, Ex. A at 1 (emphasis added).

1 would remain in place for the duration of the emergency. The emergency is not over. Finally, a  
 2 preliminary injunction is in the public interest. The value to the public of colleges and universities  
 3 having vibrant and diverse student bodies, including international students, is obvious—that value  
 4 manifests not merely in the form of the cultural experiences of individual students or the student  
 5 body and campus life generally, but in the economies of the host communities. If the international  
 6 students leave, that value to the public is lost. Alternatively, coercing a mass re-opening (which  
 7 appears to be Defendants’ conceded purpose, as discussed below) while the pandemic is still  
 8 raging would risk increased transmission and community spread, harming the public in all the  
 9 ways public health officials have been warning about.

10 **A. THE REGENTS ARE LIKELY TO SUCCEED ON THE MERITS.**

11 **1. The Regents Are Likely to Prevail on the First Cause of Action Under  
 12 the APA Because the July 6 Directive is Arbitrary and Capricious.**

13 The Administrative Procedure Act “sets forth the procedures by which federal agencies  
 14 are accountable to the public and their actions subject to review by the courts.” *Franklin v.*  
 15 *Massachusetts*, 505 U.S. 788, 796 (1992). In evaluating whether agency actions are reasonable  
 16 and lawful, courts must conduct a “thorough, probing, in-depth review” of the agency’s reasoning  
 17 and a “searching and careful” inquiry into the factual underpinnings of the agency’s decision.  
 18 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971). A court “shall”  
 19 set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in  
 20 accordance with law.” 5 U.S.C. § 706(2)(A); *see also Butte Env’tl. Council v. U.S. Army Corps*  
 21 *of Eng’rs*, 620 F.3d 936, 945 (9th Cir. 2010). Agency action should be set aside as arbitrary and  
 22 capricious if the agency fails to explain the basis of its decision, fails to consider all relevant  
 23 factors and articulate a “rational connection between the facts found and the choice made,” or  
 24 fails to offer a “reasoned explanation” for departures from preexisting policies. *Motor Vehicle*  
 25 *Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); *Encino*  
 26 *Motorcars*, 136 S. Ct. at 2126 (in explaining its changed position, agency must also be cognizant  
 27 that prior policies may have “engendered serious reliance interests that must be taken into  
 28 account”); *see also Regents*, 2020 WL 3271746, at \*14. The Directive fails each of these  
 requirements.

1                                    **a.        The Directive Failed to Offer a Reasonable Explanation for**  
2                                    **ICE’s Policy Reversal.**

3                    Having stated in that earlier Guidance that the policy would remain in effect “for the  
4 duration of the emergency,” it was nothing short of shocking that ICE would announce in the  
5 Directive that F-1 students would not be allowed into the country or, if already here, would be  
6 required to leave, if their schools are not intending to provide traditional classroom instruction,  
7 and that universities would have to certify by August 4 that the courses selected by thousands of  
8 international students in hybrid programs meet the Directive’s in-person classroom strictures. The  
9 July 6 Directive never acknowledges what the March 13 Guidance actually said – that it would  
10 remain in place for the duration of the emergency – or explains why ICE changed course. The  
11 Directive instead states that ICE had only provided guidance for the “spring and summer  
12 semesters.” That is not correct. *See* RJN, Ex. B at 1.

13                    Even where authorized to do so, when a federal agency reverses its own prior policy, it  
14 must “acknowledge and provide an adequate explanation for its departure from established  
15 precedent, and an agency that neglects to do so acts arbitrarily and capriciously.” *Jicarilla*, 613  
16 F.3d at 1119 (D.C. Cir. 2010) (internal citation omitted); *see also Encino Motorcars*, 136 S. Ct. at  
17 2126 (agency cannot depart from prior policy without “explaining its changed position”);  
18 *Regents*, 2020 WL 3271746, at \*14-15 (finding that DHS’s decision to rescind the Deferred  
19 Action for Childhood Arrivals (DACA) program was arbitrary and capricious, in part because  
20 DHS’s memorandum rescinding the program failed to consider certain aspects of policy). Thus,  
21 reversing a pre-existing policy requires a “more detailed justification than what would suffice for  
22 a new policy created on a blank slate.” *FCC v. Fox Telev’n Stns., Inc.*, 556 U.S. 502, 515 (2009).

23                    Here, as discussed, the Directive represents a complete reversal of Defendants’ earlier  
24 Guidance on not only the existence and severity of the COVID-19 pandemic but, more  
25 importantly, the ability of students studying on F-1 visas “to continue to make progress in a  
26 normal course of study.” *See* RJN, Ex. E at 1. The failure to provide any justification for the  
27 reversal is contrary to law and requires that the Directive be set aside.

28

1                                   **b.       The Directive Failed to Consider Important Aspects of the**  
 2                                   **Problem, Including the Reliance of Plaintiff and Its Students on**  
 3                                   **the March 13 Guidance.**

4           Further, the Directive fails to consider, much less evaluate, the significant reliance  
 5 interests of both the University and its affected students engendered by the current DHS/ICE  
 6 policy. *Regents*, 2020 WL 3271746 at \*4; *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106  
 7 (2015) (government must provide special justification “when its prior policy has engendered  
 8 serious reliance interests that must be taken into account”). The Directive also fails to consider the  
 9 health risks that a broader re-opening of in-person classes would entail; the burdens on the  
 10 universities (and the likely impossibility) of having to certify, by August 4, that the courses  
 11 chosen by each F-1 visa holder in a hybrid program comply with the in-person classroom  
 12 strictures of the Directive; and the financial and other impacts the Directive would have on  
 13 universities and their educational programs, as well as on students, faculty and staff.

14           The March 13 Guidance expressly permitted F-1 students to “participate in online or other  
 15 alternate learning procedures” and assured universities and students that the policy would be “in  
 16 effect for the duration of the emergency.” *See* RJN, Ex. B at 1; *see also id.* at 1-2 (applying same  
 17 policy to international students who return to their home countries and continue to take classes  
 18 on-line). To change this policy with no notice and without considering any of these effects is an  
 19 arbitrary, capricious, and unreasoned agency action. It must be set aside.

20           Based in part on the March 13 Guidance, the University started preparing and planning for  
 21 the Fall 2020 semester four months ago. *See* Christ Decl. ¶ 3. Specifically, at each campus, the  
 22 University engaged its faculty in the assessment and development of COVID-19 recovery and  
 23 resiliency planning to ensure the safety of its university community while continuing to carry out  
 24 its education and research mission. *See generally id.*, ¶¶ 4-17. The University invested millions of  
 25 dollars and thousands of faculty hours tackling important considerations impacting health and  
 26 safety. Alcocer Decl., ¶ 10. At UC Berkeley alone, nine committees of experts across numerous  
 27 disciplines have worked for months to determine the University’s best course forward in the Fall.  
 28 Christ Decl., ¶ 4. Relying on the fact that international students could continue their studies  
 online, the University administration and various working groups devised a complex course

1 schedule that accounted for the large number of courses, the nature of individual courses and the  
2 feasibility of transitioning those courses to online instruction. *Id.* ¶ 12. The University’s Fall  
3 semester curriculum assumed that international students would continue to be enrolled even if  
4 their classes would be held primarily online. *Id.* at ¶¶ 11-16. Also relying on the March 13  
5 Guidance, the University’s Fall curriculum assumed that international graduate students would  
6 continue as teaching assistants. Similarly, the University’s budget for the Fall semester assumed  
7 the continued enrollment of international students. Alcocer Decl., ¶¶ 5-6. The disenrollment of  
8 international students from the University in the Fall semester alone caused by the enforcement of  
9 the Directive could be substantial, and likely cannot be made up by extending offers at this late  
10 date to U.S.-based students. *Id.*

11 UC’s students who hold F-1 visas relied on the March 13 Guidance as well. *See* Christ  
12 Decl. ¶19. Many international students continued to live near their campuses in reliance on the  
13 fact that they could continue their instruction, albeit remotely, through the Fall 2020 semester. *Id.*  
14 If the Directive is enforced, those students who remained in the U.S. during the Summer would be  
15 forced to break their leases at great expense. *Id.* Those students who have already left the country  
16 planning to return for the Fall semester, have not made plans to transfer to other universities – and  
17 are to suffer significant interruption in their education with negative impacts to their career  
18 prospects. Other international students will be unable to participate in U.S.-based practical  
19 training opportunities like internships that will further impact their development of practical skills  
20 and professional networks.

21 Had these international students known that Defendants would abruptly issue its  
22 Directive, thereby reversing the March 13 Guidance, these students could have made other  
23 arrangements for Fall 2020. Now, it is too late to expect students to transfer to other universities,  
24 especially for those students in specialized courses of study, as the Directive suggests that  
25 students may do. Moreover, similarly-situated universities dealing with the devastating effects of  
26 COVID-19—indeed, all of them—would also be forced to primarily offer online instruction. The  
27 government’s facile instruction that international students simply enroll in a different university  
28 offering in-person instruction is particularly cruel under the circumstances.



1 Beyond reliance interests, the Directive is oblivious to other important aspects of the  
 2 problem. Among other things, Defendants failed to consider the social, academic, and research  
 3 impacts of their decision. Many students have already reported the emotional and psychological  
 4 harm from the sudden, unanticipated about-face in the government's immigration policy. Others  
 5 have expressed concern about being forced to return to the violence and poverty afflicting their  
 6 home countries or being forced to return to their home countries where there may not be adequate  
 7 access to reliable high-speed internet required for remote learning technologies.

8 The Directive also fails to account for the various benefits and contributions made by  
 9 international students to institutions of higher learning. *All* students benefit from a diversity of  
 10 perspectives and experiences. Depriving universities of a key element of their diverse student  
 11 bodies does real damage to the institution of learning and to all students' educational experience.  
 12 Moreover, international students play critical roles in the University's research partnerships as  
 13 discussed above. The threat to the University's research objectives caused by the removal of  
 14 international students merely because their coursework will take place online in the midst of a  
 15 global pandemic is substantial. In some cases, the setback in research due to the loss of the unique  
 16 skillsets of many such students is months, if not years. *See* Christ Decl. ¶ 18; Deas Decl. ¶¶ 21(a),  
 17 23; Schooley Decl. ¶ 20(a). Further, Defendants have not acknowledged, much less analyzed or  
 18 considered, the extreme setback to public health that their Directive represents. As a result of the  
 19 significant losses threatened by the disenrollment of thousands of international students, the  
 20 Directive will likely force universities to prematurely revert to in-person instruction, upending  
 21 any gains made by communities in quelling the rapid spread of COVID-19 and squandering the  
 22 past sacrifice of millions across this country. Many of these harms are explained further below, in  
 23 the discussion of irreparable harm, and detailed more completely in the attached declarations. But  
 24 in addition to the Court's evaluation of the gravity of the harms for purposes of that separate  
 25 prong of the preliminary injunction test, it must consider ICE's lack of attention to these harms in  
 26 evaluating the reasonableness of the agency's action. Here, the July 6 Directive lacks the *sine qua*  
 27 *non* of lawful agency action: reasoned decision-making. *See Regents*, 2020 WL 3271746, at \*15.

28 **c. Defendants Failed to Explain Any Basis for the Directive.**

1 The Directive is arbitrary and capricious also because it does not articulate *any* rationale  
 2 that would justify ICE’s decision. It is “a fundamental requirement of administrative law ... that  
 3 an agency set forth its reasons for decision; an agency’s failure to do so constitutes arbitrary and  
 4 capricious agency action.” *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014)  
 5 (internal citation omitted). “[C]onclusory statements will not do; an agency’s statement must be  
 6 one of *reasoning*.” *Id.* (internal marks omitted); *see also Dep’t of Commerce v. New York*, 139 S.  
 7 Ct. 2551, 2569 (2019) (an agency must “articulate[] a satisfactory explanation for [its] decision”).

8 The two and one-half page Directive fails this threshold test. It threatens to inflict grievous  
 9 harm on hundreds of thousands of F-1 visa-holding university students who were invited to study  
 10 at American universities, including the potential for removal proceedings to make them leave,  
 11 without providing *any* explanation—much less a clear and adequate explanation—as to why.

12 The sole statement that might be considered a “justification” is the statement that while  
 13 “accommodations to provide flexibility to schools and nonimmigrant students” may be made,  
 14 such accommodation must be weighed against “a concordant need to resume the carefully  
 15 balanced protections implemented by federal regulations.” RJN, Ex. A at 1. Such threadbare and  
 16 cryptic justification is woefully deficient, if for no other reason than the fact that it cannot  
 17 possibly be based on “the relevant data,” such as the well-documented fact that the COVID-19  
 18 health crisis is currently intensifying, not abating. *See Dep’t of Commerce*, 139 S. Ct. at 2569.  
 19 This is demonstrable from the simple fact that the rate of infections and hospitalizations is greater  
 20 today than it was when the March 13 Guidance issued. Moreover, the government itself is  
 21 predicting that as many as 1.5 million people may ultimately die from COVID-19 illness, with  
 22 over 200,000 of those deaths occurring by November 1. Thus, to the extent that this statement can  
 23 be read as the federal government’s justification for its abrupt about-face from its March 13  
 24 Guidance, it is inadequate as insufficiently based on fact and reason.

25 Moreover, DHS has admitted publicly that the *actual* basis for the reversal of the policy  
 26 rests on political considerations rather than rational decision-making after reasoned deliberation  
 27 and consultation with experts. Acting Deputy Secretary of Homeland Security Kenneth Cuccinelli  
 28 set pretext aside when he plainly announced, on July 7, 2020, that the F-1 visa policy change is

1 designed to “encourage schools to reopen.”<sup>18</sup>

2 In light of Defendants’ failure to provide any comprehensible rationale for its about-face,  
3 the Directive rescinding the March 13 Guidance should be set aside. *SEC v. Chenery Corp.*  
4 (*“Chenery II”*), 332 U.S. 194, 196–97 (a court cannot “be compelled to guess at the theory  
5 underlying the agency’s action; nor can a court be expected to chisel that which must be precise  
6 from what the agency has left vague and indecisive.”); *Nat’l Ass’n of Home Builders v. Norton*,  
7 340 F.3d 835, 849 (9th Cir. 2003) (same).

8 **2. The Regents Will Likely Prevail on Its Second APA Cause of Action,  
9 Because the Directive is a Substantive Rule that Did Not Comply with  
the APA’s Notice and Comment Requirements.**

10 The Regents are also likely to succeed on its claim that the Directive purporting to rescind  
11 the March 13 Guidance also fails to meet the APA’s procedural requirements. The Directive is a  
12 legislative rule compelling universities to take certain action, not previously required, under pain  
13 of being deemed out of compliance. Indeed, ICE states in the Directive itself that it intends to  
14 publish its content at some future time in the Federal Register as a Temporary Final Rule.  
15 Because the Directive is a legislative rule, DHS was required to abide by the full panoply of APA  
16 procedures, including providing notice and an opportunity for public comment. It failed to do so.

17 Under the APA, courts must set aside agency action that is taken without observance of  
18 procedures required by law. 5 U.S.C. § 706(2)(D). An agency’s substantive rules must go through  
19 the APA’s notice-and-comment rulemaking requirements before they become effective. *See* 5  
20 U.S.C. § 553(b), (c); *San Diego Air Sports Ctr., Inc. v. F.A.A.*, 887 F.2d 966, 971 (9th Cir. 1989).  
21 A rule is substantive if it “narrowly limits administrative discretion” or establishes a “binding  
22 norm” that “so fills out the statutory scheme that upon application one need only determine  
23 whether a given case is within the rule’s criterion.” *Colwell v. Dep’t of Health & Human Servs.*,  
24 558 F.3d 1112, 1124 (9<sup>th</sup> Cir. 2009). Put another way, an agency’s substantive rule that has the

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26 <sup>18</sup> John Bowden, *Cuccinelli says rule forcing international students to return home will*  
27 *‘encourage schools to reopen’*, The Hill (July 7, 2020, 4:17 PM),  
28 <https://thehill.com/homenews/administration/506248-cuccinelli-says-rule-forcing-international-students-to-return-home>

1 “force and effect of law” is subject to the APA’s notice and comment procedures. *Chrysler Corp.*  
 2 *v. Brown*, 441 U.S. 281, 302-303 (1979); *accord Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30,  
 3 66 (D.D.C. 2020) (explaining that “a rule is legislative, and therefore must undergo notice and  
 4 comment, when it ‘change[s] the law,’” and concluding that HHS’s amended rule and guidance  
 5 regarding fees for delivering health records was a legislative rule subject to notice and comment)  
 6 (*quoting Nat’l Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011)).

7 Here, the Directive is a substantive rule for which the APA’s notice-and-comment  
 8 requirements applied. Among other things, because the University is adopting a hybrid model –  
 9 that is, a mixture of on-line and in-person classes –for the Fall 2020 semester, the Directive  
 10 compels the University to certify to SEVP for each of its 37,000-plus F-1 students that, among  
 11 other things, “the student is not taking an entirely on line course load” by August 4, 2020. Christ  
 12 Decl. ¶ 17(f). This is a significant burden on the University as it will require thousands of hours of  
 13 staff time, further exacerbated by the fact that only designated school officials certified by DHS  
 14 may perform these tasks, thereby significantly limiting the University’s ability to adapt to this  
 15 substantial added burden. *Id.*. The Directive also compels F-1 visa students to take courses in-  
 16 person to be able to remain in the United States to continue pursuing their studies or face the  
 17 threat of visa revocation or even removal. ICE/SVEP is also conditioning the UC students’  
 18 maintenance of their F-1 nonimmigrant status upon compliance with the Directive. The Directive  
 19 is indisputably a substantive rule, subject to notice and comment requirements.

20 **B. THE REGENTS AND ITS STUDENTS ARE LIKELY TO SUFFER**  
 21 **IRREPARABLE HARM.**

22 The Directive is already inflicting severe and irreparable harm on the University. The  
 23 University is being forced right now to grapple with decisions with life-altering consequences for  
 24 its international students as well as serious impacts to the health and safety of everyone affiliated  
 25 with the University and the communities that it serves. The Directive presents the University with  
 26 a difficult choice: reopen more of its lecture halls, dormitories, and dining halls at increased risk  
 27 to the health of all of its students, faculty, and staff, *or* effectively prevent the University’s F-1  
 28 visa students the opportunity to carry out their studies and, thus, deprive all other University

1 students of the diversity of opinion and perspective that they expect and is central to the pedagogy  
 2 of a world-class academic institution. The July 6 Directive threatens irreparable consequences for  
 3 its academic community, including the immediate loss of valued students and the erosion of any  
 4 gains made to date in protecting its community from an even higher rate of transmission of the  
 5 potentially deadly COVID-19 virus. That the Directive theoretically permits UC students with F-1  
 6 visas to transfer to another university does not materialize into realistic options for UC students at  
 7 this time. In this situation, “[a] delay, even if only a few months, pending trial represents precious,  
 8 productive time irretrievably lost.” *Enyart v. Nat’l Conference of Bar Examiners, Inc.*, 630 F.3d  
 9 1153, 1166 (9th Cir. 2011). Moreover, it is no solution to permit international students to take a  
 10 “hybrid” course load where then any international student with a pre-existing medical condition  
 11 that makes her susceptible to severe illness resulting from COVID-19 would be unfairly  
 12 discriminated against for opting not to attend in person classes.

13 The Directive further creates economic harm to the University. *See* Alcocer Decl. ¶¶ 5-6.  
 14 Moreover, the budget shortfall will also prevent the University from carrying out planned  
 15 infrastructure and capital improvements to its campus facilities. *Id.* ¶ 9. Even before the Directive,  
 16 the University was reeling from the economic fall-out of the COVID-19 pandemic and the  
 17 resultant transition to on-line learning. Indeed, the University spent millions developing its  
 18 COVID-19 recovery and resiliency plans, which investment would be rendered meaningless if the  
 19 University were forced to abandon its well-considered plan to protect the health of its community.  
 20 *Id.* ¶ 10. Furthermore, the University estimates that it will have to expend significant resources to  
 21 reissue I-20 forms for the thousands of students affected by the Directive. *See* Christ Decl., ¶ 17.

22 More importantly, if the Directive is implemented, the University will suffer the loss of  
 23 many international students who are vital to the pedagogy of its lecturers, the vibrancy of its  
 24 culture, and the success of its research programs. The University and surrounding community will  
 25 further lose the substantial economic benefit from international students. Christ Decl. ¶ 19(d).

26 **C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH**  
 27 **HEAVILY IN FAVOR OF A PRELIMINARY INJUNCTION ORDER.**

28 The final elements of the preliminary injunction test—the balance of equities and the

1 public interest—merge when the government is a party. *See League of Wilderness Defs./Blue*  
2 *Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). In assessing  
3 these factors, courts consider the impacts of the injunction on nonparties as well. *See id.* at 766.

4 The balance of equities and the public interest weigh strongly in favor of granting  
5 injunctive relief to The Regents to maintain the status quo, in advance of the August 4 deadline to  
6 submit Form I-20 certifications to ICE. RJN, Ex. A at 1. While UC and its students holding F-1  
7 visas will be severely impacted should the Directive be implemented, the Defendants face no  
8 articulable harm should the Court grant relief. Since Defendants intended for the March 13  
9 Guidance to remain “in effect for the duration of the emergency,” they cannot now claim that they  
10 will be harmed by the continuation of their sound, prior policy. As discussed above, the public  
11 health emergency caused by the COVID-19 pandemic is ongoing, and there is no reasonable basis  
12 to contend otherwise. Further, the reversal in policy appears to stem from a desire to reopen  
13 schools regardless of whether doing so will harm the health and lives of students, faculty, and  
14 staff and place others with whom university community members come into contact at risk. The  
15 balance of equities between UC’s goal of protecting the health and well-being of its community  
16 and maintaining its academic freedom on the one hand, and a federal government seeking to  
17 coerce in-person activity at universities on the other, tips sharply in favor of granting the  
18 injunction. It is in the public interest that Defendants be enjoined from carrying out their arbitrary  
19 and capricious plan to force the premature transition of universities to in-person learning.

20 Finally, a preliminary injunction is appropriate where, as here, the hardship balance tips  
21 sharply toward the plaintiff, and the plaintiff has articulated “serious questions going to the  
22 merits.” *Alliance for the Wild Rockies*, 632 F.3d at 1132. The Regents have demonstrated “a fair  
23 chance of success on the merits” on their claims and irreparable harm if the Directive is permitted  
24 to proceed. Further, the balance of equities and the public interest favor the Regents.

## 25 **V. CONCLUSION**

26 For all the above reasons, this Court should issue a preliminary injunction that (i) enjoins  
27 Defendants from proceeding with their July 6 Directive and (ii) orders that Defendants preserve  
28 the status quo ante pending adjudication of this dispute on the merits.

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Respectfully submitted,

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THE REGENTS OF THE UNIVERSITY OF  
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