

1 ANDREW J. PINCUS (*pro hac vice* to be filed)
 apincus@mayerbrown.com
 2 ELIZABETH ESPIN STERN (*pro hac vice* to be filed)
 estern@mayerbrown.com
 3 MAXIMILLIAN L. DEL REY (SBN 295397)
 mdelrey@mayerbrown.com
 4 MAYER BROWN LLP
 5 1999 K Street, N.W.
 Washington, D.C. 20006-1101
 6 Telephone: (202) 263-3000
 7 Facsimile: (202) 263-3300

8 Attorneys for *Amici Curiae* Leading Business Organizations and Companies

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

 Plaintiffs,

 v.
 UNITED STATES DEPARTMENT
 OF HOMELAND SECURITY, et al.,

 Defendants.

Case No. 20-cv-07331-JSW

**BRIEF OF *AMICI CURIAE*
 LEADING BUSINESS
 ORGANIZATIONS AND
 COMPANIES IN SUPPORT OF
 PLAINTIFFS’ MOTION FOR
 PRELIMINARY INJUNCTION TO
 STAY AGENCY ACTION OR FOR
 PARTIAL SUMMARY JUDGMENT**

 Date: November 23, 2020
 Time: 10:00 A.M.
 Judge: Hon. Jeffrey S. White
 Ctrm.: 5

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

Page

SUMMARY OF ARGUMENTvi

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION 1

ARGUMENT5

THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION BARRING
THE NEW RULES FROM TAKING EFFECT.5

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

 B. The New Rules Will Impede America’s Economic Recovery and Inflict
 Long-Term Damage on U.S. Competitiveness. 8

 C. The Economic Impact of the COVID-19 Pandemic Does Not Support—
 But Rather Weighs Heavily Against—the New Rules. 10

 D. The Rules Will Inflict Irreparable Harm on Large Numbers of U.S.
 Businesses. 12

CONCLUSION..... 15

TABLE OF AUTHORITIES

1				Page(s)
2				
3	Cases			
4				
5	<i>Nat’l Ass’n of Mfrs. v. DHS,</i>			
6	2020 WL 5847503 (N.D. Cal. Oct. 1, 2020)			12
7	Statutes and Regulations			
8				
9	5 U.S.C. § 553(b)(3)(B)			3
10	8 U.S.C. § 1101(a)(15)(H)(i)(b)			12
11	8 U.S.C. § 1182(n)(1)(A)(i)			2
12	8 U.S.C. § 1184(i)(1)			2, 12
13	105 Stat. 1747, <i>et seq.</i> (Dec. 12, 1991).....			3
14	110 Stat. 3009, <i>et seq.</i> (Sept. 30, 1996)			3
15	114 Stat. 1251, <i>et seq.</i> (Oct. 17, 2000)			3
16	118 Stat. 3353, <i>et seq.</i> (Dec. 8, 2004).....			3
17	8 C.F.R. § 214.2(h)(1)(ii)(B)(1)			2
18	Improving and Expanding Training Opportunities for F-1			
19	Nonimmigrant Students with STEM Degrees and Cap-Gap Relief			
20	for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016)			6
21	Strengthening the H-1B Nonimmigrant Visa Classification Program, 85			
22	Fed. Reg. 63,918 (Oct. 8, 2020)			1
23	Strengthening Wage Protections for the Temporary and Permanent			
24	Employment of Certain Aliens in the United States, 85 Fed. Reg.			
25	63,872 (Oct. 8, 2020).....			1, 10, 11, 13
26	Other Authorities			
27	American Immigration Council, <i>The H-1B Visa Program: A Primer on</i>			
28	<i>the Program and Its Impact on Jobs, Wages and the Economy</i> (Apr.			
	2020)			8

1 Stuart Anderson, *New Trump H-1B Visa Restrictions Will Harm*
 2 *Companies*, Forbes (June 23, 2020), <https://bit.ly/2Dhf3TQ>..... 11

3 Deloitte & The Manufacturing Institute, *The jobs are here, but where*
 4 *are the people?: Key findings from the 2018 Deloitte and The*
 5 *Manufacturing Institute skills gap and future of work study 2* (2018)..... 6

6 Britta Glennon, National Bureau of Economic Research, *How Do*
 7 *Restrictions on High-Skilled Immigration Affect Offshoring?*
 8 *Evidence from the H-1B Program* 28 (July 2020),
 9 <https://bit.ly/39XDscO>..... 9, 10

10 National Foundation for American Policy, *Employment Data for*
 11 *Computer Occupations for January to September 2020* (Sept. 2020),
 12 <https://bit.ly/37Pbr8h> 11

13 National Foundation for American Policy, NFAP Policy Brief,
 14 *Employment Data for Computer Occupations* (May 2020),
 15 <https://bit.ly/2PugvEA> 6

16 National Science Foundation, *Research and Development: U.S. Trends*
 17 *and International Comparisons* (Jan. 15, 2020),
 18 <https://bit.ly/2Puq8mK> 10

19 New American Economy Research Fund, *Sizing Up the Gap in our*
 20 *Supply of STEM Workers: Data and Analysis* (Mar. 29, 2017),
 21 <https://bit.ly/2HInlWV> 6, 7

22 Alex Nowrasteh, *Don’t Ban H-1B Workers: They Are Worth Their*
 23 *Weight in Innovation*, Cato at Liberty (May 14, 2020),
 24 perma.cc/SMW4-UUJT..... 5, 10

25 O*NET OnLine, *Summary Report for: 17-2111.01 – Industrial Safety*
 26 *and Health Engineers* (last updated Aug. 18, 2020),
 27 <https://bit.ly/34FBsVq> 13

28 O*NET OnLine, *Summary Report for: 29-2011.00 – Medical and*
Clinical Laboratory Technologists (last updated Aug. 18, 2020),
<https://www.onetonline.org/link/summary/29-2011.00> 13

William Olney & Dario Pozzoli, *The Impact of Immigration on Firm-*
Level Offshoring, Dept. of Econ., Williams College (June 13, 2019),
<https://bit.ly/3a36loa> 9

1 Giovanni Peri, Kevin Shih, Chad Sparber, *STEM Workers, H-1B Visas,*
 2 *and Productivity in US Cities*, J. of Labor Economics S225 (July
 2015), <https://bit.ly/2HM7HcZ>..... 6, 7

3 Sarah Royster, Bureau of Labor Statistics, *Working With Big Data,*
 4 *Occupational Outlook Quarterly* (Fall 2013),
 5 <https://www.bls.gov/careeroutlook/2013/fall/art01.pdf> 13

6 Neil G. Ruiz, Pew Research, *Key Facts About the U.S. H-1B Visa*
 7 *Program* (Apr. 27, 2017), <https://pewrsr.ch/3jC9TAR>..... 5

8 Frederik R. Treyz, et al., Regional Economic Models Inc., *Key*
 9 *Components of Immigration Reform* (July 17, 2013),
<https://bit.ly/3kE6cMb>..... 8

10 U.S. Bureau of Labor Statistics, *Civilian Unemployment Rate* (last
 11 visited Oct. 28, 2020), [https://www.bls.gov/charts/employment-](https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm)
 12 [situation/civilian-unemployment-rate.htm](https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm) 11

13 U.S. Citizenship and Immigration Services, *Characteristics of H-1B*
 14 *Specialty Occupation Workers, Fiscal Year 2019 Annual Report to*
 15 *Congress* (Mar. 5, 2020), <https://bit.ly/37QkBkM>..... 2

16 U.S. Citizenship and Immigration Services, *H-1B Authorized-to-Work*
 17 *Population Estimate 1* (Sept. 30, 2019), <https://bit.ly/34CRZtC> 14

18 U. S. Dep’t of Labor, Bureau of Labor Statistics, *Fastest Growing*
 19 *Occupations* (last modified Sept. 1, 2020),
<https://www.bls.gov/emp/tables/fastest-growing-occupations.htm> 6

20 U.S. Dep’t of State, Bureau of Consular Affairs, *Directory of Visa*
 21 *Categories* (last visited Oct. 28, 2020), <https://bit.ly/3mALWLV> 2

22 Michael E. Waugh, *Firm Dynamics and Immigration: The Case of*
 23 *High-Skilled Immigration*, High-Skilled Migration to the United
 24 States and Its Economic Consequences, Nat’l Bureau of Econ.
 25 Research 205 (May 2018),
 26 <https://www.nber.org/system/files/chapters/c13843/c13843.pdf>..... 6

27 Madeleine Zavodny, Amer. Enterprise Institute for Public Policy
 28 Research & Partnership for a New American Economy,
Immigration and American Jobs (Dec. 2011),
<https://bit.ly/37TFBHI>..... 8

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

Madeline Zavodny, National Foundation for American Policy, *The Impact of H-1B Visa Holders on the U.S. Workforce* (May 2020), <https://bit.ly/34GM4Up> 7

SUMMARY OF ARGUMENT

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

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

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

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

INTEREST OF THE *AMICI CURIAE*

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

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

INTRODUCTION

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

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

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

16 In addition, the employer must certify to the Department of Labor that it will
17 pay its H-1B employee, at a minimum, the greater of “the actual wage level paid by
18 the employer to all other individuals with similar experience and qualifications for the
19 specific employment in question” or “the prevailing wage level for the occupational
20 classification in the area of employment.”⁵ Congress has closely overseen the H-1B
21
22

23 ¹ See, e.g., U.S. Dep’t of State, Bureau of Consular Affairs, *Directory of Visa Categories* (last visited
24 Oct. 28, 2020), <https://bit.ly/3mALWLV>.

25 ² 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

26 ³ 8 U.S.C. § 1184(i)(1).

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

28 ⁵ 8 U.S.C. § 1182(n)(1)(A)(i).

1 program, making multiple revisions since 1990.⁶

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

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

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

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

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

25
26 ⁶ See 105 Stat. 1747, *et seq.* (Dec. 12, 1991) (corrections to the 1990 Act); 110 Stat. 3009, *et seq.*
27 (Sept. 30, 1996) (miscellaneous amendments); 114 Stat. 1251, *et seq.* (Oct. 17, 2000) (American
28 Competitiveness in the Twenty-first Century Act); 118 Stat. 3353, *et seq.* (Dec. 8, 2004) (H-1B Visa
Reform Act of 2004).

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

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

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

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

1
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

ARGUMENT

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

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

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

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

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

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

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

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

1 The federal government itself has recognized these very same benefits.⁹

2 H-1B workers also improve U.S. productivity. A 2015 economic study found
3 that an increased number of H-1B visa holders in a city generates productivity gains—
4 the growth in H-1B workers “explained between one-third and one-half of the average
5 [Total Factor Productivity] growth during” 1990-2010.¹⁰ And another study
6 concluded that eliminating the H-1B program would significantly reduce GDP,
7 confirming the benefits to the overall economy resulting from the H-1B program.¹¹

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

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

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

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

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

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

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

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

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

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

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

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

24 ¹⁵ *Sizing Up the Gap*, *supra* n.14.

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

26 ¹⁷ *Id.*

27 ¹⁸ *Id.*

28 ¹⁹ Peri, et al., *supra* n.10, at S246-247 and Table 6.

1 gross domestic product by 2045.²⁰

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

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

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

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

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

22 Those economic benefits will instead be transferred to other countries, making
23

24 ²⁰ Frederik R. Treyz, et al., Regional Economic Models Inc., *Key Components of Immigration*
25 *Reform* 14 & Table 2 (July 17, 2013), <https://bit.ly/3kE6cMb>.

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

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

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

5 A widely cited empirical study confirms this conclusion: “foreign affiliate
6 employment increased as a direct response to increasingly stringent restrictions on H-
7 1B visas” imposed in 2004.²³ Companies in the U.S. were *more likely* to open foreign
8 affiliates in new countries in response to the reduced availability of H-1B visas.²⁴
9 Attempts to reduce the number of H-1B workers, such as those imposed in 2004,
10 therefore inevitably will “have the unintended consequence of encouraging firms to
11 offshore jobs abroad.”²⁵

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

18 The impact on innovation will be especially significant. One quarter of global
19 research and development in STEM fields takes place in the United States, the largest
20 percentage for any nation—and the share of R&D performed in the U.S. has been on
21

22
23 ²³ Britta Glennon, National Bureau of Economic Research, *How Do Restrictions on High-Skilled*
24 *Immigration Affect Offshoring? Evidence from the H-1B Program* 28 (July 2020),
25 <https://bit.ly/39XDscO>; see also William Olney & Dario Pozzoli, *The Impact of Immigration on*
26 *Firm-Level Offshoring*, Dept. of Econ., Williams College (June 13, 2019), <https://bit.ly/3a36loa>.

27 ²⁴ Glennon, *supra* n.23, at 28.

28 ²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

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

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

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

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

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

23 *Second*, Defendants have been planning to issue these regulations for years.
24

25 ²⁸ National Science Foundation, *Research and Development: U.S. Trends and International*
26 *Comparisons* (Jan. 15, 2020), <https://bit.ly/2Puq8mK>.

27 ²⁹ Nowrasteh, *supra* n.8.

28 ³⁰ Glennon, *supra* n.23, at 29.

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

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

7 To begin with, that overall rate has declined significantly—from 14.7% in April
8 2020 to 7.9% in September 2020.³¹ The level remains unacceptably high, but is not
9 at all unprecedented, as Plaintiffs explain. Plaintiffs’ Motion at 12, Dkt. No. 31.

10 More importantly, the overall unemployment rate is not the relevant metric.
11 The vast majority of H-1B visa holders work in computer occupations.³² And the
12 unemployment rate in the U.S. for individuals in computer occupations *declined* in
13 the first several months of the COVID pandemic, from 3% in January 2020 to 2.8%
14 in April, and further still to 2.5% in May.³³ It has remained relatively stable through
15 September 2020.³⁴ That is not surprising, because the pandemic has dramatically
16 increased reliance upon technology by consumers and businesses—and companies
17 therefore have a pressing need for workers in computer-related positions.

18 Indeed, this Court has already recognized that overall unemployment rates are
19 irrelevant to the H-1B program. In granting a preliminary injunction barring
20 implementation of Presidential Proclamation 10052’s ban on the entry of H-1B
21

22 ³¹U.S. Bureau of Labor Statistics, *Civilian Unemployment Rate* (last visited Oct. 28, 2020),
23 <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm>.

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

28 ³³ Anderson, *supra* n.32.

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

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

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

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

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

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

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

1 a degree in a relevant engineering sub-specialty.

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

9 Moreover, in other areas, where a particular degree is not “always” a
10 prerequisite for employment, the DHS rule would also eliminate eligibility. Essential
11 occupations such as clinical laboratory scientists,³⁶ and industrial safety and health
12 engineers³⁷ could well become ineligible for H-1B classification, notwithstanding
13 significant shortages of such workers at a time when their contribution is so clearly in
14 the national interest.

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

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

22

23

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

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

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

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

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

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

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

24 The costs and disruption imposed will be particularly burdensome because they
25 would occur in the midst of a pandemic, when companies’ operations are already
26

27 ³⁸ U.S. Citizenship and Immigration Services, *H-1B Authorized-to-Work Population Estimate 1*
28 (Sept. 30, 2019), <https://bit.ly/34CRZtC>.

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

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

8 **CONCLUSION**

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

11 DATED: October 30, 2020

Respectfully submitted,

12
13 By: /s/ Maximillian L. Del Rey
14 Maximillian L. Del Rey (SBN 285397)
15 mdelrey@mayerbrown.com
16 Andrew J. Pincus*
17 apincus@mayerbrown.com
18 Elizabeth Espín Stern*
19 estern@mayerbrown.com
20 MAYER BROWN LLP
21 1999 K Street, N.W.
22 Washington, D.C., 20006-1101
23 (202) 263-3000

Attorneys for *Amici Curiae*

**Pro Hac Vice* to be filed

APPENDIX: *AMICI CURIAE*

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

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

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

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

46. Worldwide ERC®