State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

November 9, 2026

Via Federal eRulemaking Portal

Mr. David J. Venturella
Acting Director
U.S. Immigration and Customs Enforcement
United States Department of Homeland Security
500 12th Street SW
Washington, DC 20536

RE: Comment on Notice of Proposed Rulemaking on Optional Practical Training Fees, 91 Fed. Reg. 64566 (Oct. 8, 2026), DHS Docket No. ICEB-2026-0100, RIN 1653-AB01.

Dear Mr. Venturella:

We, the Attorneys General for California, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin (the "States") write in opposition to the Immigration and Customs Enforcement ("ICE") and Department of Homeland Security ("DHS") Notice of Proposed Rulemaking Optional Practical Training Fees, 91 Fed. Reg. 64566 (Oct. 8, 2026), DHS Docket No. ICEB-2026-0100, RIN 1653-AB01 (the "Proposed Rule").

The Proposed Rule would cause significant, irreparable injury to the States. The payment contemplated in the Proposed Rule would be cost prohibitive for institutions of higher education (IHEs), effectively shutting down the optional practical training program (OPT). Without OPT, IHEs will attract fewer international students, leading to diminished international student enrollment and the loss of the educational and financial contribution they provide to IHEs. In turn, the States' workforces, especially STEM workforces, and economies will be negatively impacted.

The Proposed Rule is unlawful for the same reasons that the federal government's earlier effort to impose a $100,000 levy on employers for each H-1B petition filed was unlawful. *See California v. Mullin*, 833 F. Supp. 3d 50, 62-63 (D. Mass. 2026). That $100,000 H-1B policy was held to be an unconstitutional, unauthorized tax implemented in violation of the Administrative Procedure Act ("APA"), *see id.* at 69-84, and the First Circuit recently concluded that the federal

government was unlikely to succeed on the merits of its appeal of that order, *see California v. Mullin*, 183 F.4th 42, 51 (1st Cir. 2026). In this Proposed Rule, DHS attacks another form of work authorization, OPT, and claims to have rulemaking authority based on a different legal provision in the Immigration and Nationality Act (INA). But these differences do not change the fundamental problem with both attempts: Congress has not authorized the executive branch to impose such an extraordinary tax. And imposing such a tax on educational institutions is the definition of arbitrary and capricious because DHS is making implausible choices that run counter to the evidence before it; failing to meaningfully consider the actual costs of the Proposed Rule; relying on factors Congress did not intend for DHS to consider; and failing to consider alternatives.

DHS should withdraw the Proposed Rule and refrain from proposing further taxes on educational institutions that support applications for OPT.

I. Background

A. OPT Overview and History

Since at least 1947, international students have been authorized to engage in employment as a training component of their education. 12 Fed. Reg. 5,355, 5,355-57 (Aug. 7, 1947). One type of such training is "optional practical training" (OPT), which allows international students in F-1 nonimmigrant status to obtain authorization to work for up to one year as an initial period. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). OPT can be granted both during a student's studies (pre-completion OPT) or following graduation (post-completion OPT). *Id.* A student is eligible for another 12-month period of OPT if they advance to a higher educational level. 8 C.F.R. § 214.2(f)(10). If a student receives a degree in Science, Technology, Engineering, or Mathematics (STEM), an additional 24-month extension is available. 8 C.F.R. § 214.2(f)(10).

Congress has implicitly accepted that OPT is an integral part of the educational experience. "Congress understood that it does not detract from the accuracy or sincerity of F-1 students' purpose to come to this country 'solely' to undertake a degree program that they may, once here, participate in practical training[.]" *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 187 (D.C. Cir. 2022). DHS has historically shared this understanding that OPT falls within the purpose of completing a course of study: DHS's past regulations have acknowledged that such post-study employment is intended to improve the ability of F-1 students "to absorb a full range of project-based skills and knowledge directly related to their study." *Id.* at 189 (citing 81 Fed. Reg. at 13049).

B. Process for OPT Authorization

International students intending to enroll at IHEs in the United States must first seek admission with the school, and then register for the Student and Exchange Visitor Information System (SEVIS) that DHS administers and pay a SEVIS fee of $350.[1] The IHE must be Student

[1] 8 C.F.R. § 214.13.

and Exchange Visitor Program (SEVP) -certified, and must have a Designated School Official (DSO), who issues a Form I-20 or "Certificate of Eligibility for Nonimmigrant Student Status."[2] Upon receipt of the Form I-20, the student can apply for an F-1 visa, and then seek admission into the United States to enroll in school.[3] In addition to the initial I-20 that the DSO completes, DSOs are responsible for keeping up-to-date school records on the student throughout their studies, which are reported to DHS through SEVIS.[4] Students who wish to seek OPT work authorization must first seek authorization from the DSO.[5] Students must again seek authorization from the DSO to seek a STEM extension, with the DSO once again completing a Form I-20 authorizing the STEM extension.[6] Once the DSO issues the Form I-20 authorizing OPT, the student can submit an application for an OPT Employment Authorization Document to U.S. Citizenship and Immigration Services, paying a $520 fee associated with the employment authorization application.[7] There is presently no fee for schools when students make use of OPT.

In 2024, 194,554 F-1 nonimmigrant students were granted Employment Authorization Documents, or work permits, for pre-completion or post-completion OPT and 95,384 received STEM OPT extensions. 91 Fed. Reg. 64582.

C. Proposed Rule

On October 8, 2026, DHS published a notice of proposed rulemaking entitled "Optional Practical Training Fees." 91 Fed. Reg. 64566. The Proposed Rule would require IHEs to make an initial payment of $70,000 prior to issuing an I-20 authorizing a student to seek OPT work authorization and an additional payment of $30,000 for each F-1 student prior to a subsequent recommendation to participate in OPT, such as where students qualify for a 24-month STEM OPT extension. *Id.* at 64599. Thus, under the Proposed Rule, for each student who receives OPT and then a STEM extension, the institution will have to pay $100,000 to DHS. *Id.* DHS proposes for the money paid to go into a general account at the Treasury and not be earmarked for DHS. *Id.* at 64576. The rule does not restrict IHEs from seeking reimbursement from the foreign student or the employer for these payments, but the Proposed Rule requires the IHEs to transmit the payment to DHS. *Id.* at 64575.

The Proposed Rule justifies these OPT payments as the fix for what DHS claims is "widespread use of OPT as an informal and unlimited employment benefit that has little to or no relationship to an F-1 nonimmigrant student's program of study." *Id.* at 64570. Additionally, DHS justifies the proposed payments as "ensur[ing] that only highly qualified eligible F-1 students participate in OPT and the labor market is not oversaturated with low-paid foreign workers." *Id.* at 64572. DHS primarily points to 8 U.S.C. § 1184(a), which authorizes the DHS

[2] *Id.*
[3] 8 C.F.R. § 214.2(f).
[4] *Id*.
[5] 8 C.F.R. § 274a.12(c)(3)(i)(B); 8 C.F.R. § 214.2(f)(10)(ii)(A)(3).
[6] 8 C.F.R. § 214.2(f)(10)(ii)(C).
[7] 8 C.F.R. §§ 106.2(a)(44).

Secretary to prescribe the time and conditions of admission of noncitizens, as its legal authority for the Proposed Rule. *Id.* at 64567.

The Proposed Rule gives interested parties 30 days in which to submit comments. *Id.* at 64566.

II. The Proposed Rule Harms States

A. The Proposed "Fee" is Cost Prohibitive for Institutes of Higher Education

The Proposed Rule would add a financial burden for IHEs that has never existed and exponentially increase the cost of students' participation in OPT. The Proposed Rule would require an IHE to pay a minimum of $70,000 per student who wishes to engage in OPT and $100,000 per student for those engaging in a STEM OPT extension. According to the Institute of International Education, more than 294,250 students participated in OPT in the 2024-25 academic year.[8] This means that IHEs would need to spend billions of dollars to sustain current levels of engagement in OPT. Many IHEs likely would not expend this payment for even one student, let alone all who currently make use of this training avenue. Indeed, the payments that the rule proposes would create a prohibitive cost that would effectively prevent IHEs from offering OPT at all.

For example, in Fall 2026, more than 7,500 F-1 visa holders in the California State University system engaged in OPT, which would equate to approximately $530 million that the system would have to pay under the Proposed Rule. In Fall 2026, more than 1,600 F-1 visa holders at the University of Maryland, College Park are engaging in OPT, and of those, 682 individuals engage in the STEM extension, which would equate to over $132 million for that one institution in a single academic year. Montclair State University in New Jersey currently has 758 individuals participating in OPT, which would require payment of over $53 million. At two of the University of Wisconsin's campuses, 2,186 individuals engaged in OPT, 948 of which engaged in the STEM extension, which would be a cost of approximately $181 million. At three of the University of Illinois campuses, 5,831 individuals engaged in OPT or have a pending application, 3,118 of which are STEM extensions, which would require payment of approximately $501 million. In Oregon, 1,091 individuals engaged in OPT, which would equate to at least $76 million. At the University of Hawai'i at Mānoa, 188 individuals participated in OPT, 32 of whom engaged in a STEM extension, which would equate to approximately $14.1 million for that one institution in a single year. At the City University of New York institutions, in Fall 2026, there are 966 individuals participating in OPT, 342 of which are STEM extensions, which would require payment of approximately $78 million dollars under the Proposed Rule. In Fall 2025, at the University of Arizona, 947 individuals participated in OPT, 399 of which were STEM extensions, which would require payment of over $78 million for that one institution.

[8] *2025 Fast Facts*, Opendoors, at 2 https://opendoorsdata.org/wp-content/uploads/2025/11/OD25_Fast-Facts.pdf.

B. Loss of OPT Will Significantly Decrease International Student Enrollment and Negatively Impact IHEs and All Students

If IHEs are unable to provide access to OPT, they will lose enrollment of F-1 visa holders. U.S. IHEs are already facing declining international student enrollment due in part to the federal administration's travel ban and uncertainty regarding visa changes such as the elimination of duration of status.[9] The Proposed Rule is yet another effort to penalize international students and would cause international student enrollment to decline even further.[10] From 2006 to 2022, 56% of all international graduates used OPT, and some individual institutions have higher participation rates.[11] The program is a key driver of foreign student enrollment; a survey of international students found that 54% of current students and 48% of prospective students reporting they would not come to the US for a degree without access to OPT.[12] Ninety-two percent of U.S. institutions report that without OPT, international students would likely choose other countries for their education.[13] As discussed above, thousands of international students engage with the OPT program.

A decline in international student enrollment will deprive all students and institutions of the educational, cultural, and research contributions of international students. International students bring rich and diverse viewpoints, interests, and skillsets, which they share in classrooms, research projects, on-campus jobs, clubs, and other extracurricular activities, as well as in everyday social interactions. Approximately 81% of IHEs prioritize international student outreach and recruitment due to the value of international student perspectives.[14] Research shows that American students appreciate the different perspectives that international students bring to class, and, equally, international students stated that they benefit too from this cross-national interaction.[15] In one study, students shared that cross-national interactions helped them gain knowledge and skills needed for effective intercultural communication, improved their ability to reflect on their own culture, helped them develop leadership and problem-solving skills, and increased their engagement with

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[9] *New Research: Loss of 111,000 International Students Could Cost U.S. Economy $3.4 Billion and Nearly 40,000 Jobs*, NAFSA (Aug. 11, 2026), https://www.nafsa.org/fall2026outlook.

[10] This Proposed Rule follows DHS's attempt to restrict the curricular practical training (CPT), making this Proposed Rule part of a broader effort to penalize international students. *See generally Ass'n of Am. Univs. v. Dep't of Homeland Sec.*, No. 26-cv-14520 (D. Mass. Oct. 5, 2026).

[11] *How do international students enter the workforce after graduation?*, OPT OBSERVATORY, https://optobservatory.org/ (last visited Nov. 5, 2026).

[12] *Surveys on International Talent Pipelines*, Institute for Progress and NAFSA: Association of International Educators, at 2-3 (Sept. 15, 2025), https://ifp.org/wp-content/uploads/2025-Surveys-on-International-Talent-Pipelines-1.pdf; Biance Quilantan, *DHS proposes $70k fee for international student work program*, POLITICO (Oct. 7, 2026), https://www.politico.com/news/2026/10/07/dhs-fees-international-student-work-program-01110012.

[13] Open Doors, *Fall 2025 Snapshot on International Student Enrollment Key Findings*, https://tinyurl.com/k9b57xsm.

[14] *Id.*

[15] *See generally* Diana N. Yefanova et al., *Instructional Practices Facilitating Cross-National Interactions in Undergraduate Classes*, 7 J. of Int'l Students 786 (2017).

course content utilizing multiple perspectives.[16] International students and scholars further enhance the classroom experience for *all* students through teaching roles, including as visiting professors, lecturers, and teaching assistants. International students also valuably add to critical research fields further enhancing the States' institutions and the education they offer, as well as American innovation.

Further, diminished international student enrollment will have financial ramifications that, in turn, impact core educational objectives. International students greatly contribute to our institutions' financial well-being. For example, at California State Universities, during academic year 2024-25, international students contributed nearly $230 million in tuition and fees. At California Community Colleges, during academic year 2024-25, international students contributed nearly $163 million in tuition. International students contribute more than $224 million per year to two state universities in Illinois. At Montclair State University in New Jersey, international students contributed an average of $17 million per year across 2023-25 in tuition revenue alone. In the 2025-26 academic year, international undergraduate students contributed an estimated $15 million to the University of Hawai‘i at Mānoa. In the 2025-26 academic year, at the University of Washington Seattle campus, international students contributed approximately $278 million. International students contribute more than $44 million annually to the City University of New York institutions.

If international students no longer wish to study in the United States, the fiscal impact will be felt across the States' university and college systems, including their ability to serve lower-income in-state students. Financial losses could mean fewer course offerings, student services, academic support, and housing services, harming all students.

The loss will be particularly acute in certain degrees and fields. Significantly, the proportion of international doctorate student enrollment in science and engineering climbed from 66% in 2004 to 79% in 2024.[17] In Fall 2025, approximately 27% of graduate students in STEM within the University of California school system were international students. [18] These STEM students are more likely to participate in OPT, given the availability of an extension. For example, at the University of Maryland College Park, 80% of its OPT participants are in a STEM program. In Illinois, at least 53% of OPT participants at three state universities engaged in STEM programs. In Wisconsin, at least 43% of OPT participants at two state universities engaged in STEM programs. At the University of Arizona, in Fall 2025, at least 42% of OPT participants engaged in STEM programs. If there is a decrease in these international students due to the loss of the availability of OPT, graduate programs are likely to suffer, particularly those programs in STEM that enroll a particularly high number of international students. Given the especially high cost to authorize both OPT and the STEM extension under the rule (a total of $100,000 when including the $30,000 cost for the STEM extension, which could be as high as $190,000 if a

[16] *Id*.
[17] *Report U.S. doctorate awards*, U.S. NATIONAL SCIENCE FOUNDATION, https://ncses.nsf.gov/pubs/nsf26315 (last visited Nov. 6, 2026).
[18] *Fall Enrollment at a Glance*, University of California, https://www.universityofcalifornia.edu/about-us/information-center/fall-enrollment-glance (last visited Nov. 4, 2026).

student were to participate in OPT at each degree level and obtain two STEM extensions), STEM fields are particularly vulnerable to reduced enrollment of international students and, by extension, the most vulnerable to the negative impacts of reduced enrollment.

If international students choose to pursue their studies outside of the United States because they effectively will be unable to pursue OPT, IHEs and their students will lose out on their numerous contributions. As a result, all students will be less prepared and less able to compete in an increasingly globalized economy.

C. The Rule Would Negatively Impact State Economies

The Proposed Rule poses a significant risk to the health of State economies. In addition to tuition, international students rent apartments and houses from local landlords; purchase food from grocery stores and restaurants; frequent retail stores; and make entertainment and leisure purchases. According to the NAFSA Association of International Educators, international students contributed $42.9 billion to the U.S. economy and, supported more than 355,000 jobs during the 2024-25 school year.[19] In 2023 in California, international students attending California institutions contributed $6.4 billion to the economy and supported more than 55,000 jobs.[20] If these enrollment numbers sharply declined from the loss of OPT, state economies would suffer.

Prior to the release of the Proposed Rule, the NAFSA Association of International Educators report already projected a decline of $3.4 billion and a potential loss of 40,000 jobs nationwide due to declining application volumes, persistent visa appointment bottlenecks, and newly restrictive immigration policy changes (including reforms to OPT).[21] The Proposed Rule would likely exacerbate these already significant harms by accelerating the decline in international enrollment, resulting in additional job losses and declines in sorely needed tax revenue.

Additionally, international students who remain in the U.S. through OPT help build a more high-tech and innovative economy.[22] OPT is the primary way for high-skilled students trained at U.S. institutions to receive on-the-job training after graduation, and is essential in attracting and retaining highly-skilled international students at a time when countries like

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[19] Erica L. Stewart, *International Students Contributed $43 Billion to the U.S. Economy in 2024-2025; Fall 2025 Spending Down by $1.1 Billion*, NAFSA, https://www.nafsa.org/about/about-nafsa/international-students-contributed-43-billion-us-economy-2024-2025-fall-2025 (last visited Nov. 5, 2026).

[20] Venkates Swaminathan, *Immigrant students shape California's future. Don't close the door on them*, CALMATTERS (Aug. 19, 2025), https://calmatters.org/commentary/2025/08/immigrant-students-california-future/.

[21] *New Research: Loss of 111,000 International Students Could Cost U.S. Economy $3.4 Billion and Nearly 40,000 Jobs*, NAFSA (Aug. 11, 2026), https://www.nafsa.org/fall2026outlook.

[22] Zuzana C. Wootson, *Optional Practical Training Continues to Serve America's Needs*, PRESIDENT'S ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION (Apr. 22, 2026), https://www.presidentsalliance.org/optional-practical-training-continues-to-serve-americas-needs/.

Canada, Australia, China, and India, who offer their own post-graduation work programs, are competing to attract that talent.[23] In 2024, a total of 194,554 foreign students obtained work authorization through OPT, while a separate population of 95,384 foreign students obtained work authorization through STEM OPT.[24] While these students receive this additional training, they also positively impact their U.S. employers and help to keep the U.S. globally competitive. One report found that higher levels of OPT participants in a region led to increased innovation in that region, as measured by the number of patents, which increased through some combination of direct innovation by OPT participants and indirect spillover effects caused by a larger supply of highly educated workers, and higher average earnings among the college educated.[25] The same report found no evidence of adverse effects on average earnings, unemployment, or labor force participation from OPT. [26]

By effectively eliminating OPT, the Proposed Rule would negatively impact important fields and the economy more broadly. At least six of the top 25 employers for foreign students participating in pre- and post-completion OPT in 2024 were state institutions.[27] Additionally, at the University of Maryland, College Park, 179 faculty members or researchers are OPT participants. At the University of Wisconsin-Madison, 97 employees are OPT participants. Across two Illinois state universities, 70 employees are OPT participants. At the University of Washington Seattle campus, 204 employees are OPT participants, including staff, faculty, and postdoctoral scholars. Within the City University of New York institutions, 176 employees are OPT participants. At the University of Arizona, 135 employees are OPT participants. Further, the Business Roundtable estimates that reforms to OPT could cost 443,000 jobs over a decade, including 255,000 jobs held by U.S.-born workers.[28] This same study posits that restricting OPT could also cause declines in hourly wages across all employees and in GDP.[29] The technology, business, and engineering sectors would be especially impacted since most OPT participants have degrees in those fields.[30] This would have a significant negative impact on California's workforce where 77.4% of international graduates from California IHEs work in California

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[23] Andrew Moriarty, *What is OPT? Optional Practical Training Policy Brief*, (Mar. 16, 2026), https://www.fwd.us/news/what-is-opt/.
[24] *Student and Exchange Visitor Program (SEVP) 2024 SEVIS by the Numbers Report*, U.S. Immigration Customs and Border Enforcement, at 13, https://www.ice.gov/doclib/sevis/btn/25_0605_2024-sevis-btn.pdf.
[25] Jeremy L. Neufeld, *Optional Practical Training (OPT) and International Students After Graduation Human Capital, Innovation, and the Labor Market*, at 5 (Mar. 2019), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2019/03/OPT.pdf.
[26] *Id.*at 1.
[27] *Student and Exchange Visitor Program (SEVP) 2024 SEVIS by the Numbers Report*, *supra* note 24, at 13-14.
[28] *The Economic Impact of Curbing the Optional Practical Training Program*, BUSINESS ROUNDTABLE (Dec. 10, 2018), https://www.businessroundtable.org/rebuilding-together/immigration/economic-impact-curbing-optional-practical-training-program.
[29] *Id.*
[30] Andrew Moriarty, *supra* note 23.

through OPT and where California's workforce attracts additional graduates from out-of-state schools through OPT.[31]

III. The Proposed "Fee" is an Unconstitutional Tax

While the Proposed Rule characterizes the OPT payment as a fee, *see* 91 Fed. Reg. 64574, it in fact operates as a tax and unconstitutionally encroaches upon Congress' exclusive power to tax under the Constitution. *See California v. Mullin*, 833 F. Supp. 3d 50, 68 (D. Mass. 2026).

The Supreme Court has distinguished between taxes and fees by observing that "fees . . . bestow[] a reciprocal benefit on the payor, not shared by other members of society" while "taxes are expected to inure to the benefit of the wider public." *FCC v. Consumers' Rsch*., 606 U.S. 656, 676 (2025) (quoting *Nat'l Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 341, 343 (1974)) (cleaned up). Here, the substantial payment under the Proposed Rule does not bestow a reciprocal benefit on the payor. As discussed above, the payment could amount to hundreds of millions of dollars for a single IHE and is cost prohibitive to the point of having a punitive effect—IHEs will be unable to continue the OPT program, reducing their ability to attract international students. As such, the payment would not be a "fee."

Rather, the payment is a tax. DHS makes clear that it is meant to "incentivize educational institutions to exercise greater oversight and selectivity when recommending students for OPT, thereby reducing fraudulent authorizations and curbing 'visa mill' activities . . . ." 91 Fed. Reg. 64574. According to DHS, "[t]he financial costs would deter schools from recommending students with questionable qualifications for OPT." *Id.* In other words, in DHS's view, which remains unsupported, the payment would provide a benefit—reduction of fraudulent authorizations and "visa mills"—to the wider public. Viewed another way, the payment would reduce the number of "undesirable" students, i.e., those with questionable qualifications for OPT, in the United States. *See California v. Mullin*, 833 F. Supp. 3d 50, 71 (D. Mass. 2026) (acknowledging the government may impose a tax that does not increase total revenue but that "curb[s] the purchase of undesirable goods"). Further, the payment is meant to generate revenue. DHS contemplates that "[i]t is also conceivable that funds collected could later be effectively appropriated by Congress to various government agencies to further enhance the integrity of the immigration system." 91 Fed. Reg. 64576. In essence, putting aside the fact that the States disagree with DHS's views about the potential broader consequence of the payment, the funds would provide revenue to advance the agendas of government agencies—a purported benefit for the wider public.

The cited provisions in the INA do not support by "clear congressional authorization[,]" the executive branch to levy a tax in this manner, making the tax unconstitutional. *See Learning Res., Inc. v. Trump*, 607 U.S. 229, 248 (2026) (quoting *Biden v. Nebraska*, 600 U.S. 477, 506 (2023)). DHS cites 8 U.S.C. § 1184(a) as authorizing DHS to prescribe the "time" and

[31] *How do international students enter the workforce after graduation?*, OPT OBSERVATORY, https://optobservatory.org/ (last visited Nov. 5, 2026).

"conditions" of nonimmigrants and to regulate "the ability for F–1 nonimmigrant students to 'engage in limited periods of employment for practical training . . . according to the terms set out in the [OPT] [r]ule.'"[32] 91 Fed. Reg. 64567 (citing *Wash. All. of Tech. Workers*, 50 F.4th at 180-82). Per DHS in the Proposed Rule, "[a]s part of the conditions of admission, DHS is now setting a fee to ensure employers, students, and institutions are engaging in appropriate activities consistent with admission as an F–1 nonimmigrant." *Id.* But the INA, in 8 U.S.C. § 1184(a), gives authority to prescribe the "time" and "condition" of entry, which is not a clear authorization to levy a tax.

DHS's claim that the INA ''need not specifically authorize each and every action taken by [DHS], so long as [such] action is reasonably related to the duties imposed upon [the Secretary]" is to no avail. *Id.* (citing *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)). While "[t]he Executive has broad discretion over the admission and exclusion of aliens, ... that discretion is not boundless." *California v. Mullin*, 833 F. Supp. 3d 50, 69 (D. Mass. 2026) (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)). Such discretion "may not transgress constitutional limitations" or "the statutory authority conferred by Congress." *Id.* Here, the payment does not reasonably relate to either the "time" or "condition" of the entry of F-1 visa holders. It is a tax that was not clearly authorized by Congress, making the Proposed Rule a transgression of constitutional limitations.

IV. The Proposed Rule is not authorized by the INA's Fee Setting Provisions

Congress limits the executive branch's delegated authority to set visa-related adjudication fees. Under 8 U.S.C. § 1356(m), the fees that DHS may charge for adjudication and naturalization services are limited to those that "ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants," and "recover any additional costs associated with the administration of the fees collected." DHS has long acknowledged Congress' clear intent to limit its fee-setting authority. For example, in a 2007 rulemaking, DHS recognized that "[f]iling fees are not designed to function like tariffs and generate general revenue to support broader policy decisions, or like fines to deter certain behaviors. The filing fees are not intended to influence public policy in favor of or in opposition to immigration, limit immigration, support broader infrastructure, or impact costs beyond USCIS." Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851, 29856

[32] DHS also cites 6 U.S.C. § 112 and 8 U.S.C. §§ 1103(a)(1), (3) in the INA for DHS's authority "to administer and enforce the immigration and naturalization laws of the United States, to include the issuance of regulations that [the Secretary of Homeland Security] deems necessary." 91 Fed. Reg. 64567. But these provisions only allow DHS to carry out laws granting authority given to it by Congress, and Congress did not grant authority to levy a tax as contemplated under the Proposed Rule. *See* 6 U.S.C § 112(e) (allowing issuance of regulations "in laws granting regulatory authorities"); 8 U.S.C. §§ 1103(a)(1), (3) (limiting authority to that under the provisions of this chapter). Similarly, Congress does not grant authority to levy a tax through 8 U.S.C. § 1324a(h), which DHS attempts to cite as authority for regulating employment of aliens, or 8 U.S.C. § 1372, which DHS attempts to cite as authority to administer programs F nonimmigrant students engage in and regulate the institutions in which they enroll. 91 Fed. Reg. 64567-68, 64575.

(May 30, 2007). Even under the current administration, DHS has observed that its authority to recover costs for fees is, at most, recovery of "the general costs associated with providing all adjudication and naturalization services." Naturalization Application Fee Adjustments, 91 Fed. Reg. 37500, 37504 (June 23, 2026).

The substantial value of the Proposed Rule's "fee" coupled with DHS's contemplation that Congress may appropriate the funds for other government agencies clearly indicates that DHS seeks to generate revenue, but not to recover costs associated with the provision of DHS services. Even where the relevant provision of the INA explicitly allows collection of a fee in the school context, it does not allow for the imposition of a fee onto the IHE nor the generation of revenue. *See* 8 U.S.C. § 1372(e). Section 1372(e), which provides the basis to collect a SEVIS fee, specifies that it is to be paid by the noncitizen, not the IHE, and mandates the fee's particular use—to reimburse for the expenses related to SEVP. The Proposed Rule directly contradicts the explicit purpose for which DHS may recover a fee and is not authorized by the INA.

V. The Proposed Rule is Arbitrary and Capricious

Under the APA, an agency action is arbitrary and capricious if it is not "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Agency action fails this test if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 879 F.3d 1202, 1215 (D.C. Cir. 2018) (citation omitted) (agency action is arbitrary and capricious if it is "internally inconsistent"). The Agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted). Finally, the Agency has a duty to consider responsible alternatives to its chosen policy and provide a reasoned explanation for rejecting such alternatives. *Farmers Union Cent. Exch., Inc. v. F.E.R.C.*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

Throughout the Proposed Rule, DHS consistently violates basic principles of reasoned agency decision-making by: (1) making implausible choices that run counter to the evidence before it, such as placing the burden of these payments and DHS's OPT screening initiative on all SEVP-certified educational institutions; (2) failing to meaningfully consider the actual costs of the Proposed Rule, the reliance interests at stake, and retroactive impact; (3) relying on factors Congress did not intend for DHS to consider; and (4) failing to consider alternatives that would protect State institutions and address DHS's stated concerns.

A. DHS Makes the Implausible Choice of Placing the Burden of the Tax on all SEVP-Certified Institutions

The Proposed Rule improperly places the burden of making these payments on all SEVP-certified IHEs. This approach is arbitrary and capricious as a result of its sheer

overbreadth. Additionally, DHS does not reasonably consider that its conclusions that schools will be able to make these payments and that IHEs will continue to authorize OPT for certain international students are implausible and run counter to the evidence.

This proposal is exceedingly overbroad—despite pointing to individual instances of fraud and to the unemployment of U.S. workers in the technology industry, the Proposed Rule would require *all* SEVP-certified IHEs to make these payments, regardless of whether they previously had issues with fraud or they are authorizing OPT for workers outside the technology industry. *See State of Cal. v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1066-67 (N.D. Cal. 2018) (finding that even if the agency had provided factual evidence to support its decision with respect to an issue, a blanket application of the decision was arbitrary and capricious because it was "not properly tailored" to address the alleged issue).

Additionally, the Rule's new tax requirement, which DHS "believes . . . would incentivize educational institutions to exercise greater oversight and selectivity when recommending students for OPT[,]" 91 Fed. Reg. at 64574, is an implausible fix to the alleged problems that DHS wishes to address. If this Proposed Rule goes into effect, it will not incentivize IHEs to authorize only "the most promising students[,]" 91 Fed. Reg. 64574, 64591, but rather, IHEs will cease authorizing students for OPT all together. As noted above, IHEs cannot afford to pay $70,000 or $100,000 for each student, especially given that in most instances these students are no longer paying tuition, as the majority of students engage in post-completion OPT. Indeed, many state institutions may not be authorized to make such payments absent a specific appropriation in their state budgets.[33] Nor will the IHEs be able to recoup the payment from employers or students. Employers will not shoulder the burden of such an exorbitant payment for an entry-level employee who is seeking training through their employment.[34] And requiring students to pay back these amounts could result in debt, no net wages, or net wages that will be reduced to substantially below the market rate for these positions.

The Proposed Rule also fails to provide DSOs with any standards by which they should judge "the most promising students[.]" 91 Fed. Reg. 64574. When a student seeks authorization to apply for OPT employment authorization, the DSO's regulatory obligation is to "ensure that the student is eligible for the given type and period of OPT and that the student is aware of the student's responsibilities for maintaining status while on OPT." 8 C.F.R. § 214.2(f)(11)(ii). The Proposed Rule represents that these school officials are "not fully trained," 91 Fed. Reg. 64574, yet rests the entirety of the agency's OPT screening initiative on the shoulders of such DSOs.

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[33] *See, e.g.*, MD. CONST. art. III, § 32 (prohibiting funds from being drawn from the state treasury except in accordance with an appropriation in the enacted state budget bill).

[34] Data collected by DHS shows that from September 21, 2025, through May 24, 2026, when DHS had its 2025 H-1B Policy in place, requiring a similar fee of H-1B petitioning employers, USCIS received *91.2% fewer* initial consular Form I-129 H-1B petitions relative to the same time frame in the previous year. U.S. Citizenship and Immigration Services, *Technical Appendix to Fee for Certain H-1B Petitions NPRM RIA_08.13.26*, USCIS-2026-0298 (Aug. 24, 2026), https://www.regulations.gov/document/USCIS-2026-0298-0003.

By proposing that all SEVP-certified IHEs pay this tax and not providing DSOs with any standards by which to evaluate one OPT application against another, this Proposed Rule is an implausible choice that runs counter to the evidence before the agency and is, therefore, arbitrary and capricious.

B. DHS Fails to Meaningfully Consider the Actual Costs of the Proposed Rule, the Reliance Interests at Stake, and its Retroactive Impact

The agency fails to meaningfully consider the costs of this proposal. DHS assumes that the opportunity cost will be equal to the value of the tax proposed, and, as the Proposed Rule acknowledges, DHS does not take into account the loss of the net societal benefits that are generated by OPT employment. Those net societal benefits are substantial. A 2019 study estimated that a 60 percent decline in OPT would reduce the U.S. GDP by about a quarter of a percentage point and cost the labor market 443,000 jobs, including 255,000 jobs held by native-born workers, in just eight years.[35] DHS apparently assumes that if the loss of these benefits were to exceed the amount of the proposed "fee," the affected parties would collectively share the cost to preserve OPT, but this ignores the reality of net benefits that are shared across a society. It is unreasonable to assume that the school, worker, and employer will willingly pay the cost of the tax in support of a greater societal benefit that may not result in their direct reimbursement.

DHS has similarly underestimated the profound reliance interests at stake with this Proposed Rule. As just one example of such interests, employers, including state institutions, may have hired scientific researchers for an initial one-year period, doing so with the understanding that such a training opportunity would continue for the additional two-year period of the STEM extension. Should the Rule go into effect, critical research will be impacted by the loss of continuity. DHS counters this point by noting that "any assumption that such employment will be automatically granted undermines the original intent of the F-1 nonimmigrant visa to solely pursue a full course of study." 91 Fed. Reg. 64579. But this is wrong. "Training through real-world employment overseen by one's academic institution has undisputed educational benefits." *Wash. All. of Tech. Workers*, 50 F.4th at 186. DHS disregards how a training opportunity is mutually beneficial to both the employer and the OPT participant, a benefit that Congress intended, and DHS therefore underestimates these reliance interests.

DHS also does not meaningfully consider the Proposed Rule's retroactive impact. DHS characterizes these OPT payments as a condition on admission and therefore authorized under 8 U.S.C. § 1184(a). 91 Fed. Reg. 64567. But students who are already admitted to the U.S. in F-1 status will not seek admission at the time of seeking authorization to apply for OPT. The Proposed Rule assumes that these students will seek admission again because of DHS's final rule "*Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*," 91 Fed. Reg. 44976, which would require international students to seek an extension of stay to engage in OPT. But that final rule is not in effect as litigation challenging it

[35] *The Economic Impact of Curbing the Optional Practical Training Program*, *supra* note 28.

proceeds. *Presidents' All. on Higher Educ. and Immigr. v. U.S. Dep't of Homeland Sec.*, No. 26-13799-FDS (D. Mass. Sept. 14, 2026). Additionally, as the Proposed Rule acknowledges, students who seek pre-completion OPT or who are grandfathered under the duration of status final rule will not have to seek extension of stay. 91 Fed. Reg. 64575 n.115. Even if DHS had the statutory authority to impose the exorbitant tax, if the Rule goes into effect, DHS would be seeking to apply a new "condition" on admission to students who have already been admitted for the duration of their status, in some instances a full four years ago. The agency cannot establish such a retroactive condition without explanation. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 (D.C. Cir. 1986).

C. By Penalizing Participation in OPT, DHS Considers Factors that Congress Did Not Authorize It to Consider

DHS has considered factors which Congress did not authorize it to consider in establishing these "fees." Congress has explicitly authorized DHS to assess fees, but, as discussed above, those fees are intended to reimburse the agency for appropriations spent in carrying out the SEVIS program. 8 U.S.C. §§ 1372(e), 1356(m). Congress has not authorized DHS to institute a tax to discourage use of a program that Congress has authorized. *See Mullin*, 833 F. Supp. 3d at 71 (discussing government's imposition of tax intended to "curbing the purchase of undesirable goods (e.g., a tobacco tax).") Additionally, DHS has explicitly set the amount of these payments at a collective $100,000, which matches the $100,000 tax on H-1B petitions, but the policies implementing the $100,000 H-1B tax have been vacated as unconstitutional and in excess of DHS's statutory authority as well. *Id.* at 79. "Congress understood that it does not detract from the accuracy or sincerity of F-1 students' purpose to come to this country 'solely' to undertake a degree program that they may, once here, participate in practical training[.]" *Wash. All. of Tech Workers*, 50 F.4th at 187. DHS does not have authority to penalize these students for such authorized continuation of their education, and it certainly does not have authority to penalize their educational institutions.

D. DHS Fails to Consider Reasonable Alternatives that Allow OPT Use to Continue for Students at State Institutions or in Specific Roles

DHS has failed to consider reasonable alternatives to its proposed "fees." DHS cites to the Office of Citizenship and Immigration Services Ombudsman's Annual Report 2020 to support DHS's concern regarding fraud in the OPT program, 91 Fed. Reg. 64571, but fails to consider the report's suggested mitigation strategies, such as providing U.S. Citizenship and Immigration Services with more authority to confirm eligibility and legitimacy of the employer, the training opportunity, and the student in the context of adjudication of employment authorization applications, and enhancing necessary training for DSOs to ensure they understand the regulations, their responsibilities, and how to identify fraud schemes.[36] Further, DHS has failed to consider exempting public institutions or not assessing the tax in instances in which

[36] *Office of the Citizenship and Immigration Services Ombudsman, Annual Report 2020*, at 81-85 (June 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

students are seeking authorization to apply for OPT such that they can work for a cap-exempt employer. DHS has also failed to consider the alternative of assessing a fee below the proposed $70,000 and $30,000 taxes proposed. Charging international students an additional nominal filing fee for OPT employment authorization, such as $100 for example, which could increase SEVP's operating budget by more than $28 million and allow for greater enforcement against fraud without effectively ending the program.[37] But DHS considers none of these alternatives. Instead, it cursorily mentions and summarily rejects site visits, training plans, additional reporting, and exemptions for small educational institutions, while paying greater lip service to even worse alternatives such as requiring an additional $70,000 when students seek initial periods of OPT at a higher education level. 91 Fed. Reg. 64577. Ultimately, the only alternative that DHS truly considers is shutting down OPT all together, which is effectively what this proposal accomplishes.

VI. The Comment Period is Procedurally Deficient

On October 8, 2026, DHS published the Proposed Rule, proposing to fundamentally overhaul regulations governing a heavily utilized international student work authorization program. Despite these sweeping changes, the Proposed Rule allowed for just 30 days for public analysis and comment. Nowhere in the 35-page proposal did DHS attempt to justify such an abbreviated period.

DHS's rush to close the comment period makes the Proposed Rule procedurally deficient. The APA and the Executive Branch's longstanding application of the APA's requirements make clear that an abbreviated 30-day comment period fails the APA's notice-and-comment requirements for reasoned agency decision-making. The APA requires that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…" 5 U.S.C. § 553(c). For more than two and a half decades, executive agencies have followed a presumption that a minimum of 60 days is necessary to provide the public with a meaningful opportunity to comment on proposed agency regulations. Executive Order 12,866 provides that "[e]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Regulatory Planning & Review, Exec. Order 12,866, § 6(a)(l) (Sept. 30, 1993); *see also* Improving Regulation & Regulatory Review, Exec. Order 13,563 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."). There is no reasoned justification for a 30-day comment period for a proposal that is estimated to require schools to pay $12.9 billion annually. *See* 91 Fed. Reg. 64579.

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[37] *U.S. Department of Homeland Security Budget in Brief*, at 19, https://www.dhs.gov/sites/default/files/2026-04/26_0422_ocfo_fy27-budget-dhs-budget-in-brief.pdf (SEVP's FY 2026 annualized CR budget was $186,610,000).

VII. Conclusion

DHS repeatedly threatens to end the availability of OPT if these payments do not go forward. But if adopted, the Proposed Rule would cause significant, direct harm to the States, our public institutions, and our residents by effectively ending the OPT program, as well. The Proposed Rule is unlawful for the many reasons stated. Thus, the States urge DHS to withdraw the Proposed Rule.

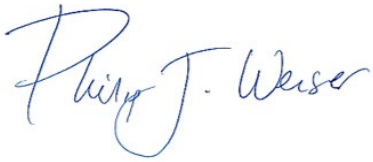
Sincerely,



ROB BONTA
California Attorney General



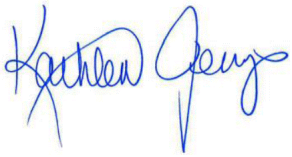
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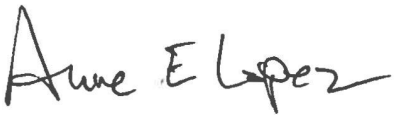
WILLIAM TONG
Connecticut Attorney General



KATHLEEN JENNINGS
Delaware Attorney General



BRIAN L. SCHWALB
District of Columbia Attorney General



ANNE E. LOPEZ
Hawaii Attorney General



KWAME RAOUL
Illinois Attorney General



AARON M. FREY
Maine Attorney General



ANTHONY G. BROWN
Maryland Attorney General



ANDREA JOY CAMPBELL
Massachusetts Attorney General



DANA NESSEL
Michigan Attorney General



KEITH ELLISON
Minnesota Attorney General



AARON D. FORD
Nevada Attorney General



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New Jersey Attorney General



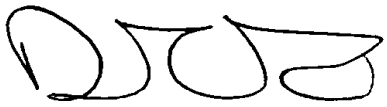
RAÚL TORREZ
New Mexico Attorney General



LETITIA JAMES
New York Attorney General



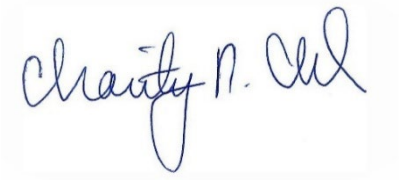
JEFF JACKSON
North Carolina Attorney General



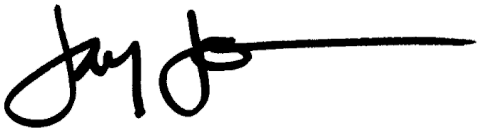
DAN RAYFIELD
Oregon Attorney General



PETER NERONHA
Rhode Island Attorney General



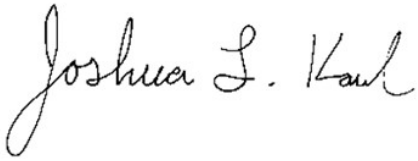
CHARITY R. CLARK
Vermont Attorney General



JAY JONES
Virginia Attorney General



NICHOLAS W. BROWN
Washington Attorney General



JOSHUA L. KAUL
Wisconsin Attorney General