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<u>Via Federal eRulemaking Portal</u>

The Hon. Joseph B. Edlow
Director
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: **Comment on Notice of Proposed Rulemaking to Establish a Fee for Certain H-1B Petitions, 91 Fed. Reg. 54817 (August 25, 2026), DHS Docket No. USCIS-2026-0298, RIN 1615-AD20, CIS No. 2861-26.**

Dear Director Bedlow:

We, the undersigned Attorneys General of California, Massachusetts, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Hawaiʻi, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Virginia, Washington, and Wisconsin (the "States") write in opposition to the U.S. Citizenship and Immigration Services ("USCIS") and Department of Homeland Security ("DHS") Notice of Proposed Rulemaking *Fee for Certain H-1B Petitions*, 91 FR 54817, 8 CFR Part 106, RIN 1615-AD20, CIS No. 2861-21; DHS Docket No. USCIS-2026-0298 (the "Notice").

The rule proposed in the Notice is a transparent effort to resurrect the DHS and Department of State ("DOS") policy (the "2025 Policy") imposing a $100,000 levy on employers for each H-1B petition filed. *See California v. Mullin*, 833 F. Supp. 3d 50, 62-63 (D. Mass. 2026) (describing the 2025 Policy and its implementation). That 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 drafting the proposed rule, USCIS tinkered around the edges of the 2025 Policy: the amount of the tax has risen to $103,265; the agencies now claim authority under a different section of the Immigration and Nationality Act ("INA"); and the tax does not apply to cap-exempt employers even as it now extends to persons already lawfully in the country. However, USCIS's modifications do not address the fundamental problem with the first attempt: Congress has not authorized the executive branch to impose such an extraordinary tax on any employer—let alone public employers like schools and hospitals that rely on H-1B personnel to alleviate persistent shortages of teachers, doctors, nurses, and other critical service providers.

The proposed rule would cause significant, irreparable injury to the States, their constituent localities and agencies, and their residents. School districts will be faced with the impossible choice of foregoing the hiring of necessary personnel or cutting program offerings to make up the $103,265 cost. Local hospitals, especially in rural and low-income communities that disproportionately rely on H-1B personnel due to an inability to recruit domestic workers, will be forced to increase patient ratios or rely on facilities in far-away larger cities to provide critical care. USCIS once again overlooked the plain consequences of the proposed tax, with no mention of the harms that will befall the States and their residents.

USCIS should withdraw the proposed rule and refrain from proposing further taxes on public employers' efforts to meet the basic needs of their residents.

I. Background

A. H-1B Program Overview and History

The H-1B program was created by Congress pursuant to its "plenary power to make rules for the admission of aliens." *Boutilier v. INS*, 387 U.S. 118, 123 (1967). Congress's aim was to address "the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages." H.R. Rep. No. 101-723 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6721, 1990 WL 200418; *see also U.S. v. Patnaik*, 125 F.4th 1223, 1225 (9th Cir. 2025) ("The Immigration and Nationality Act . . . authorizes employers to 'request H-1B status for nonimmigrant foreign workers in specialty occupations' that American workers cannot fill." (quoting *U.S. v. Prasad*, 18 F.4th 313, 316 n.2 (9th Cir. 2021) (citing 8 U.S.C. § 1101(a)(15)(H)(i)(b))).

The H-1B classification traces back to the 1952 enactment of the INA, which established an "H visa" for "an alien having a residence in a foreign country which he has no intention of abandoning who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability." Pub. L. No. 82-414, § 101(a)(15)(H), 66 Stat. 163, 168 (1952). The Immigration Act of 1990 amended the INA and created the H-1B nonimmigrant classification still in effect today, allowing an employer in the United States to petition to hire a nonimmigrant worker in a "specialty occupation" in the United States for a maximum duration of six years. Pub. L. No. 101-649, 104 Stat. 4978; *see* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(g)(4); 8 C.F.R. § 214.2(h)(1)(i). A "specialty occupation" is an occupation that requires "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1); *see also* 8 C.F.R. § 214.2(h)(4)(ii).

To protect the domestic labor force, Congress has capped H-1B visa approvals for most private employers (excluding certain government and nonprofit employers) at 65,000 per year, with another 20,000 holders of advanced degrees. 8 U.S.C. § 1184(g). Certain employers, however, are exempt from the H-1B cap. Specifically, the H-1B cap does not apply to institutions of higher education, or a related or affiliated nonprofit entity, nonprofit research organizations, or governmental research organizations. 8 U.S.C. § 1184(g)(5). These employers are referred to as "cap-exempt" as opposed to "cap-subject."

To obtain an H-1B visa for a worker, an employer in the United States subject to the H-1B cap must enter an annual lottery that is generally held in March of each year for employment starting at the beginning of the federal fiscal year in October. 8 C.F.R. § 214.2(h)(8)(iii). Cap-exempt employers that have established their cap-exempt status do not need to register or participate in the annual lottery and may file petitions with USCIS using Form I-129, Petition for Nonimmigrant Worker at any time. *See Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers*, 89 Fed. Reg. 103,054, 103,183 (Dec. 18, 2024).

B. <u>H-1B Visa Program Fees</u>

When petitioning for an H-1B worker, employers are required to pay certain fees. Some are statutory fees set by Congress. *See* 8 U.S.C. § 1356(m); 8 U.S.C. § 1184(c)(9)–(13). Others are USCIS "adjudication" fees set by notice-and-comment rulemaking pursuant to Congress's grant of authority to DHS to promulgate regulations and charge fees to ensure recovery of full costs to provide services. *See* 8 U.S.C. § 1103(a)(3); 8 U.S.C. § 1356(m). These fees are to be paid by the petitioning employer, not by the H-1B worker. *See* 20 C.F.R. § 655.731(c)(9)(iii)(C).

In 1998, through the American Competitiveness and Workforce Improvement Act ("ACWIA"), Congress required certain H-1B petitioners to pay a fee of $500 to address concerns about the potential adverse impact of the H-1B program on domestic workers and possible abuse of the program. *See* Pub. L. No. 105-277, § 414, 112 Stat. 2681, 2681-652 (1998). Higher education and nonprofit or government research institutions were exempted. *Id.* § 414, 112 Stat. at 2681-651 (codified at 8 U.S.C. § 1184(c)(9)(A)). In 2000, Congress increased this fee to $1,000. *See* Pub. L. No. 106-311, 114 Stat. 1247.

When the ACWIA fee expired in 2003, Congress revived it through the H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, § 422, 118 Stat. 2877, 3353. The act increased the fee to $1,500 for employers with 26 or more employees, but it maintained the exemption for higher education and nonprofit or government research institutions and reduced the fee to $750 for all other employers. *See id.* The act also added a new $500 anti-fraud fee to be paid by the employer with each initial H-1B petition. *Id.* § 426, 118 Stat. at 3357-58.

In 2010, Congress increased the filing fee and anti-fraud fee by $2,000 for those employers with 50 or more employees in the United States, where more than 50% of their employees are on H-1B or L-1 nonimmigrant status ("50/50 employers"). Pub. L. No. 111-230, § 402(b), 124 Stat. 2485, 2487. And in 2015, Congress increased the fee for 50/50 employers to $4,000 for each H-1B petition in addition to the other filing and petition fees. Pub. L. No. 114-113, § 411(g), 129 Stat. 2242, 3006.

Congress limits the executive branch's delegated authority to set visa-related adjudication fees beyond those just described. 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." Pursuant to that authority, DHS has previously set several H-1B fees through notice-and-comment rulemaking, including a fee that cap-subject employers must pay to register a prospective H-1B worker for the annual lottery, 8 C.F.R. § 106.2(c)(11); a filing fee for the Form I-129 submitted by the petitioner, *id.* § 106.2(a)(3); and an "asylum program fee," *id.* §106.2(c)(13). By statute, all fee adjustments (apart from adjustments for inflation) must be made through notice-and-comment rulemaking. *See* 8 U.S.C. § 1356(m), (u)(3)(C); 8 C.F.R. § 106.2(d).

To ensure that its filing fees accurately recover the full costs of providing the services rendered, pursuant to the Chief Financial Officers Act ("CFO Act"), USCIS reviews the fees that it charges every two years. 31 U.S.C. § 902(a)(8). The fees prescribed in the regulations that are not set or limited by statute may be adjusted for inflation, but not more than once per year, and only by publication of a rule in the Federal Register. 8 C.F.R. § 106.2(d).[1]

As of the most recent fee-setting in 2024, the fees applicable to an H-1B petition include the following, which, for cap-subject employers, amount to between 2% and 10% of the newly proposed $103,265 tax:

- A $780 petition fee, $460 for small employers and nonprofits, set by noticed rulemaking.[2] 8 C.F.R. § 106.2(a)(3).
- A $215 H-1B Registration Process fee for employers subject to the H-1B cap, set by noticed rulemaking. 8 C.F.R. § 106.2(c)(11).
- An Asylum Program Fee of $600 or $300 for a small employer, set by noticed rulemaking. Non-profits are exempt from this fee. 8 C.F.R. § 106.2(c)(13);
- An ACWIA fee, set by Congress, of either $1,500 or $750. 8 U.S.C. § 1184(c)(9)(A)–(B); 8 C.F.R. § 214.2(h)(19); 8 C.F.R. § 106.2(c)(4). Cap-exempt employers are exempt from this fee. 8 C.F.R. § 214.2(h)(19)(iii).
- A fraud prevention and detection fee, set by Congress, of $500 for certain H-1B petitions. 8 U.S.C. § 1184(c)(12)(A)–(C); 8 C.F.R. § 106.2(c)(5)(i).
- A $2,805 "premium processing fee" if the sponsoring employer elects to have a petition processed within a shorter timeframe, set by noticed rulemaking.[3] 8 U.S.C. § 1356(u)(3); 8 C.F.R. § 106.4.
- A $4,000 Public Law 114-113 Fee, set by Congress, for 50/50 employers. 8 C.F.R. § 106.2(c)(8).[4]

C. 2025 Policy and *California v. Mullin*

[1] The regulation does not explicitly require that the agency go through the notice-and-comment rulemaking process for inflation adjustments to fees that are not set or limited by statute. *See* 8 C.F.R. § 106.2(d); *see also infra* note 12.

[2] A "small employer" is defined under the Code of Federal Regulations as a "firm or individual that has 25 or fewer full-time equivalent employees in the United States, including any affiliates and subsidiaries." 8 C.F.R. § 106.1(f)(1). "Non-profit" is defined as "not-for-profit primary or secondary educational institutions, or institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. § 1001(a); organizations organized as tax exempt under the Internal Revenue Code of 1986, section 501(c)(3), 26 U.S.C. § 501(c)(3); or governmental research organizations as defined under 8 C.F.R. § 214.2(h)(19)(iii)(C)." 8 C.F.R. § 106.1(f)(2).

[3] DHS published a final rule, effective February 26, 2024, that increased premium processing fees charged by USCIS to reflect the amount of inflation from June 2021 through June 2023. *See Adjustment to Premium Processing Fees*, 88 Fed. Reg. 89,539 (Dec. 28, 2023). The adjustment increased premium processing fees for H-1B petitions from $2,500 to $2,805.

[4] Collection of this fee is scheduled to end on September 30, 2027. 8 C.F.R. § 106.2(c)(8).

On September 19, 2025, President Trump issued Proclamation 10973, *Restriction on Entry of Certain Nonimmigrant Workers*, 90 Fed. Reg. 46027 (Sept. 24, 2025) (the "2025 Proclamation"), directing federal agencies to immediately impose a $100,000 tax on all applications for H-1B visas. The defendant agencies subsequently carried out that order, undertaking a series of agency actions (collectively, the "2025 Policy") to implement this new tax. While the 2025 Policy was justified as "necessary" to address abuse of the H-1B program by employers in the technology sector specifically, 90 Fed. Reg. at 46028, it was nevertheless imposed indiscriminately on all employers, including state and local governments. Following a series of clarifications by USCIS, U.S. Customs and Border Protection ("CBP"), and DOS, the 2025 Policy ultimately was applied to petitions involving nonimmigrants not already lawfully present in the U.S., whose applications were filed on or after September 21, 2025. *Mullin*, 833 F. Supp. 3d at 63.

On December 12, 2025, a coalition of twenty states, all of which are among the undersigned, challenged the 2025 Policy on grounds that it unconstitutionally arrogated powers vested in Congress and violated the Administrative Procedure Act. *Id.* On June 8, 2026, the district court vacated the 2025 Policy. *Id*. at 83-84.[5]

As relevant here, the court held first that the $100,000 payment levied under the 2025 Policy was a tax within the meaning of the Constitution's taxation clause, rather than a penalty or "regulatory payment" as the federal government had argued. *Id*. at 69-71. The court further held that the purported statutory authority invoked by the federal government—8 U.S.C. §§ 1182(f), 1185(a)(1)—did not confer authority on the executive branch to levy taxes because no part of either statutory provision "ma[de] it clear that Congress intended to delegate the taxing power." *Id*. at 71-72.

The court also held that the 2025 Policy violated the APA. Most notably, the 2025 Policy was in excess of statutory authority because Congress had not delegated to the executive branch power to levy the tax imposed under the 2025 Policy. *Id*. at 78-79. The court specifically observed that Section 286(m) of the INA ("Section 286(m)"), which governs the assessment of adjudication fees, did not authorize the 2025 Policy. *Id.* Additionally, the court concluded that the 2025 Policy was arbitrary and capricious because the federal government, in promulgating the policy, "(1) fail[ed] 'to acknowledge that the Policy represents a significant divergence from past practice or offer any justification for that shift'; (2) fail[ed] to consider Plaintiffs' 'significant reliance interests'; and (3) rel[ied] on factors Congress did not intend for them to consider 'by

[5] Defendants have appealed the judgment of the district court. *See California v. Mullin*, No. 26-1699 (1st Cir.). The First Circuit declined to stay the district court's order pending appeal after concluding that "the defendants have failed to make a strong showing as to the critical likelihood-of-success factor." *Mullin*, 183 F.4th at 51.

basing the Policy on domestic economic policy considerations and failing to consider Congress's statutory scheme.'" *Id* at 79 (quoting Plaintiffs' Motion for Summary Judgment).

D. Proposed Rule and Related Rulemaking

The proposed rule seeks to resurrect the unconstitutional $100,000 tax that the federal government already sought to impose with the now-vacated 2025 Policy. [6] While Defendants in *Mullin* previously argued the 2025 Policy was not subject to the limitations imposed by Section 286(m), USCIS now claims that Section 286(m) *itself* provides sufficient authority for the proposed $103,265 tax on employers for each H-1B petition submitted.

USCIS has somewhat narrowed the scope of the proposed rule by excluding from its application cap-exempt employers, which it asserts reflects the relative ability to pay of cap-exempt and cap-subject employers. *See* 91 Fed. Reg. at 54820. But the 2026 Rule makes no allowance for the countless public employers—including schools, healthcare facilities, and other state and local government agencies—that are not cap-exempt.[7]

The agency has also expanded the reach of the proposed rule by extending its application to all H-1B petitions, regardless of whether an applicant is already lawfully present in the United States on another visa status. 91 Fed. Reg. at 54819. Again, the proposed rule makes no mention of the important role that changes in status play in placing nonresident students and trainees directly into the schoolrooms and hospital clinics most in need of personnel in the wake of the nation's shortage of these core service providers.

[6] In the Notice, USCIS and DHS identify six overlapping rulemakings: Naturalization Application Fee Adjustments; Collection and Use of Biometrics by USCIS; USCIS Immigration Fees and Related Procedures Required by H.R.1 Reconciliation Bill; CBP 9-11 Response and Biometric Entry-Exit Fee for H-1B and L-1 Visas; EOIR Fees; and Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States. 91 Fed. Reg. at 54824-25. On September 11, 2026, USCIS and DHS announced another proposed rule that will bear directly on H-1B visas. *See Eliminating the Discretionary 60-Day Grace Period*, 91 Fed. Reg. 57807 (Sept. 11, 2026).

[7] USCIS has indicated its intent in the immediate future to "reform the H-1B program by revising eligibility for cap exemptions." *See* Office of Information and Regulatory Affairs, Reforming the H-1B Nonimmigrant Visa Classification Program (with proposed timetable indicating a notice of proposed rulemaking planned for August 2026), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202510&RIN=1615-AD00. Given that the scope of the Proposed 2026 Rule is primarily based on whether employers are cap-exempt (a category that includes many large state employers), this forthcoming rule could dramatically expand the harm that the Proposed 2026 Rule would cause for the States and their residents.

II. The Proposed Rule Would Harm States

Like the $100,000 tax that the federal government sought to impose through the 2025 Policy before it was vacated by the court, the visa tax set forth in the proposed rule would inflict incontrovertible harm on the States. The States and their respective local governments depend on H-1B petitions to fill positions for which there are often few, if any, qualified domestic candidates due to a wide range of recruiting challenges. The tax will curtail the States' ability to hire and retain employees in critical state agencies as well as their schools and medical facilities, which will reverberate through the States' communities. State institutions are incapable of absorbing an additional $103,265 for every H-1B hire. The resulting shortages caused by the proposed rule, both within and without our institutions and agencies, will irreparably harm our operations, systems, and services in healthcare, education, and other essential areas. We share an overview of just a few of these harms.[8]

A. The Proposed Rule Directly Harms Primary and Secondary Schools

In recent years, the States have experienced shortages of teachers and aides within our public schools, particularly in rural or underserved communities.[9] Across the United States, States face a severe K-12 teacher shortage. The Bureau of Labor Statistics projects 103,800 openings for kindergarten and elementary school teachers, 40,500 openings for middle school teachers, and 66,200 openings for high school teachers each year, on average, from 2025 to 2035.[10] In the 2024-2025 school year, a staggering 74% of school districts reported having trouble filling vacancies due to a lack of qualified candidates and too few applications.[11] Due to the difficulty filling vacant teaching positions, local educational agencies ("LEAs") nationwide,

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[8] Remarkably, USCIS concluded that the "proposed rule does not have substantial direct effects on the States," 91 Fed. Reg. at 54838, even though the district court in *California v. Mullin* recognized that the States had established significant harm as a result of the 2025 Policy, and that the federal defendants failed to undercut this evidence. *See* 833 F. Supp. 3d at 65.

[9] These harms were well documented in *California et al. v. Mullin et al.*, No. 1:25-cv-13829-LTS (D. Mass.), Dkt. 88-2 AZ-2 ¶¶5-7; AZ-3 ¶¶7-9; AZ-4 ¶¶4-5, 7-8; CA-3 ¶9; CA-4 ¶¶15-16; CO-2 ¶¶22-23, 27; DE-1 ¶¶14-15, 17; IL-2 ¶¶9-11; IL-3 ¶¶14-16; NC-2 ¶¶10, 15. "Ex." as used herein shall refer to the exhibits to Dkt. 88 unless otherwise specified.

[10] U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook: Kindergarten and Elementary School Teachers*, https://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm (last visited Sept. 24, 2026); U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook: Middle School Teachers*, https://www.bls.gov/ooh/education-training-and-library/middle-school-teachers.htm (last visited Sept. 24, 2026); U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook: High School Teachers*, https://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm (last visited Sept. 24, 2026).

[11] *See Most U.S. public elementary and secondary schools faced hiring challenges for the start of the 2024–25 academic year*, Nat'l Ctr. for Educ. Statistics (Oct. 17, 2024), https://ies.ed.gov/learn/press-release/most-u-s-public-elementary-and-secondary-schools-faced-hiring-challenges-start-2024-25-academic-year.

including public school districts that are cap-subject, often turn to the H-1B visa program to fill vital educator roles that cannot be filled by domestic workers.[12] As an Alaska superintendent observed with respect to the 2025 Policy, "[w]ith a pen stroke, we possibly have ruined the future of education for Alaska students."[13] A South Dakota superintendent remarked, "[w]e've hired the H-1B teachers because we quite simply don't have other applicants for those positions. So they're certainly not taking jobs from Americans. They're filling jobs that otherwise just simply would not get filled."[14]

Because LEAs rely on H-1B visas to fulfill core educational obligations, the proposed rule will cause significant harm not just to LEAs but also to the students and communities they serve. Surely most and probably all LEAs simply lack the funds to pay an additional $103,265—which often significantly exceeds the annual salary budgeted for the positions in question—for each H-1B visa petition. LEAs will be faced with a difficult choice: leave educator roles unfilled or, if possible, attempt to divert money from other needs to pay the tax required under the proposed rule. But even that difficult choice may be unavailable for many States, as their fiscal year budgets have often been determined years in advance, and States may lack any available funds to make this payment.

Often, public employers have no choice but to turn to H-1B personnel to fill critical roles and ensure that school districts have staffing adequate to meet student needs and comply with federal and state law. For example, in North Carolina, "the statewide teaching position vacancy rate as of September 1, 2024, was approximately 7.5 percent," particularly concentrated in rural and impoverished areas.[15] Responding to this need at the start of the 2025-2026 school year, North Carolina LEAs employed at least 1,100 H-1B visa holders in schools in rural and impoverished areas of the state, particularly "where vacancies [were] higher and qualified domestic workers are less inclined to live."[16]

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[12] See Madeleine Ngo, *Trump's H-1B Visa Fee Could Strain Universities and Schools*, N.Y. Times (Oct. 8, 2025), https://www.nytimes.com/2025/10/08/us/politics/trump-h-1b-visa-fee-universities.html; Carrie Jung, *How Are Some Districts Responding to the Teacher Shortage? With H-1B Visas*, WBUR News (May 18, 2023), https://www.wbur.org/news/2023/05/18/bilingual-teachersrecruitment-framingham-visas.

[13] Brian Venua, *The White House Raised the Cost of H-1B visas. Alaska Schools Could Face Major Consequences*, Alaska Public Media (Sept. 29, 2025), https://alaskapublic.org/news/2025-09-29/the-white-house-raised-the-cost-of-h1b-visas-alaska-schools-could-face-major-consequences.

[14] Sarah Raza, *Trump's $100,000 H-1B Visa Fee Threatens Rural Schools and Hospitals Reliant on Immigrant Workers*, PBS (Oct. 8, 2025), https://www.pbs.org/newshour/politics/trumps100000-h-1b-visa-fee-threatens-rural-schools-and-hospitals-reliant-on-immigrant-workers.

[15] Ex. NC-1 ¶10.

[16] Ex. NC-1 ¶11.

Without the ability to rely on H-1B visas, school systems will be unable to provide services to students for essential programs such as coursework centered on English as a second language, science, and special education. For example, Chicago Public Schools ("CPS"), one of the largest school districts in the United States, actively uses the H-1B program to hire specialized staff who are primarily educators. CPS frequently targets positions that are more difficult to fill locally, including bilingual teachers (typically for Spanish and Mandarin Chinese), special education teachers, math teachers, computer science teachers, and bilingual speech-language pathologists. At the end of 2025, CPS had 711 teacher vacancies—and were unable to pursue any candidates who reside outside of the United States because of the previous H-1B tax.[17]

As a result, the States will grapple with larger class sizes, less individualized attention for students, and cuts to programs and course offerings. Not only are students deprived of learning opportunities and staff overburdened throughout the States, but school districts may face challenges satisfying their legal obligations to students.[18] In Arizona, state officials note that class sizes would increase "dramatically," and that students would be at risk of losing "music, band, chorus, art, physical education, and library" altogether.[19] In North Carolina, officials noted that the 2025 tax, $3,000 less than that of the proposed rule, means that North Carolina may be unable to satisfy federal education requirements.[20] All of these effects lead to diminished academic development and learning loss at critical stages in childhood development. Such harms can never be fully remedied. *See N. D. v. Reykdal*, 102 F.4th 982, 995 (9th Cir. 2024) ("It is almost beyond dispute that wrongful discontinuation of a special education program to which a student is entitled subjects that student to actual irreparable harm"); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 122–23 (1st Cir. 2003) (lack of student access to disability support personnel would cause irreparable harm); *Massachusetts v. NIH*, 770 F. Supp. 3d 277, 320 (D. Mass. 2025)), aff'd, No. 25-1343, 2026 WL 26059 (1st Cir. Jan. 5, 2026) (recognizing the injuries that stem from "loss of human capital and talent"); *John T. v. Del. Cnty. Intermediate Unit*, 2000 WL 558582 at *8 (E.D. Pa. May 8, 2000) ("Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at the appropriate time").

In some states, a portion of the H-1B personnel hired by LEAs were originally lawfully present in the United States as trainees or academic exchange participants on J-1 visas. While such changes of status were not taxed under the 2025 Policy, the proposed rule breaks from that

[17] Ex. IL-3 ¶¶ 15, 17, 20.

[18] Ex. AZ-4 ¶¶11-12; Ex. CO-2 ¶38; Ex. DE-1 ¶21; Ex. IL-2 ¶13; Ex. IL-3 ¶22; Ex. MD-3 ¶¶15-16.

[19] Ex. AZ-3 ¶14.

[20] Ex. NC-1 ¶¶14, 15.

earlier policy that did not tax those who were merely seeking to change their lawful residency status and will render it even more difficult for these LEAs to maintain adequate staffing.

B. The Proposed Rule Directly Harms Healthcare Systems

The proposed rule will also harm the provision of healthcare by non-research facilities, which are not cap-exempt. States' agencies, public healthcare centers, public and private hospitals, and healthcare providers rely on the H-1B visa program to hire physicians, surgeons, nurses, and other healthcare personnel, particularly in institutions serving low-income and working-class neighborhoods.[21] Without H-1B visas, health facilities will be unable to fill critical vacancies.[22] The H-1B visa program is a vital pathway to hiring healthcare workers to fill staffing shortages nationwide.[23]

The loss of H-1B medical workers will harm communities across our States, and the $103,265 tax in the proposed rule will directly impact the availability and quality of medical care in States. In a September 25, 2025, letter to former DHS Secretary Kristi Noem, the American Medical Association ("AMA") noted that the United States is projecting a shortfall of 86,000 physicians by 2036.[24] The National Center for Health Workforce analysis projects an even greater physician shortage of 187,130 by 2037.[25] These shortages are acutely felt in our States. In New York, for example, one hospital recently hired twelve clinical lab technologists using the H-1B process after unsuccessful efforts to fill positions locally.[26] The importance of H-1B visas to healthcare systems is particularly acute in rural areas, where international candidates are often the only applicants for key positions.[27] The AMA letter explained that the original $100,000 tax

[21] See Fran Smith, *The Health Divide: Trump's New H-1B Visa Fee Could Worsen America's Doctor Shortage*, USC Annenberg (Oct. 13, 2025), https://centerforhealthjournalism.org/ourwork/insights/health-divide-trumps-new-h-1b-visa-fee-could-worsen-americas-doctor-shortage.

[22] Exs. IL-1 ¶12; MD-2 ¶18; MI-1 ¶21; MN-2 ¶¶9-11; NJ-2 ¶¶10, 18; NY-3 ¶¶11, 15; WI-1 ¶16.

[23] *The Health Divide: Trump's new H-1B visa fee could worsen America's doctor shortage, supra* note 21; Omar Abughanimeh & Mouhanna Abu Ghanimeh, *H-1B Visa Program and Implications for Health Care*, JAMA (Oct. 29, 2025), https://image2url.com/r2/default/documents/1768511123664-f9e11513-da13-4b04-b21f-2d1ee46dafdb.pdf; David Ovalle, *Rural America relies on foreign doctors. Trump's visa fee shuts them out*, Wash. Post (Dec. 8, 2025), https://www.washingtonpost.com/health/2025/12/08/h1b-visa-fees-rural-health.

[24] Letter to Kristi Noem from National Medical Societies and State Medical Associations (Sept. 25, 2025), https://searchlf.ama-assn.org/letter/documentDownload?uri=/unstructured/binary/letter/ LETTERS/lfimg.zip/Sign-on-Letter-Restriction-on-Entry-of-Certain-Nonimmigrant-WorkersProclamation-9-25-25.pdf.

[25] National Center for Health Workforce Analysis, State of the U.S. Health Care Workforce, 2024 (Nov. 2024), https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/state-of-the-healthworkforce-report-2024.pdf.

[26] Ex. NY-2 ¶¶12, 14, 16, 18.

[27] *See* Exs. NY-2 ¶¶13-15; MI-1 ¶¶24, 28; MN-2 ¶7, 10.

endangered access to quality care for some of the Americans who need it most—approximately 75 million people live in a primary care Health Professional Shortage Area.[28] As a recent study observed, "increasing H-1B visa fees could exacerbate workforce shortages and worsen access to care, particularly in rural and high-poverty communities."[29] Under the proposed rule, institutions will be forced to choose between filling essential roles or foregoing other necessary expenditures, such as other staff, assuming they even have funds available for these payments.

The proposed rule's impact on healthcare professionals will cause cascading harm throughout States. States without state healthcare providers will face harm from the ripple effect of a shortage of healthcare professionals. Shortfalls in doctors and nurses, and no ability to fill these vacancies with qualified foreign doctors, will render it more difficult for States' residents to obtain the regular medical care they need. This will cause an enormous financial burden on States' insurance programs as more residents need to rely on emergency medical care in lieu of routine appointments. *See NIH*, 770 F. Supp. 3d at 325 (describing harm that "not only impact[s] the . . . States and institutions, but the communities and people they serve"). Inadequate medical staffing reduces the quality of care that patients receive; as a result, patients are exposed to a risk of increased provider errors, wait times, and mortality rates.[30]

The proposed rule would also impact an entirely new set of individuals hoping to work in the medical field in the U.S.: physician J-1 visa holders. Historically, the federal government has instituted several programs permitting physician J-1 visa holders to transition directly to other immigration statuses such as H-1B, on the condition that they practice medicine for at least three years "at a health care facility located in an area designated by U.S. Department of Health and Human Services as a Health Professional Shortage Area, Medically Underserved Area, or Medically Underserved Population or serving patients who reside in [the former]."[31] Between 2001 and 2024, almost 23,000 H-1B physicians worked in underserved areas,[32] with 64% of foreign-trained physicians reportedly practicing in Medically Underserved Areas or Health Professional Shortage Areas.[33]

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[28] *See Letter to Kristi Noem, supra* note 24.

[29] Michael Liu, Vishal R. Patel, Tarun Ramesh, and Rishi K. Wadhera, *Health Care Professionals Sponsored for H-1B Visas in the US*, 334 JAMA 22. (Dec. 9, 2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC12573110

[30] *See generally* Hoag Levins, *How Inadequate Hospital Staffing Continues to Burn Out Nurses and Threaten Patients*, Penn LDI (Jan. 9, 2023), https://ldi.upenn.edu/our-work/research-updates/how-inadequate-hospital-staffing-continues-to-burn-out-nurses-and-threaten-patients.

[31] *See, e.g.*, Conrad 30 Waiver Program, U.S. CITIZENSHIP & IMMIGR. SERVS., (last visited Sept. 24, 2026), https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/conrad-30-waiver-program.

[32] *See Letter to Kristi Noem, supra* note 24.

[33] Health Professional Shortage Areas "can be geographic areas, populations, or facilities. These areas have a shortage of primary, dental, or mental health care providers." *What is a Shortage Designation*, Health Res. & Servs.

In addition to this proposed rule, the administration is simultaneously advancing multiple regulatory proposals that impact the H-1B program, including changes to eligibility for cap-exemption, *see* 8 C.F.R. 214.2(h).[34] The proposed rule fails to adequately explain how the justification for and impact of this rule would change the operation and accessibility of the H-1B program, both before and after the other proposed changes go into effect. As written to date, the proposed rule inflicts harm on States' cap-subject employers. But should the other forthcoming proposed rules be published, they will drastically increase the harm faced by States that will now have to apply the new tax to state institutions of higher education and other institutions and agencies that were historically cap exempt.

III. The Proposed Rule is Not Authorized by the INA

USCIS asserts three statutory bases for its authority to promulgate the proposed rule: Section 286(m) of the INA,[35] which "delegates to [DHS] the authority to set visa-related adjudication fees," *Mullin*, 833 F. Supp. 3d at 61; Section 286(n) of the INA,[36] which "directs that the fee revenues collected under [Section 286(m)] and deposited into the Immigration Examinations Fee Account (in the Treasury of the United States) are to be used to fund the 'expenses in providing immigration adjudication and naturalization services,'" *Paz v. Mayorkas*, 767 F. Supp. 3d 368, 371 (E.D. Tex. 2025) (citing 8 U.S.C. § 1356(j)); and Section 286(j)[37] which confers authority to "prescribe such rules and regulations as may be necessary to carry out the provisions of [Section 286]."[38] 91 Fed. Reg. at 54819-20. USCIS asserts that these provisions give it authority to levy the $103,265 tax to recover the cost of "administering the lawful immigration system" not just for USCIS's adjudication and naturalization functions, but also for other DHS components and for entirely separate agencies. *Id.*; *see* 91 Fed. Reg. at 54285 ("[T]his proposed rule would recover costs attributable not only to USCIS, but also to other departments and agencies that have statutory responsibilities in administering the lawful immigration system including ICE, CBP, EOIR, DOS, and DOL."). However, neither of the two substantive provisions invoked by USCIS—Sections 286(m) and 286(n)—grant authority sufficient to promulgate the proposed rule, and the general authority conferred by Section 286(j) only

Admin. (June 2023), https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation. Medically Underserved Areas "have a shortage of primary health services within geographic areas." *Id.*

[34] *See* Reforming the H-1B Nonimmigrant Visa Classification Program, *supra* note 7.

[35] 8 U.S.C. § 1356(m).

[36] 8 U.S.C. § 1356(n).

[37] 8 U.S.C. § 1356(j).

[38] USCIS also claims authority under its general regulatory powers. *See* 91 Fed. Reg. at 54819.

authorizes the agency to effectuate Sections 286(m) and 286(n)—not to collect or distribute funds outside of their scope.

A. Section 286(m)

Section 286(m) establishes the "Immigration Examinations Fee Account" ("IEFA") for the collection of "all adjudication fees." It further limits the amount that may be charged as "adjudication and naturalization" fees to the level necessary to recover the costs of "providing adjudication and naturalization services":

> [F]ees for providing adjudication and naturalization services may be set at a level that will 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. Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.

8 U.S.C. § 1356. While USCIS[39] exercises some discretion in whether to set fees at the level that will provide full cost recovery or at a lower level, and to some extent in how to allocate fees among the various visa types and services offered, both the plain language of the statute and the agency's own past interpretations of the statute limit both the amount of costs recovered and the IEFA to "adjudications" or "adjudication and naturalization services." *Id.* As the INS observed in 1994, "in setting up the Examinations Fee Account, Congress was clearly aware of INS's organizational division into Examinations and Enforcement components, with the adjudication function being part of Examinations. . . . Section 286(n) makes it clear that the Examinations Fee Account is solely for 'immigration adjudication and naturalization services.'" Deposit of Receipts Into the Examinations Fee Account, Immig. & Naturalization Serv. Genco. Op. No. 94-8 (Jan. 12, 1994), 1994 WL 1753113. The statute's reference to "adjudication and naturalization" is not a catch-all reference to the entire "lawful immigration system," as USCIS now asserts. 91 Fed. Reg. at 54818. Rather, Section 286(m) was intended to limit cost recovery to the agency's adjudication functions—to the clear exclusion of DHS components engaged in enforcement rather than adjudication functions, and even more clearly to the exclusion of altogether different agencies like the Department of Justice or Department of State.

USCIS has long acknowledged Congress's clear intent to limit its fee-setting authority. For example, in a 2007 rulemaking, USCIS recognized that "[f]iling fees are not designed to function like tariffs and generate general revenue to support broader policy decisions, or like

[39] In referring to USCIS, we intend to include its predecessor, the Immigration and Naturalization Service, and their respective parent agencies.

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 (May 30, 2007). The agency further observed that limiting cost-recovery to costs incurred by USCIS "is the most consistent with broader Administration policy on user fees and the intent of Congress in the enactment of, and amendments to, section 286(m) of the Immigration and Nationality Act (INA), 8 U.S.C. 1356(m)." *Id.* The most recent fee-setting rulemaking, from 2024, similarly observed that setting fees based on "cost recovery for USCIS" was the "approach [that] is consistent with DHS's legal authorities." U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 FR 6194, 6242 (Jan. 31, 2024) (citing 8 U.S.C. 1356(m)). Even under the current administration, USCIS 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).[40]

B. Section 286(n)

Section 286(n) similarly does not authorize the disbursal of "adjudication fees" from the IEFA to other components of DHS or to other agencies. As the INS has long recognized, "Section 286(n) makes it clear that the Examinations Fee Account is solely for 'immigration adjudication and naturalization services,'" both with respect to deposits into the account and transfer of funds from the account. Deposit of Receipts Into the Examinations Fee Account, Immig. & Naturalization Serv. Genco. Op. No. 94-8 (Jan. 12, 1994), 1994 WL 1753113. USCIS's assertion that "the statute does not limit fee-funded cost recovery to USCIS alone" is both incorrect and beside the point. Fees assessed under Section 286(m) may not be used to fund anything other than the agency's adjudication and naturalization functions—even other functions within USCIS or its predecessor INS. *See, e.g.*, *id.* (concluding that "[t]he [Detention and Deportation] program may not receive funds from the Examinations Fee Account to cover the

[40] To its credit, USCIS recognizes that its interpretation of its statutory authority to assess and distribute fees from H-1B petitioners represents a sharp break from all past interpretations in multiple regards. *See, e.g.*, 91 Fed. Reg. at 54821 ("[W]e have never directly transferred the costs of one program to another based on a determination that requestors under one program can afford higher fees more than other general or specific requestors."), 54825 ("Historically, USCIS fee regulations have been structured to recover only the costs incurred by USCIS in providing immigration adjudication and naturalization services. However, this proposed rule would recover costs attributable not only to USCIS, but also to other departments and agencies that have statutory responsibilities in administering the lawful immigration system including ICE, CBP, EOIR, DOS, and DOL."), 54831 ("DHS recognizes that the other agency costs that are included in this rule and used to establish the fee proposed in this rule are new. DHS also recognizes that DOS and DOL have not independently used the authority in section 286(m) of the INA, 8 U.S.C. 1356(m), to establish fees to cover the costs they incur for administering adjudication services."). Nevertheless, the Notice fails to set forth reasoning to justify this abrupt shift from past practice.

costs of processing and [Application for Stay of Deportation or Application for Suspension of Deportation], as such work is not part of INS's adjudicative function").

IV. The Proposed "Fee" is an Unconstitutional Tax

Even though the $100,000 payment levied under the 2025 Policy was held to be a tax, *see Mullin*, 833 F. Supp. 3d at 70, USCIS makes no attempt in the Notice to explain why the $103,265 payment levied under the proposed rule would not *also* be a tax—indeed, the word "tax" does not appear anywhere in the Notice. As the federal government argued in defending the 2025 Policy, a "defining feature of a tax" is to "raise revenue," Def. Mem. in Supp. of Mot. for Summ. Judg. at 24, *California v. Mullin*, No. 1:25-cv-13829, Dkt. No. 93 (D. Mass., Mar. 9, 2026); *see also Mullin*, 833 F. Supp. 3d at 70, and USCIS asserts throughout the Notice that the purpose of the proposed rule is "to generate dedicated revenue to support the costs of administering the lawful immigration system." 91 Fed. Reg. at 54818.

Courts have recognized that not all measures by the government to collect revenue amount to taxes, and USCIS has indeed characterized the $103,265 assessment as a "fee." *Id*. 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." *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. 656, 676 (2025) (quoting *National Cable Television Assn., Inc. v. U.S.*, 415 U.S. 336, 341, 343 (1974)) (cleaned up). Here, USCIS has not been shy about declaring its intent for payments collected under the proposed rule to fund the "immigration system" by assessing an amount far beyond the cost of providing H-1B visa adjudication services—the amount that would be the upper limit to be considered a "fee" under the controlling case law—and also far beyond the cost of providing "adjudication and naturalization services," the maximum amount authorized by the most generous interpretation of Section 286(m).

Even if Section 286(m), or any generic rulemaking authorities cited by USCIS, were sufficiently ambiguous that they could be interpreted to authorize the tax proposed in the proposed rule, the imposition of a tax by the executive branch must be supported by "'clear congressional authorization.'" *Learning Res., Inc. v. Trump*, 607 U.S. 229, 248 (2026) (quoting *Biden v. Nebraska*, 600 U.S. 477, 506 (2023)). The fact that the executive branch has never before claimed such sweeping powers under Section 286(m), coupled with the extraordinary "economic and political significance" of the proposed action, strongly support the conclusion that Congress did not intend to authorize the action proposed by USCIS. *Learning Res., Inc.*, 607 U.S. at 245-46 (2026); *cf. U.S. v. Naviwala*, 825 F. Supp. 3d 451, 465 (D.N.J. 2026) ("To avoid [legal and constitutional] roadblocks, this administration frequently purports to have discovered enormous grants of executive power hidden in the vagaries and silences of the code." (citing *Learning Resources*, 607 U.S. 229; *Trump v. Illinois*, 146 S.Ct. 432 (2025))).

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) (agency action is arbitrary and capricious if it is "internally inconsistent").

Additionally, agency action is unreasonable, and therefore also arbitrary and capricious, when it "relies on an erroneous interpretation of the law." *Filazapovich v. Dep't of State*, 560 F. Supp. 3d 203, 243 (D.D.C. 2021), rev'd and remanded on other grounds sub nom; *Goodluck v. Biden*, 104 F.4th 920 (D.C. Cir. 2024). For decisions to be reasonable, agencies must offer "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 588 U.S. 752, 756 (2019).

USCIS fails to acknowledge the significant costs that the proposed rule would impose upon the States in violation of the APA. Throughout the proposed rule and its "justifications," USCIS consistently violates basic principles of reasoned agency decision-making by failing to consider States' reliance interests, failing to consider alternatives that would protect state and local government, relying on inconsistent reasoning, adopting vague standards, making arbitrary determinations of interagency costs, and in some instances not explaining proposed changes at all.

With the proposed rule, the administration attempts to circumvent the district court's decision in *California v. Mullin* by introducing a new rule, substantially similar to but in some ways broader in scope than the 2025 Policy, that will continue to harm states. The proposed rule is grounded neither in legal authority nor in substantive evidence; it is a textbook example of arbitrary and capricious agency action. USCIS claims that "the purpose of this proposed rulemaking is to generate dedicated revenue to support the costs of administering the lawful immigration system" 91 Fed. Reg. at 54818. But none of the authorities cited by USCIS authorize the agencies to arbitrarily impose a financing structure that taxes a specific, congressionally mandated visa type in order to fund far-flung corners of the "lawful immigration system." Here, fully two-thirds of the revenue from this tax would be directed to programs and projects unrelated to adjudication, *see* 91 Fed. Reg. at 54831, and would be in addition to already established fees for H-1B petitions that are designed to recover the cost of adjudication.

A. The Proposed Rule Fails to Consider States' Reliance Interests and the Impact on States

When an agency changes its existing policy, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy[.]" *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). Agencies must provide "more detailed justification" for a change in policy when their prior policy "engendered serious reliance interests." *Housatonic River Initiative v. EPA*, 75 F.4th 248, 270 (1st Cir. 2023) (quoting *Fox*, 556 U.S. at 515).

USCIS has failed to consider the substantial reliance interests held by States and the impact that the proposed rule would have on States. States and their instrumentalities have made hiring decisions under the H-1B program for decades in response to labor shortages for providers of necessary services. States have long followed Congress's careful judgments about the proper balance between the goals of admitting uniquely skilled noncitizen workers, protecting the domestic workforce, and accommodating the unique needs of government and nonprofit employers. In adopting the proposed rule, USCIS is departing from the pre-existing lawful fee schedule for H-1B visas. This is impermissible under the APA—where an agency is "not writing on a blank slate," it is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020).

USCIS asserts that employers "are willing to pay and can afford an additional $103,265 fee." 91 Fed. Reg. 54831. This unsupported statement does not exhibit the consideration of reliance interests required by the APA. Moreover, the agencies' own Technical Appendix contradicts this unsupported claim. Data collected by USCIS shows that from September 21, 2025, through May 24, 2026, USCIS received *91.2% fewer* initial consular Form I-129 H-1B petitions relative to the same time frame in the previous year.[41] USCIS attempts to wave this away by labeling the Proclamation payment "an information shock that H-1B petitioners did not have time to absorb."[42] What data actually shows is that government and not-for-profit employers simply do not have the means to pay such a high tax on a single petition—indeed, even heavily resourced private employers generally could not or would not pay the tax. States feel this most acutely in small, rural communities—"attaching th[e] price tag [of an H-1B fee] to

[41] 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.

[42] *Id.*

a single hire, it just simply puts that position out of reach for rural budgets."[43] Education and healthcare agencies simply cannot afford to pay one $103,265 tax, let alone multiple to fill necessary positions, which takes "them out of the equation for H-1B candidates" and adds additional strain on already stretched systems.[44]

B. The Proposed Rule Fails to Consider Alternatives that would Protect State and Local Government

USCIS claims to have based the proposed rule on a newfound need to "generate dedicated revenue to support the costs of administering the lawful immigration system." 91 Fed. Reg. at 54818. The administration has failed to consider alternative means of raising revenue. Even assuming the agency had the power to simply raise revenue for this purpose, which, as discussed *supra*, it does not, the agency failed to consider any alternative means of raising revenue. Nor did the agency consider alternatives that would spare those providing crucial public services, like exempting all government and medical employers.

Having failed to consider the catastrophic impact on employers like the States, and having failed to consider alternative means of raising revenue that would avoid that impact, USCIS instead justifies its refusal to consider alternatives by asserting that it "believes that cap-subject H-1B petitioners are willing to pay and can afford an additional $103,265 fee." 91 Fed. Reg. at 54831. But nowhere in the proposed rule does USCIS provide any basis for this claim—it offers no evidence to suggest that cap-subject H-1B petitioners are willing and able to pay such a tax, and indeed, the sharp decline in petitions since the 2025 Policy is further evidence against USCIS' assertions.[45]

C. The Proposed Rule Makes an Arbitrary Determination of Interagency Costs to Reimburse the Revenue Generated by the Proposed Rule

The primary claimed authority for the proposed rule is Section 286(m), which generally caps visa-related "fees" at an amount necessary to cover agency costs in providing visa adjudication services.[46] With the proposed rule, USCIS expands its understanding of interagency

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[43] *Trump's $100,000 H-1B Visa Fee Threatens Rural Schools and Hospitals Reliant on Immigrant Workers*, *supra* note 14.

[44] Nick Hut, *H-1B visa fee strains the healthcare workforce and hospital finances*, HFMA (Apr. 15, 2026), https://www.hfma.org/operations-management/h-1b-visa-fee-strains-the-healthcare-workforce-and-hospital-finances/.

[45] *Technical Appendix to Fee for Certain H-1B Petitions NPRM RIA_08.13.26*, *supra* note 41.

[46] This interpretation of § 1356(m) is contrary to law for the reasons set forth in Section III.

costs to inexplicably include costs incurred by USCIS, CBP, U.S. Immigration and Customs Enforcement (ICE) in DHS, Executive Office for Immigration Review (EOIR) in the Department of Justice, DOS, and the Department of Labor. 91 FR 54819. This amount totals nearly $9 billion dollars. Arbitrarily dividing this figure by 85,000 (the number of H-1B visas permitted annually under the cap) arrives at the $103,265 "fee" contemplated by the proposed rule.

This new "fee" is a significant departure from the previously determined costs of adjudicating H-1B visas or administering the program, which normally totals between $960 to $7,595 for each H-1B petition in addition to the other filing and petition fees. Pub. L. No. 114-113, § 402(g), 129 Stat. 2242, 3006. The amount is arbitrarily based on how much money the administration would like to raise for different projects for ICE, CBP, and more. 91 FR 54831. And under 8 U.S.C § 1356(m), the fees that USCIS 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 cost 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."

D. <u>The Proposed Rule Fails to Consider Data on the Demand Impact of the Proposed $103,265 Tax</u>

The proposed rule is also arbitrary and capricious because USCIS fails to consider data that undercut the claimed purpose of the proposed rule of raising revenue. In particular, when the 2025 Policy was in place, H-1B applications fell to such an extent that they would not support the supposed revenue now anticipated in the Notice. In particular, USCIS provides data on the volume of initial consular Form I-129 H-1B petitions received by USCIS between 2022 and 2026.[47] When the Proclamation payment was not in effect, in the 245-day time period between September 21 and May 26, in each year from 2022-2025, USCIS received between 13,823 to 17,607 initial consular Form I-129 H-1B petitions.[48] In the time period in 2026, USCIS received only 1,212 petitions.[49]

USCIS tries to explain away this trend with claims that these "short-term responses" are not indicative of the national trend.[50] Yet the data demonstrates, clearly and plainly, that employers are unable or unwilling to pay these exorbitant charges, and USCIS offers no

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[47] *See Technical Appendix to Fee for Certain H-1B Petitions NPRM RIA_08.13.26*, *supra* note 41.

[48] *Id.*

[49] *Id.*

[50] *Id.*

alternative theory as to why employers would suddenly come up with the funds to pay each new H-1B tax.

VI. The Comment Period is Procedurally Inadequate

The Notice invites public comments for a period of only thirty days—from publication of the notice on August 25, 2026, until the close of comments on September 24. This unusually short comment period is justified nowhere in the notice—a particularly glaring admission where the proposed rule would impose direct costs of nearly $9 billion annually, with arguably incalculable further costs to Americans' access to education, healthcare, and other basic services, as well as secondary economic costs to state and local economies.

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). While the APA does not specify the minimum duration for acceptance of public comment, "because 30 days is ordinarily seen as the minimally acceptable period, two Executive Orders state that agencies should "generally" or "in most cases" provide at least 60 days for comments." *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. CV 21-00094, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021) (citing Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821 (Jan. 18, 2011); Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993)).

The abbreviated time period offered by USCIS in this instance is particularly egregious due to the simultaneous initiation of eight other overlapping rulemaking processes, as noted above, including a forthcoming rulemaking originally slated for August 2026 that could greatly expand the scope of the proposed rule's impact. *See* 91 Fed. Reg. at 54824-25; secs. I, III, *supra*.[51] Courts have held that the existence of concurrent, related rulemaking specifically renders an abbreviated comment period insufficient. *See Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. CV 21-00094, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021) (finding likelihood of success on APA challenge where only thirty days were given for public comment even though "defendants and other executive agencies were simultaneously promulgating numerous other immigration-related regulations"); *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 822 (N.D. Cal. 2020) (granting temporary restraining order after holding that thirty-day comment period raised "serious questions," particularly in light of simultaneous, related rulemaking).

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[51] On September 18, 2026, a few days shy of the close of this comment period, President Trump also announced that he is extending his 2025 Proclamation directing agencies to impose the $100,000 tax that was the primary feature of the 2025 Policy. See Proc. 11069, Restriction on Entry of Certain Nonimmigrant Workers, 91 Fed. Reg. 60497 (Sept. 23, 2026). The effect of this proclamation is not addressed in the proposed rule.

Conclusion

If finalized, the proposed rule would cause significant, direct harm to the States, their public institutions, and their residents by making inaccessible the benefits that Congress intended the H-1B program to provide. The proposed rule is unlawful for the many reasons stated. The States urge USCIS to withdraw the rule.

Respectfully,

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