LETITIA JAMES
ATTORNEY GENERAL

XAVIER BECERRA
ATTORNEY GENERAL

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Via Federal eRulemaking Portal

Chad F. Wolf, Acting Secretary
U.S. Department of Homeland Security
Kenneth T. Cuccinelli, Acting Director
U.S. Citizenship and Immigration Services
Samantha Deshommes, Chief Regulatory Coordination Division,
Office of Policy and Strategy U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2140

RE: Comment on *Employment Authorization for Certain Classes of Aliens with Final Orders of Removal*, 85 Fed. Reg. 74,196 (Nov. 19, 2020), RIN 1615-AC40.

Dear Acting Secretary Wolf, Acting Director Cuccinelli, and Chief Deshommes:

We, the Attorneys General for the States of New York, California, and Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, and Rhode Island ("the States") write to oppose the U.S. Department of Homeland Security's ("DHS") proposal to change the employment authorization eligibility criteria for immigrants with final orders of removal released from immigration detention under orders of supervision ("OSUPs") by the Proposed Rule, *Employment Authorization for Certain Classes of Aliens with Final Orders of Removal*, 8 Fed. Reg. 74,196 (Nov. 19, 2020) ("Proposed Rule"). The Proposed Rule will harm immigrant communities, small businesses and the States by preventing virtually all immigrants under OSUPs from legally working in the United States. Furthermore, the Proposed Rule will not achieve its stated aims, is not supported by reasoned agency decision-making, and is contrary to law.

I. LEGAL BACKGROUND.

A. Statutory Background.

The INA authorizes DHS to, among other things, enforce immigration law, supervise the presence of noncitizens in the United States and administer procedures for removing those present in the United States without federal authorization. *See* Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101 et seq.). Typically, DHS has 90 days to remove a noncitizen following the issuance of a final order of removal by an immigration official. INA § 241(a)(1)(A), (B)(i); 8 U.S.C. § 1231(a)(1)(A), (B)(i). DHS is authorized to detain the

noncitizen who is subject to the removal proceeding during this 90-day removal period. *See* INA § 241(a)(2); 8 U.S.C. § 1231(a)(2). If DHS is unable to make a removal within six months, and "there is no significant likelihood of removal in the reasonably foreseeable future," then DHS must either rebut this showing or temporarily release the noncitizen under an OSUP.[1] *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); INA § 241(a)(3).

Noncitizens under OSUPs are usually required to meet certain conditions in order to qualify for temporary release from DHS custody. INA § 241(a)(3); 8 U.S.C. § 1231(a)(3); 8 CFR § 241.5(a). Upon their release, DHS has the authority to grant employment authorization documents ("EADs") that allow noncitizens under OSUPs to legally work in the United States. INA § 241(a)(7); 8 CFR § 274a.12(c)(18). DHS may issue EADs whenever the DHS Secretary determines that a noncitizen cannot be removed because no country will accept them or their removal is impracticable or contrary to the public interest. INA § 241(b); 8 U.S.C. § 1231(b). DHS may also renew EADs for noncitizens under OSUPs who remain in the country. *See id.*

Pursuant to this framework, DHS issues and renews EADs for tens of thousands of noncitizens living under OSUPs each year. 85 Fed. Reg. 74,226. Over the last ten years, the number of initial DHS approvals for EADs ranged from 3,433 to 8,748, and the number of renewal DHS approvals for EADs ranged from 8,297 to 24,464. *See id.* Significantly, DHS grants the vast majority of initial and renewal applications; over this ten-year period, the average initial approval rate was approximately 84% and the average renewal approval rate was approximately 93%. *Id.*

B. The Proposed Rule.

Through the Proposed Rule, DHS seeks "to eliminate employment authorization eligibility for aliens who have final orders of removal but are temporarily released from custody on an order of supervision with one **narrow** exception." 85 Fed. Reg. 74,196 (emphasis added). Under this narrow exception, initial applications for EADs may only be granted for "aliens for whom DHS has determined that their removal is impracticable because all countries from whom DHS requested travel documents have affirmatively declined to issue such documents" and who "establish economic necessity for employment during the period of the order of supervision." 85 Fed. Reg. 74,197.

Renewal applications for EADs may only be issued for individuals who meet the new "narrow exception"; demonstrate economic necessity; establish that they warrant a "favorable exercise of discretion"; and establish that they are employed by a U.S. employer who is a participant in good standing in DHS's E-Verify program. *Id.* The Proposed Rule also adds new discretionary factors for USCIS to consider when deciding whether to grant EADs, requires applicants to submit new biometric data, and imposes additional fees. *See id.* at 74,197–74,198.

DHS claims that the purpose of the Proposed Rule is to align DHS policy with Executive Order 13,768 by prioritizing for removal all noncitizens who have final orders of removal. *Id.* at 74,207; *see* Executive Order 13,768, "Enhancing Public Safety in the Interior of the United

[1] DHS may extend the detention period under certain special circumstances as provided by 8 CFR § 241.14.

States," 82 Fed. Reg. 8799 (Jan. 25, 2017). But the central justification for the Proposed Rule—to align agency policy with Executive Order 13,768 – is contrary to law, as found by courts which have invalidated other DHS policies promulgated pursuant to this Executive Order. *See New York v. U.S. Immigration & Customs Enf't*, 466 F. Supp. 3d 439, 449 (S.D.N.Y. 2020) (invalidating ICE's courthouse arrest policy and finding that ICE's sole rationale for the policy was a "misguided reliance" on Executive Order 13,768); *see also Washington v. U.S. Dep't of Homeland Sec.*, No. C19-2043 TSZ, 2020 WL 1819837 (W.D. Wash. Apr. 10, 2020) (invalidating ICE's courthouse arrest policy and finding that ICE failed to provide sufficient explanation for this policy change).

In addition to the Proposed Rule's reliance on a discredited Executive Order, as explained more fully below, DHS failed to adequately consider the impact of the Proposed Rule on the States, affected immigrants, and businesses, while ignoring evidence that its purported goals will not be served by the Proposed Rule. Absent from DHS' discussion is any meaningful analysis of the fact that the Proposed Rule would, by effectively prohibiting almost all noncitizens under OSUPs from qualifying for EADs in the future, threaten the livelihood of over 20,000 individuals and their families nationwide. In addition to the hardship faced by impacted individuals and their families, the loss of employment created by the Rule would harm employers, as well as States' economies and tax bases, and cause an increase in expenditures on publicly-funded healthcare and social services. For those relatively few individuals who will remain eligible for EADs, DHS will require them to secure work with the very limited number of employers who are part of the "E-Verify" program, which is rife with problems. DHS's failure to consider these important aspects of the problem renders its decision subject to invalidation under the Administrative Procedure Act (APA).

II. THE PROPOSED RULE VIOLATES THE APA BY FAILING TO ADEQUATELY CONSIDER THE PROPOSED RULE'S IMPACTS.

"The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). Under the APA, federal agencies must "engage in reasoned decisionmaking," considering "the advantages *and* the disadvantages of agency decisions" before taking action. *Id.* As the Supreme Court has held, "agency action is lawful only if it rests on a consideration of the relevant factors," and an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether regulation is appropriate. *Michigan v. EPA*, 135 S. Ct. 2699, 2706-07 (2015) (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (brackets and quotation marks omitted)). If an agency action is not "based on a consideration of the relevant factors," that action is arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 40–43 (citing 5 U.S.C. § 706(2)(A)). Further, where an agency changes a prior policy, it must provide "a reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009).

Here, DHS failed to provide reasoned justifications for the significant changes set forth in the Proposed Rule as required by the APA. DHS's failures to adequately consider impacts to the affected immigrants and their families, the States, and employers means that their action fails to

satisfy the APA. *See e.g.*, *Regents*, 140 S. Ct. at 1914 (listing, *inter alia*, impacts to (1) affected individuals' employment and families (including U.S.-citizen children); (2) their employers ; and (3) state and local government tax revenues as factors that DHS was required to consider before rescinding Deferred Action for Childhood Arrivals program (DACA); *Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *28 (D. Md. Sept. 11, 2020) (invalidating DHS's new asylum work authorization rules, finding that "DHS simply paid lip service to a certain degree of economic hardship that that the new rules inflict"; DHS "never wrestled with the fundamental implications of deferring or denying advance work authorization." (internal quotation marks omitted)).

A. The Proposed Rule Fails to Adequately Consider the Harm to Impacted Immigrant and their Families.

1. The Proposed Rule Would Contribute to Immigrant Poverty, Including Food Insecurity, Homelessness, and Reduced Healthcare.

The impact of the proposed regulatory amendments is to effectively eliminate the ability of individuals released OSUP to obtain work authorization. Whereas the prior approval rate for initial and renewal EADs ranged from 84 to 93%, the approval rate under the Proposed Rule may be as low as 3.1%. 85 Fed. Reg. 74,229. Yet DHS's discussion of the costs and benefits of the Proposed Rule is bereft of any analysis of the impacts that the loss of EADs will have on these immigrants and their families. DHS includes only a very general statement about "personal and family-related hardships," 85 Fed. Reg. 74,201, with neither any actual analysis of these hardships nor balancing them against the ostensible benefits of the Proposed Rule.
The Proposed Rule threatens the livelihoods and stability of over 20,000 immigrants living in our communities under OSUPs. Without gainful employment, these immigrants will face extreme hardships in securing basic necessities for themselves and their households. For example, the loss of employment income would increase the likelihood of food insecurity in these households—a problem that immigrant households already experience at disproportionate rates.[2] Many immigrants, particularly those without robust support networks, may lose their shelter without work authorization. The resulting homelessness will exact a significant toll on these households, which includes poor mental and physical health outcomes.[3] These harms are likely to be exacerbated by the inability to afford private health insurance, or a loss in employer-sponsored healthcare coverage following the loss of gainful employment.[4] Given the ongoing—and worsening—COVID-19 pandemic, such sudden losses of affordable access to healthcare may have life-threatening consequences for immigrants under OSUPs and their families.

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[2] Mariana Chilton et al., *Food Insecurity and Risk of Poor Health Among US-Born Children of Immigrants*, 99 Am. J. of Pub. Health vol. 3 556-62 (2009).
[3] The Centers for Disease Control and Prevention, *Homelessness as a Public Health Law Issue: Selected Resources*, https://tinyurl.com/CDCPhomelessness.
[4] Jacob Goldin, et al., *Health Insurance and Mortality: Experimental Evidence from Taxpayer Outreach*, NBER Working Paper No. 26533 (Dec. 2019), https://www.nber.org/papers/w26533.

2. The Proposed Rule Would Result in Affected Immigrants Working Without Authorization.

Not only does evidence establish—contrary to DHS's unsupported assumption—that immigrants denied EADs will remain in this country (*see infra* section III.A.), but, as a Cato Institute Study found, they will likely work without authorization.[5] These immigrants forced into the underground economy—and undocumented workers as a whole—face serious exploitation. A landmark study in 2009 found that 26% of unauthorized workers received less than the minimum wage, 76% were not paid overtime, and 69% failed to receive required breaks.[6] When unauthorized workers suffered injuries on the job, only 8% received workers compensation and 50% experienced some form of retaliation, including firings, immigration violation notifications, and the denial of workers compensation benefits.[7] Employers of unauthorized workers often do not carry workers' compensation insurance, leaving workers to pay for their own treatment of workplace injuries. For example, 41% of undocumented workers in Illinois paid the cost of their workplace injuries.[8]

These abuses have been documented in several localities within the States. For example, in Chicago, 38% of undocumented workers reported their employers did not pay them minimum wages, and 66.2% of undocumented workers reported their employers did not pay them overtime wages.[9] According to one study, in New York City, 77% of surveyed low-wage workers who worked overtime in the previous week reported that they had not been paid the correct amount.[10] A recent study of low-wage employees working without authorization in San Diego County found that 64% of the janitors surveyed had not been paid what they were owed or suffered some other labor violation.[11] Worse yet, nearly one-third said they had been forced to work against their will, and 17% of that group said they had experienced some kind of physical threat, including sexual violence, at work.[12] Women without legal authorization face particularly dangerous work-place situations—in a study of 150 female farmworkers in California, 40% had suffered sexual harassment.[13]

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[5] *Id.*
[6] Annette Bernhardt et al., *Broken laws, Unprotected Workers, Violation of Employment and Labor Laws in America's Cities*, UCLA Inst. for Res. on Lab. and Employment, Ctr. for Urban Econ. Devel., and Nat'l Employment L. Proj. (2009), https://tinyurl.com/yble23lg.
[7] *Id.*
[8] Douglas D. Heckathorn et al., *Unregulated work in Chicago: The Breakdown of Workplace Protections in the Low-Wage Labor Market*, Ctr. for Urban Econ. Devel., U. of Ill. at Chicago, 18 (2010), https://tinyurl.com/yaocb4n4.
[9] *Id.*
[10] Annette Bernhardt et al., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City*, Nat'l Employment L. Proj. 18 (2010), https://tinyurl.com/Workingwithoutlaws.
[11] Bernice Yeung, *Under cover of darkness, female janitors face rape and assault*, Reveal from the Ctr. for Investigative Reporting (June 23, 2015), https://tinyurl.com/YeungReve.
[12] *Id.*
[13] Bernice Yeung and Andrés Cediel, *Rape in the Fields*, Ctr. for Latin Am. Studies at U. of Cal. Berkeley (Fall 2013), https://tinyurl.com/y23wgaxm.

In addition, "immigrants are disproportionately employed in agriculture and construction, sectors with relatively high injury and fatality levels."[14] The Centers for Disease Control noted that immigrants "may be more willing to perform tasks with higher risks and may be more hesitant to decline such tasks for fear of losing their jobs."[15] "Undocumented workers in the meat and poultry industries hold the 'most dangerous factory jobs' in America and are subject to many abuses from their employers."[16] Despite this evidence, DHS fails to even acknowledge, still less take into account, the devastating impacts of the Proposed Rule's denial to affected immigrants of the opportunity to legally work.

3. DHS Fails to Consider E-Verify's Failures.

While DHS acknowledges that E-Verify "may" hamper those few remaining immigrants released OSUP who would still qualify for an EAD from obtaining employment, it fails to provide an analysis of the concern. The reality is that a substantial number of the immigrants who would remain eligible for EADs under the Proposed Rule (by DHS estimates, 459) will have difficulty finding an employer willing to hire them that also participates in the E-Verify program, since only 13.5% of employers participate in the program.[17] E-Verify has also been plagued by an inaccurate database, resulting in otherwise eligible employees being denied employment.[18] In 2018, over 58,000 workers had to file challenges to establish their right to work.[19] And in industries that rely heavily on immigrant labor, such as agriculture and construction, many employers do not participate in the program and oppose it.[20] A Cato Institute study in Arizona, which mandates the use of E-Verify, found that the program had no impact on deterring immigrant labor, but did result in an 8% salary reduction for immigrants.[21] Ironically, the salary reduction caused immigrants to work even more hours and resulted in more female immigrants entering the workforce.[22] Here again, DHS offers no assessment of E-Verify and the degree to which it would preclude immigrants from even finding eligible employers, as well as the problems these immigrants are likely to encounter with the program.

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[14] Pia M. Orrenius and Madeline Zavodny, *Do Immigrants Work In Riskier Jobs?*, NCBI (Aug. 2009), https://tinyurl.com/y9pb458t .
[15] *Id.*
[16] *Id.*
[17] David Bier, *The Facts About E-Verify: Use Rates, Errors, and Effects on Illegal Employment,* Cato Inst. (Jan. 31, 2019), https://tinyurl.com/ycfg9ept.
[18] *Id.*
[19] *Id.*
[20] *See* Am. Farm Bureau, https://tinyurl.com/y9azr5w6 ; Derek Illar, *Decoding Pennsylvania's new act & its implications on the entire U.S.*, Construction Business Owner (Apr. 29, 2020), https://tinyurl.com/yc6ftz7y.
[21] Bier, *supra* note 17.
[22] *Id.*

4. DHS's Fails to Adequately Substantiate Any Cost Savings and Need to Depart from Existing INA Criteria.

Although DHS submits that the Proposed Rule "promotes the efficient use of DHS's limited resources" by minimizing the time spent on monitoring the status of immigrants on OSUPs, DHS offers no evidence of the current cost, magnitude, or difficulties associated with DHS's monitoring efforts. 85 Fed. Reg. 74,213. Nor does DHS explain how these speculative benefits outweigh the harms to individuals who will lose EAD eligibility under the Proposed Rule. DHS similarly fails to explain the need to depart from the current EAD eligibility framework, which allows DHS to grant EADs whenever an immigrant's removal would be impossible, impracticable or contrary to the public interest. *See* INA § 241(b); 8 U.S.C. § 1231(b). The Proposed Rule's new standard, by contrast, would only allow DHS to issue EADs when an immigrant's removal is impossible because "all countries from whom DHS has requested travel documents have **affirmatively declined** to issue such documents." 85 Fed. Reg. 74,197 (8 CFR § 274a.12(c)(18)(i)) (emphasis added). This standard has no basis in law or practice, and would, for example, bar immigrants from receiving EADs simply because a country is slow to respond to DHS's request for travel documents. DHS fails to explain what legitimate agency ends are served by denying work authorization to immigrants in this situation.

B. The Proposed Rule Fails to Adequately Consider the Harm to the States.

The Proposed Rule will negatively impact the States in significant ways. The Proposed Rule will make it virtually impossible for individuals under OSUPs to legally work, costing the States millions of dollars in lost tax revenue and diminished economic growth. The resulting denials of work authorization and employment income will lead to increased healthcare costs shouldered by the States. Given that nearly 4 out of every 10 immigrants resides in New York and California,[23] these States will bear a substantial share of the harms associated with the Proposed Rule.

1. The Proposed Rule Will Deprive the States of Important Streams of Revenue, Decrease Tax Revenue, and Increase Public Support Costs.

The States benefit from all immigrants, including those living under OSUPs, being able to work within their borders. DHS itself recognizes that these immigrants might lose up to $14.7 billion in wages, *id.* at 74,244, that would otherwise have flowed into the economy in the form of increased spending power, and contributed to economic growth. By prohibiting tens of thousands of immigrants under OSUPs from legally working in the United States, the Proposed Rule will significantly lower the tax revenue that States and localities receive from these workers' economic activity. *See infra* section III.B.1. Indeed, DHS estimates that the Proposed Rule would result in federal tax losses ranging from "$923,844,794 and $2,251,612,274" from fiscal year 2020 to 2029. *Id.* at 74,244. Although DHS has not attempted to calculate the tax losses to States or localities, it recognizes that the Proposed Rule will likely result in such losses. *See id.*

[23] Abby Budiman, *Key findings about U.S. immigrants*, Pew Res. Ctr. (Aug. 20, 2020), https://tinyurl.com/yy7ydm3p.

Although unauthorized workers pay taxes,[24] tax revenue increases when immigrants can legally work, and the States could stand to lose substantial revenue if the Proposed Rule is implemented. Currently, undocumented immigrants residing in the signatory States pay approximately $6.8 billion in state and local taxes annually.[25] This would increase by approximately $1.24 billion if undocumented immigrants were given legal status. Conversely, the Proposed Rule will reduce the tax revenues collected by the States from individuals released OSUP who have EADs. In addition, the economic impact of wage theft that impacted immigrants are likely to experience as a result of the Proposed Rule, *see supra* section II.A.2, will also impact the States' tax revenues.

The Proposed Rule will significantly reduce the spending power of immigrants under OSUPs and increase turnover costs for the businesses who currently employ such workers, to the detriment of businesses in the States and localities where they reside. *See infra* section III.B.1. These costs may be substantial for small businesses, many of whom are already suffering due to the economic downturn related to the COVID-19 pandemic, and will further decrease State and local tax revenue and hinder economic growth. Further, because several sectors of the signatory States' economies disproportionately employ immigrants, these sectors are more likely to face especially high costs while trying to find labor substitutes. *See infra* section III.B.2.

2. The Proposed Rule Will Increase States' Costs for Healthcare and Other Public Benefits.

For many immigrants under OSUPs, eliminating or delaying the ability to work will result in lack of access to essential healthcare. Immigrants using EADs and their families relying on employer-sponsored health insurance will lose this coverage, joining the ranks of unemployed workers lacking such insurance. Immigrants in this situation will either seek state-funded health insurance plans, or find themselves uninsured. In either scenario, the costs will be borne by the States because individuals without insurance are far more likely to skip preventative care, and are more likely to develop more expensive medical conditions that may need to be treated in emergency care settings.[26]

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[24] For example, in 2018, undocumented immigrants paid over $3.1 billion in state and local taxes in California; $1.1 billion in New York; $758.8 million in Illinois; $587.4 million in New Jersey $124.1 million in Connecticut; $86.9 million in Michigan; $80.7 million in Oregon and $67.7 million in New Mexico. Lisa Christensen Gee, et al., *Undocumented Immigrants' State & Local Tax Contributions*, Inst. on Tax. and Pol'y (Mar. 2017), https://tinyurl.com/yc37mnyk.

[25] *See id.*

[26] Stacey McMorrow et al., *Determinants of Receipt of Recommended Preventive Services: Implications for the Affordable Care Act*, Am. J. Pub. Health (Dec. 2014), https://tinyurl.com/McMorrowPublicHealth; Jennifer E. DeVoe et al., *Receipt of Preventive Care Among Adults: Insurance Status and Usual Source of Care*, 93 Am. J. of Pub. Health 5 786-791 (May 1, 2003), https://tinyurl.com/DeVoePublichHealth; Cal. Ass'n of Pub. Hospitals and Health Systems, *About California's Public Health Care Systems*, https://tinyurl.com/y68c6m87 (stating that public hospitals in California account for 40 % of hospital care to the remaining uninsured in the communities they serve).

Lack of health insurance also will harm overall public health. For example, the uninsured are less likely to receive vaccinations, which prevent the spread of infectious diseases throughout the community.[27] This is of particular concern to the States, many of whom are currently rolling out massive COVID-19 vaccination projects to help curtail the devastating impact of the COVID-19 pandemic. New York and California, for example, have just begin implementing their vaccination plans, starting with high-risk health care and essential workers, as well as nursing home residents and staff.[28] DHS's Proposed Rule and its impact on healthcare access could not come at a worse time for the States and the Nation as a whole.

Relatedly, immigrants unable to work due to the Proposed Rule will turn to other safety nets for support, including state-funded non-profit organizations, and State-sponsored public assistance.[29] These State expenditures will further strain State budgets already severely impacted by COVID-19.

C. DHS Fails to Adequately Consider Harms to Employers.

Employers in the States will also be harmed by the Proposed Rule, which will further reduce the pool of individuals authorized to work in essential services in which there are already critical shortages including healthcare; agriculture; the delivery of food and other goods; food processing and preparation; technology; childcare; and construction. *See infra* section III.B.2. The Proposed Rule would reduce the labor pool at time when even former Trump Administration officials acknowledge that such labor is desperately needed.[30] Certain industries are clamoring for more immigrant labor, including agriculture and construction.[31] As a consequence, unauthorized immigrants represent a significant part of the workforce, particularly in such industries.[32] This places many employers in the position of hiring workers they either know, or have strong reason to suspect, are undocumented. It also is one significant reason for employers' avoidance of the E-Verify program.[33]

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[27] Peng-jun Lu et al., *Impact of Health Insurance Status on Vaccination Coverage Among Adult Populations*, 48 Am. J. Prev. Med. 647–661 (Apr. 15, 2015), https://tinyurl.com/y5es4yt4 .
[28] New York State, *New York State COVID-19 Vaccine Program* (Dec. 10, 2020), https://tinyurl.com/yax58c5g; Cal. Dep't of Pub. Health, *CDPH Allocation Guidelines for COVID-19 Vaccine During Phase 1A: Recommendations* (Dec. 5, 2020), https://tinyurl.com/y4tpcfy2.
[29] *See Mapping Public Benefits for Immigrants in the States*, Pew Res. Ctr. (Sept. 24, 2014), https://tinyurl.com/y4v6qqau; Jose A. Del Real and Manny Fernandez, *As Government Pulls Back, Charities Step in to Help Released Migrants*, N.Y. Times (Jan. 14, 2019), https://tinyurl.com/y9draaf4.
[30] Jeanna Smialek and Zolan Kanno-Youngs, *Why a Top Trump Aide Said 'We Are Desperate' for More Immigrants*, N.Y. Times (Feb. 27, 2020), https://tinyurl.com/vnq9b64.
[31] Eduardo Porter, *Short of Workers, U.S. Builders and Farmers Crave More Immigrants*, N.Y. Times (Apr. 3, 2019), https://tinyurl.com/y4soqp7v.
[32] Jeffrey S. Passel, *Industries of Unauthorized Immigrant Workers*, Pew Res. Ctr. (Mar. 26, 2015), https://tinyurl.com/y924x69q.
[33] Alex Nowrasteh, *Three Reasons Why Immigrants Aren't Going to Take Your Job*, Cato Inst. (Apr. 22, 2020), https://tinyurl.com/ybw5qvye.

Further, as DHS has acknowledged, the Proposed Rule would impact employers through turnover costs of $15,621 per worker, costs to apply and participate in the E-Verify program, lost productivity, and possibly "reduced profitability due to operational and production disruptions." 85 Fed. Reg. 74,239–74,242. These costs may be substantial for small businesses, many of whom are already suffering due to the economic downturn related to the COVID-19 pandemic. But DHS's analysis does to balance these acknowledged costs against the Proposed Rule's ostensible benefits.

III. DHS FAILED TO PROVIDE EVIDENCE THAT THE PROPOSED RULE WILL ACHIEVE ITS STATED GOALS.

Another aspect of the APA's arbitrary and capricious standard renders agency action subject to being struck down if the agency failed to articulate a "rational connection between the facts found and the choice made" or "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 40. DHS's actions here do not meet this standard.

A. DHS Failed to Provide Evidence that the Proposed Rule Will Encourage Immigrants with Final Orders of Removal to Leave the United States.

DHS claims as justification for the Proposed Rule that it "has identified that providing an 'open market' employment authorization to aliens with final removal orders exacerbates the challenges in effectuating removal by incentivizing such aliens to remain in the United States." 85 Fed. Reg. 74,208. However, DHS provides no evidence that the Proposed Rule will actually encourage these immigrants to leave the United States, and the facts on the ground do not support this assumption.

A Cato Institute study found that undocumented immigrants receive, on average, a 253% wage increase by staying in this country.[34] For example, a working-age Mexican male with 9–12 years of education in his home country can expect a 2.6-fold increase in his wages.[35] Thus, even if they lose work authorization, these immigrants have a strong incentive to stay in the United States.

Further, many immigrants have reasons to remain in the United States which override their ability to work legally. Most prominently, the vast majority have existing family and community ties here. Nationally, about 16.7 million people in the country have at least one unauthorized family member living with them in the same household.[36] And more than 8 million U.S. citizens have at least one unauthorized family member living with them.[37] In addition to these familial ties, many undocumented individuals are "respected community members [with] deep and

[34] Bier, *supra* note 17.
[35] Nowrasteh, *supra* note 33.
[36] Silva Methema, *Keeping Families Together*, Ctr. for Am. Progress (Mar. 16, 2017), https://tinyurl.com/y9dttye8.
[37] *Id.*

longstanding ties to the United States."[38] And many immigrants' incentive to remain in the United States is based on threats to life and limb in their countries of origin and will not be meaningfully impacted by DHS's plan to withdraw their EADs.[39]

B. DHS Failed to Provide Evidence that the Proposed Rule Will Protect American Jobs.

Another justification that DHS offers for the Proposed Rule is that it "would also help strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers, especially as the U.S. economy and the labor market recover from the significant disruptions caused by the COVID–19 pandemic." 85 Fed. Reg. 74,208. "DHS asserts it is likely that some aliens with final orders of removal and temporarily released on an order of supervision may compete for, and potentially occupy, jobs that U.S. workers might have applied for and been offered, particularly during this period of high unemployment." *Id.* at 74,209. But here again, DHS offers no evidentiary support for these propositions—which, indeed, are no more than unsupported "assert[ions]."

DHS concedes that the main benefits that it claims the Proposed Rule will generate—allowing U.S. workers to have a better chance of securing a job and reducing the incentive for immigrants to remain in the U.S.—are speculative, and that it "cannot estimate with confidence" whether the Proposed Rule will actually result in net benefits, "instead of costs." 85 Fed. Reg. 74,219–74,220. DHS further concedes that it has no information regarding whether U.S. workers, can, or will, fulfill the jobs that will be open as a result of immigrants losing work authorization due to the Proposed Rule. *Id.* at 74,219. Nor does DHS identify any quantifiable benefits flowing to either U.S. workers or the agency that would offset the up to $2.3 billion cost of the Proposed Rule. *Compare id.* at 74,206 to 74,244. Thus, DHS simply "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard." *State Farm*, 463 U.S. at 56.

1. DHS's Justification for the Proposed Rule Ignores the Valuable Economic Contributions of Immigrants.

First, DHS's justifications are premised on the erroneous assumption that immigrants and foreign-born workers threaten the integrity of the U.S. labor market. The signatory States' experience shows that the advantages of immigration are profound and reciprocal. Not only do immigrants benefit from the opportunities associated with living and working in the United States, cities, States, and the country as a whole benefit from immigrants' contributions to our communities.

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[38] Clara Long et al., *The Deported: Immigrants Uprooted from the Country They Call Home*, Human Rights Watch (Dec. 5, 2017), https://tinyurl.com/y7qvxb67_ftn29.

[39] Many undocumented immigrants are fleeing from Central American countries "plagued with violence—much of it gang-related—as well as economic and political instability." Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, Ctr. for Amer. Progress (June 1, 2018), https://tinyurl.com/y8g7fd5b.

As of 2017, at least 43% of Fortune 500 companies were founded by first or second-generation immigrants.[40] In 2015, Asian and Latino immigrant entrepreneurs alone contributed a total of $1 trillion in revenue, 6.7 million jobs, and $212 billion in annual payroll.[41] Immigrant-owned companies in the United States employ over 7.9 million workers across a variety of sectors.[42] In California, one out of every six business owners is an immigrant; in the Los Angeles area, more than 45% of business owners are immigrants.[43] California's 937,000 immigrant business owners have generated $24.5 billion in revenue for the state's economy.[44] Foreign-born residents also make up 38% of all entrepreneurs in California, generating over $20 billion in income as of 2014.[45] Likewise, immigrants own more than 30% of all small businesses in New York State,[46] and nearly half of all small businesses in New York City.[47] As of 2014, immigrant-owned businesses employed approximately 500,000 New Yorkers,[48] and as of 2018, those businesses generated nearly $8 billion in income.[49]

In Maryland, immigrant entrepreneurs represent almost 20% of the State's business owners and have generated $1.7 billion in combined annual revenue.[50] Many other immigrants fill important service sector jobs that support others' ability to remain in demanding professions, including child care, domestic work, and home health work.[51] Foreign-born workers also contribute to their communities by paying taxes and promoting the success of other businesses through the use of their purchasing power. For example, in California, immigrant-led households paid $38.9 billion in state and local taxes and exercised $290.9 billion in spending power in 2018.[52] In New York, immigrant-led households paid $21.8 billion in state and local taxes and exercised $120.5 billion in spending power.[53] *See supra* section II.B.1.

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[40] *See* Ctr. for Am. Entrepreneurship, *Immigrant Founders of the 2017 Fortune 500* (Dec. 2017), http://startupsusa.org/fortune500/. Eleven California-based Fortune 500 firms—including EBay, Google, and Qualcomm—were founded or co-founded by immigrants. New Am. Econ., *The Contributions of New Americans in California* 3 (Aug. 2016), https://tinyurl.com/yyyadso3.
[41] Dan Kosten, *Immigrants as Economic Contributors: Immigrant Entrepreneurs*, Nat'l Immigr. Forum (July 2018), https://tinyurl.com/y9o6hgrt.
[42] New Am. Econ., *Immigrants and the Economy in: United States of America*, https://www.newamericaneconomy.org/locations/national/.
[43] Am. Immig. Council, *Immigrants in California* (Aug. 6, 2020), https://tinyurl.com/ybe2bdpf.
[44] *Id.*
[45] *Contributions of New Americans in California*, *supra* note 40.
[46] Am. Immig. Council, *Immigrants in New York* 4 (June 4, 2020), https://tinyurl.com/yca5pj5c.
[47] Lena Afridi & Diana Drogaris, *The Forgotten Tenants: New York City's Immigrant Small Business Owners*, Ass'n for Neighborhood Hous. & Dev. (Mar. 6, 2019), https://tinyurl.com/y23s7c5n.
[48] N.Y. Immig. Coal., *Blueprint for an Immigrant New York* 3 (Jan. 2019), https://tinyurl.com/yakbq5xg.
[49] *Immigrants in New York*, *supra* note 46, at 15.
[50] Am. Immig. Council, *Immigrants in Maryland* (Aug. 6, 2020), https://tinyurl.com/yxrfnj5w.
[51] Dan Kosten, *Immigrants as Economic Contributors: They Are the New American Workforce*, Nat'l Immig. Forum (June 5, 2018), https://tinyurl.com/y6ju8wcq.
[52] *Immigrants in California*, *supra* note 43, at 4-5.
[53] Am. Immig. Council, *Immigrants in New York* 4 (June 4, 2020), https://tinyurl.com/y4z7qg4e.

In addition to these economic contributions, immigrants enrich our country's social and cultural life, injecting new ideas into our intellectual fabric; offering path-breaking contributions in science, technology, and other fields; and ultimately making our diverse communities more desirable places to live.[54]

2. DHS's Justification for the Proposed Rule Ignores Evidence that Foreign-Born Workers Disproportionately Fill Positions in Essential and Underserved Sectors of the Economy.

DHS's unsubstantiated assertions regarding the likelihood that immigrants who will be subject to the Proposed Rule will displace "American" workers, *see* 85 Fed. Reg. 74,209, ignores evidence that immigrants disproportionately work in underserved industries, including in jobs deemed essential during the pandemic. In fact, as a February 2020 study found, policies aimed at curbing immigration will result in "long-term damage to the U.S. economy" resulting in a 35% reduction in the average annual growth in the work force.[55]

Indeed, in the signatory States and across the Nation, immigrants are critically needed employees in essential sectors. In California, for example, immigrants make up over one-third of the total workforce, filling over 66% of the jobs in California's agricultural sector, 45% of manufacturing positions, 43% of construction worker positions, and 42% of computer and mathematical sciences positions.[56] In Hawai'i, immigrants comprise nearly one quarter of the total labor force, filling 35% of jobs in health care support industries.[57] In addition to these fields, the COVID-19 pandemic has heightened awareness about this Nation's reliance on an array of other essential services, from telehealth,[58] to delivery of goods and food,[59] as well as the technological infrastructure and software necessary to support telecommuting with up to half the United States workforce working from home during the pandemic.[60] But despite the critical importance of these essential sectors of the economy during a global pandemic, DHS takes aim at the very immigrants that supply this country with essential workers.

In addition to the sectors discussed above, immigrants have been providing other essential services during the pandemic. A substantial portion of the United States workforce requires

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[54] Darrell M. West, *The Costs and Benefits of Immigration*, 126 Political Sci. Quarterly 427, 437-41 (2011), https://tinyurl.com/yb4okpv5.
[55] Nat'l Found. for Am. Pol'y, *The Impact of Administration Policies on Immigration Levels and Labor Force Growth* (Feb. 2020), https://tinyurl.com/yad6nj4d.
[56] *Immigrants in California*, *supra* note 43, at 4; David J. Bier, *Immigrants Are About 1/3 of California's "Essential Workers,"* Cato at Liberty (Mar. 30, 2020), https://tinyurl.com/yd8bomdt.
[57] Am. Immig. Council, *Immigrants in Hawaii* (Aug. 6, 2020), https://tinyurl.com/y5qz6q6e.
[58] Ctrs. for Disease Control & Prevention, *Using Telehealth Services* (June 10, 2020), https://tinyurl.com/yypvoba2.
[59] Chris J. Macias, *Is the Food Supply Strong Enough to Weather COVID-19?*, UCDavis.edu: Feeding a Growing Population (June 25, 2020), https://tinyurl.com/y6uyy6nl.
[60] Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long After the Pandemic*, Brookings Inst. (Apr. 6, 2020), https://tinyurl.com/vmux6kh.

childcare: more than 40 million workers have children under the age of 18, and nearly 34 million have children under the age of 14.[61] The COVID-19 pandemic has aggravated an existing lack of affordable childcare into a full-blown crisis. One recent study found that more than 13% of working parents had lost a job or reduced their hours due to a lack of childcare.[62] In another study of working parents in Massachusetts, nearly half of those surveyed responded that "they will not be able to return to work without a consistent child care solution."[63]

Immigrant workers disproportionately fill roles in the informal child care industry and are especially likely to work as nannies or babysitters for private families in home-based settings.[64] Rather than ameliorate unemployment as suggested by DHS, restricting immigrants' ability to work will make it more difficult for working parents to perform their jobs, much less *remain* employed, by depriving them of the support that affordable child and home care can provide.

3. DHS Failed to Consider that the Proposed Rule Will Not Protect "American" Jobs Because It Would Only Impact a Tiny Fraction of the Workforce.

In making its unsubstantiated assertion that the Proposed Rule would help protect "American" jobs, DHS failed to consider that the population of individuals released OSUP with EADs comprises only a small fraction of the workforce as a whole and the immigrant workforce specifically. As DHS itself notes in the text of the Proposed Rule, it will impact a "very small percentage of the U.S. labor market," amounting to a mere .01% of the Nation's workforce. 85 Fed. Reg. 74,248. And the approximately 17,000 to 22,000 immigrants who could be affected by the Proposed Rule also comprise a very small fraction of the estimated 11.3 million unauthorized immigrants (.15-.19%). DHS offers no evidence that the Proposed Rule would protect a substantial proportion of "American" jobs, particularly as it is not evident that any U.S. workers would fulfill the jobs formerly held by immigrants under OSUPs.[65]

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[61] Nicole Bateman, *Working parents are key to COVID-19 recovery*, Brookings Inst. (July 8, 2020), https://tinyurl.com/y9ct7h77.

[62] Alicia Sasser Modestino, *Coronavirus Child-care Crisis Will Set Women Back a Generation*, Wash. Post (July 29, 2020), https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/.

[63] Alissa Haywoode, *Results from Our Family Survey*, Eye on Early Educ. (May 7, 2020), https://tinyurl.com/yadcf7s3.

[64] Leila Schochet, *Trump's Attack on Immigrants Is Breaking the Backbone of America's Child Care System*, Ctr. for Am. Progress (Feb. 5, 2018), https://tinyurl.com/y9jtbbqe.

[65] Jens Manuel Krogstad et al., *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, Pew Res. Ctr. (June 10, 2020), https://tinyurl.com/yc3xy44x.

IV. THE PROPOSED RULE IS CONTRARY TO LAW.

A. The Proposed Rule Impermissibly Eliminates a Criterion Specified by Congress under the INA for Individuals Released OSUP to Receive EADs.

Agencies "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Under *Chevron*, an agency rule may not be "contrary to clear congressional intent or frustrate[] the policy Congress sought to implement." *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010).

DHS maintains that INA section 241 does not entitle any immigrants with final orders of removal to employment authorization. 85 Fed. Reg. 74,210. Under DHS's interpretation, DHS is not *required* to make either of the two findings specified under INA section 241 as to any immigrant released OSUP, and "can choose to maintain the permanent bar on employment authorization for *all* aliens subject to a final order of removal without further action." *Id.* (emphasis added). Using this reasoning, DHS maintains that it may restrict EADs for individuals released OSUP by eliminating one of the INA's expressed bases for their issuance, because such an action comes within its overall discretion to bar such employment. *Id.* Thus, DHS's legal interpretation reads one of the INA section 241 factors out of the statute, namely the provision allowing DHS to grant EADs to immigrants whose removal is "otherwise impracticable or contrary to the public interest." 8 U.S.C. § 1231(a)(7).

DHS's position is not tenable. In *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1281 (9th Cir. 2020), the Ninth Circuit Court of Appeals affirmed the District Court's order granting a nationwide preliminary injunction where a DHS regulation overrode the INA's "plain congressional intent" using similar logic. Specifically, DHS argued that its discretion to regulate asylum included the ability to effectively eliminate it for individuals who enter the United States without authorization. *Id.* at 1272. The *East Bay* court held that Congress's delegation of authority to DHS to regulate asylum did not go so far as to allow the agency to adopt a "categorical ban" on eligibility. *Id.*

The same is true here. By including language specifically enabling DHS to provide EADs to immigrants released OSUP, Congress clearly intended that DHS at least could, in some individual instances, exercise that power. To be sure, no individual immigrant has an entitlement to an EAD, which DHS can grant or deny in its discretion consistent with the criteria that Congress enumerated in the INA; however, DHS may not categorically deny such applications which otherwise fall within the INA's criteria. Like *East Bay*, because the Proposed Rule would override the "plain congressional intent" by eliminating a criterion that DHS is required to consider in exercising its discretion in issuing EADs, it would violate the APA. *Chevron*, 467 U.S. at 843; 5 U.S.C. § 706(2)(A).

B. Acting Secretary Wolf Lacks the Authority to Promulgate the Proposed Rule.

In addition to the significant legal problems identified above with the Proposed Rule itself, if adopted by DHS it would be invalid because purported Acting Secretary Wolf was not authorized to exercise the functions and duties of the Secretary of Homeland Security. Accordingly, the Proposed Rule would be issued in excess of statutory authority or otherwise not in accordance with law under the APA.

The Homeland Security Act ("HSA") allows the Secretary to designate an order of succession if several top DHS offices are vacant. 6 U.S.C. § 113(g)(2). In February 2019, then-Secretary Nielsen designated an order of succession in the event of a vacancy resulting from the resignation of the Secretary of Homeland Security. That order of succession was never properly amended to permit either Mr. Wolf or his predecessor, Commissioner McAleenan, to serve as Acting Secretary of Homeland Security. *See Batalla Vidal v. Wolf*, No. 16-CV-4756-NGG-VMS, 2020 WL 6695076, at *8–9 (E.D.N.Y. Nov. 14, 2020); *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-CV-05883-JSW, 2020 WL 5798269, at *7–9 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *20–23 (D. Md. Sept. 11, 2020). Accordingly, both Commissioner McAleenan's and Mr. Wolf's services as purported Acting Secretary violated the HSA, and the subsequent actions taken by Mr. Wolf in exercise of the functions and duties of the Secretary of Homeland Security, including his delegation of authority to Chad Mizelle to issue the Proposed Rule, *see* 85 Fed. Reg. 74,525, and his various memoranda purporting to ratify his prior actions, are in excess of statutory authority and without force or effect.[66]

V. CONCLUSION.

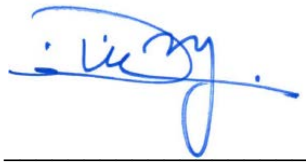
For these reasons, the undersigned Attorneys General ask that the Department withdraw the Proposed Rule.

Sincerely,

LETITIA JAMES
New York Attorney General

XAVIER BECERRA
California Attorney General

[66] Mr. Wolf's authority is also subject to challenge on constitutional grounds, as Commissioner McAleenan lacked authority to issue the order of succession that led to Mr. Wolf's designation as Acting Secretary of Homeland Security, in violation of the Appointments Clause of the U.S. Constitution.



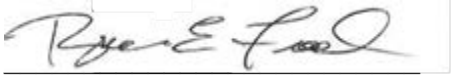
WILLIAM TONG
Connecticut Attorney General

KATHLEEN JENNINGS
Delaware Attorney General

CLARE E. CONNORS
Hawai'i Attorney General

KWAME RAOUL
Illinois Attorney General

TOM MILLER
Iowa Attorney General



BRIAN E. FROSH
Maryland Attorney General

MAURA HEALEY
Massachusetts Attorney General

DANA NESSEL
Michigan Attorney General

KEITH ELLISON
Minnesota Attorney General

AARON D. FORD
Nevada Attorney General

GURBIR S. GREWAL
New Jersey Attorney General

HECTOR BALDERAS
New Mexico Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

PETER NERONHA
Rhode Island Attorney General