

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE; et al,

Plaintiffs,

v.

Civil Action No. 1:20-cv-11283

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.

Defendant.

**BRIEF OF UNITED CHINESE AMERICANS, INC., AMICUS CURIAE, IN SUPPORT
OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

STATEMENT OF INTEREST

UCA is a community-based civic movement and federation, dedicated to the enrichment and empowerment of the Chinese American community in the United States. UCA is a nonpartisan, non-government affiliated coalition with a growing number of chapters, partners and affiliates throughout the United States.

Founded in September 2016 at the inaugural Chinese American Convention, UCA was formally incorporated and received IRS 501(c)(3) nonprofit status in 2017. UCA has since grown into a national federation with 12 chapters and over 30 community partners. Currently, UCA has chapters in the following cities or states: Atlanta, Connecticut, Illinois, Iowa, Massachusetts, Nevada, New Jersey, New York City, San Francisco, Washington State, West Virginia, and Wisconsin.

UCA's efforts to enrich and empower Chinese American communities is accomplished through civic participation, political engagement, youth education and development, and

preservation of heritage and culture, thus promoting a better mutual understanding between the United States and China, for the well-being of our community, our country, and our world. UCA is particularly interested in supporting the 370,000 Chinese students currently studying in the United States. Members of UCA include Chinese American citizens in business and academic institutions, and many studied in the United States as foreign students. There are more foreign students studying in the United States from China than from any other country in the world. Many Chinese students will return to China and continue to become leaders in industry, academic institutions and government that will guide the relationship between the two largest economies in the world. Other students may choose to remain legally in the United States and will make important contributions to employers, universities, and government in the United States.

UCA acknowledges the Court's point that the Court does not require a great deal of input regarding the larger harm to society that could result from the challenged policy. As an association dedicated to the interests of the Chinese American community in the United States, however, UCA can briefly offer a unique perspective not shared by the parties regarding how the challenged ruling affects Chinese students planning to study in the United States, and how those impacts will, in turn, impair the benefits all Americans obtain from the foreign student program.

ARGUMENT

Introduction

Plaintiffs argue in their Motion for a Temporary Restraining Order that the ICE directive failed to consider the impact that it would have upon the universities and foreign students that have relied upon the March 13, 2020 directive. Citing the recent decision of the Supreme Court in *Department of Homeland Security v Regents of the University of California*, No 18-587, 2020

WL 3271746 (U.S. June 18, 2020), the Plaintiffs persuasively argue that the Defendants were required to take into account the impact of their decisions on the parties affected. *See also Motor Vehicle Mfgs. of U.S., Inc. v State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). Approximately one-third of all foreign students in the United States are from China. UCA offers this amicus brief to bring to the Court's attention the impact of the Defendants' decision upon the approximately 370,000 Chinese students and the larger Chinese American community, factors that the Defendant failed to, but were required to consider before making the sudden change in the emergency policy.

Chinese students, like all students and indeed, all people, are working to adjust to the global pandemic, looking to and planning for the future as well as adjusting daily activities to implement maximum safety procedures to stop the spread of the COVID-19 virus. Following the implementation of virtual classes in the spring, supported by the ICE announcement of flexibility in the application of foreign student regulations in March, students have adjusted and made plans for the upcoming academic year. These plans include travel, or more often the decision not to travel over the summer break, and arranging for appropriate housing for the fall semester, which may include entering into lease agreements at locations outside campuses due to previously announced restrictions for students to live on campus.

For students, the primary academic planning goals in the selection of courses for the Fall of 2020 are to secure the pre-requisite foundations for more advanced studies in semesters beyond the Fall of 2020, and completing course requirements to enable timely graduation. As such, course selections are individualized and depend upon the academic goals of each student, and these academic goals and interests should be the driving force behind decisions on the selection of colleges and coursework. However, the ICE policy announcement in July suggests

that the students' course decisions, or even more extreme, the need to transfer to a different school, should be governed by the school's assessment of which courses can be safely offered in person and which courses must be offered online.

The Global Pandemic Requires Flexibility

The flexibility announced in March permitted foreign students to continue to focus on their studies, and to adapt, as required of all students, to the realities of the global pandemic. This flexibility recognized the unusual realities of a world struggling to contain the transmission of a deadly virus. As demonstrated by the materials submitted by the Plaintiffs, universities across the country are also struggling to find the right balance between virtual and physical classrooms and campus life. Each school is seeking to maintain maximum academic achievement while recognizing the primary need for safety and public health. There are no easy answers, and colleges and universities have announced a range of options. However, it is important to note that these options are subject to change abruptly for the worse, as the daily reports of viral "hot spots" emerge, or positively, as other cities and campuses report progress toward the goal of eliminating the virus. No matter how the pandemic may affect campus life and possibly force all students to clear out of all campuses (as they did in the Spring), students must be able to keep their focus on their studies, and not be forced to change schools or academic programs based upon the changing landscape of which universities are able to maintain a higher proportion of in-person classroom instruction.

The ICE directive distinguishes on-line classes from in-person classes, but ignores the significant advances in technology that universities have pioneered during this pandemic. The beginning of distance learning introduced on-line instruction, which permitted the student to log into a computer network at his/her convenience, download study materials, complete

assignments, and communicate with faculty by electronic messaging. While this model is still used, it has been eclipsed by the virtual classroom that has become more prevalent as schools have struggled to find appropriate teaching methodologies while maintaining the safe social distancing recommended by the Centers for Disease Control and state/local officials. The virtual classroom has become more popular, and “on-line” courses now include classroom presentations and discussions in a virtual environment, using the very same technology that this Court has used for hearings in this proceeding. The technology permits real time, face-to-face communication while maintaining a safe social distance. The ICE directive does not recognize that this virtual classroom has been widely used as a substitute for in-person classes during this pandemic. As universities have instituted new technologies for socially distant learning, these methods are not limited to the traditional on-line coursework that permits a student to study and progress at an individualized pace. Yet the challenged directive treats all technology the same. However, for students engaged in a virtual classroom, it is still important to be in proximity, if not the same room at the same time. Campus resources, including libraries and laboratories are still available to the student, notwithstanding the virtual classroom experience. The failure to consider this distinction highlights the arbitrary nature of the directive.

For years, the United States has recognized that significant benefits of foreign students studying in the United States include the relationships forged by the students while here, as well as the knowledge and understanding of our country that follows them home when they become leaders in industry, academics and government in their home country. This was well stated by Former Secretary of State Colin Powell:

These individuals enrich our communities with their academic abilities and cultural diversity, and they return home with an increased understanding and often a lasting affection for the United States. I can think of no more valuable asset to our country than the friendship of future world leaders who have been educated here.

Colin Powell, Statement on International Education Week, August 7, 2001. <https://2001-2009.state.gov/secretary/former/powell/remarks/2001/4462.htm> (Last visited July 11, 2020).

We know from our own experiences that college life presents an intellectual challenge and opportunity for students to grow, explore, and study within their chosen academic field as well as their place in the larger society. While course work and the major field of academic study is the focus, the college experience, particularly for foreign students, includes much more than merely attending classes. The goal of a university education, both at the graduate and undergraduate levels, is to train students to become contributing members of society. The university experience encourages students to match their understanding of their academic studies in the context of the larger world. Studying and living in the United States gives Chinese students an opportunity to experience democratic institutions first hand, improve English language skills, and better understand the cultural environment that constitutes our strong and diverse country. The exposure to and experience with Western culture would be particularly helpful to Chinese students, who come from an Eastern culture. Their presence would also be a window for American students to learn about Chinese culture and to understand each other, particularly during the global pandemic, when international travel is nearly impossible.

A recent study found that approximately 46% of Chinese foreign students studying in the United States plan to return to China to pursue career opportunities in the growing Chinese economy.¹ History teaches us that these students will become leaders in industry, academics and government. Their experience in the United States will help mold the United States-China relationship for generations to come. A positive experience will enhance the ability of the two

¹ Fewer Chinese to stay abroad after graduation – Survey, University World News, May 31, 2018. <https://www.universityworldnews.com/post.php?story=20180531154955271> (Last visited July 11, 2020).

societies to understand each other, and to foster a better, more cooperative relationship, whether that be in trade relationships, academic cooperation, or as required by the current crisis, cooperate in an international effort to stem a global pandemic. Creating adversarial relationships based upon the expulsion of Chinese students from their studies through the implementation of arbitrary, capricious and irrational policies will sow mine fields within the relationships of future leaders both in China and in the Chinese-American community in the U.S. for years to come. Foreign students, and indeed, all of the American public, are entitled to rational policies from the administration that will protect public health and advance educational achievement. Policies that ignore the public health mandate and fail to balance educational needs with informed guidelines based upon science will earn only disrespect and contempt. Both short-term and long-term relationships cannot be founded upon irrational treatment of Chinese foreign students.

While many students plan to and do return to China, many other students will make a decision to remain here to accept long-term or permanent employment, taking advantage of the advanced opportunities in industry, science and academics in the United States. Many former Chinese students have made significant contributions to the diverse fields in the United States, such as engineering, computer science, academics, medicine and literature. One recent report in the New York Times noted the dominant influence of Chinese engineers at Google, whose contributions to artificial intelligence were key to important programs for the military and the defense of the United States.² Senator Tom Cotton recently expressed the concern that Chinese students were coming to the United States to develop expertise in artificial intelligence and

² A U.S. Secret Weapon in A.I.: Chinese Talent, New York Times, June 9, 2020. <https://www.nytimes.com/2020/06/09/technology/china-ai-research-education.html>.

return to China with that expertise. However, his concern is not supported by evidence, which suggests that 85% of Ph.D. graduates from China remain in the United States.³

The foreign student program was created by Congress with the first major legislative act controlling immigration in 1924.⁴ Some Chinese students will remain in the United States, and others will return. These dual benefits have been the hallmark of Congressional policy for almost 100 years. The Congressional Research Service noted that “Foreign students are generally considered to enrich cultural diversity of the educational experience for U.S. residents as well as enhance the reputation of U.S. universities as world-class institutions.”⁵ Plaintiffs properly point out that the directive announced on July 6, 2020, appears to intentionally create chaos among the universities and foreign student population. While the universities struggle to find the right balance between in-person and virtual instruction, each student is required to make a decision about his or her own education. The directive creates the need for a Hobson’s choice, requiring that students must elevate the need to comply with technical requirements over educational goals and safety. While the decision between attending classes in person or online to safely balance social distancing measures with educational progress is a difficult decision, the ICE directive requires that the primary factors be subjugated to the need to choose schools and courses to maintain valid nonimmigrant status. This requires each foreign student to re-visit the decision to study in the United States or choose a university in another country. The effect of

³ Sen. Tom Cotton suggested Chinese STEM students head home after studying in the U.S. The research shows otherwise. Washington Post, April 28, 2020. <https://www.washingtonpost.com/politics/2020/04/28/sen-tom-cotton-suggested-chinese-stem-students-head-home-after-studying-us-research-shows-otherwise/>.

⁴ Foreign Students in the United States: Policies and Legislation, CRS Report for Congress, Congressional Research Service, January 31, 2008. <https://fas.org/sgp/crs/misc/RL31146.pdf>.

⁵ *Id.*

this directive, intended or not, is to diminish the foreign student program. This is the prerogative of Congress, not administrators in the Department of Homeland Security.

The ICE Directive Creates Additional Unnecessary Problems for Students

The impact of this directive is best demonstrated by the examples of several Chinese students who have either started their studies in the United States or hope to begin their studies here. The global pandemic has impacted all of our lives, but this directive imposes an unnecessary level of irrationality on the decisions students must make as a result of the last minute change in the rules.

Iris Zhou, from Wuxi, China, was admitted to University of Wisconsin (Madison campus) to begin her freshman year this fall. She followed the proper procedures after she was admitted by the school and submitted an application for a visa to the consulate in May 2020. Currently, the earliest possible date for the visa interview appears to be November 2020 (notwithstanding studies that show the COVID-19 infection in Jiangsu Province, where Ms. Zhou lives, peaked at 639 total cases among a population of 79 million people on January 31, 2020, and has been dramatically reduced since then.⁶) The University of Wisconsin has established a hybrid plan for the Fall Semester where some, but not all, classes will be offered in person. For example, all lectures with more than 100 students, and many with between 50 and 100 students, will be offered only online. Students will not be able to choose course schedules until later in July, and foreign students may be forced to take courses outside of their normal studies to accommodate the requirement of in-person classes.

⁶ Epidemiology of 2019 novel coronavirus in Jiangsu Province, China after wartime control measures: A population-level retrospective study, US. National Library of Medicine, National Institutes of Public Health, May-June 2020. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7130124/> (Last visited July 11, 2020).

The University of Wisconsin emphasizes that public health guidance is the primary factor to determine the policy governing virtual and in-person classes.⁷ Currently Wisconsin is one of the hot spots with increased COVID-19 cases.⁸ Thus, it is possible that even if Ms. Zhou were able to schedule a visa interview and arrive to begin the Fall Semester in Madison, changes in the COVID-19 rates in Wisconsin could change the ability of the school to safely offer her in-person courses, creating the need for Ms. Zhou to leave the United States on short notice. Yet, if the University does adapt to a changing environment, and announces a mid-semester adjustment to virtual classrooms, the challenged policy clearly requires the student to transfer to another school, something that is not possible mid-semester, or to depart the United States. The policy states:

If a school changes its operational stance mid-semester, and as a result a nonimmigrant student switches to only online classes, or a nonimmigrant student changes their course selections, and as a result, ends up taking an entirely online course load, schools are reminded that nonimmigrant students within the United States are not permitted to take a full course of study through online classes. If nonimmigrant students find themselves in this situation, they must leave the country or take alternative steps to maintain their nonimmigrant status such as transfer to a school with in-person instruction.

Broadcast Message: COVID-19 and Fall 2020. *See* Exhibit 1 to Declaration of Felicia H.

Ellsworth in Support of Plaintiff’s Motion for a Temporary Restraining Order. Document 6-1, Page 2 of 4.

Such a requirement is not only impossible to plan for as a practical matter, and extraordinarily disruptive to an educational program and expensive, but also fits the very

⁷ University of Wisconsin, Our Plan. The University states: “To safeguard the health of the community, the university will modify many of its operations based on public health guidance.” <https://smartrestart.wisc.edu/plan/#housing-and-dining> (last visited July 11, 2020).

⁸ COVID-19 diagnoses spiked on June 29, 2020, and continue at high levels for several days in early July. Wisconsin Department of Health Services, COVID-19: County Data, <https://www.dhs.wisconsin.gov/covid-19/county.htm> (Last visited July 11, 2020).

definition of arbitrary and capricious. Students at the University of Wisconsin are not the only students who may be impacted by this arbitrary requirement.

Wayne Shi, from Beijing, China, is an undergraduate student at Duke University, planning to begin his junior year as a biomedical engineering major. Wayne remained in the United States and chose not to travel over the summer both because flights were difficult to find, and international travel requires more exposure and potential to contract the coronavirus. He has made a significant effort to observe the recommended guidelines for social distancing to avoid both contracting and spreading the disease.

Shiyue Yang, from Shanghai, China, is an undergraduate student at University of North Carolina at Chapel Hill, planning to begin her junior year as a biomedical engineering major. Shiyue returned back to China in May to visit her family, after numerous attempts to purchase flights to return home. She plans to return to the U.S. in August so she can continue to pursue her academic study for the fall semester. In order to return to the U.S., she purchased airline tickets from Shanghai to Singapore, Dubai, and finally the last leg to the U.S.. Her itinerary included 16 days in a hotel in Dubai to allow for the requisite 14 day self-quarantine before completing her journey. This travel took months of planning, and could not be replicated in reverse if the policies change without notice.

Each of the universities discussed above have announced that the primary factor informing policy for the Fall Semester will be the health of students, faculty and staff. All have made it clear that that adjustments to the reopening plan will be made “as required by public health conditions, and state and local regulations.”⁹ Wayne and Shiyue both choose to attend classes virtually if offered the same choice that is available to their classmates for a particular

⁹ A Return To Campus: Price Provides Update On Fall Semester, <https://today.duke.edu/2020/06/return-campus-price-provides-update-fall-semester> (Last visited July 11, 2020).

course, elevating concern for their safety and the safety of the community around them over the danger of attending in-person classes. However, the ICE Directive effectively prohibits them from considering safety when choosing classes and whether to attend those classes virtually or in person. Wayne and Shiyue also fear that, if the universities finds it necessary to transition mid-semester to eliminate in-person class attendance based upon public health conditions or regulations, they will be unable to complete the semester, and will be required to depart the United States, as they will be unable to maintain valid nonimmigrant status through no fault of their own. Departing the United States at that time will be problematic at best, if not impossible, as there are no regularly scheduled flights between the United States and China at this time. Booking flights to China often requires purchasing tickets several months in advance and, even then, flights are often cancelled at the last minute.

UCA consulted with another student, John Zhang, who made plans to enroll in an LLM program at the University of Pennsylvania Carey Law School (Penn Law). In anticipation of attendance, he resigned from his employment in China, but is now uncertain whether he will be able to apply for a visa and attend classes at Penn Law. He does not have the option to return to his employment and his ability to attend classes is both uncertain now and for the entire fall semester. Penn Law has developed a flexible policy to offer some classes partially in-person, and other classes entirely on-line, and like other schools, has announced that it will follow public health guidance and may change course mid-semester.¹⁰ Like the universities discussed above, students at Penn Law are subject to changing health conditions beyond their control, and may be

¹⁰ Penn Law, fall 2020 Planning Current Students. <https://www.law.upenn.edu/live/news/10200-fall-2020-planning-current-students> (Last visited July 11, 2020).

required to depart the United States quickly if the school is required to change its policy regarding in-person instruction.

In addition to the arbitrary nature of a potential and uncertain need to depart quickly to maintain proper nonimmigrant status, travel arrangements during this global pandemic are subject to a constant array of changing circumstances, available flights, and rules regarding the arrival of passengers in each country from different international destinations. Projecting the need and ability to travel to maintain status throughout the semester is not possible. Yet, the revised rules announced by ICE require flexibility that does not exist in the real world. The competing pressures and impossible decision points were depicted in a humorous, but uncannily accurate, social media post that was widely distributed among Chinese students.¹¹

CONCLUSION

Defendants' directive, issued with public announcements and a stated intention to publish a Temporary Final Rule, does not meet the requirements of the Administrative Procedure Act to effectuate a last-minute change in the manner in which the foreign student regulations will be applied to universities and foreign students during the extraordinary period of a global pandemic. The process to consider and announce this directive fails to take into consideration the impact upon universities and students. This directive will force students to elevate the need to comply with irrational rules over their safety and academic goals. There are 370,000 Chinese students, approximately one-third of all foreign students in the United States. The physical distance between the United States and China, together with the suspension of regularly scheduled airline traffic resulting from the pandemic, forces irrational and impossible decisions to try and comply

¹¹ This drawing was created by a Chinese student and translated into English.
<https://twitter.com/dwertime/status/1281262077584109568/photo/1> (Last visited July 12, 2020).

with the Defendants' directive. Indeed, as universities adjust to changing conditions during the course of the Fall Semester, it is not clear that it will be physically possible for foreign students to comply with the directive. The obvious choice then becomes whether or not to abandon studies in the United States. Congress created the foreign student program almost 100 years ago, and Defendants cannot take steps to eliminate this program using the excuse of a global pandemic to change rules and create irrational requirements. The Court should grant the motion for a Temporary Restraining Order, and permit universities to find the proper balance for classroom and virtual instruction that is based upon science, public health policy, and the best pedagogical practices rather than compliance with the irrational rules of this last-minute directive.

United Chinese Americans recognizes that the opportunity to submit this brief in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is unusual and appreciates the Court's consideration of the arguments presented.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of United Chinese Americans, Amicus Curiae in Support of Plaintiffs was filed on July 13, 2020 by use of the Court's ECF filing system and served by ECF to all parties of record.

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