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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VENTURE CAPITAL ASSOCIATION, ATMA KRISHNA, ANAND KRISHNA, OMNI LABS INC., PEAK LABS LLC d/b/a OCCASION, Plaintiffs, v. ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, JAMES MCCAMENT, in His official capacity as Acting Director of U.S. Citizenship and Immigration Services, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	Civil Action No. 1:17-cv-01912-JEB

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute (IRLI) is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of United States citizens, civic organizations, and workers, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including challenges to *ultra vires* immigration regulations and agency violations of the Administrative Procedure Act ("APA"). *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); and *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

IRLI is considered an expert in immigration law by the Board of Immigration Appeals, and has prepared *amicus* briefs for the Board, at the request of that body, for more than twenty years. *See, e.g.*, *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

Also, IRLI has twice submitted public comments on the rule at issue here, the International Entrepreneur Rule, to the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS"). IRLI's first comment was in response to the original Notice of Proposed Rulemaking, International Entrepreneur Rule, 81 Fed. Reg. 60,130, 60,130-68 (Aug. 31, 2016) ("2016 NPRM"); its second was in support of the notice of intent to rescind the International Entrepreneur Parole Final Rule, International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,887, 31, 887-90 (July 11, 2017).

Plaintiffs do not consent to the filing of this *amicus curiae* brief. Defendants have given their consent. No party or party's counsel authored any part of this brief. No person or entity,

other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

ARGUMENT

Because the International Entrepreneur Parole Final Rule ("IEP Final Rule") exceeds the authority of DHS, it is *ultra vires* and a nullity. An *ultra vires* regulation can provide no basis for the injunction plaintiffs seek.

A. An *Ultra Vires* Rule Should Not Be Given Effect By This Court.

As explained below, the IEP Final Rule is *ultra vires.* For that reason, it would be nonsensical for this Court to enjoin either its rescission or its delayed implementation. On the contrary, courts must invalidate, rather than give effect to, *ultra vires* regulations. *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir 1992); 5 U.S.C. § 706(2)(C) ("The reviewing courts shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .").

Plaintiffs argue at length that DHS has failed to provide an adequate statement of reasons for their finding of good cause to delay implementation of the IEP Final Rule, and that its last-minute publication precludes reliance by the agency on the APA's "good cause" exception to notice and comment. Mot. for Prelim. Inj., Docket No. 12, at 13-23. At the same time, however, even plaintiffs implicitly concede that an *ultra vires* rule cannot be the basis for the injunction they seek, and that their arguments are inapplicable to such a rule. *See id.* at 13 ("These [notice and comment] requirements apply with no less force when the agency seeks to delay or repeal a *valid* final rule.") (emphasis added). Indeed, none of the decisions plaintiffs cite involved an *ultra vires* rule at all, let alone what is at issue here: a published Notice of Proposed Rulemaking

("NPRM") seeking notice and comment on the agency's intention to rescind an *ultra vires* rule that was "final" but had never been implemented.

B. The IEP Final Rule Is An Ultra Vires Agency Action.

In reviewing an *ultra vires* claim, courts examine statutory language to determine whether Congress intended the agency to have the power that it exercised when it acted. *Univ. of the D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth*., 163 F.3d 616, 620 (D.C. Cir. 1998). A reviewing court must reasonably be able to conclude that the grant of authority contemplated the regulations issued. *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979).

No such conclusion would be reasonable here, for at least three reasons. First, the history of the parole statute is one of progressive tightening of its language, and the restriction of agency discretion, in reaction to agency overreach; it is unreasonable to conclude that, as part of this tightening, Congress intended to expand DHS's parole authority to the vast extent necessary to authorize the IEP Final Rule. Second, Congress has created a detailed and comprehensive scheme for regulating the employment of aliens, including alien entrepreneurs, in the United States. It would be unreasonable to conclude that Congress regulated entrepreneurial employment by aliens as carefully as it has, but also intended DHS to be able to use parole to allow an indefinite number of additional aliens, in its discretion, to engage in such employment. Such a counterintuitive interpretation requires, at the minimum, a clear statutory statement before it can be credited, and such a statement is utterly lacking here. Third, more generally, if the phrase "significant public benefit" in the parole statute allowed DHS to parole an indefinite number of alien entrepreneurs, the same phrase would allow DHS to parole an indefinite number of any other class of aliens—such as Science, Technology, Engineering, and Math ("STEM")

workers or agricultural laborers—whose presence the agency might deem of public benefit. It is implausible in the extreme that Congress intended so to abdicate its authority, exercised in innumerable statutory provisions, to regulate the entry of aliens into the country.

1. Congress intended to restrict agency authority.

In light of the plain language of the parole statute and the history of agency overreach Congress sought to remedy by that language, it is unreasonable to conclude that Congress intended DHS to have the power to issue the IEP Final Rule.

Between 1952 and enactment of the Refugee Act in 1980, the Immigration and Nationality Act ("INA") authorized the Attorney General to parole aliens into the United States, without a grant of admission, only (1) for "emergent" reasons or (2) where parole was "deemed strictly in the public interest." 8 U.S.C. § 1182(d)(5)(A) (1979). Even in that era, congressional intent was unambiguously restrictive:

> The parole provisions [of the INA] were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.

S. Rep. No 89-748, at 17 (1965); *accord* H.R. Rep. No. 89-745, at 15–16 (1965).

Nonetheless, the Immigration and Naturalization Service ("INS") resisted this restrictive congressional intent. For example, emphasizing the lack of express statutory prohibitions on categorical grants of parole, between 1959 and 1961, the INS paroled more than 20,000 Cubans into the United States. David A. Martin, The Refugee Act of 1980: Its Past and Future, 3 Mich. Y.B. of Int'l Legal Stud. 91, 94 (1982).

In the 1980 Refugee Act, reacting to this history of agency abuse of discretion, Congress prohibited the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General determined that "compelling reasons in the public interest with respect to that

particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. § 1182(d)(5)(B).

In 1996, Congress acted yet again to rein in agency abuse of discretion to parole aliens into the United States, authorizing discretionary grants of parole by the agency "only" where multiple conditions had been met. Since 1996, parole may only be granted: (1) temporarily, (2) "on a case-by-case basis," (3) for no other purpose than "urgent humanitarian reasons or significant public benefit," (4) if the parolee was in the "custody" of DHS at the time of the grant of parole, and (5) if the grant of parole is never ("shall not be") "regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A) (2017). As the United States Court of Appeals for the Ninth Circuit put it, "The scope of § 1182(d)(5)(A) is carefully circumscribed: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.' 8 U.S.C. § 1182(d)(5)(A)." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007).

In light of this history, it is clear that Congress intended to *restrict* parole when it enacted the current statute, and thus it is highly implausible that, by doing so, Congress intended to grant limitless authority to DHS to grant parole in a particular category, that of alien entrepreneurs.

2. Congress has carefully regulated the entrepreneurial employment of aliens by statute.

Multiple express provisions of immigration law provide detailed statutory guidance on the conditions under which an alien may enter the United States for employment or entrepreneurial purposes. *See, e.g.*, 8 U.S.C §§ 1101(a)(15)(E)(ii), 1101(a)(15)(H)(i)(b) (covering employment-based nonimmigrants); 8 U.S.C. §§ 1153(b)(2)(B)(i), 1153(b)(3)(A)(i), 1153(b)(5) (covering employment-based immigrants). Entry under one of these visa categories is the only option provided by Congress for the admission of aliens under a nonimmigrant or

immigrant visa in order (in the words of the 2016 NPRM) "to establish and grow" start-up entities in the United States, and so "promote entrepreneurship and investment; facilitate research and development and other forms of innovation; support the continued growth of the U.S. economy; and lead to job creation for U.S. workers." 81 Fed. Reg. at 60,135.

For specialty occupations in nonimmigrant visa categories—including the STEM fields, which the 2016 NPRM identified as frequently associated with high-growth start-up entities, 81 Fed. Reg. 60,158—international entrepreneurs who are the sole owners of a corporation which also employs them may direct a start-up entity to petition for an H-1B visa on their behalf. Nothing prevents entrepreneurs admitted in H-1B status from holding up to a 50% interest in their corporate sponsor, and H-1B workers may routinely extend their authorized stay for six years. 8 C.F.R. § 214.2(h)(4)(ii); *Matter of Aphrodite*, 17 I. & N. Dec. 530 (Comm'r 1980). Also, aliens from more than eighty "treaty" nations may be admitted (along with accompanying spouses and children) in E-2 status "to develop and direct the operations of [a bona fide] enterprise in which the alien has invested, or is actively in the process of investing, a substantial amount of capital." 22 C.F.R. § 41.51.

U.S. immigrant visa categories are also available for international entrepreneurs. The 2016 NPRM stated that extending immigration benefits to start-up entities with the potential to show a high level of growth or innovation will prospectively benefit the national economy because they are "vital to economic growth and job creation in the United States," with a record of having "generated a cohort of high-growth firms that have driven a highly disproportionate share of net new job creation." 81 Fed. Reg. at 60,153–54. Yet Congress had already enacted the EB-2 second preference immigrant sub-category, which specifically provides the entry mechanism for international entrepreneurs who hold advanced degrees or whose exceptional

ability in the sciences, arts, or business "will substantially benefit prospectively the national economy . . . or welfare of the United States . . . ." 8 U.S.C. § 1153(b)(2)(A). This immigrant classification is especially favorable for talented alien entrepreneurs investing in U.S. start-up entities, who are eligible for a national interest waiver. 8 U.S.C. § 1153(b)(2)(B)(i).

The EB-5 fifth preference immigrant category also offers conditional permanent residence to aliens and their spouses and children who will "engag[e] in a new commercial enterprise . . . in which the alien has invested . . . capital in the amount of [$1 million or in certain instances $500,000] . . . which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or [lawful permanent residents] . . . ." 8 U.S.C. §§ 1153(b)(5), 1186b.

Against this backdrop of the statutory regulation of entrepreneurial employment by aliens, it is highly implausible that Congress intended to grant DHS the authority to parole an indefinite number of additional aliens, in its discretion, to engage in such employment; by doing so, it would have given DHS the power to set Congress's own statutory scheme at naught.

3. Congress did not grant to DSH the authority to parole any class of aliens whose presence the agency might deem of "significant public benefit."

More generally, if DHS had the authority it claimed when it issued the IEP Final Rule, it would also have the general authority simply to expand the admission of aliens as it saw fit. It is most implausible that Congress intended to grant it such freewheeling authority.

No mention is made in the parole statute of entrepreneurs, or start-ups, or job growth. If that statute granted power to DHS to parole alien entrepreneurs, it did so on the basis of the apparently wide-open meaning of the phrase "significant public benefit."

Past agency practice had been to interpret that phrase narrowly. As DHS reported to Congress in 1998:

> In general, the parole authority in section 212(d)(5) allows the INS to respond in individual cases that present problems that are time-urgent or for which no remedies are available elsewhere in the Immigration and Nationality Act. The prototype case arises in an emergency situation. For example, the sudden evacuation of U.S. citizens from dangerous circumstances abroad often includes household members who are not citizens or permanent resident aliens, and these persons are usually paroled. When aliens are brought to the United States to be prosecuted or to assist in the prosecution of others, they are paroled. Parole is sometimes used to reunite divided families . . . .
>
> Since FY 1992, the INS has used six categories to classify paroles. A brief description of each follows . . . .
>
> 5. Public Interest Parole
> The public interest parole category invokes the "significant public benefit" language in the law. It is primarily used with aliens entering in conjunction with a legal proceeding. These aliens may have been brought to the United States for prosecution under our laws, or they may be assisting U.S. officials in a prosecution. The authority for public interest parole rests with the INS Headquarters Office of International Affairs.
>
> Public interest parole has been the least used type of parole in recent years, accounting for about 2 percent of all paroles in both FYs 1997 and 1998…. On average in FY 1997, public interest parole was given for 7 weeks.

U.S. Dep't of Homeland Sec., *Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act Fiscal Years 1997–1998,* https://www.ilw.com/immigrationdaily/news/2001,0329-Parole.shtm (last visited October 17, 2017).

Indeed, a 2008 DHS internal agency Memorandum of Agreement strictly limited the applicability of significant public benefit parole:

> As [agency] practice has evolved, DHS bureaus have generally construed "humanitarian" paroles (HPs) as relating to urgent medical, family, and related needs and "significant public benefit paroles" (SPBPs) as limited to persons of law enforcement interest such as witnesses to judicial proceedings. Categorizing parole types helps prospective parole beneficiaries direct their applications to the appropriate bureau and facilitates DHS tracking….
>
> [Parole is] an extraordinary measure, sparingly used only in urgent or emergency circumstances, by which the Secretary may permit an inadmissible alien

> temporarily to enter or remain in the United States. Parole is not to be used to circumvent normal visa processes and timelines.

U.S. Dep't of Homeland Security, *Memorandum of Agreement, Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority under INA § 212(d)(5)(A) With Respect to Certain Aliens Located Outside of the United States* 2 (Sep. 29, 2008), https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.

The IEP Final Rule's departure from this practice only shows the wisdom of the agency's prior view. If the phrase "significant public benefit" were broad enough to authorize the parole of an unlimited number of alien entrepreneurs, it also would be broad enough to authorize the parole of an unlimited number of any other class of aliens—for example, STEM workers, or agricultural laborers—whose entry DHS deemed of "significant public benefit." Yet it would be unreasonable to suppose that Congress intended, with this mere phrase, to allow DHS to overthrow Congress's own regulation of the entry of aliens whenever it decided that doing so would benefit the public. *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep economic and political significance'] to an agency, it surely would have done so expressly."). "Congress [] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Congress cannot be supposed to have granted DHS dual authority to define classes of aliens who may enter the United States unless it has made a clear statement to that effect. Yet no such provision exists. For this reason, too, the IEP Final Rule is an *ultra vires* agency action that cannot support a motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for a preliminary injunction.

DATE: October 17, 2017

Respectfully Submitted, *Amicus Curiae*,
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CERTIFICATE OF COMPLIANCE

I certify that per Fed. R. App. P. 32(a)(5) and (a)(6), the attached *amici curiae* brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 12 point Times New Roman font. Per Fed. R. App. P. 27(d)(2), this brief contains, and contains 2,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(2)(B).

October 17, 2017
Date

/s/ Christopher J. Hajec
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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2017 I electronically filed a copy of the foregoing Brief *Amici Curiae* using the CM/ECF System for the United States District Court for the District of Columbia, which will send notification of that filing to all counsel of record in this litigation.

Dated: October 17, 2017

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