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11 UNITED STATES DISTRICT COURT

12 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 IMMIGRANT LEGAL RESOURCE CENTER, *et*
14 *al.*

15 Plaintiffs,

16 v.

17 CHAD F. WOLF, *et al.*

18 Defendants.
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Case No. 4:20-cv-05883-JSW

**BRIEF OF THE ALLIANCE OF
BUSINESS IMMIGRATION LAWYERS,
INC., AS *AMICUS CURIAE*, IN SUPPORT
OF PLAINTIFFS**

The Hon. Jeffrey S. White

Date: September 25, 2020
Time: 9:00 a.m.
Courtroom: 5, 2nd Floor

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Interest of *Amicus Curiae* 1

I. Filing fees paid to USCIS can only be disbursed for lawfully authorized statutory purposes 2

II. Filing fees paid to USCIS may not be unlawfully diverted from the Immigration Examinations Fee Account (IEFA) to pay for investigative and intelligence functions because USCIS violates the Homeland Security Act of 2002 when it uses IEFA funds to conduct such non-adjudicative activities 4

III. USCIS through its Fraud Detection and National Security Directorate regularly engages in unlawful investigative and intelligence-gathering activities 10

IV. This Court should enjoin Defendants from implementing the Final Rule and require recalculation of proposed filing fees without inclusion in IEFA of expenses attributable to any USCIS investigative and intelligence activities prohibited under the Homeland Security Act of 2002 13

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INTEREST OF AMICUS CURIAE¹

Amicus is the Alliance of Business Immigration Lawyers, Inc. (ABIL), a corporation incorporated in the State of Nevada, and established as an invitation-only strategic alliance of 44 prominent law firms in the U.S. and abroad practicing immigration, naturalization and global mobility law. ABIL is comprised of more than 420 experienced immigration attorneys and law professors (including several past presidents of the national immigration bar association, American Immigration Lawyers Association (AILA)) who have joined forces in advancing best practices in the provision of legal services and positive outcomes for their immigration clients. Ranked as the only “Band 1 Immigration Legal Network” in the prestigious *Chambers and Partners Global Guide*,² ABIL advocates publicly for procedural due process, adherence to the rule of law, and enlightened reform of U.S. and foreign immigration laws through comments to proposed agency regulations, continuing legal education, and support for publication of immigration-related educational materials and books, including the award-winning *Green Card Stories - 50 people | 5 Continents | 1 America*,³ while upholding America’s promise of exceptionalism and our country’s historic tradition as a nation of immigrants. Amicus is not formally affiliated in any way with AILA, although many of ABIL’s members are also members of AILA.

Amicus agree with the legal challenges asserted in this litigation by Plaintiffs and request that the Court make all rulings of law and orders of relief as urged by the Plaintiffs. The issues raised by amicus are narrower, however, and involve agency practices with which amicus’s members have direct and

¹ No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

² Chambers and Partners, *Chambers and Partners 2020 Global Guide*, accessible at: <https://chambers.com/guide/global?publicationTypeId=2&practiceAreaId=31&subsectionTypeId=4&locationId=15649> (last visited September 8, 2020).

³ Sandra Amrhein *Green Card Stories - 50 people | 5 Continents | 1 America*, Umbrage Press (2011), accessible at: <http://www.greencardstories.com/about-the-book/> (last visited September 8, 2020), chosen as a 2012 Nautilus Book Award Silver Medal Winner in the Conscious Media/Journalism/Investigative Reporting category, as a Finalist for the 2012 IBPA Benjamin Franklin Award in the Multicultural category, a Bronze Medalist for the 2012 Independent Publisher IPPY Awards in the Multicultural Non-Fiction Adult category, received an Honorable Mention for the 2012 Eric Hoffer Award, and shortlisted for the Santa Fe Writers Project Literary Award.

1 extensive experience in the sub-specialty of employment-based immigration law which likely may
2 amplify, supplement or corroborate the experience of Plaintiffs, individually or as a group.

3 **I. FILING FEES PAID TO USCIS CAN ONLY BE DISBURSED FOR LAWFULLY**
4 **AUTHORIZED STATUTORY PURPOSES**

5 Under the U.S. Constitution, only Congress may grant budgetary authority.⁴ This arrangement
6 was intended by the framers to ensure the government remained directly accountable to the will of the
7 people and to hold a key check on other branches of government – especially the Executive Branch –
8 protecting against the “overgrown prerogatives” of these branches.⁵ While “some play must be allowed
9 to the joints if the machine is to work,” the way an agency expends funds may not go beyond the scope
10 of its lawful statutory authority.⁶

11 Because an appropriation must derive from an act of Congress, it is for Congress to decide the
12 purposes for which an Agency’s funds may be used. A tenet that applies to every agency, every officer,
13 and every employee of the federal government is “that the expenditure of public funds is proper only
14 when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”⁷
15 Further, as stated by the Government Accountability Office (GAO), “[A]ny government obligation –
16 whether it is derived from the general fund, **from fees arising from the government’s business-like**
17 **activities**, or from any other source – may be made only as authorized by an appropriation.”⁸ The fees
18 prescribed by an agency to conduct its operations constitute appropriations based on a Congressional
19 statute so long as the statute (1) authorizes the collection of fees, and (2) makes the fees available for
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24 ⁴ U.S. Const., art. I, § 9, cl. 7.

25 ⁵ Government Accountability Office (GAO), *Principles of Federal Appropriations Law*, Fourth Ed.,
26 Chapter 1, Page 1 (2017), accessible at [https://www.gao.gov/legal/appropriations-law-decisions/red-](https://www.gao.gov/legal/appropriations-law-decisions/red-book)
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28 ⁶ *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927).

⁷ *United States v. MacCollum*, 426 U.S. 317, 321 (1976).

⁸ GAO, *supra*, Chapter 1, Page 6 (emphasis added).

1 expenditure for a specified purpose. “Therefore, agencies must operate not only in accordance with
2 funding levels Congress has permitted, but also in accordance with their authorizing statutes.” *Id.*

3 A bedrock statute legitimizing the appropriation of funds is 31 U.S.C. § 1301(a), also known as
4 “the purpose statute.” It states:

5 “Appropriations shall be applied only to the objects for which the appropriations were
6 made except as otherwise provided by law.”

7 In applying the purpose statute, courts consider the common meaning of the words in an agency’s
8 originating legislation, which govern the purposes for which funding may be applied.⁹ As an example,
9 the GAO notes that an appropriation of funds for *replacement* of state roads damaged by nearby federal
10 dam construction could be used for *restoring* these roads, but not *improvements* such as widening.¹⁰ The
11 GAO also observes that even if an expenditure would result in substantial savings or other benefits, the
12 expenditure is nevertheless improper if inconsistent with the statutory language.¹¹ An agency cannot do
13 indirectly what it is not permitted to do directly.¹²

14 In addition, under 31 U.S.C. § 9701, the head of each U.S. government agency “may prescribe
15 regulations establishing the charge for a service or thing of value *provided by the agency.*” (Italics
16 added.) Here again, the charges levied by an agency are constrained by the specific activities the agency
17 is statutorily authorized to perform.

18 As will be shown, the Final Rule Defendant Department of Homeland Security (DHS) published
19 in the Federal Register on August 3, 2020, “U.S. Citizenship and Immigration Services Fee Schedule
20 and Changes to Certain Other Immigration Benefit Request Requirements,” contravenes the
21 fundamental principle that an agency’s expenditure of funds is proper only when authorized by
22 Congress.¹³

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⁹ 41 Comp. Gen. 255 (1961).

¹⁰ GAO, *supra*, Chapter 3, Page 11 (Italics added).

¹¹ *Id.*

¹² *Id.* at Page 13.

¹³ 85 Fed. Reg. 46,788 (Aug. 3, 2020).

1 **II. FILING FEES PAID TO USCIS MAY NOT BE UNLAWFULLY DIVERTED FROM**
 2 **THE IMMIGRATION EXAMINATIONS FEE ACCOUNT (IEFA) TO PAY FOR**
 3 **INVESTIGATIVE AND INTELLIGENCE FUNCTIONS BECAUSE USCIS VIOLATES**
 4 **THE HOMELAND SECURITY ACT OF 2002 WHEN IT USES IEFA FUNDS TO**
 5 **CONDUCT SUCH NON-ADJUDICATIVE ACTIVITIES.**

6 The Final Rule cites two provisions in the Immigration and Nationality Act (INA), INA §
 7 286(m) and (n), codified at 8 U.S.C. §§ 1356(m) and (n), as statutory authority allowing Defendant U.S.
 8 Citizenship and Immigration Services (USCIS) to deposit immigration filing fees into the agency’s
 9 Immigration Examinations Fee Account (IEFA). These provisions authorize the deposit of “fees for
 10 providing **adjudication and naturalization services**” and require that “[all] deposits into the [IEFA]
 11 shall remain available until expended to the Attorney General [now the DHS] to reimburse any
 12 appropriation . . . **for expenses in providing immigration adjudication and naturalization**
 13 **services.**”¹⁴

14 The Homeland Security Act of 2002 (HSA),¹⁵ the foundational statute that created DHS and its
 15 component agencies, similarly refers to agency services and functions classifiable as immigration-
 16 related “[a]djudications.”¹⁶ Specifically, § 271(b) of the HSA transferred from the Commissioner of the
 17 predecessor immigration agency, Immigration and Naturalization Service (INS), to the Director of the
 18 Bureau of Citizenship and Immigration Services (now known as USCIS), “the following functions”:

- 21 (1) **Adjudications** of immigrant visa petitions.
- 22 (2) **Adjudications** of naturalization petitions.
- 23 (3) **Adjudications** of asylum and refugee applications.
- 24 (4) **Adjudications** performed at service centers.

25 ¹⁴ See 8 U.S.C. § 1356(m) and 8 U.S.C. § 1356(n) (Emphasis added); These provisions are to be
 26 distinguished from a separate provision, not part of the present litigation, found at 8 U.S.C.
 27 § 1356(v)(2)(B), which establishes the Fraud Prevention and Detection Account (FPDA), makes no
 28 mention of USCIS, and instead broadly authorizes the Secretary of DHS for programs and activities to
 prevent and detect immigration benefit fraud . . . ”

¹⁵ Pub. L. No. 107–296, 116 Stat. 2135, enacted November 25, 2002, *accessible at*
https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (last visited September 8, 2020).

¹⁶ 6 U.S.C. § 271(b).

1 (5) All other **adjudications** performed by the [INS] immediately before the effective date
2 specified in [the HSA]. (Emphasis added.)

3 At the same time, the HSA, in “Part D – Immigration Enforcement Functions,” assigned various
4 immigration law enforcement functions discharged by the former INS – including those relating to
5 “intelligence” and “investigations” – to U.S. Immigration and Customs Enforcement (ICE).¹⁷ The HSA
6 also established separate accounts and budgets for USCIS and ICE and prohibits the transfer of fees
7 between the two DHS components for unauthorized purposes.¹⁸

8
9 In addition, the HSA granted the President the authority to reorganize the new DHS by
10 submitting to Congress a plan of reorganization, provided that any plan so submitted “shall contain,
11 **consistent with this Chapter** [Chapter 1 of Title 6], such elements as the President deems
12 appropriate.”¹⁹

13
14 Another provision, however, 6 U.S.C. § 291(b), expressly proscribes any power in the President
15 to reorganize or recombine within a single component of DHS the immigration functions performed and
16 organizational units maintained previously by INS. Section 291(b) thus contains the following
17 “Prohibition[:]”

18
19 The authority provided by [HSA] section 542 [6 U.S.C. § 542] may be used to reorganize
20 functions or organizational units within the Bureau of Border Security [now ICE] or the Bureau
21 of Citizenship and Immigration Services [now USCIS], but **may not be used to recombine the
22 two bureaus into a single agency or otherwise to combine, join, or consolidate functions or
23 organizational units of the two bureaus with each other.** (Emphasis added.)

24 As noted, Congress intentionally created in the HSA separate immigration components and
25 expressly prohibited their recombination, joinder or consolidation, as well as the transfer of fees between

26 ¹⁷ See 6 U.S.C. §§ 251(3) and 251(4), as amended, which expressly provide for transfers of statutory
27 authority from the former INS Commissioner to what was then the Bureau of Border Security and is
28 now known as ICE over “[the] intelligence program” and “[the] investigations program.”

¹⁸ 6 U.S.C. § 296.

¹⁹ 6 U.S.C. § 542 (emphasis added).

1 the two DHS components. The USCIS is to perform solely adjudications functions, and ICE is to
2 perform non-adjudicative functions of investigations, law enforcement and intelligence gathering.

3
4 Congress took these steps for compelling substantive reasons. Over many years, the former INS
5 had faced unrelenting criticism for endeavoring to fulfill two seemingly contradictory statutory
6 mandates: investigating and enforcing the immigration laws, and adjudicating whether to approve or
7 deny petitions and applications for immigration and naturalization benefits.²⁰

8
9 Unsurprisingly, given this history, the June 24, 2002 report of the Senate Committee on
10 Governmental Affairs on S. 2452,²¹ a bill that would ultimately be meshed into the HSA, acknowledged
11 that S. 2452's proposed statutory "division of INS programs into 'enforcement' and 'service'
12 components tracks an administrative reorganization plan that is already underway."

13
14 In ultimately enacting the HSA, however, Congress deviated from S. 2452 by creating a new
15 Department of Homeland Security to house the enforcement and service components of the former INS,
16 rather than following the plan proposed in the Senate bill, which envisioned that "the law enforcement
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21 ²⁰ See, e.g., contemporary critiques of INS before HSA's enactment, Demetrios G. Papademetriou, T.
22 Alexander Aleinikoff, and Deborah Waller Meyers, *Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability* (1998) (describing the need for a demarcation between
23 immigration enforcement and immigration services) (accessible at:
24 <https://www.brookings.edu/book/reorganizing-the-u-s-immigration-function/>)(last visited September 8,
25 2020); Demetrios G. Papademetriou and Deborah Waller Meyers, *Reconcilable Differences? An Evaluation of Current INS Restructuring Proposals*, Policy Brief, Migration Policy Institute (June 2002)
26 (analyzing two legislative and two Executive Branch INS-restructuring proposals proposals) (accessible
27 at: https://www.migrationpolicy.org/sites/default/files/publications/200206_PB.pdf)(last visited
28 September 8, 2020).

²¹ United States Senate Committee on Governmental Affairs Together with Additional Views to
Accompany S. 2452, Report 107-175 (107th Congress, 2d Session) *accessible at*
<ftp://ftp.loc.gov/pub/thomas/cp107/sr175.txt> (last visited September 8, 2020).

1 pieces transferred from INS . . . would necessarily need to maintain close coordination with the service
2 programs that would remain in the Justice Department.”²²

3
4 Notwithstanding the § 291(b) prohibition, the temptation to recombine adjudications and
5 investigations within USCIS has resurfaced in the rulemaking history leading to the Final Rule.²³
6 Although USCIS in its Notice of Proposed Rulemaking (NPRM) had proposed to transfer to \$207.6
7 million from the IEFA to fund ICE operations, Defendants announced that this transfer would not occur
8 and would instead be deducted from their Final-Rule fee calculations, purportedly because Congress had
9 provided ICE with an equivalent appropriation.²⁴ Nonetheless, without addressing the § 291(b)
10 prohibition or the § 296(d) bar to fee transfers, Defendants maintained in the Final Rule that “DHS may
11 fund activities conducted by any component of [DHS] that constitute immigration adjudication and
12 naturalization services using the IEFA.”²⁵

13
14
15 The obligation to interpret and uphold the § 291(b) prohibition and the bar to fee transfers in §
16 296(d) therefore rests with this Court. In discharging this responsibility, the Court should determine the
17 ordinary public meaning of a statute’s language at the time of the law’s adoption.²⁶

18
19 [O]nly the words on the page constitute the law adopted by Congress and approved by
20 the President. If judges could add to, remodel, update, or detract from old statutory terms
21 inspired only by extratextual sources and our own imaginations, [courts] would risk
22 amending statutes outside the legislative process reserved for the people’s
23 representatives. And [judges] would deny the people the right to continue relying on the
24 original meaning of the law they have counted on to settle their rights and obligations.²⁷

25 ²² *Id.* at p. 10.

26 ²³ 84 Fed. Reg. 62,280 (Nov. 14, 2019) (proposed rule).

27 ²⁴ *Supra*, 85 Fed. Reg. 46,788 at 46,875.

28 ²⁵ *Id.*

²⁶ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

²⁷ *Id.*

1 Consistently with *Bostock*, this Court, in interpreting the prohibition in § 291(b) against
2 recombining, joining, or consolidating organizational units or functions of the former INS, should apply
3 the “ordinary public meaning” of the statutory term, “adjudications” in § 271(b), and distinguish it from
4 the words, “investigations ” and “intelligence” in § 251(3) and § 251(4), based on how these words were
5 commonly understood when the HSA was enacted in 2002.
6

7 Dictionary definitions make plain the distinction between adjudications, investigations and
8 intelligence:

9 **The Cambridge Dictionary:**

10 *adjudicate*²⁸ . . .

11 : to act as judge in a competition or argument, or to make a formal decision about something:

12 *He was asked to adjudicate on the dispute.*

13 *He was called in to adjudicate a local land dispute.*

14 *The game was adjudicated a win for Black.*

15 **The Merriam-Webster Dictionary:**

16 *adjudicate*²⁹ . . .

17 : to make an official decision about who is right in (a dispute): to settle judicially.

18 *The school board will adjudicate claims made against teachers. . . .*

19 : to act as judge

20 *The court can adjudicate on this dispute.*

21 **The Cambridge Dictionary:**

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26 ²⁸ “Meaning of **adjudicate** in English,” *The Cambridge Dictionary*, (2020), Cambridge University
27 Press, accessible at <https://dictionary.cambridge.org/dictionary/english/adjudicate> (last visited
28 September 8, 2020).

²⁹ “Adjudicate.” *Merriam-Webster.com Dictionary*, 2020, Merriam-Webster, accessible at
<https://www.merriam-webster.com/dictionary/adjudicate> (last visited September 8, 2020).

1 *investigate*³⁰

2 [:] to examine a crime, problem, statement, etc. carefully, especially to discover the truth:

3 *Police are investigating allegations of corruption involving senior executives.*
4 *We are of course investigating how an error like this could have occurred.*

5 **The Merriam-Webster Dictionary:**

6 *investigate*³¹

7 to observe or study by close examination and systematic inquiry

8 : to make a systematic examination; especially: to conduct an official inquiry

9 **The Cambridge Dictionary:**

10 *intelligence noun (SECRET INFORMATION)*³²

11 secret information about the governments of other countries, especially enemy governments, or
12 a group of people who collect and deal with this information:

13 *the Central Intelligence Agency*

14 *military intelligence*

15 *They received intelligence (reports) that the factory was a target for the bombing.*

16 **The Merriam-Webster Dictionary:**

17 *intelligence*³³

18 information concerning an enemy or possible enemy or an area[;] also : an agency engaged in
19 obtaining such information

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23 ³⁰ “Meaning of **investigate** in English,” *The Cambridge Dictionary*, (2020), Cambridge University
24 Press, accessible at <https://dictionary.cambridge.org/dictionary/english/investigate> (last visited
25 September 8, 2020).

26 ³¹ “Investigate.” *Merriam-Webster.com Dictionary*, (2020), Merriam-Webster, accessible at
27 <https://www.merriam-webster.com/dictionary/investigate> (last visited September 8, 2020).

28 ³² “Meaning of **intelligence** in English,” *The Cambridge Dictionary*, (2020), Cambridge University
Press, accessible at <https://dictionary.cambridge.org/dictionary/english/intelligence> (last visited
September 8, 2020).

³³ “Intelligence.” *Merriam-Webster.com Dictionary*, (2020) Merriam-Webster, accessible at
<https://www.merriam-webster.com/dictionary/intelligence> (last visited September 8, 2020).

1 Amicus submits that central to the concept of “adjudication,” as delimited in § 271(b), is the act
2 of making an impartial decision based on (a) an assessment of facts presented as evidence before a
3 tribunal, and (b) the application of relevant law to the facts, *i.e.*, to act, in this context, as an
4 administrative judge.
5

6 On the other hand, to “investigate” and gather “intelligence,” when used in reference to the
7 assigned statutory duties of ICE in §§ 251(3) and 251(4), under the caption, “Immigration Enforcement
8 Functions,” must connote the proactive, affirmative pursuit of evidence wherever it may be found, and
9 not necessarily constrained by the procedural due process protections applicable to an impartial
10 adjudicative tribunal.
11

12 It therefore follows that when the sole function of USCIS is prescribed as “adjudications” of
13 requests for immigration and naturalization benefits, the agency must act as an impartial judge, and only
14 consider extrinsic evidence, if at all, under the principle of administrative notice of commonly known
15 facts, such as current events or the contents of official documents. Compare 8 C.F.R.
16 § 1003.1(d)(3)(iv)(authorizing the Board of Immigration Appeals to take administrative notice), and
17 Executive Office for Immigration Review, *Immigration Judge Benchbook - Evidence Guide*, § II, H.,
18 “Administrative Notice”.³⁴
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21 **III. USCIS THROUGH ITS FRAUD DETECTION AND NATIONAL SECURITY**
22 **DIRECTORATE REGULARLY ENGAGES IN UNLAWFUL INVESTIGATIVE AND**
23 **INTELLIGENCE-GATHERING ACTIVITIES**
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26 ³⁴ Executive Office for Immigration Review (EOIR), *Immigration Judge Benchbook - Evidence Guide*,
27 § II, H., “Administrative Notice,” p. 35 et seq. (allowing immigration judges to take administrative
28 notice), archived at: <https://www.justice.gov/eoir/page/file/988046/download> (last visited September 8,
2020).

1 Defendant USCIS created a unit known as Fraud Detection and National Security (FDNS) in
 2 2004 and elevated it to a Directorate in 2010.³⁵ In fiscal year 2010, FDNS conducted 14,433
 3 “administrative site visits” at the business premises of employers of H-1B specialty occupation workers
 4 under its Administrative Site Visit and Verification Program (ASVVP).³⁶ According to FDNS, “[since]
 5 2009, the . . . ASVVP . . . has conducted over 100,000 Compliance Reviews of businesses and other
 6 organizations.”³⁷ Following the issuance on April 18, 2017 of Presidential Executive Order 13788, “Buy
 7 American and Hire American Executive Order,”³⁸ FDNS established a new Targeted Site Visit and
 8 Verification Program (TSVVP), with the avowed purpose of combatting H-1B fraud and abuse.³⁹

9
 10 While FDNS may attempt to couch the description of its activities euphemistically as
 11 “resolution[s] of petitions,” “fraud assessments,” “compliance reviews,” and “referral of petitions to ICE
 12 to consider for investigation,”⁴⁰ it is clear – especially when its areas of inquiry are “targeted” based on
 13 actionable intelligence expressly solicited unabashedly from the public⁴¹ – that FDNS regularly conducts
 14 investigative and intelligence activities contrary to the prohibition in § 291(b).

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 17 ³⁵ USCIS, “Fraud Detection And National Security Directorate,” “History,” *accessible at*
 18 [https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-](https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate)
 19 [directorate](https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate) (last visited September 8, 2020).

20 ³⁶ USCIS, “USCIS Fraud Detection & National Security (FDNS) Director Answers AILA
 21 Administrative Site Visit & Verification Program (ASVVP) Questions,” (June 7, 2011), AILA InfoNet
 22 Doc. No. 11062243.

23 ³⁷ USCIS, “FDNS Overview” (May 2019), PowerPoint Presentation, p. 8, *accessible at*
 24 [https://www.uscis.gov/sites/default/files/document/presentations/USCIS_OLIA_March_2019_Hill_Conf](https://www.uscis.gov/sites/default/files/document/presentations/USCIS_OLIA_March_2019_Hill_Conference_FDNS_Overview.pdf)
 25 [erence_FDNS_Overview.pdf](https://www.uscis.gov/sites/default/files/document/presentations/USCIS_OLIA_March_2019_Hill_Conference_FDNS_Overview.pdf) (last visited September 8, 2020).

26 ³⁸ Presidential Executive Order 13788 is accessible at [https://www.govinfo.gov/app/details/DCPD-](https://www.govinfo.gov/app/details/DCPD-201700255)
 27 [201700255](https://www.govinfo.gov/app/details/DCPD-201700255) (last visited September 8, 2020).

28 ³⁹ FDNS Overview, *supra*, p. 8.

⁴⁰ DHS, Office of Inspector General (OIG), “Review of the USCIS Benefit Fraud Referral Process,”
 April 2008, *accessible at* https://www.oig.dhs.gov/assets/Mgmt/OIGr_08-09_Apr08.pdf (last visited
 September 8, 2020).

⁴¹ USCIS, “Combating Fraud and Abuse in the H-1B Visa Program,” USCIS Website, March 13, 2020,
accessible at <https://www.uscis.gov/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program>
 (last visited September 8, 2020), noting that its purpose in part is “not meant to target nonimmigrant
 employees for any kind of criminal or administrative action but rather to identify employers who are
 abusing the system,” and to “conduct site visits in cases where there are suspicions of fraud or abuse and
 refer many of the cases to our counterparts at [ICE] for **further investigation.**” (Emphasis added.)

1 The USCIS website expressly states that FDNS conducts site visits – a plainly investigative
 2 activity – with respect to, among other kinds of immigration benefits requests, special immigrant
 3 religious worker petitions, H-1B nonimmigrant temporary visas, L-1 nonimmigrant intracompany
 4 transferee executive or manager visas, and EB-5 immigrant investor program visas.⁴² Further, a relevant
 5 DHS Privacy Impact Assessment details the process through which FDNS conducts what it openly
 6 refers to as “administrative **investigations.**” (Emphasis added.) While these are initially described as
 7 consisting of “further checks to verify information prior to an adjudicative step,” the report enumerates
 8 numerous activities that FDNS undertakes pursuant to these investigations such as telephone calls, site
 9 visits, interviews of applicants, beneficiaries, petitioners, and others, and subpoenas that plainly qualify
 10 as investigative.⁴³

11
 12 In addition, numerous District Court decisions (in which U.S. citizen petitioners challenged
 13 denials of marriage-based immigration applications) similarly highlight how FDNS plays a decidedly
 14 investigative role in its *ex parte* probing of immigration benefits requests.⁴⁴ Indeed, without
 15 sheepishness over its clear flouting of the prohibition in § 291(b) against recombining, joining, or
 16 consolidating organizational units or functions of the former INS, USCIS on July 30, 2020 entered into a
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21 ⁴² See, USCIS, “Administrative Site Visit and Verification Program,” *accessible at*
 22 [https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-](https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program)
 23 [security/administrative-site-visit-and-verification-program](https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program) (last visited September 8, 2020).

24 ⁴³ U.S. DHS, “Privacy Impact Assessment for the Fraud Detection and National Security Data System
 25 (FDNS-DS)” (May 18, 2016) Pages 4-5, *accessible at*
 26 <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdnsds-november2017.pdf> (last
 27 visited September 8, 2020).

28 ⁴⁴ See, e.g., *Simko v. Bd. of Immigration Appeals*, 156 F. Supp. 3d 300 (D. Conn. 2015) (referring to the
 USCIS officer conducting an “investigation” into marriage fraud); *Gatithi v. Bd. of Immigration*
Appeals, 412 F. Supp. 3d 1075 (E.D. Mo. 2019) (describing the process through which FDNS procured
 statements from the U.S. citizen petitioner and foreign beneficiary as is customary during site visits);
Ruhe v. Varr, 2019 U.S. Dist. LEXIS 166819 (C.D. Cal. 2019) (detailing visit and gathering of
 statement by FDNS investigators at the petitioner’s and beneficiary’s listed joint address).

Memorandum of Agreement⁴⁵ involving the exchange of data with the U.S. Department of Labor, which provides in relevant part:

DOL data shared with USCIS may be **accessed by USCIS FDNS . . . for authorized investigative purposes.** This MOA does not alter or restrict **the ability for DOL and USCIS FDNS to continue to share investigative information through existing arrangements.** (Emphasis added.)

IV. THIS COURT SHOULD ENJOIN DEFENDANTS FROM IMPLEMENTING THE FINAL RULE AND REQUIRE RECALCULATION OF PROPOSED FILING FEES WITHOUT INCLUSION IN IEFA OF EXPENSES ATTRIBUTABLE TO ANY USCIS INVESTIGATIVE AND INTELLIGENCE ACTIVITIES PROHIBITED UNDER THE HOMELAND SECURITY ACT OF 2002

The Final Rule included Defendants’ summary responses to the 43,108 public comments on the NPRM.⁴⁶ In responding to comments on “USCIS Staffing,” Defendants stated: “USCIS estimates that it must add an additional 1,960 positions in FY 2019/2020 (relative to FY 2018 authorized staffing levels) to address incoming workload.”⁴⁷

The FDNS Overview notes that, as of May 1, 2019, FDNS employed 1,337 federal employees:⁴⁸

FDNS Employees as of 5/1/19	
HQFDNS	247
RAIO	34
Asylum	98
FOD	736
SCOPS	232
Total	1347
Total Authorized	1553

⁴⁵ Department of Labor (DOL) website, “July 30, 2020 Memorandum of Agreement (MOA) between the Department of Homeland Security United States Citizenship and Immigration Services and the Department of Labor regarding Employment-Based Petition, Labor Certification, and Labor Condition Application Data”, p. 3, available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/ICE.pdf> (last visited September 8, 2020).

⁴⁶ See 85 Fed. Reg. at 46,796.

⁴⁷ *Id.* at Footnote 23.

⁴⁸ *Id.* at Footnote 27.

1 The Final Rule does not expressly mention FDNS and does not indicate how many of the 1,960
2 additional positions proposed for FY 2019/2020 will be allocated to FDNS for new hires. Similarly,
3 Defendants' responses to public comments did not specifically address a comment focused on FDNS:

4 USCIS has unlawfully siphoned off existing user fees to the operation of its Fraud
5 Detection and National Security Directorate, an enforcement agency which is illegally
6 constituted and a direct violation of the Homeland Security Act. . . . Those illegally used
7 fees for FDNS should be restored to the immigration user fee account, and no additional
8 user fees should be devoted to the lawless FDNS.⁴⁹

9 This Court should affirm the same constraints on DHS, USCIS and FDNS as the Supreme Court
10 applied to the federal judiciary in *Bostock*.⁵⁰ The Defendants should not be permitted to "add to,
11 remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their]
12 own imaginations, [for Defendants] would risk amending statutes outside the legislative process
13 reserved for the people's representatives . . . [and] deny the people the right to continue relying on the
14 original meaning of the law they have counted on to settle their rights and obligations."

15 Defendants should be required to abide by the prohibition in § 291(b) against recombining,
16 joining, or consolidating organizational units or functions of the former INS and the ban in § 296(d)
17 against transfers of IEJA fees earmarked for adjudication and naturalization services from USCIS to any
18 investigative or intelligence-gathering agency – whether the attempted transfer is to ICE or to FDNS.
19 They should also be enjoined from implementing the Final Rule and be required to recalculate proposed
20 filing fees, preferably under the watchful eyes of a Special Master appointed by this Court pursuant to
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25 ⁴⁹ See comment of Angelo A. Paparelli (now serving as co-counsel to amicus), posted Dec. 27, 2019,
26 accessible at <https://www.regulations.gov/document?D=USCIS-2019-0010-6535> (last visited September
27 8, 2020). The comment also cited a law review article, Angelo A. Paparelli, "USCIS's Fraud Detection
28 and National Security Directorate ~ Less Legitimate Than Inspector Clouseau, But Without the Savoir
Faire," 1 *AILA Law Journal* 57 (April 2019), AILA Doc. No. 19042441, which offered similar legal
analysis as provided in this amicus brief.

⁵⁰ *Supra*.

1 Federal Rule of Civil Procedure 53(a)(1)(B)(ii), without including in IEFA expenses attributable to any
2 USCIS investigative and intelligence activities prohibited under the Homeland Security Act.

3
4
5 Respectfully submitted on behalf of amicus,

6 Date: September 8, 2020

7 /s/ Steven J. Malm

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