

# THE FAIRNESS FOR HIGH-SKILLED IMMIGRANTS ACT: THE FIRST STEP TO COMPREHENSIVE IMMIGRATION REFORM

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## INTRODUCTION

As President Donald Trump ran for the 2016 Republican nomination, he embraced largely anti-immigrant rhetoric while also seeming to endorse legal and skilled immigration.<sup>1</sup> Trump always qualified his statements favorably for both legal and skilled immigration; he said at a 2015 Oklahoma rally, “I want legal immigration. I want great people to come in.”<sup>2</sup> As president, Trump endorsed skilled immigration with a new merit immigration proposal unveiled in 2019, which adopts a “points system” that rewards well-educated immigrants from “specialized vocations.”<sup>3</sup> Other Republicans have supported his call for more high-skilled immigration, including Senators Kevin Cramer of North Dakota and Mike Lee of Utah.<sup>4</sup>

The American people also agree with Trump’s statements. Around eighty percent of Americans favor more high-skilled immigration, a figure that far outnumbers the twenty-four percent<sup>5</sup> of Americans who want more overall immigration, per a 2019 poll.<sup>6</sup> In turn, Congress has responded with the Fairness for High-Skilled Immigrants Act (“the Act”), a bill introduced every session since Lee joined the Senate in 2011.<sup>7</sup> The Act would raise per-country caps on family immigration while getting rid of per-country caps entirely for employment, clearing the visa backlog for large countries like India and China.<sup>8</sup> The Act has gained political momentum during the 116<sup>th</sup> Congress, which runs from January 3, 2019 to January 3, 2021. On July 10, 2019, the

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1. See HBO, *Legal Immigration: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Sept. 15, 2019), <https://www.youtube.com/watch?v=tXqnRMU1fTs>.

2. *Id.*

3. See Abigail Hauslohner, *Trump Wants a Different Kind of Immigrant: Highly Skilled Workers Who Speak English and Have Job Offers*, WASH. POST (May 15, 2019, 7:54 PM), [https://www.washingtonpost.com/immigration/trump-wants-a-different-kind-of-immigrant-highly-skilled-workers-who-speak-english-and-have-job-offers/2019/05/15/9c1d8eca-772b-11e9-bd25-c989555e7766\\_story.html](https://www.washingtonpost.com/immigration/trump-wants-a-different-kind-of-immigrant-highly-skilled-workers-who-speak-english-and-have-job-offers/2019/05/15/9c1d8eca-772b-11e9-bd25-c989555e7766_story.html). A separate faction of the Republican Party, led by Senators David Perdue of Georgia and Tom Cotton of Arkansas, not only favored a point system that favored high-skilled immigration but also favor cutting legal immigration overall. *Id.* Trump called Perdue and Cotton “wonderful Senators” for their work on the bill. *Text of President Donald Trump’s Bill on Merit-based Immigration System*, VOICE OF AMERICA (Aug. 2, 2017, 12:19 PM), <https://www.voanews.com/archive/text-president-donald-trumps-bill-merit-based-immigration-system>.

4. See Hauslohner, *supra* note 3.

5. Phillip Connor & Jens Manuel Krogstad, *Many Worldwide Oppose More Migration – Both into and out of Their Countries*, PEW RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/many-worldwide-oppose-more-migration-both-into-and-out-of-their-countries/>.

6. Phillip Connor & Neil G. Ruiz, *Majority of U.S. Public Supports High-Skilled Immigration*, PEW RES. CTR. (Jan. 22, 2019), <https://www.pewresearch.org/global/2019/01/22/majority-of-u-s-public-supports-high-skilled-immigration/>.

7. See Fairness for High-Skilled Immigrants Act of 2011, S. 1857, 112th Cong. (2011); Fairness for High-Skilled Immigrants Act of 2013, S. 293, 113th Cong. (2013); Fairness for High-Skilled Immigrants Act of 2015, H.R. 213, 114th Cong. (2015); Fairness for High-Skilled Immigrants Act of 2017, S. 281, 115th Cong. (2017); Fairness for High-Skilled Immigrants Act of 2019, S. 386, 116th Cong. (2019).

8. S. 386.

Act passed in the House and, although the Senate has not yet voted on the legislation, it is co-sponsored by thirty-five senators from both parties.<sup>9</sup> Furthermore, the Act has broader bipartisan support than alternatives, including the RAISE Act, the BELIEVE Act, and the RELIEF Acts, which have four,<sup>10</sup> one,<sup>11</sup> and six<sup>12</sup> co-sponsors, respectively. The possibility that the Fairness for High-Skilled Immigrants Act becomes law is very real, and our current immigration system's brokenness and inefficiencies make its modest approach only more vital.

This Note will address how the Fairness for High-Skilled Immigrants Act would allow more high-skilled immigration while also addressing longstanding problems in our immigration system unsolved by the Immigration and Nationality Act of 1965 and subsequent immigration legislation. Although the Act would not solve all inequities within our immigration system, the Act would be a proverbial step in the right direction. In Part I, I will explain the main problems within our current immigration system. In Part II, I will address the Fairness for High-Skilled Immigrants Act's proposed policy changes and the implications of these changes. In Part III, I will argue that the bill would not harm America's reputation for welcoming immigrants and would benefit the United States economy. In Part IV, I will assess the Act's political support and viability for becoming law. In Part V, I will address the different legal challenges the Act might face from different branches of government. In Part VI, I will address the ongoing challenges in our immigration system that, despite the Act's positive attributes, would persist after the Act's passage and must still be addressed to fix our immigration system.

## I. OUR IMMIGRATION SYSTEM LACKS THE ABILITY TO PROCESS IMMIGRANTS FROM LARGE COUNTRIES EFFECTIVELY

Our current immigration system subjects all countries to a uniform seven percent per-country cap for both employment and family immigration, in accordance with the Immigration and Nationality Act of 1965 ("INA").<sup>13</sup> The major avenues for bringing in Indian, Chinese, and Mexican skilled workers, which have resulted in a backlog, are through the EB-2 and EB-3 visas.<sup>14</sup> These visas are allocated to immigrants with advanced degrees or bachelor's degrees.<sup>15</sup> EB-1 visas, moreover, are reserved for "extraordinary" immigrants

9. *See id.*

10. Reforming American Immigration for a Strong Economy Act, S. 1103, 116th Cong. (2019).

11. Backlog Elimination, Legal Immigration, and Employment Visa Enhancement Act, S. 2091, 116th Cong. (2019).

12. Resolving Extended Limbo for Immigrant Employees and Families Act, S. 2603, 116th Cong. (2019).

13. 8 U.S.C.A. § 1152(a)(2) (West 2021).

14. *See* 8 U.S.C.A. § 1153(b)(2-3) (West 2021); Abigail Hauslohner, *The Employment Green Card Backlog Tops 800,000, Most of Them Indian. A Solution Is Elusive.*, WASH. POST (Dec. 17, 2019, 5:26 PM), [https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce\\_story.html](https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html).

15. Hauslohner, *supra* note 14.

in the “sciences, arts, education, businesses, or athletics” whose abilities have “extensive documentation” and who will continue to work in that area to benefit the United States.<sup>16</sup> Historically, EB-1 visas have been awarded to senior or high-profile individuals in the arts, sciences, and athletics: prominent examples include Melania Trump, John Lennon, and Yoko Ono.<sup>17</sup> The other employment visa categories, EB-4 and EB-5, are reserved for immigrants in special categories: EB-4 for those who have served in unique roles for the United States like translators for service members or as religious workers abroad, and EB-5 for investors who pledge to invest \$1 million in a non-rural area.<sup>18</sup> Seven percent caps limit how many visas each nationality can obtain across all EB visa categories, allocated for immigrants on a path towards permanent residence.<sup>19</sup> H-1B visas, meanwhile, are allocated to temporary workers and do not have seven percent caps.<sup>20</sup>

By doing so, however, this system subjects large countries like India and China, which have large populations of potential immigrants, to the same standards as tiny countries like Malta.<sup>21</sup> This has resulted in a severe backlog in the number of immigrants seeking to come to the United States. Approximately seventy-five percent of the employment-based green card backlog is composed of Indian immigrants, with Chinese immigrants comprising the remainder.<sup>22</sup> Meanwhile, the family-based visa backlog was largely composed of Mexican and Filipino immigrants at the end of 2019, with adult siblings of United States citizens from these nations facing a wait time of more than twenty years for a green card.<sup>23</sup> This employment and family-based immigration backlog is only expected to worsen with the COVID-19 pandemic, which has resulted in the furlough of United States Citizen and Immigration Services (“USCIS”) workers and a USCIS billion-dollar deficit that slowed facilities operations.<sup>24</sup> Countries with large populations applying for permanent residency with a path toward citizenship find themselves at an extreme and unfair disadvantage. For example, as of mid-April 2018, the waiting time for an Indian green card holder was up to 151

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16. 8 U.S.C.A. § 1153(b)(1) (West 2021).

17. See Miriam Jordan, *Did Melania Trump Merit an ‘Einstein Visa’? Probably, Immigration Lawyers Say*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/us/melania-trump-einstein-visa.html>; Sinduja Rangarajan, *Melania Trump Got an “Einstein Visa.” Why Was It So Hard for This Nobel Prize Winner?*, MOTHER JONES (Feb. 27, 2010), <https://www.motherjones.com/politics/2020/02/genius-green-card-visa-nobel-prize-trump/>.

18. 8 U.S.C.A. § 1153(b)(4-5) (West 2021).

19. 8 U.S.C.A. § 1152(a)(2) (West 2021).

20. A PRIMER ON U.S. IMMIGRATION POLICY, CONG. RES. SERV. 7 (2018), <https://fas.org/sgp/crs/homesec/R45020.pdf>.

21. HBO, *Legal Immigration: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Sept. 15, 2019), <https://www.youtube.com/watch?v=tXqnRMUlfTs&t=493s>.

22. Hauslohner, *supra* note 14, at 2.

23. *Id.*

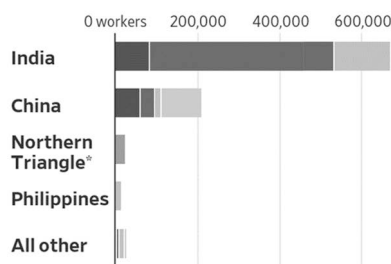
24. Priscilla Alvarez, *US Immigration Agency Prepares to Furlough More Than Half of Its Workforce*, CNN (June 24, 2020, 6:04 PM), <https://www.cnn.com/2020/06/24/politics/uscis-immigration-citizenship-furlough/index.html>.

years, and the combined Indian visa applicants for EB-2 and EB-3 visas averaged a fifty-eight-year wait.<sup>25</sup> And as of March 2020, more than 700,000 Indian visa applicants were on waiting lists for EB-2 and EB-3 visas,<sup>26</sup> while only 10,146 Indians were admitted under these visas in 2019.<sup>27</sup>

Chart 1: Waitlisted workers by their country of origin<sup>28</sup>

**Green-Card Wait**  
Wait-listed workers by nation of origin

- Preference 1: Priority workers, researchers
- 2: Professionals with advanced degrees
- 3: Skilled workers
- 4: Religious workers, abused or abandoned juveniles
- 5: Investors



\*The northern triangle consists of Central American countries El Salvador, Guatemala and Honduras  
Source: Migration Policy Institute analysis of data from the State Department and U.S. Citizenship and Immigration Services

Reforming this flawed process is not simple, however. Many groups, including Irish-American organizations, are concerned that large countries like India and China could monopolize the immigration process while smaller countries will lose out.<sup>29</sup> Others are concerned that the Fairness for High-Skilled Immigrants Act is not true to American values as it prioritizes highly skilled workers over the “tired” and “poor . . . huddled masses”

25. Ethan Baron, *H-1B Visa to Green Card: Wait Time for Indian Workers Is up to 151 Years*, THE MERCURY NEWS (July 25, 2018, 10:47 AM), <https://www.mercurynews.com/2018/06/08/h-1b-visa-to-green-card-wait-time-for-indian-workers-is-up-to-151-years-report/>; David J. Bier, *150-Year Wait for Indian Immigrants with Advanced Degrees*, CATO INSTITUTE: CATO AT LIBERTY (June 8, 2018, 12:45 PM), <https://www.cato.org/blog/150-year-wait-indian-immigrants-advanced-degrees>.

26. THE EMPLOYMENT-BASED IMMIGRATION BACKLOG, CONGRESSIONAL RESEARCH SERVICE 10–11 (2020), <https://crsreports.congress.gov/product/pdf/R/R46291>.

27. David J. Bier, *Fairness for High Skilled Immigrants Act: Wait Times and Green Card Grants*, CATO INSTITUTE: CATO AT LIBERTY (Sept. 30, 2019, 12:45 PM), <https://www.cato.org/blog/fairness-high-skilled-immigrants-act-wait-times-green-card-grants>.

28. Lindsay Wise, *The Other Immigration Morass: A Battle Over Workers' Green Cards*, WALL ST. J. (Sept. 7, 2019, 12:01 AM), <https://www.wsj.com/articles/the-other-immigration-morass-a-battle-over-workers-green-cards-11567828860>.

29. See, e.g., Ray O'Hanlan, *Hibernians Sound Alarm over Immigration Bill*, IRISH ECHO (Oct. 4, 2019), <https://www.irishecho.com/2019/10/hibernians-sound-alarm-over-immigration-bill/>.

seeking a better life.<sup>30</sup> Finally, critics claim the Act would give jobs to foreign workers that could otherwise go to Americans.<sup>31</sup> Moreover, bipartisan immigration proposals are always elusive given the current partisan political landscape, as the failure of the 2007 and 2013 immigration compromises demonstrates.<sup>32</sup>

## II. THE FAIRNESS FOR HIGH-SKILLED IMMIGRANTS ACT RAISES PER-COUNTRY CAPS

The Fairness for High-Skilled Immigrants Act would address many flaws in our country's immigration system, including lifting per-country caps. The Act would restructure our immigration system to increase family sponsorship and allow more highly skilled immigrants into the United States. The bill would end the INA's employment-based per-country EB visa caps and lift the INA's family-based per-country visa cap from seven percent to fifteen percent.<sup>33</sup> According to some experts, it would take seven to eight years to clear the backlog that more populous countries like India and China have faced.<sup>34</sup> Without the Fairness for High-Skilled Immigrants Act, by contrast, Indians, Chinese, and foreign nationals from other populous countries would have to wait between forty and fifty years for this backlog to clear.<sup>35</sup>

The Act does have some mechanisms to prevent any one country from monopolizing visas. It provides for a transition period from 2020 to 2022 before its provisions would fully take effect: for fiscal year 2020, fifteen percent of immigrant visas under the new visa system<sup>36</sup> would be made available to immigrants not from China or India;<sup>37</sup> for fiscal years 2021 and 2022, ten percent of immigrant visas would be made available to immigrants not from India or China.<sup>38</sup> The Act also explicitly states that no more than eighty-five percent of EB-2 and EB-3 visas may be awarded to any single country.<sup>39</sup>

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30. Hauslohner, *supra* note 3.

31. See Virgil Goode, *Fairness for High Skilled Immigrants Act Exposes Silicon Valley's Hollow Diversity Slogans*, THE HILL (July 9, 2019, 1:15PM), <https://thehill.com/blogs/congress-blog/technology/452194-fairness-for-high-skilled-immigrants-act-exposes-silicon>.

32. See Seung Ming Kim & Carrie Budoff Brown, *The Death of Immigration Reform*, POLITICO (June 27, 2014, 5:01 AM), <https://www.politico.com/story/2014/06/how-immigration-reform-died-108374>. Broad comprehensive immigration reform proposals, which sought to combine a path to citizenship for many undocumented immigrants with enhanced border security, failed in both 2007 and 2013. *Id.*; Dana Bash & Andrea Koppel, *Senate Immigration Bill Suffers Crushing Defeat*, CNN (June 28, 2007, 8:44 PM), <http://www.cnn.com/2007/POLITICS/06/28/immigration.congress/index.html> [<https://web.archive.org/web/20130530035756/http://www.cnn.com/2007/POLITICS/06/28/immigration.congress/index.html>].

33. S. 386.

34. Bier, *supra* note 27.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

The Act also has mechanisms to prevent other inadvertent harms. An amendment proposed by Senator Charles “Chuck” Grassley would increase enforcement related to H-1B visas<sup>40</sup> by strengthening the Department of Labor’s authority in enforcing these visas, requiring disclosure of visa recipient salaries by employers, and closing loopholes allowing employers to bypass visa caps.<sup>41</sup> A “do no harm” provision would also ensure all visa recipients who got their visas before the Act’s enactment would not lose those visas.<sup>42</sup> Furthermore, a “shortage occupations” provision would allow around 4,400 EB-3 visas per year for “shortage occupations” like nurses or physical therapists from 2020 to 2028.<sup>43</sup>

Finally, the Act would remove an offset that reduced the number of visas granted to individuals from China.<sup>44</sup> The Chinese have received around 1,000 fewer visas because of measures passed after the 1989 Tiananmen Square Massacre. After the Massacre, Congress passed the Chinese Student Protection Act, which allowed Chinese students to stay in the United States and seek permanent residence.<sup>45</sup> These measures allowed certain Chinese nationals in the United States to stay until political upheaval had subsided.<sup>46</sup> Around 50,000 Chinese scholars have sought permanent residence in the United States since.<sup>47</sup>

The Act would also improve the United States’ economy, as Chinese and Indian immigrants tend to be highly skilled and highly educated.<sup>48</sup> Immigrants from India and China, likely the chief beneficiaries of the Act, have historically shown a particular bent towards entrepreneurship through a disproportionate share of patents: in 2004, Chinese and Indian immigrants held six percent and nine percent of United States domestic patents,<sup>49</sup> respectively, despite comprising only 0.9% and 0.6% of the

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40. S. Amdt. 906 to S. 386.

41. *Id.*

42. S. 386.

43. A PRIMER ON U.S. IMMIGRATION POLICY, CONG. RES. SERV. 7 (2018), <https://fas.org/sgp/crs/homsec/R45020.pdf>; Bier, *supra* note 27; *see also* Julia Gelatt (@J\_Gelatt), TWITTER (Sept. 19, 2019, 1:50 PM), [https://twitter.com/J\\_Gelatt/status/1174742597677518851?s=20](https://twitter.com/J_Gelatt/status/1174742597677518851?s=20); *see generally* 20 C.F.R. 656.5 (a) (defining “shortage occupations”).

44. S. 386.

45. *See generally* LISONG LIU, CHINESE STUDENT MIGRATION AND SELECTIVE CITIZENSHIP: MOBILITY, COMMUNITY AND IDENTITY BETWEEN CHINA AND THE UNITED STATES 92 (2016). After the Communist Party leader Hu Yaobang’s death, pro-democracy protests broke out in China in May and June 1989. The Chinese Government responded with overwhelming force. Thousands died in the resulting crackdown (an official death toll has never been released), provoking world condemnation and rendering the Tiananmen Square a symbol of pro-democracy resistance. *Tiananmen Square: What Happened in the Protests of 1989?*, BBC NEWS (June 3, 2019), <https://www.bbc.com/news/world-asia-48445934>.

46. *Id.*

47. *Id.*

48. *See* William R. Kerr, *U.S. High-Skilled Immigration, Innovation, and Entrepreneurship: Empirical Approaches and Evidence* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 19377, 2013).

49. *Id.* at 5.

population at the 2000 Census.<sup>50</sup> Highly skilled workers have long been integral to both the United States' economy and its growth. In the 2008 Current Population survey, immigrants represented twenty-nine percent of growth in bachelor's degrees among the workforce during the 1995-2008 period.<sup>51</sup> Furthermore, as of 2013, highly skilled immigrants accounted for a quarter of American workers in fields of innovation and entrepreneurship.<sup>52</sup> More generally, India has long been a source of skilled tech workers for the United States, and tech workers are willing to take their skills to other countries if the United States does not accept them.<sup>53</sup>

Additionally, many U.S. tech and research companies find filling jobs with well-educated workers unduly challenging as employers received a thirty-two percent denial rate for H-1B applications provided to skilled guest workers in the first quarter of the 2019 fiscal year.<sup>54</sup> A November 2018 study by the National Association of Manufacturers ("NAM") showed unfilled manufacturing positions calling for "skilled production workers, supply chain talent, engineers, scientists, software engineers and operational managers."<sup>55</sup> One of the study's suggested solutions was utilizing more highly skilled immigration.<sup>56</sup> And although better education and training for American workers to fill those jobs would be an excellent long-term solution, an immediate supply of highly skilled foreign workers would benefit America's economic needs right now.<sup>57</sup> In February 2019, NAM's CEO said that United States manufacturers have 428,000 jobs to fill and will have four million to fill over the next decade.<sup>58</sup> The Fairness for High-Skilled Immigrants Act, through providing a significant increase in the number of holders of advanced degrees, would help fill this skilled labor void by resolving the backlog among Indian and Chinese immigrants.<sup>59</sup>

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50. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS (2000), <https://www.census.gov/content/dam/Census/library/publications/2001/dec/2khus.pdf> (last visited Oct. 15, 2019).

51. Kerr, *supra* note 48, at 4.

52. *Id.* at 5.

53. Hauslohner, *supra* note 3; Clive Thompson, *Tech Workers Are Living the American Dream—in Canada*, WIRED (Aug. 18, 2018, 6:00 AM), <https://www.wired.com/story/immigrant-tech-workers-american-dream-canada/>.

54. Laura D. Francis, *Jump in H-1B Denials Affecting All Companies Seeking Visas*, BLOOMBERG LAW (Apr. 10, 2019, 3:53 PM), <https://news.bloomberglaw.com/daily-labor-report/jump-in-h-1b-denials-affecting-all-companies-seeking-visas>.

55. Ryan Golden, *With 400K Jobs to Fill, Manufacturers Seek Immigration Reform*, HR DIVE (Feb. 21, 2019), <https://www.hrdiver.com/news/with-400k-jobs-to-fill-manufacturers-seek-immigration-reform/548842/>.

56. *See id.*

57. *See id.*

58. *Id.*

59. *See* Baron, *supra* note 25.



Table 1: Top 30 Employers of Workers in the United States on H-1B Visas<sup>60</sup>

**The top 30 H-1B employers account for more than one in four H-1B petitions approved by USCIS**

Top 30 H-1B employers by number of approved petitions, fiscal year 2019

Rank	Employer name	Total H-1B petition approvals	Outsourcing/offshoring business model?
1	Cognizant Technology	13,466	Yes
2	Deloitte Consulting LLP	7,690	Yes
3	Tata Consultancy	7,620	Yes
4	Amazon.com Services	7,337	—
5	Google LLC	6,054	—
6	Infosys Ltd.	5,546	Yes
7	Microsoft Corp.	5,275	—
8	Capgemini America Inc.	3,695	Yes
9	Facebook Inc.	3,552	—
10	Larsen & Toubro Infotech	3,495	Yes
11	Apple Inc.	3,469	—
12	Wipro Ltd.	3,131	Yes
13	Accenture LLP	3,120	Yes
14	Intel Corp.	2,992	—
15	IBM Corp.	2,966	Yes
16	Ernst & Young US LLP	2,910	Yes
17	Tech Mahindra Americas	2,866	Yes
18	HCL America Inc.	2,431	Yes
19	Cisco Systems Inc.	2,098	—
20	Oracle America Inc.	2,005	—
21	PricewaterhouseCoopers	1,735	Yes
22	JPMorgan Chase & Co.	1,697	—
23	Qualcomm Technologies	1,620	—
24	Walmart Associates Inc.	1,518	—
25	Salesforce.com Inc.	1,310	—
26	Mphasis Corp.	1,303	Yes
27	Amazon Web Services	1,283	—
28	Syntel Inc.	1,196	Yes
29	Uber Technologies Inc.	1,160	—
30	Randstad Technologies	1,120	—
<b>Total H-1B petition approvals, top 30</b>		105,660	
<b>Total H-1B petition approvals, all employers</b>		389,323	
<b>Top 30 share of total H-1B petition approvals</b>		27%	

**Notes:** H-1B petition approvals include approved petitions for initial and continuing employment. Petitions are approved by U.S. Citizenship and Immigration Services (USCIS).

**Source:** Authors' analysis of USCIS H-1B Employer Data Hub, fiscal year 2019 data

**Economic Policy Institute**

The Act, which is often portrayed as a boon for Silicon Valley, would benefit businesses beyond the Silicon Valley hubs portrayed by critics as

60. DANIEL COSTA & RON HIRA, H-1B VISAS AND PREVAILING WAGE LEVELS, ECON. POL'Y INST. 20 (2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

benefiting from the bill.<sup>61</sup> Silicon Valley companies used a combined 22,640 H-1B visas to bring in foreign workers during fiscal year 2019.<sup>62</sup> Around 140,000 employment-based visas are available under the INA.<sup>63</sup> And 57.2% of those, or approximately 80,000, are the EB-2 and EB-3 visas often used to bring highly skilled immigrants to the United States.<sup>64</sup> The around 80,000 EB-2 and EB-3 green cards available under the INA that Silicon Valley businesses would use to hire permanent workers under the Act, instead of temporary H-1B visas, well outnumber the H-1B visas the top 30 Silicon Valley H-1B employers now use.<sup>65</sup> Silicon Valley companies would therefore obtain many EB-2 and EB-3 visas for skilled immigrant workers under the Fairness for High-Skilled Immigrants Act, but ample visas for other businesses to hire highly skilled employees would remain. Therefore, it is mistaken to say that Silicon Valley companies would monopolize the around 80,000 available EB-2 and EB-3 green cards: tech hubs nationwide<sup>66</sup> and not just in Silicon Valley would benefit from the Fairness for High-Skilled Immigrants Act.

It is likely, however, that large companies with massive amounts of resources in suburban areas, urban areas, and Silicon Valley will obtain the majority of skilled tech workers under this bill rather than smaller businesses in rural and exurban areas.<sup>67</sup> The thirty companies that received the most H-1B visas in fiscal year 2019 included twenty-two tech conglomerates, which received a combined 80,995 temporary H-1B visas, more than the around 80,000 EB-2/EB-3 visas available for them under the INA if the Act becomes law.<sup>68</sup> Large tech conglomerates will therefore have a critical advantage when procuring H-1B or other immigration visas.<sup>69</sup>

The bill would aid large companies, but not the sort of small businesses or parts of the country that could also use highly skilled laborers; with the exception of Walmart, every company among the top thirty temporary H-1B visa procurers that could use permanent EB visas if the Act becomes law is headquartered in a coastal state and an urban or suburban area.<sup>70</sup> Although in some cases a lawyer can obtain an EB-1 employment visa, it

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61. See, e.g., Goode, *supra* note 31.

62. See *supra* Table 1; Costa & Hira, *supra* note 60.

63. 8 U.S.C.A. § 1151(d)(1) (West, Westlaw through P.L. 116-169).

64. See THE EMPLOYMENT-BASED IMMIGRATION BACKLOG, CONGRESSIONAL RESEARCH SERVICE 7 (2020), <https://crsreports.congress.gov/product/pdf/R/R46291>.

65. Costa & Hira, *supra* note 60. I am defining “Silicon Valley companies” as high-tech businesses around the entire San Francisco Bay area.

66. Kevin J. Ryan, *North Carolina Startups Raised More Than \$1 Billion Last Year. Here’s Why Raleigh Is the Tech Industry’s Best Kept Secret*, INC. (2018), <https://www.inc.com/magazine/201902/kevin-j-ryan/north-carolina-raleigh-research-triangle-2018-surge-cities.html> (last visited Oct. 21, 2019).

67. See *supra* Table 1; Costa & Hira, *supra* note 60.

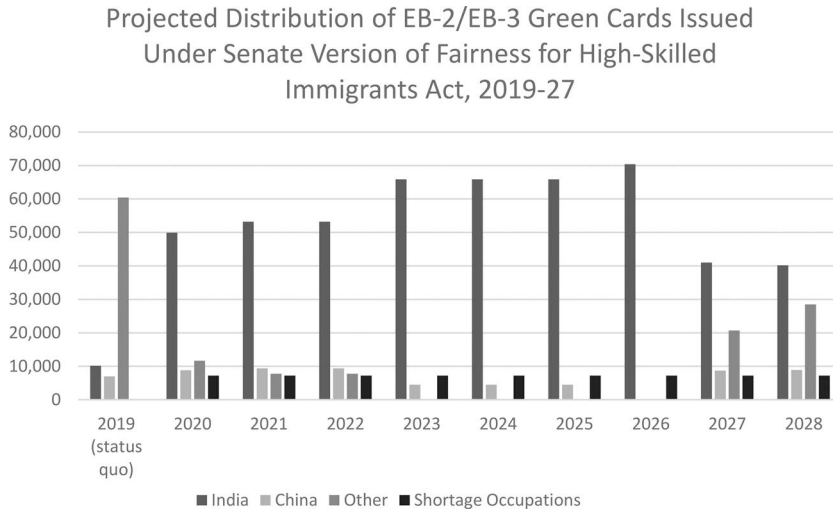
68. See Costa & Hira, *supra* note 60. This figure also represents around seventy-seven percent of the total H-1B petition approvals awarded.

69. See *id.*

70. *Id.*

is unclear whether the applicants affected by this bill have sufficient legal representation to convince an immigration officer of the applicants' "extraordinary" abilities. As a result, the bill's economic expansion would be felt among the wealthy, predominantly in major population centers.

Chart 2: Projected Distribution of EB-2/EB-3 Green Cards Issued Under the Senate Version of the High-Skilled Immigrants Act, 2019-27<sup>71</sup>



The bill will undoubtedly cut into visa totals for other countries. Given the level of backlog among Indian immigrants, the Cato Institute projects Indian immigrants will likely comprise the vast majority of EB-2/EB-3 visa recipients, likely claiming around sixty-four percent of EB-2/EB-3 visas in 2020; around sixty-nine percent of EB-2/EB-3 visas in 2021 and 2022; around eighty-five percent in 2023, 2024, and 2025; around ninety-one percent in 2026; and around fifty-three percent in 2027 and 2028.<sup>72</sup> Although the Cato Institute's projections may be imprecise, there is no question that the influx of Indian and Chinese immigrants claiming EB visas will create an imbalance among countries claiming employment visas; Indians and Chinese will claim the vast majority of employment visas for a few years.

This temporary decrease in immigrants not from India, China, and Mexico is a worthwhile price to undo the backlog among immigrants from these countries. Not only do current backlogs deprive the United States of an enormous source of highly skilled labor that would boost our economy, but the

71. See *supra* Chart 2; Bier, *supra* note 27.

72. See Bier, *supra* note 27.

EB-2 and EB-3 visa backlogs unjustly penalize immigrants from more populous countries composed of ethnic minorities and favor white immigrants.<sup>73</sup> Many in the backlog use temporary H-1B visas to work in the United States, which leaves these workers “vulnerable to exploitation.”<sup>74</sup> These workers are tied to their current jobs, where they lack bargaining power and are consequently paid significantly less, sometimes tens of thousands of dollars less, than what an American would make.<sup>75</sup> This deeply flawed form of “indentured servitude”<sup>76</sup> allows H-1B visa workers to take jobs from Americans and return home with their earnings instead of immigrating to the United States and contributing to its economy. The Fairness for High-Skilled Immigrants Act would head off this trend and make it easier for companies to get EB visas for these H-1B workers.<sup>77</sup>

Furthermore, this level of inequity between large and small countries results in an immigration system that likely incentivizes illegal immigration when immigrants from these large countries have no other way to enter the United States.<sup>78</sup> These illegal immigrants are then deprived of rights and can be exploited by employers or other institutions within the United States.<sup>79</sup> Our immigration system, often portrayed in public discourse as a “line” in which immigrants must stand, is closed to Indian, Chinese, and Mexican immigrants. For a Mexican immigrant whose visa application from 1992 is still being processed under our current per-country cap system, the proverbial line is never-ending.<sup>80</sup> The lack of a true “line” has understandably incentivized millions to immigrate to the United States outside legal channels for decades.<sup>81</sup> This longstanding problem in our immigration system, fueled by per-country caps, led the Supreme Court to sanction public school education to all children, regardless of legal status, in 1982.<sup>82</sup>

The Fairness for High-Skilled Immigrants Act would undo this backlog that fuels illegal immigration and leaves many without legal protections, while including a three-year period that would set aside visas for immigrants

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73. See *id.*; Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019, 4:45 AM), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/>.

74. Ethan Baron, *Bill to Scrap Per-Country Green Card Cap Passes House with Bipartisan Support*, MERCURY NEWS (July 11, 2019, 4:19 AM), <https://www.mercurynews.com/2019/07/10/bill-to-scrap-per-country-green-card-cap-passes-house-with-bipartisan-support/>.

75. See *id.*; COSTA & HIRA, *supra* note 60, at 10 (“Previous data analyses have revealed that H-1B outsourcing companies pay their H-1B employees relatively lower wages in absolute terms. . .”).

76. See Baron, *supra* note 74.

77. See *id.*

78. See Gordon H. Hanson, *The Economic Logic of Illegal Immigration*, COUNC. ON FOREIGN REL. 14-18 (Apr. 2007), <https://cdn.cfr.org/sites/default/files/pdf/2007/04/ImmigrationCSR26.pdf>; Jawetz, *supra* note 73.

79. See Hanson, *supra* note 78, at 4; Jawetz, *supra* note 73.

80. NPR Tell Me More, *Is There Really a ‘Line’ for Immigration?*, NPR (Feb. 27, 2013), <https://www.npr.org/2013/02/27/173056252/is-there-really-a-line-for-immigration>.

81. *Id.*; Jawetz, *supra* note 73.

82. See Plyler v. Doe, 457 U.S. 202, 218 (1982) (stating that “[s]heer incapability or lax enforcement of the laws barring entry into this country . . . has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”) (emphasis added).

not from India or China.<sup>83</sup> The Act would do so while boosting our economy, although visas would be largely available to companies headquartered in cities, suburbs, and Silicon Valley. The Act thus resolves a grotesque inequity in our system for deserving immigrants from large countries, while remaining somewhat cognizant of potential negative effects.

Despite the Act's seemingly exclusive title, this legislation would benefit those seeking a better life as well as the highly skilled. The Act's title may imply favoritism towards more highly skilled or more educated workers, but a bill title is often more of a political statement than a policy statement.<sup>84</sup> Highly skilled immigration is highly popular with the American public, a fact upon which the Act seeks to capitalize.<sup>85</sup> More generally, bill titles are not the be-all and end-all: Republicans and Democrats indisputably disagreed with respect to whether President Obama's Affordable Healthcare and Patient Protection Act would actually contribute to the affordability of healthcare, just as both parties doubted that President Trump's signature Tax Cuts and Jobs Act would actually create jobs. It is naïve to judge a bill primarily on its title, and the Fairness for High-Skilled Immigrants Act has far-reaching effects beyond the EB-2 and EB-3 visas that would be more readily available to Indian and Chinese immigrants after the Act's passage.

The Act would also aid family-based immigration. Namely, the Act would raise the seven percent cap for family immigration to fifteen percent, allowing family members of United States citizens and legal permanent residents to immigrate more easily, regardless of their education level.<sup>86</sup> The Act would also raise immigration caps for immigrants looking to obtain EB-4 and EB-5 visas, categories that include wealthy investors looking to invest \$1 million in job creation in American communities as well as interpreters that assisted United States service members in Iraq and Afghanistan.<sup>87</sup> Furthermore, there are still many temporary visas for unskilled workers looking to send remittances to their home countries or foreign students hoping to earn a degree in the United States. H-2A agricultural worker visas, F-1 visas

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83. S. 386.

84. Emily Heil, *Congressional Bill Names, Unspun*, WASH. POST (July 24, 2013), [https://www.washingtonpost.com/blogs/in-the-loop/post/congressional-bill-names-unspun/2013/07/24/44b2be70-f2df-11e2-ae43-b31dc363c3bf\\_blog.html](https://www.washingtonpost.com/blogs/in-the-loop/post/congressional-bill-names-unspun/2013/07/24/44b2be70-f2df-11e2-ae43-b31dc363c3bf_blog.html); Chrissie Long, *Lawmakers Turn to Catchy Names for Bills*, THE HILL (Apr. 21, 2005, 12:00 AM), <https://thehill.com/homenews/news/11040-lawmakers-turn-to-catchy-names-for-bills>; see also *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring) (stating that a title alone is “not dispositive” in interpreting that a Sarbanes-Oxley Act section’s title could support that the Act’s destruction of records provision did not apply to fishermen throwing fish overboard, and that the fish were not the “record, document, or tangible object” referred to in the statute). *But see Yates*, 574 U.S. at 539–40 (holding that a Sarbanes-Oxley Act section’s title was *supporting evidence* the Act’s destruction of records provision did not apply to fishermen throwing fish overboard, and that the fish were not the “record, document, or tangible object” referred to in the statute).

85. See Connor & Ruiz, *supra* note 6.

86. S. 386 § 2.

87. A PRIMER ON U.S. IMMIGRATION POLICY, CONG. RES. SERV. 4 (June 22, 2018), [https://www.everycrsreport.com/files/20180622\\_R45020\\_f21e3d8538bf40d8d4cdbc3c05745d7e8be4af.pdf](https://www.everycrsreport.com/files/20180622_R45020_f21e3d8538bf40d8d4cdbc3c05745d7e8be4af.pdf); see 8 U.S.C.A. § 1153(b)(5) (West, Westlaw through P.L. 116-169).

for language and academic workers, and H-2B non-agricultural guest workers are just a few examples of temporary provisions for unskilled workers.<sup>88</sup> Unlike the RAISE Act, which would introduce a points system based on an immigrant's education level, the Fairness for High-Skilled Immigrants is more of a cap-lifting bill than one that solely expedites highly skilled immigration. In sum, the Fairness for High-Skilled Immigrants Act's title is more of a reflection of the popularity of highly skilled immigration among the American public and among politicians from both parties than of the policies implemented under the Act.

### III. THE ACT'S SUPPORT AMONG POLITICAL INSIDERS FROM BOTH PARTIES AND THE GENERAL PUBLIC

The Fairness for High-Skilled Immigrants Act's bipartisanship in Congress should help it break through our partisan political climate. The Act currently has "bipartisan and overwhelming"<sup>89</sup> support, with thirty-five Democratic and Republican co-sponsors, which is an encouraging sign of the enforcement system moving away from "federal inaction" and "toward bipartisan agreement and concrete solutions."<sup>90</sup> The Act also incorporates both major parties' policy goals: the Act would make our immigration system more equitable and efficient but would keep immigration levels constant.<sup>91</sup>

Meanwhile, President Trump, who normally casts immigration in the language of drugs and illegal immigrants, may be more inclined to support a bill backing highly skilled immigration.<sup>92</sup> Trump has a mixed record on highly skilled immigration: he has signed the "Buy American Hire American" executive order that increases scrutiny of H-1B visas and strongly criticized the H-1B visa program.<sup>93</sup> However, Trump has also supported more immigration by people who speak English and have job offers in America.<sup>94</sup> Although President Trump has not expressed support for the Fairness for High-Skilled Immigrants Act specifically, his Administration has rolled out a plan calling for a "merit-based" system that more closely resembles the Canadian system.<sup>95</sup> President Trump's views may thus align with the Act, which pushes

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88. CONG. RES. SERV., *supra* note 87.

89. Mayu Takeda, *The V Visa: Something We Can All Agree On*, CTR. FOR AM. PROGRESS (Dec. 12, 2011, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2011/12/12/10788/the-v-visa-something-we-can-all-agree-on/>.

90. *Id.*; S. 386.

91. See Baron, *supra* note 74.

92. MSNBC, *Watch President Donald Trump's Full Immigration Remarks*, YOUTUBE (Jan. 8, 2019), <https://www.youtube.com/watch?v=3HA-wY6aQd4>.

93. See Nicole Narea, *Trump Reportedly Wants to Restrict Visa Programs for Skilled Workers*, VOX (May 24, 2020, 9:00 AM), <https://www.vox.com/2020/5/24/21266920/trump-h1b-opt-visa-immigration-student>.

94. Hauslohner, *supra* note 3.

95. Alexia Fernandez Campbell, *How Trump's New Immigration Plan Could Hurt the Economy*, VOX (May 20, 2019, 5:50PM), <https://www.vox.com/2019/5/20/18632477/trump-merit-immigration->

politically popular skilled immigration to boost our economy.<sup>96</sup>

Unlike the Trump proposal for a merit-based immigration system, which would dispense with the United States' unique system of family-based immigration for one that is merit-based, the Fairness for High-Skilled Immigrants Act would not fundamentally change the United States' immigration system from the one established under the INA.<sup>97</sup> The Act would merely lift per-country caps while maintaining the current level of green cards at 140,000 for employment and 480,000 for family.<sup>98</sup> Although some may be concerned that lifting per-country caps for immigrants coming from India, China, and Mexico may draw a racial backlash given President Trump's 2016 victory on a racially-charged campaign focused on immigration, that is unlikely given Americans' broad support for the highly skilled immigration that the Act favors.<sup>99</sup> Attitudes towards immigrants have arguably improved during President Trump's time in office due in part to partisan attitudes reacting against President Trump's anti-immigrant policies.<sup>100</sup>

The Act would be a preferable option to other major immigration proposals because of its bipartisan history and nature. Senator Rand Paul's BELIEVE Act, which would raise the number of employment green cards from around 140,000 to around 270,000, has admirable goals and would also help resolve the immigration backlog in one to three years.<sup>101</sup> However, the BELIEVE Act was not bipartisan from the outset, as the Fairness for High-Skilled Immigrants Act has been.<sup>102</sup> While the BELIEVE Act has only one co-sponsor, Senator Paul,<sup>103</sup> the Fairness for High-Skilled Immigrants Act has thirty-five co-sponsors and has also undergone an extensive amendment process. Senator Chuck Grassley added an amendment that would increase

plan-skilled-workers. Canada's immigration system measures potential immigrants on a broad list of factors, including their age, knowledge of English and French, education, and future employment prospects. IMMIGR., REFUGEES & CITIZENSHIP CAN., *Understanding Canada's Immigration System* (2019), [https://www.canada.ca/content/dam/ircc/documents/pdf/english/campaigns/2433\\_takeaway\\_en\\_rev.pdf](https://www.canada.ca/content/dam/ircc/documents/pdf/english/campaigns/2433_takeaway_en_rev.pdf).

96. See Muzaffar Chisti & Jessica Bolton, "Merit-Based" Immigration: Trump Proposal Would Dramatically Revamp Immigrant Selection Criteria, but with Modest Effects on Numbers, MIGRATION POL'Y INST. (May 30, 2019), <https://www.migrationpolicy.org/article/merit-based-immigration-trump-proposal-immigrant-selection>.

97. S. 2603 § 2.

98. *Id.*

99. Connor & Ruiz, *supra* note 6. It is also unsubstantiated that Trump's 2016 victory was a sign that prejudice towards immigrants and minorities was the new norm, just as Barack Obama's 2012 victory was not the sign of an "emerging Democratic majority" that doomed Republicans' White House chances. See JOHN SIDES, MICHAEL TESLER, & LYNN VAVRECK, *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 291–92 (2018). "Trump's victory was never predicated on a wave of growing hostility or prejudice; rather it relied on his willingness to openly appeal to an existing reservoir of discontent about changing American society and culture. Views of these groups actually became more favorable as Trump rose to power." *Id.*

100. SIDES et al., *supra* note 99, at 210.

101. David J. Bier, *Sen. Paul's BELIEVE Act Raises Skilled Immigration Without Tradeoffs*, CATO INST.: CATO AT LIBERTY (July 11, 2019, 2:44 PM), <https://www.cato.org/blog/sen-pauls-believe-act-raises-skilled-migration-without-tradeoffs>; Danilo Zak, *Bill Analysis: The BELIEVE Act*, NAT'L IMMIGR. F. (Jan. 7, 2020), <https://immigrationforum.org/article/bill-analysis-the-believe-act/>.

102. S. 386.

103. Backlog Elimination, Legal Immigration, and Employment Visa Enhancement Act, S. 2091, 116th Cong. (2019).

enforcement towards H-1B visas, requiring employers to disclose pay information,<sup>104</sup> and Senator Rand Paul has submitted a proposal to provide additional visas for nurses, and the bill has a general carveout for shortage occupations like the nursing profession.<sup>105</sup> Similarly, the RAISE Act—which would vastly restructure the system implemented by the INA by halving the number of available green cards, eliminating the diversity visa, and introducing a merit-based “points system” that prioritizes educated and English-speaking immigrants—has only four co-sponsors: David Perdue, Tom Cotton, Josh Hawley, and Marsha Blackburn.<sup>106</sup> The RAISE Act has never even received a Senate vote.<sup>107</sup> The RAISE Act thus does not have the broad-based support necessary to succeed in the Senate.

Another proposal has been Senator Dick Durbin’s RELIEF Act, which has more bipartisan support but nowhere near the level of support the Fairness for High-Skilled Immigrants Act has garnered. The RELIEF Act would lift the seven percent employment-based immigration caps to fifteen percent. The RELIEF Act would also increase the number of overall green cards available for family-based immigration—for example, under the RELIEF Act, the number of green cards available for unmarried children would increase from 23,400 to 111,334, and the current visa backlog would be resolved within five years.<sup>108</sup> But the RELIEF Act has only six co-sponsors, all of whom are Democrats.<sup>109</sup> It is therefore not as poised to pass the Senate as the Fairness for High-Skilled Immigrants Act.

Moreover, most of the other twenty-one Judiciary Committee members are inclined to vote for the Fairness for High-Skilled Immigrants Act. Of all the senators on the committee when the last major immigration bill came to the floor in 2013, only Senators John Cornyn, Chuck Grassley, Ted Cruz, Mike Crapo, and Mike Lee voted against the measure.<sup>110</sup> By contrast to the 2013 immigration reform attempt, Senators Cornyn, Lee, and Crapo are all co-sponsors on the Fairness for High-Skilled Immigrants Act,<sup>111</sup> and Senator

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104. S. Amdt. 906 to S. 386.

105. Narea, *supra* note 93.

106. See generally *The RAISE Act: What Lies Beneath the Proposed Points System?*, AM. IMMIGR. COUNCIL (Aug. 11, 2017), <https://www.americanimmigrationcouncil.org/research/raise-act>; Alexander Bolton, *GOP Senators Introduce Bill to Reduce Legal Immigration*, THE HILL (Apr. 10, 2019, 11:24 AM), <https://thehill.com/homenews/senate/438221-gop-senators-introduce-bill-to-reduce-legal-immigration>; *Reforming American Immigration for a Strong Economy Act*, S. 1103, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1103/cosponsors?q={%22search%22:%22RAISE+Act%22}&r=9&s=1&searchResultViewType=expanded>.

107. *Id.*

108. S. 2603. Danilo Zak, *Bill Analysis: The RELIEF Act*, NAT’L IMMIGR. F. (Feb. 20, 2020), <https://immigrationforum.org/article/bill-analysis-relief-act/>.

109. *Co-Sponsors: S. 2603—116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/2603/cosponsors?searchResultViewType=expanded> (last accessed Oct. 31, 2020).

110. 159 CONG. REC. S5329 (daily ed. June 27, 2013) (Senate vote on 2013 immigration bill).

111. *Co-Sponsors: S. 386—116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/386/cosponsors?q={%22search%22:%22Fairness+for+High-Skilled+Immigrants+Act%22}&r=2&s=2&searchResultViewType=expanded> (last accessed Oct. 31, 2020).



Grassley supported a past version of the Act.<sup>112</sup> Therefore, of these five, only Senator Cruz is not inclined to support the Act. But Senator Cruz has expressed support for “legal immigration” of the sort that the Act promotes.<sup>113</sup> Of the newer Republican senators, Josh Hawley has not declared whether or not he will support the Act, however, and has only made statements on the border crisis in his less than one year in office.<sup>114</sup> But given the tech industry’s support of the Act through its lobbying group, FWD.us,<sup>115</sup> and the fact that Senator Hawley launched investigations of Google and Facebook as Missouri Attorney General, he may be disinclined to support a bill that would help them.<sup>116</sup> Senator Marsha Blackburn also has not taken a position on expediting immigration by highly skilled workers. But as a former House member, Senator Blackburn accused tech companies<sup>117</sup> of anti-conservative media bias. Blackburn may thus be disinclined to support a bill that would help tech companies.<sup>118</sup> The Act therefore has widespread support from a majority of Judiciary Committee members.

#### IV. LEGAL CHALLENGES TO THE ACT FROM DIFFERENT BRANCHES OF GOVERNMENT

##### A. *Challenges to the Federal Power to Regulate Immigration by the Supreme Court*

The Act has constitutional backing that would survive opposition from states’ rights immigration doctrines. The Constitution itself does not explicitly give Congress general power to regulate immigration: the Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Justice Scalia’s dissent in *Arizona v. United States*, which got three votes from the eight justices that heard the case, argued similarly that states, as sovereign powers, could make their own immigration laws and that earlier Supreme Court jurisprudence allowed states to do so.<sup>119</sup> Furthermore, it is possible that, given the Supreme Court’s makeup, states may challenge the use of federal administrative state power to

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112. Memorandum from Sen. Chuck Grassley (Iowa) on The Fairness for High-Skilled Immigrants Act, H.R. 3012, to Reporters and Editors (July 11, 2012) (on file with author).

113. *Immigration*, U.S. SENATOR FOR TEX. TED CRUZ, <https://www.cruz.senate.gov/?p=issue&id=33>.

114. See Senator Josh Hawley, *Crisis at the Border: The Behavior of this Congress is Pathetic* (June 26, 2019) (transcript available at <https://www.hawley.senate.gov/sen-hawley-crisis-border-behavior-congress-pathetic>).

115. Paul Bradford, *Mike Lee Backs Big Tech Crony Capitalism*, AM. GREATNESS (July 1, 2019), <https://amgreatness.com/2019/07/01/mike-lee-backs-big-tech-crony-capitalism/>.

116. Cristiano Lima, *Antitrust Scrutiny Looms for Tech*, POLITICO: MORNING TECH (Feb. 8, 2019, 10:00 AM), <https://www.politico.com/newsletters/morning-tech/2019/02/08/antitrust-scrutiny-looms-for-tech-506317>.

117. Bradford, *supra* note 115.

118. Lima, *supra* note 116.

119. *Arizona v. United States*, 567 U.S. 387, 416–21 (2012) (Scalia, J., dissenting).

regulate immigration.<sup>120</sup> And the appointments of Justices Brett Kavanaugh and Neil Gorsuch reflect a Trump Administration goal of undermining the federal administrative state that regulates immigration: Gorsuch has endorsed dismantling lawmaking by the Executive Branch, which has awesome power over our immigration system, and curbing the Branch's lawmaking powers to "filling up details and finding facts."<sup>121</sup> Meanwhile, Kavanaugh has endorsed restricting the federal administrative state's powers, albeit less drastically than Gorsuch.<sup>122</sup> Kavanaugh and Gorsuch have joined fellow federal administrative state foes Clarence Thomas and Samuel Alito.<sup>123</sup> Finally, Justice Amy Coney Barrett, who is a textualist and proponent of public meaning originalism, would likely share Gorsuch's views on the federal administrative state.<sup>124</sup> More justices with a similar mindset that seeks to undermine the federal administrative state's role in governance would clear the way for state immigration regulations like Arizona's SB 1070 in order to fill the resulting void left by the administrative state.<sup>125</sup>

As the Court now stands, though, state regulation of immigration is a misnomer because Congress has typically had broad power to preempt state immigration laws.<sup>126</sup> The arguments in Justice Scalia's dissent in *Arizona v. United States* cited many cases and legal texts from before the Civil War because modern Supreme Court jurisprudence has given the federal government broad power regarding immigration that preempts state law.<sup>127</sup> Notwithstanding the impracticability of having over fifty forms of law for such a complex and far-reaching issue, the majority in *Arizona v. United States* accordingly held for the United States in abrogating most of Arizona's SB 1070, an Arizona state law that drew allegations of racial profiling for

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120. See U.S. CONST. amend. X; see also Ilya Somin, *Does the Constitution Give the Federal Government Power over Immigration?*, CATO UNBOUND (Sept. 12, 2018), [https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration#\\_ftn18](https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration#_ftn18).

121. *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting); see also Mark Joseph Stern, *The Supreme Court's Conservatives Are Ready to Take a Wrecking Ball to the Entire Federal Bureaucracy*, SLATE (June 20, 2019, 5:59 PM), <https://slate.com/news-and-politics/2019/06/neil-gorsuch-supreme-court-conservatives-gundy-sex-offender.html>. Additionally, former Trump advisor Steve Bannon endorsed a "deconstruction of the administrative state" early in the Trump presidency. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html). Although Bannon has long departed from the Trump Administration, Trump's Supreme Court appointees reflect this policy: undermining the federal administrative state.

122. See Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/>.

123. See Stern, *supra* note 121.

124. See Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. ON REG.: NOTICE & COMMENT (July 3, 2018), <https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/>.

125. See Daniel Gonzalez et al., *How SB 1070 Helped Pave the Way for Donald Trump's Rise to the Presidency*, ARIZ. REPUBLIC (Apr. 22, 2020, 8:15 PM), <https://www.azcentral.com/story/news/politics/immigration/2020/03/08/how-sb-1070-helped-pave-way-donald-trumps-rise-presidency/4908129002/>.

126. See Somin, *supra* note 120.

127. *Id.*

requiring state officers to check immigration status during any lawful “stop, detention, or arrest.”<sup>128</sup> The federal government’s power under the Naturalization Clause, the Court reasoned, “rests, in part, on the National Government’s constitutional power to ‘establish a uniform Rule of Naturalization.’”<sup>129</sup> Thus, there is constitutional backing for the Act that could easily surmount challenges from states’ rights doctrines, provided the current makeup of the court does not change.

### B. *Challenges Due to the Inefficiencies and Ideologies of USCIS Leadership*

The Act would face challenges in its execution by executive agencies like USCIS, especially given the chronic understaffing at Trump Administration federal agencies.<sup>130</sup> USCIS is notorious for its inconsistencies in processing green cards, whose processing times can range from seven months to twenty-four months.<sup>131</sup> How this agency deploys resources would play a major role and could potentially hinder the Act’s success, especially if USCIS creates bottlenecks in how the agency processes applications. Furthermore, USCIS Acting Director Ken Cuccinelli has pushed policies that delighted immigration restrictionists in his current role.<sup>132</sup> Cuccinelli has championed various administrative regulations at USCIS that have raised filing fees for immigrants of all stripes.<sup>133</sup> There is no telling how Cuccinelli would administrate the Act given his past nativist and anti-immigrant statements, which included comparing curbing immigration to eliminating household pests, like rats.<sup>134</sup> Cuccinelli has a long history as a hardliner that makes the Act’s future tenuous as long as it is under his stewardship.<sup>135</sup>

Moreover, legal immigration that the Act favors is widely popular and may result in Cuccinelli’s acquiescence. Cuccinelli maintains that he supports “legal immigration,”<sup>136</sup> and highly skilled immigration (which the Act would increase) is highly popular among the American public.<sup>137</sup> There may

128. See *Arizona v. United States*, 567 U.S. 387, 394 (2012).

129. *Id.*

130. See Erich Wagner, *These Agencies Have Lost the Most Workers Under Trump*, GOV’T EXEC. (Aug. 15, 2018), <https://www.govexec.com/management/2018/08/these-agencies-have-lost-most-workers-under-trump/150577/>.

131. See, e.g., Letter from Pete Olson, Tex. Member of Cong., to L. Francis Cissna, Dir., U.S. Citizenship and Immigr. Serv. (Mar. 28, 2019) (on file with author).

132. See Zolan Kanno-Youngs & Maggie Haberman, *Ken Cuccinelli Emerges as Public Face, and Irritant, of Homeland Security*, N.Y. TIMES A12 (Sept. 6, 2019).

133. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280 (Nov. 14, 2019) (to be codified at 8 C.F.R. pt. 103).

134. Jessica Cobian, *The Anti-Immigrant Extremists in Charge of the U.S. Immigration System*, CTR. FOR AM. PROGRESS (June 24, 2019, 5:27 PM), <https://www.americanprogress.org/issues/immigration/news/2019/06/24/471398/anti-immigrant-extremists-charge-u-s-immigration-system/>.

135. See Susan Baer, *Who Is Ken Cuccinelli?*, WASHINGTONIAN (May 3, 2011), <https://www.washingtonian.com/2011/05/03/who-is-ken-cuccinelli/>.

136. Kanno-Youngs & Haberman, *supra* note 132.

137. Connor & Ruiz, *supra* note 6.

be significant public pressure on Cuccinelli to administrate the Act properly, or at least not to hinder the Act's administration. Large companies need these skilled workers, and Cuccinelli would face massive pressure to administer EB visas properly.<sup>138</sup>

Regardless, the Trump Administration's notorious tendency to be understaffed would still present a challenge to the Act's administration, stretching into a Biden Administration.<sup>139</sup> Many government agencies, including the Departments of Agriculture and Health and Human Services, have remained shorthanded throughout the Trump Administration.<sup>140</sup> USCIS is no exception—the agency has announced plans to furlough more than half of its workforce in June 2020 due to a billion-dollar deficit after the agency slowed operations before and during the COVID-19 pandemic.<sup>141</sup> These massive layoffs may bring the agency's operations to a halt and make the implementation of the Fairness for High-Skilled Immigrants Act more difficult in the coming years. The Migration Policy Institute has pinpointed three issues that led to USCIS' financial troubles: a drop in visa petitions, increased spending on “fraud detection,” and mismanagement of the agency's existing financial resources.<sup>142</sup>

### C. *Challenges Due to the COVID Crisis*

The entire United States immigration system, including USCIS, shut down during the COVID-19 crisis and could still be affected by the pandemic despite limited reopenings, which would hinder the Fairness for High-Skilled Immigrants Act's implementation.<sup>143</sup> President Trump suspended the issuance of visas to new immigrants on April 22, 2020, disallowing any foreign immigrants from entering the country during the COVID crisis who were outside the United States on that date or did not have an immigrant visa valid on April 22 for sixty days.<sup>144</sup> It will be impossible to implement the Fairness for High-Skilled Immigrants Act until this order is lifted; green cards cannot be granted without USCIS staff.<sup>145</sup> The resulting loss of fees due to President Trump's order has deprived the agency of revenue required to

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138. See Golden, *supra* note 55.

139. See SIDES et al., *supra* note 99, at 283.

140. Wagner, *supra* note 130.

141. Alvarez, *supra* note 24.

142. Muzaffar Chisthi et al., *Impending USCIS Furloughs Will Contribute to a Historic Drop in U.S. Immigration Levels*, MIGRATION POL'Y INST. (July 28, 2020), <https://www.migrationpolicy.org/article/impending-uscis-furloughs-will-contribute-historic-drop-us-immigration-levels>. These policies signal a larger Trump administration goal to curtail immigration, and lower new immigration as much as possible. *Id.*

143. See *USCIS Response to COVID-19*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/uscis-response-to-covid-19> (last accessed Oct. 9, 2020).

144. Donald J. Trump, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, WHITE HOUSE (April 22, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/>.

145. See Chisthi et al., *supra* note 142.

function.<sup>146</sup> The agency now plans to furlough seventy percent of its workforce, leading to a backlog of as many as 75,000 cases a month.<sup>147</sup> Regardless of when Congress passes the Act, implementation will have to wait either until the Trump Administration lifts the COVID-related suspension of immigration, or until Vice President Joe Biden institutes a less draconian policy after the 2021 inauguration.

V. THE FAIRNESS FOR HIGH-SKILLED IMMIGRANTS ACT LEAVES MANY IMMIGRATION ISSUES UNSOLVED

A. *A Program to Reward Highly Skilled Immigration, in Conjunction with the Current American Immigration System, Should Be Considered*

Our country would benefit from a program rewarding highly skilled immigration separate from the current framework established under the INA, as many of our allies and other free democracies have done. A program to reward highly skilled immigration could coexist with the values of a free and democratic society, provided the program was adopted in addition to and not instead of the framework established under the INA. The INA preserves immigration regardless of skill level with only certain visa categories, like EB-2 and EB-3 visas, reserved for skill level.<sup>148</sup> Other countries also have separate programs that favor more highly skilled legal immigration: Canada—the United States’ neighbor to the North, second-largest trading partner,<sup>149</sup> and longtime ally—also reserves spots in its immigration system for highly skilled workers.<sup>150</sup> Canada’s immigration system has numerous programs designed to attract skilled workers and entrepreneurs with business ideas looking for investment opportunities.<sup>151</sup> The Canadian system is similar to the EB-5 visa program in the United States that targets foreign investors, many from large countries like China,<sup>152</sup> for which the Act would remove caps. Potential Canadian immigrants are measured based on factors including their age, knowledge of English and French, education, and future employment prospects.<sup>153</sup> A report by the Organization for Economic Development called the Canadian system a “role model” that led to better integration of immigrants into Canadian society and a more positive view of immigrants

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146. *See id.*

147. *Id.*

148. *See, e.g.* 8 U.S.C.A. § 1153(a-c) (West 2021).

149. Evie Liu, *China Is No Longer America’s Largest Trading Partner. The New Tariffs Will Keep It That Way*, Barron’s (Aug. 2, 2017, 2:17 PM), <https://www.barrons.com/articles/mexico-not-china-is-u-s-largest-trading-partner-51564769779>.

150. GOV’T OF CANADA, UNDERSTANDING CANADA’S IMMIGRATION SYSTEM (2019), [https://www.canada.ca/content/dam/ircc/documents/pdf/english/campaigns/2433\\_takeaway\\_en\\_rev.pdf](https://www.canada.ca/content/dam/ircc/documents/pdf/english/campaigns/2433_takeaway_en_rev.pdf).

151. *Id.*

152. *See id.*

153. *Id.*

because of their economic contributions.<sup>154</sup> Australia, another major ally,<sup>155</sup> has taken a similarly aggressive approach. Australia practices a “talent for citizenship exchange” where highly skilled immigrants are rewarded with expedited citizenship and political stability in exchange for their advanced education.<sup>156</sup> Given that English remains the *lingua franca* of the world economy, the United States is also well positioned to take advantage of the highly skilled immigrant population seeking political stability.<sup>157</sup> By adding a program for highly skilled immigration in addition to family immigration, the United States could follow the example of longtime allies like Canada and Australia and take advantage of this surge of talented immigrants.

### B. *We Need More Visas in Addition to Resolving the Backlog*

In the long term, our country would be better served by issuing more green cards, one especially attractive component of the BELIEVE Act and RELIEF Act. The BELIEVE Act would increase the number of employment-based visas from 140,000 to 270,000 and not count spouses and minor children against the visa total. Spouses and minor children take up half of the employment green card total now, depriving many of work authorization in the United States.<sup>158</sup> Meanwhile, the RELIEF Act would also expand the number of employment and family-based visas, resolving the backlog within an estimated five years.<sup>159</sup> Although the Fairness for High-Skilled Immigrants Act would resolve the most egregious aspects of our immigration system, including the enormous backlogs, the Act merely shifts the existing pie of green cards around. Increasing the size of the proverbial pie in terms of green cards would be a better long-term solution to meet the demand for skilled and non-skilled workers coming to the United States than merely shifting them around.

## VI. THE WAY FORWARD

The Fairness for High-Skilled Immigrants Act is by no means a permanent fix to our immigration problems. Complex problems require complex solutions, and our immigration system surely has complex problems. But the Act is a step in the right direction that would address one of the system’s most glaring defects: an enormous immigrant backlog that both disadvantages

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154. Kim Mackrael, *Report Cites Canada’s Immigration System as ‘Role Model,’* WALL ST. J. (Aug. 13, 2019, 9:00 AM), <https://www.wsj.com/articles/report-cites-canadas-immigration-system-as-role-model-11565701200>.

155. See Jason Scott, *Australians May Not Like Trump, but They Value the U.S.,* BLOOMBERG (June 20, 2017, 10:20 PM), <https://www.bloomberg.com/news/articles/2017-06-21/trump-s-unpopularity-fails-to-dint-australia-s-faith-in-alliance>.

156. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 149, 164 (2006).

157. See *id.* at 166.

158. Bier, *supra* note 101.

159. Zak, *supra* note 108.

more populous countries and prevents the United States from absorbing more skilled immigrants. Lifting immigration per-country caps and granting more visas to immigrants with advanced degrees would allow an infusion of highly skilled workers to improve America's economy.<sup>160</sup> The Act could also make the United States' immigration system more equitable by resolving the massive visa backlog among immigrants from large countries. The Act would also be politically palatable to the American public, Congress, and President Trump; a majority of the American public supports highly skilled legal immigration, the Act has thirty-five co-sponsors, and President Trump has previously praised highly skilled legal immigration. With the 2020 election decided, the United States will decide whether to follow in the footsteps of other major allies that provide a working and efficient immigration system by passing the Fairness for High-Skilled Immigrants Act or similar legislation. Reform to America's inefficient per-country cap system cannot come soon enough.

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160. See Kerr, *supra* note 48, at 4–5 (“... the share of immigrants with bachelor's educations is almost 25%. Moreover, Kerr and Lincoln (2010) estimate that immigrants account for a majority of the net increase in the U.S. STEM workforce since 1995.”)