

®ABC...HIJ, is the U.S. Teacher Shortage Here to Stay? Using U.S. Immigration Policy to Address the Domestic Teaching Shortage

“There just aren’t enough teachers.”¹

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INTRODUCTION

Immigration is one of the most politically charged issues in the country. The various topics surrounding immigration policy have become a polarizing issue in recent years “as policy makers continue to weigh economic, security and humanitarian concerns.”² Because Congress cannot reach a decision on comprehensive immigration reform, many policy decisions are decided by the courts or, even more controversial, by executive order.³

While debating who we should let in and who should remain in the United States, what is absent from our daily discussion is how much immigration plays a critical role in the U.S. labor market. In 2019, “immigrants comprised almost 14 percent of the U.S. population, or

1. Adam Edelman, *Biden Wants to Fix the Nation’s Teacher Shortage. Educators Say the Problem Is Worsening.*, NBC NEWS (June 6, 2021, 4:30 AM), <https://www.nbcnews.com/politics/joe-biden/biden-wants-fix-nation-s-teacher-shortage-educators-say-problem-n1269340> (quoting Charles Prijatelj, superintendent of the Altoona Area School District in central Pennsylvania).

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2. Claire Felter et al., *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS.: BACKGROUNDER (Aug. 31, 2021, 8:00 AM), <https://www.cfr.org/backgrounder/us-immigration-debate-0>.

3. Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 348 (2018); see also Emily C. Callan, *A Funny Thing Happened on My Way to the Border . . . How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform*, 47 U. BALT. L. REV. 1, 13–14 (2017).

nearly 45 million people” out of a total of [approximately] 328 million
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And despite the large immigrant population, our 24-hour news cycle continues to highlight every asylum-seeking caravan of migrants traveling through our southern border,⁵ often stoking xenophobic fears. Rarely, however, are the contributions by our immigrant community celebrated. Kitchen table discussions neglect to acknowledge our immigrant community that is so intimately woven into our states, cities, and towns and how actively they contribute to the functioning of our United States.⁶

Americans fear that foreign workers will take jobs away from U.S. workers,⁷ but rarely is it publicly acknowledged when foreign workers

4. Felter et al., *supra* note 2 (citing the U.S. census bureau); *see also* Cecilia Esterline & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Mar. 17, 2022), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

5. The Dallas Morning News reports that despite the fact that the media focuses on unlawful border entry, visa overstays make up the majority of those in the United States unlawfully. Imelda Garcia, *As Illegal Border Crossings Drop, the Face of Unauthorized Immigration in the U.S. has Changed*, DALLAS MORNING NEWS (Apr. 27, 2021, 7:22 PM), <https://www.dallasnews.com/news/immigration/2021/04/27/as-illegal-border-crossings-drop-the-face-of-unauthorized-immigration-in-the-us-has-changed/>. Citing to the Department of Homeland Security, the face of unauthorized immigration in the U.S. has changed; two-thirds of the nation’s 10.2 million unauthorized immigrants entered legally but then overstayed their authorized period of stay. *See* U.S. DEP’T HOMELAND SEC., FISCAL YEAR 2019 ENTRY/EXIT OVERSTAY REPORT 12 (Mar. 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf [hereinafter 2019 DHS Report]. Furthermore, the 2019 DHS Report highlighted that most people who entered legally and overstayed for pleasure or business came from Canada, followed by Brazil, Mexico, Venezuela, Colombia, China, the United Kingdom, Spain, Dominican Republic, and India. *Id.* at 36–42. Additionally, for people who entered with student or exchange visas, the list is led by China, followed by India, Brazil, Saudi Arabia, Vietnam, South Korea, the Philippines, Japan, Nigeria and Canada. *Id.* at 13, 20–24.

6. Alia Al-Khatib & Jayesh Rathod, *Equity in Contemporary Immigration Enforcement: Defining Contributions and Countering Criminalization*, 66 U. KAN. L. REV. 951, 959–61 (2018).

7. The fear of losing jobs to foreign workers in the United States has been exacerbated by the recent practice of many corporations to outsource jobs overseas. *See* Mark B. Baker, “*The Technology Dog Ate My Job*”: *The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 FLA. J. INT’L L. 807, 808 (2004). Oftentimes, perceptions are dependent on whether one’s job may indeed be in jeopardy. This fundamental struggle between those losing their jobs (i.e., American workers) and those outsourcing labor (i.e., American corporations) has gained public

actually fill positions where there is a genuine labor shortage, especially in industries where Americans are especially reliant.⁸ According to the Pew Research Center, Americans generally agree that immigrants—whether undocumented or living legally in the country—mostly do not work in jobs that U.S. citizens want.⁹ Most commonly, “undocumented” foreign workers¹⁰ fill the agricultural industries as well as the meat and poultry processing packaging industries,¹¹ either because not enough U.S. workers are available or not enough U.S. workers are willing to

attention, with many Americans having formed an opinion on this controversial topic. *See, e.g.,* u/Karmafarma25, *Outsourcing Jobs Is the Root of All of American's Economic Problems*, REDDIT (Feb. 6, 2017, 4:14 AM), https://www.reddit.com/r/changemyview/comments/5sd8vx/cmv_outsourcing_jobs_is_the_root_of_all_of/. The media has been filled with anecdotal stories of people who have lost their jobs to offshore outsourcing, leading many an American worker to wonder if they, too, will soon be jobless. While this Article will not discuss outsourcing jobs to other countries per se, the same sense of fear applies when the United States has “imported” workers. And in these instances, American workers may again feel displaced.

8. *See generally* Irina Ivanova, *America's Labor Shortage is Actually an Immigrant Shortage*, CBS NEWS, (last updated April 8, 2022), <https://www.cbsnews.com/news/immigration-jobs-workers-labor-shortage/> (“By one calculation, the U.S. workforce today has 2 million fewer immigrants than it would have if immigration had continued at pre-pandemic levels. That gap is especially being felt in low-paying industries, such as leisure and hospitality, food services retail, and health care.”); *see also* Julia Jagow, Comment, *Dairy Farms and H-2A Harms: How Present Immigration Policy Is Hurting Wisconsin and Immigrant Workers*, 2019 WIS. L. REV. 1269, 1288–92, 1296–98 (2019) (arguing for changes to the current H-2A guest worker program). Specifically, proposing a program that is state-run, rather than federally overseen, and that will be responsive to state-specific agricultural needs. This comment further argues that incorporating a pathway to lawful permanent residence, employer de-centralization, and participation of undocumented individuals will benefit employers, workers, Wisconsin, and the country as a whole by providing a pipeline of legal workers to address the (dairy) labor shortage. *Id.* at 1307–08.

9. Jens Manuel Krogstad et al., *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/>.

10. Jagow, *supra* note 8, at 1271; *see also* *H-2A Temporary Agricultural Workers*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Oct. 19, 2021) (“The H-2A program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs.”).

11. According to the Pew Research Center based on data from 2017, “[a]bout 750,000 unauthorized immigrants held jobs in industries that produce and distribute food – food production (290,000), food processing (210,000), food retail (170,000) and food distribution (70,000).” Krogstad et al., *supra* note 9.

perform the job duties.¹² Additionally, seasonal hospitality positions¹³ at some of our most coveted hotels and resorts and large entertainment venues are also filled by foreign workers each year.¹⁴

Many immigrants living legally in the United States hold jobs deemed “essential” by the federal government,¹⁵ including an estimated 2.7 million who worked in the healthcare sector, or nearly 15% of all healthcare workers as of 2017.¹⁶ For example, after years of understaffing, the healthcare industry was given a brief reprieve in 1999 (until 2009) when Congress not only acknowledged the nursing

12. *Id.* (“Americans generally agree that immigrants – whether undocumented or living legally in the country – mostly do not work in jobs that U.S. citizens want, with a majority saying so across racial and ethnic groups and among both political parties.”).

13. See *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (last visited Oct. 19, 2021) (“The H-2B program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary nonagricultural jobs.”); see also Exchange Visitor Program, 22 C.F.R. pt. 62.22(c)(2).

14. See Krogstad et al., *supra* note 9.

15. Donald Kerwin et al., “*US Foreign-Born Essential Workers by Status and State, and the Global Pandemic*”, CMS, CTR. FOR MIGRATION STUD. (May 1, 2020), https://cmsny.org/publications/us-essential-workers/?gclid=CjwKCAjwrZOXBhACEiwA0EoRD9hDsDJd993wrGHbQysFYFxr250H7QnuajPbmgPG7dWcQZPopQMAhoCGR8QAvD_BwE. According to the Centers for Disease Control and Prevention, “essential workers” are “those who conduct a range of operations and services in industries that are essential to ensure the continuity of critical functions in the United States.” *Vaccines and Immunizations: Interim List of Essential Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html>; see Daniela Alulema, *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID-19 Pandemic, as Supreme Court Decision Looms*, CTR. FOR MIGRATION STUD. (Mar. 30, 2020), <https://cmsny.org/daca-essential-workers-covid/>.

16. Krogstad et al., *supra* note 9.

shortage¹⁷ but also authorized a new visa category¹⁸ specifically for nurses that allowed specific hospitals and other healthcare facilities to recruit nurses from abroad to fill the void.¹⁹ Lengthy processing delays prevented the intentions behind the program from being fully realized.²⁰

17. “In times of shortage (or surplus), U.S. policy makers have sought to use immigration policy to influence the supply of nurses by allowing (or restricting) the entry of international nurses into the U.S. workforce.” Leah E. Masselink & Cheryl B. Jones, *Immigration Policy and Internationally Educated Nurses in the United States: A Brief History*, 62 NURSING OUTLOOK 39 (2014). From the mid-1970s to 2008, the number of international nurses working in the United States has increased from approximately 50,000 to an estimated 165,000, with most of those nurses coming from the Philippines, Canada, the United Kingdom, and India. *Id.* (“These trends have been shaped by immigration policy changes that were as much a function of broader political and economic conditions as of the nursing labor market changes they were intended to address.”).

18. Immigration Nationality Act, § 212(m)(1), 8 U.S.C. 1182; *see also*, Mehron P. Azarmehr & Allison Leigh Ouvry, *Overview of Legislation Relating to Healthcare Workers*, Business Immigration Law (LJP) § 11.01 (2015) (“In response to the continuing nursing shortage, a new nonimmigrant classification for nurses, H-1C, was established by Section 2 of The Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA). The purpose of this section was to make foreign nurses available for work in health professional shortage areas (HPSA) facilities currently underserved by registered nurses. Under the rules the HPSA facility must have an unexpired attestation on file with the Department of Labor to qualify for the program, and the beneficiary nurse must meet the licensing requirements in the state or employment. The H-1C program limited H-1C nurses to a three-year stay and set a cap of 500 new H-1C nurses per year. The program expired in late 2009.”).

19. Masselink & Jones, *supra* note 17, at 43. Some scholars raise concerns with the use of legislation to address labor shortages. Regarding the nursing shortage specifically:

[L]awmakers proposed policies opening new pathways for [foreign-trained nurses] to enter the United States during times of nursing labor shortages, but because of the lag time in implementing legislation, their impact was often dwarfed by political and economic events at the time of implementation. The strongest example was the triple blow of 9/11, which created a difficult political environment for any immigration proposals despite a shortage of nurses before the attacks. Lawmakers still considered proposals “left over” from before 9/11, but their motivation to pursue them was blunted by security concerns, a recession that brought many U.S.-trained nurses back to the workforce, and a massive slowdown in immigration processing.

Id.

20. Sarah J. Rasalam, *Improving the Immigration Policy of the United States to Fulfill the Caregiving Needs of America’s Aging Baby Boomers: The Alternative to Outsourcing Grandma*, 16 ELDER L.J. 405, 412–14 (2008); *see* Laura Jolley Akowuah, *Caring For An Older America: Building A Sustainable Domestic Nursing Workforce*, 10 NAELA J. 51 (2014).

Nonetheless, the program resulted in foreign nurses migrating to the United States to provide nursing services.²¹

At present, similar to that of the nursing shortage,²² we have another shortage of essential workers that has far-reaching implications: a national shortage of teachers. The shortage is real, large, and growing every day.²³ “The lack of teachers is stunting student learning, as growing class sizes are becoming unmanageable learning environments, and teacher aides are in short supply. Meanwhile, educators are strapped for time and resources to create more individualized lesson plans and

21. Masselink & Jones, *supra* note 17. “Despite the barriers faced by IENs since the Great Recession of 2008, the number of IENs in the United States still grew significantly between 2004 and 2008; IENs comprised over 8% of newly licensed nurses, and their overall number grew to over 165,000 (5.4% of all nurses).”

22. For an in-depth discussion of the existing nursing shortage, see Esperanza N. Sanchez, *Safeguarding the Public: Why Workers’ Rights Education Should Be Required Learning for Nurses*, 38 *TOURO L. REV.* 9, 16–25 (2022). The author notes,

Despite the varied attempts by policymakers and other stakeholders to ameliorate the nursing shortage, it has endured for more than two decades. The modern nursing shortage, as researchers predicted at the turn of the century, has been more complex than previous shortages. Many efforts made over the last twenty years have, indeed, improved the nursing supply. Intervening economic factors like the Great Recession have also provided a much-needed boost in the nursing supply, causing shortage projections to shift at times. These fluctuations in the nursing supply led one group of researchers to revisit a 2012 study projecting that, by 2030, there would be approximately 900,000 nursing needs across the country. Published in 2018, the revisited study revealed a decrease of approximately 400,000 in projected nursing needs by 2030, which was due, in part, to estimations of “a lower demand and a higher supply” in 2016. However, the demand for nurses outpaced any growth in the nursing supply during this period, and by February 2020, nothing prepared the nursing workforce for the unprecedented surge in demand for health-care services caused by the COVID-19 pandemic.

Id. at 20–21 (internal citations omitted). *Accord* Amy Taxin, *Strained US Hospitals Seek Foreign Nurses Amid Visa Windfall*, U.S. NEWS & WORLD REP. (Feb. 3, 2022, 4:47 PM) <https://www.usnews.com/news/business/articles/2022-02-03/strained-us-hospitals-seek-foreign-nurses-amid-visa-windfall> (“Many American hospitals are looking abroad for health care workers, saying they’re facing a dire shortage of nurses amid the slogging pandemic.”).

23. Chris Yarell, *The Emperor’s New Clothes: Stare Decisis and the Teacher Shortage Crisis*, 29 *GEO. J. POVERTY L. & POL’Y* 229 (2022).

volunteer for extracurricular activities.”²⁴ Ultimately, the shortage is not only a crisis for the U.S. teaching profession but also one that impacts the professional globally.²⁵

As the U.S. aims to become global leaders in education,²⁶ we fail miserably from the outset if we cannot even put teachers in the classrooms to start students along their learning path, especially in inner-city/urban and rural communities—two geographic areas most impacted by the teacher shortage.²⁷ Not to mention the further inequities the shortage exacerbates as we attempt to follow the mandate of providing “excellent education equitably to all students regardless of their socioeconomic or demographic characteristics.”²⁸ “The U.S. public school system has been grappling with a shortage of regular, full-time teachers for years . . . particularly in areas of science and special education.”²⁹ The gap between the number of qualified teachers needed in the nation’s K–12 schools and the number available for hire in the 2017–2018 school year was about 112,000 teachers, up from 64,000 in 2015–2016 school year and from no shortage earlier in the decade.³⁰

Teacher shortages are even greater in special education and subject areas like mathematics, science, world languages, and career and technical education—fields that are vital for our economic success.³¹

24. Marisa Fernandez, *America’s Massive Teacher Shortage Is Stunting Student Learning*, AXIOS (Oct. 26, 2019), <https://www.axios.com/teacher-shortage-student-learning-a9a859b8-a593-4ba0-b6d2-a566ff3e9253.html>.

25. Beckton Loveless, *What Countries Need More Teachers and How Much Can You Make?*, EDUC. CORNER, <https://www.educationcorner.com/what-countries-need-more-teachers/> (last visited Aug. 11, 2022).

26. See COMM. FOR ECON. DEV., EDUCATION FOR GLOBAL LEADERSHIP: THE IMPORTANCE OF INTERNATIONAL STUDIES AND FOREIGN LANGUAGE EDUCATION FOR THE U.S. ECONOMIC AND NATIONAL SECURITY (2006), <https://www.ced.org/pdf/Education-for-Global-Leadership.pdf>.

27. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1633, n.178 (2016).

28. Emma Garcia & Elaine Weiss, *A Policy Agenda to Address the Teacher Shortage in U.S. Public Schools*, ECON. POL’Y INST. (Oct. 15, 2020), <https://www.epi.org/publication/a-policy-agenda-to-address-the-teacher-shortage-in-u-s-public-schools/>.

29. Natasha Singer, *Pandemic Teacher Shortages Imperil In-Person Schooling*, N.Y. TIMES (Sept. 16, 2021), <https://www.nytimes.com/2021/01/19/us/pandemic-substitute-teacher-shortages.html>.

30. Leib Sutcher et al., LEARNING POL’Y INST., A COMING CRISIS IN TEACHING? TEACHER SUPPLY, DEMAND, AND SHORTAGES IN THE U.S. 15–16 (Sept. 2016), https://learningpolicyinstitute.org/sites/default/files/product-files/A_Coming_Crisis_in_Teaching_REPORT.pdf.

31. Valerie Strauss, *Teacher Shortages Affecting Every State as 2017–18 School Year Begins*, WASH. POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/28/teacher-shortages-affecting-every-state-as-2017-18-school-year-begins/>.

Special education teacher positions are especially hard to fill.³² According to the U.S. Department of Education,³³ “49 states and the District of Columbia currently report shortages of special educators.”³⁴ The problems persist and school districts are taking what may be seen as extraordinary measures to increase recruitment and ensure retention of teachers in this area.³⁵

The projected number of retirement-, COVID-19 pandemic-, and burnout-related exits from the field in coming years far exceeds the declining number of college students pursuing teaching preparation programs.³⁶ From 2009 to 2017, 340,000 fewer students³⁷ enrolled in

32. Tuan D. Nguyen, *Linking School Organizational Characteristics and Teacher Retention: Evidence from Repeated Cross-Sectional National Data*, 97 TEACHING & TEACHER EDUCATION, no. 103220, 5 (2021), <https://doi.org/10.1016/j.tate.2020.103220>.

33. FREDDIE CROSS, U.S. DEP’T OF EDUC., TEACHER SHORTAGE AREAS NATIONWIDE LISTING 1990–1991 THROUGH 2016–2017 (2016), <https://www2.ed.gov/about/offices/list/ope/pol/tsa.pdf>.

34. Kevin Monnin et al., *The Special Education Teacher Shortage: A Policy Analysis*, COUNCIL FOR EXCEPTIONAL CHILD., SPECIAL EDUC. TODAY (June 1, 2021), <https://exceptionalchildren.org/blog/why-now-perfect-time-solve-special-education-teacher-shortage>.

35. Beth Hawkins, *Yes, There’s a Shortage of Special Education Teachers. And That’s Nothing New*, THE74 (Sept. 15, 2022), <https://www.the74million.org/article/yes-theres-a-shortage-of-special-education-teachers-and-thats-nothing-new/>.

36. Desiree Carver-Thomas, *Teacher Shortages Take Center Stage*, LEARNING POL’Y INST. (Feb. 9, 2022), <https://learningpolicyinstitute.org/blog/teacher-shortages-take-center-stage>.

37. According to the Center for American Progress,

[L]ittle is known about why enrollment is declining; whether certain groups of students have been shying away from enrollment in preparation programs more than others; and whether the decline is worse in certain subject areas, geographic areas, or types of programs

What is known is that since 2010, total enrollment nationwide in teacher preparation programs has declined by more than one-third; this decline has occurred in the context of increasing enrollment in bachelor’s degree programs nationwide over the same time period. This means that across the country, approximately 340,000 fewer students elected to enroll in teacher preparation programs in the 2016-17 academic year—the latest year for which data are available—compared with the number of students who enrolled in 2008-09. Similarly, there was a 28 percent decline in the number of students completing teacher preparation programs in the same years.

educator preparation programs.³⁸ Similar challenges are true for science and math teachers³⁹ (STEM subjects), who also tend to be at high risk for turnover.⁴⁰ “According to the U.S. Department of Education data⁴¹ for the 2020–2021 school year, to date, 43 states are reporting shortages in math teachers, 42 in science teachers.”⁴²

Moreover, foreign language teachers (including English as a second language teachers), vital in both developing languages and expanding the views of the world, have the worst (shortages) on record, according to the American Council for the Teaching of Foreign Language.⁴³ Federal statistics⁴⁴ showed that for the 2016–2017 school year, “44 states and Washington, D.C. have a shortage of qualified foreign language instructors at the K–12 level.”⁴⁵ Those numbers have been consistent for the past 20 years and continue to remain persistent as the COVID-19 pandemic.⁴⁶ There are many causes that contribute to the decline of teachers, but none more glaring than the decline of enrollment in teacher education programs, which is now resulting in many foreign

Lisette Partelow, *What to Make of Declining Enrollment in Teacher Preparation Programs*, CTR. FOR AM. PROGRESS (Dec. 3, 2019, 6:00 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2019/12/03/477311/make-declining-enrollment-teacher-preparation-programs/> (internal citations omitted).

38. Michael A. DiNapoli Jr., *Eroding Opportunity: COVID-19’s Toll on Student Access to Well-Prepared and Diverse Teachers*, LEARNING POL’Y INST. (Feb. 10, 2021), <https://learningpolicyinstitute.org/blog/covid-eroding-opportunity-student-access-prepared-diverse-teachers>.

39. See generally Nguyen, *supra* note 32.

40. Liana Loewus, *Why Teachers Leave—or Don’t: A look at the Numbers*, EDUC. WK. (May 4, 2021), <https://www.edweek.org/teaching-learning/why-teachers-leave-or-dont-a-look-at-the-numbers/2021/05>; CROSS, *supra* note 33.

41. CROSS, *supra* note 33.

42. DiNapoli Jr., *supra* note 38.

43. See generally Scott Kissau, *Increasing Enrollment in Foreign Language Teacher Training Programs*, 85 NECTFL REV. 11 (2020), <https://www.nectfl.org/nectfl-review/>.

44. See CROSS, *supra* note 33.

45. Kathleen Stein-Smith, *Foreign Language Classes Becoming More Scarce*, CONVERSATION (Feb. 6, 2019, 6:43 AM), <https://theconversation.com/foreign-language-classes-becoming-more-scarce-102235>.

46. Alissa Rutkowski, *JNCL Hosts Congressional Briefing Calling Attention to National Language Educator Shortage*, JOINT NAT’L COMM. FOR LANGUAGES & NAT’L COUNCIL FOR LANGUAGES & INT’L STUD., (Sept. 24, 2021) (“[O]ver the past 20 years, upwards of 58% of U.S. states and territories have reported shortages in qualified teachers for World Languages and Bilingual Education. By 2025, there is projected to be a hiring gap of 100,000 teachers annually”), <https://www.languagepolicy.org/post/jncl-hosts-congressional-briefing-calling-attention-to-national-language-educator-shortage#:~:text=In%20any%20given%20academic%20year,World%20Languages%20and%20Bilingual%20Education>.

language programs being closed, particularly because of decreased enrollment.⁴⁷

The severe shortage of teachers has left such an impact on our education system that we are desperately looking for answers.⁴⁸ Despite our efforts ranging from encouraging retired teachers to return to the classroom to identifying potential students to enter into education programs, the United States still finds itself suffering from a significant teacher shortage.⁴⁹ As with the nursing shortage and other industries where there has been a dearth of workers,⁵⁰ we are forced to consider supply and demand, as well as accessing resources that exist beyond our geographic borders: addressing worker shortages by seeking assistance abroad.

Specifically, the United States, through Congress, can increase the number of visas issued, carving out one specifically for foreign teachers

47. Kissau, *supra* note 43, at 11 (citing Paul A. Garcia et al., *Facing Reality: A Survey of Methods Instructors' Perspectives on World Language Teacher Development*, 52 FOREIGN LANGUAGE ANNALS 165, 165–82 (2019)).

48. See Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RES. 326, 350–51 (2004); Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUC. 44, 65 (2005); see also Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 35–37 (2008) (arguing school districts are yielding to teacher preferences during a time of a teacher shortage. “A study of New York City elementary school teachers concluded that Latino and white teachers were more likely to leave schools as the white student population declined and the African-American population increased Another study documented similar results in North Carolina as in New York. White teachers of schools with higher nonwhite student populations were more likely to leave the schools. African-American teachers, on the other hand, were less likely to leave schools with higher nonwhite percentages [As a result of these studies, it was concluded that], ‘the teacher mobility studies reveal that race itself influences where teachers teach, not poverty or achievement rates.’”) (internal citations omitted); see also Desiree Carver-Thomas & Linda Darling-Hammond, *Teacher Turnover: Why It Matters and What We Can Do About It*, LEARNING POL’Y INST. (Aug. 16, 2016), <https://learningpolicyinstitute.org/product/teacher-turnover-report> (“Those teaching in schools with 25% or more students of color were more likely to move or leave teaching than teachers in schools with fewer students of color.”).

49. Lindsey G. Churchill, *RETIREMENT AND PENSIONS Teachers Retirement System of Georgia: Permit Retired Teachers to Return to Service and Maintain Benefits; Define Terms Relating to Retirement; Provide Conditions Upon Which a School System May Employ a Retired Teacher*, 19 GA. ST. U.L. REV. 301, 301–03 (2002); see also Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J. L. & POL’Y 181, 210–11 (2012).

50. S. Jenny Van, Comment, *Lost in Translation: The United States-Philippines Nurse Migration Problem Redefined*, 31 U. LA VERNE L. REV. 451, 451, 453 (2010).

so that they can teach in the U.S.⁵¹ In fact, by creating a specialized visa specifically for teachers, not unlike the one created for nurses, foreign national teachers can help mitigate teacher shortages immediately rather than rely solely on the efforts of “grow your own” programs.⁵² Grow your own or other seed programs may eventually help mitigate the teacher shortage but it leaves present shortages still unaddressed.

“The propriety and benefits using immigration to solve the current domestic [teaching] shortage,”⁵³ similar to that of the nursing shortage, has sparked a debate among education professionals.⁵⁴ While some agree with using foreign national teachers to attempt to fill the void, others believe that it is only a short-term option that does not address the root of the teacher shortage and undermines U.S. teacher efforts to gain support in their efforts for national reform.⁵⁵

This Article takes the position that qualified and experienced foreign national teachers can quickly assist with filling critical teaching vacancies in the United States.⁵⁶ Our vacancies are far greater than we ever imagined and we are unable fill these vacancies with our current pipeline of teachers.⁵⁷ Furthermore, making permanent investments into the career development of foreign teachers will not only result in more

51. Like the Nursing Relief for Disadvantaged Areas Act of 1999, which Congress passed to help hospitals that serve mostly inner city and rural hospitals, Congress created the H-1C temporary registered nurse visa program with provided 500 visas available each year that allowed nurses to stay for three years. This visa category expired in December 2009. The same type of legislation could be passed in order to address the nursing shortage. Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, H.R. 441, 106th Cong. <https://www.govtrack.us/congress/bills/106/hr441/text/rh>.

52. “Grow Your Own programs, developed in partnership between university-based teacher education programs and local high schools, encourage high school students to consider becoming a teacher.” TX. COMPREHENSIVE CTR. AM. INSTS. FOR RSCH., GROW YOUR OWN TEACHERS INITIATIVES RESOURCES 3 (Jan. 2018), <https://files.eric.ed.gov/fulltext/ED594981.pdf>.

53. Van, *supra* note 50, at 453.

54. *Around the Nation*, 12 EDUC. EMP. L. BULL. (Sept. 2016).

55. Andrew Craft, *School Districts Increasingly Hiring Foreign Teachers to Fill Shortages*, FOX NEWS (May 14, 2018), <https://www.foxnews.com/us/school-districts-increasingly-hiring-foreign-teachers-to-fill-shortages>.

56. Yarrell, *supra* note 23, at 229 (Vacancies are especially hard to fill in positions of math, science, special education, and foreign language as well as geographically underserved communities.).

57. Catherine Garcia, *America’s Crushing Teacher Shortage*, WEEK (Aug. 7, 2022), <https://theweek.com/briefing/1015691/teacher-shortages>.

than just a stopgap measure for addressing the shortage but also a valuable and permanent addition to our labor force.⁵⁸

This Article will discuss the national teacher shortage, the roots of the shortage, and the impact and consequences of the shortage on students. Next, it addresses efforts—by school districts, state administrators, and legislators—to address the teacher shortage, as well as our federal government’s acknowledgment and attempts to address the shortage. Then, it explores how some districts presently and successfully use foreign national teachers to address their shortage, especially in hard-to-fill positions. Finally, it advocates for a special visa status specifically for foreign teachers in K–12 education. Similar to the creation of the H-1C visa, which addressed the critical shortages among nurses, this Article will also propose a visa specifically to address the teaching shortage. This Article concludes by offering specific changes to the immigration laws for teachers that can allow teachers to pursue lawful permanent residence status and even U.S. citizenship not only through traditional channels but also through accelerated ones for those teachers who serve a number of years in hard-to-fill positions or in underserved geographic locations.

II. THE PROBLEM: THE AMERICAN EDUCATIONAL DEARTH (THERE ARE SIMPLY NOT ENOUGH TEACHERS FOR AMERICA'S STUDENTS)

Imagine that there are plenty of qualified licensed educators who choose to enter a classroom to teach every child regardless of their race, geographic location, or socio-economic background. Imagine that that teacher stays in the classroom for their entire career maintaining the same enthusiasm and motivation to continue to teach all of our children. Imagine that when they finally retire, there is a new crop of teachers eagerly waiting to take their place, with the realistic understanding that they will work their way to the top of the pay scale like the teachers before them.

Unfortunately, it was all a dream. The reality is that the pipeline of future teachers is diminished because students who may have a desire

58. See generally, LORA BARTLETT, *MIGRANT TEACHERS: HOW AMERICAN SCHOOLS IMPORT LABOR* 103 (2014).

to pursue a teaching career are choosing not to do so.⁵⁹ People who might want to stay in the classroom are instead exiting.⁶⁰ Experienced teachers are leaving, taking their experience with them.⁶¹ New teachers enter and exit the profession, ending up anywhere but in the American classroom.⁶² This is the reality of our educational system.

Between 2009 and 2020, total public school enrollment increased for twenty-six states, and of those twenty-six states, fifteen states saw increases of 5% or more in student enrollment.⁶³ The expected enrollment in public and secondary schools is expected to increase by close to a million students between 2019 and 2028.⁶⁴ This overall increase in student enrollment means increased demand for teachers.⁶⁵ Additionally, a more nuanced consideration of the increase in teacher demand recognizes that the demand for teachers is further complicated by the need to hire specialized teachers who can provide instruction in changing content areas and competencies.⁶⁶

In 2016, researchers projected that there would be 3.1 million teachers in public school classrooms.⁶⁷ By comparison, at the time, there were 7 million public-school students, which is only 13.7% of the total public school student population, that received special education services, and 9.6% of public-school students were learning English as a

59. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and The Dwindling Commitment To Public Education*, 94 WASH. U. L. REV. 423 (2016); see also Michael A. Rebell, *Safeguarding The Right To A Sound Basic Education In Times Of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1948–49 (2012).

60. See Tim Walker, *Survey: Alarming Number of Educators May Soon Leave the Profession*, NEA NEWS (Feb. 1, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/survey-alarming-number-educators-may-soon-leave-profession>.

61. Ann Blankenship-Knox, *Penalty or Damages? Are There Limits to Liquidated Damages Provision In Teacher Employment Contracts*, 14 FLA. A & M U. L. REV. 79, 99 (2021).

62. *Id.*

63. *Public School Enrollment*, NAT'L CTR. FOR EDUC. STATISTICS (May 2022), <https://nces.ed.gov/programs/coe/indicator/cga/public-school-enrollment>.

64. Garcia & Weiss, *supra* note 28.

65. Desiree Carver-Thomas, *Teacher Shortages Take Center Stage*, LEARNING POL'Y INST. (Feb. 9, 2022), <https://learningpolicyinstitute.org/blog/teacher-shortages-take-center-stage>.

66. Garcia & Weiss, *supra* note 28.

67. Sutchter et al., *supra* note 30. In 2018, Texas, California, and New York had the most teachers, and Washington D.C. and Wyoming had the fewest number of teachers. Andrej Bastrikin, *K-12 School Enrollment & Student Population Statistics*, EDUC. DATA INITIATIVE (Sept. 3, 2020), <https://web.archive.org/web/20200401045704/https://educationdata.org/k12-enrollment-statistics/>.

second language.⁶⁸ Since 2010, despite the steady increase in student enrollment, the demand for teachers has exceeded supply and has approximately quadrupled.⁶⁹ Exacerbating the shortage, it is projected that more than 270,000 public school teachers will leave the profession between 2016 and 2026.⁷⁰

The shortage is a complex problem driven by many factors. Low teacher pay, working conditions including large class sizes, and lack of professional training and support weaken the prestige of teaching and encourages young professionals to look elsewhere and experienced teachers to retire earlier than planned.⁷¹ In the wake of the COVID-19 pandemic, district superintendents report that “[t]here isn’t a big pool to pull from. Retirements are through the roof and people are leaving the profession even more than they were due to all the havoc from COVID[.]”⁷² And while the COVID-19 pandemic did not cause the shortage, it has magnified the issues that were already there and consequently caused many teachers to reconsider their careers in education.⁷³

68. Batrikin, *supra* note 67.

69. Sutchter et al., *supra* note 30, at 21.

70. Elka Torpey, *Projections for Teachers: How Many Are Leaving the Occupation?*, U.S. BUREAU OF LABOR STATISTICS CAREER OUTLOOK (Oct. 2018), <https://www.bls.gov/careeroutlook/2018/data-on-display/how-many-teachers-are-leaving.htm>.

71. See Hannah Natanson, ‘*Never seen it this bad*’: *America faces catastrophic teacher shortage*, WASH. POST <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/> (last visited August 11, 2022). At the start of writing this Article, it was the pandemic working conditions and salary that contributed to the teaching shortage. See discussion *supra* Part II. Now, the following commentary adds to the growing reasons why America’s schools are short staffed. Specifically, it states,

Why are America’s schools so short-staffed? Experts point to a confluence of factors including pandemic-induced teacher exhaustion, low pay and some educators’ sense that politicians and parents — and sometimes their own school board members — have little respect for their profession amid an escalating educational culture war that has seen many districts and states pass policies and laws restricting what teachers can say about U.S. history, race, racism, gender and sexual orientation, as well as LGBTQ issues.

Natanson, *supra* note 71.

72. Edelman, *supra* note 1.

73. Maxine Goodman, Essay, *The Expanding Role and Dwindling Protection for Private Religious School Teachers During the Pandemic: Rethinking the Ministerial Exception After Morrissey-Berru*, 54 U.C. DAVIS L. REV. ONLINE 61, 65–67 (2021).

A. Why Teacher Declines Are a Public Education Crisis?

The reality that the United States is experiencing a shortage of teachers is alarming, but it is a reality that is surprising to many.⁷⁴ Worse yet, the teacher shortage is rising to crisis levels.⁷⁵ The national teacher shortage is influenced by multiple factors including the perception of the profession in general.⁷⁶ High school students who may otherwise consider teaching as a profession are influenced not only by local conditions, but also by their perception of the profession in general.⁷⁷ Researchers “contend that a myriad of negative, and sometimes inaccurate perceptions (e.g., low pay, low status, poor working conditions) have stigmatized the profession and have dissuaded aspiring teachers away from choosing the career.”⁷⁸

Acknowledging the challenges of the teacher pipeline is something that is often overlooked.⁷⁹ The well-documented interest in the retention aspect of the teacher shortage might overshadow any focus on the recruitment aspect of the shortage.⁸⁰ Our narrowed focus appears to take for granted that there are always qualified applicants who are willing and able to be teachers when, in reality, some decisions as to what field to enter (or not enter, for that matter) are made as early as in high school.⁸¹

B. The Inability to Retain Teachers is a Contributing Factor to the Shortage

74. See Matt Zalaznick, *Is There Really a Teacher Shortage? Yes, But It's Hitting Some Areas Harder*, DIST. ADMIN. (Oct. 18, 2021), <https://districtadministration.com/teacher-teaching-shortage-hits-rural-urban-math-special-education-harder/#:~:text=Most%20states%20report%20not%20having,most%20severe%20and%20chronic%20shortages>.

75. Black, *supra* note 59, at 431.

76. Black, *supra* note 27, at 1632–33.

77. *Id.* at 1632.

78. See Kissau, *supra* note 43.

79. See, e.g., CITIZENS RSCH. COUNCIL OF MICH., MICHIGAN'S LEAKY TEACHER PIPELINE: EXAMINING TRENDS IN TEACHER DEMAND AND SUPPLY, (Feb. 2019), https://crcmich.org/PUBLICAT/2010s/2019/rpt404-teacher_pipeline.pdf.

80. See *id.* (“While state policymakers and local school officials are often tempted to concentrate on shortage strategies aimed solely at teacher recruitment, teacher retention strategies can be just as promising.”).

81. See generally *id.*

Prior to the COVID-19 pandemic, approximately 8% of teachers were leaving the profession every year.⁸² In the United States, approximately 40%–50% of novice teachers leave the profession after the first five years.⁸³ While educators leave teaching for several reasons ranging from transitioning to a different occupation or, in other cases, retiring, the Bureau of Labor Statistics categorically breaks down the projected exodus.⁸⁴ Between 2016 and 2026, more than 270,000 teachers will leave the field each year.⁸⁵ Specifically, elementary school teachers are projected to have the most departures from the field.⁸⁶ Next, follows secondary/high school teachers with more than 70,000 separations.⁸⁷ And then finally, middle school teachers with approximately 45,000 separations.⁸⁸ Special education teachers across all grade levels will make up approximately 45,000 departures.⁸⁹

Trends in the shortage vary throughout the United States.⁹⁰ Special education teacher positions are especially hard to fill.⁹¹ “[S]cience and

82. TEACHER TURNOVER: STAYERS, MOVERS, AND LEAVERS, in U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT., *CONDITION EDUC.* (2016), https://nces.ed.gov/programs/coe/pdf/coe_slc.pdf; *accord* Sutchter et al., *supra* note 29, at 4. (“Compared to high-achieving jurisdictions like Finland, Singapore, and Ontario, Canada—where only about 3% to 4% of teachers leave in a given year—U.S. attrition rates are quite high, hovering near 8% over the last decade, and are much higher for beginners and teachers in high-poverty schools and districts. If attrition rates were reduced to the levels of those nations, the United States would eliminate overall teacher shortages.”).

83. Mariana Haynes et al., *ALL FOR EXCELLENT EDUC., ON THE PATH TO EQUITY: IMPROVING THE EFFECTIVENESS OF BEGINNING TEACHERS 3* (July 2014), <https://mk0all4edorgjxiy8xf9.kinstacdn.com/wp-content/uploads/2014/07/PathToEquity.pdf>; Peter Swanson & Shannon Mason, *The world language teacher shortage: Taking a new direction*, 62 *FOREIGN LANGUAGE ANNALS* 251 (2018).

84. Torpey, *supra* note 70.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. While some researchers debate the breadth of the teacher shortage, some even suggesting the shortage is not as extensive as it is reported to be, the essence of the argument concludes the same: most states consistently report trouble staffing high need or “hard to fill positions,” specifically in the area of special education, mathematics, science and English as Second Language classrooms. See Kaitlin Pennington McVey & Justin Trinidad, *Nuance in the Noise: The Complex Reality of Teacher Shortages*, *BELLWETHER EDUC. PARTNERS* 5–6 (Jan. 2019), https://bellwethereducation.org/sites/default/files/Nuance%20In%20The%20Noise_Bellwether.pdf.

91. Nguyen, *supra* note 32, at 1.

math teachers [(STEM subjects)] tend to be at high risk for turnover.”⁹² Foreign language teachers have been in short supply for decades.⁹³

Prior to the COVID-19 pandemic, there were several reasons why a teacher may have left the classroom, but the pandemic accelerated the departures, and the departures provide cause for alarm. Recent polling by the National Education Association (NEA), a prominent national teachers union, showed that nearly 1 in 3 teachers said the COVID-19 pandemic made them more likely to resign or retire early.⁹⁴ Specifically, in the nationwide poll of educators published in August 2020 by the NEA,⁹⁵ five months after the pandemic started, “the NEA found that 28 percent of teachers said the COVID-19 pandemic has made them more likely to retire early or leave the profession, a rate that could far worsen the United States’ shortage of qualified teachers.”⁹⁶ “That number includes a significant number of new or young teachers—one in five teachers with less than 10 years’ experience.”⁹⁷ It also includes 40% of teachers with twenty-one to thirty years’ experience, who are presumably leaders and mentors on their school campuses, and 55% of those with more than thirty years.⁹⁸

The COVID-19 pandemic has vastly exacerbated that shortfall. For some, the pandemic has cloaked a sense of doubt over careers in the classroom.⁹⁹ For others, the pandemic has prompted them to leave the profession or take early retirement.¹⁰⁰

92. Liana Loewus, *Why Teachers Leave—or Don’t: A look at the Numbers*, EDUC. WK. (May 4, 2021), <https://www.edweek.org/teaching-learning/why-teachers-leave-or-dont-a-look-at-the-numbers/2021/05>.

93. Swanson & Mason, *supra* note 83, at 252.

94. Mary Ellen Flannery, *Safety Concerns Over Covid-19 Driving Some Educators Out of the Profession*, NEA TODAY (Aug. 14, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/safety-concerns-over-covid-19-driving-some-educators-out>.

95. The National Education Association is the largest labor union and the largest white-collar representative in the United States. It represents public school teachers and other support personnel, faculty and staffers at colleges and universities, retired educators, and college students preparing to become teachers. *See Purpose and Power in Community*, NEA, <https://www.nea.org/about-nea> (last visited Aug. 2, 2022).

96. Flannery, *supra* note 94.

97. *Id.*

98. *Id.*

99. *See* Walker, *supra* note 60.

100. In a study conducted in March 2020 by the Brookings Institute, “74% of teachers reported that they expected to work as a teacher until retirement, while 9% said they did not expect to, and 16% did not know. In contrast, in March 2021, 69% of teachers reported they expected to work as a teacher until retirement, while 9% reported they did not expect to, and

Considering our changing post-pandemic labor market,¹⁰¹ where employees are demanding better working conditions, work/life balance, and higher wages, the teaching market cannot be isolated from the overall labor market and viewed in a vacuum. In addition to salaries and job opportunities outside of teaching, there are new, post-pandemic requests to work remotely, which now exert a new pressure on both entry to and exit from the teaching profession as a whole.¹⁰² To this end, schools are not just competing with one another, they are competing with the private industry and other professions.¹⁰³

C. An *Unlicensed* Teacher in a Classroom is *Still* a Vacancy

Students with particularized needs such as those from low-income families, those who are English language learners, and those with low prior academic performance are less likely to have access to highly qualified or effective teachers. “The number of under-qualified teachers has risen steeply over the decade and has contributed to growing inequality in opportunity to learn. Students in high-minority and low-income schools are several times as likely to have under-qualified teachers as those in more affluent schools.”¹⁰⁴ This was in part

22% said they did not know.” Gema Zamarro et al., *How the Pandemic has Changed Teachers’ Commitment to Remaining in the Classroom*, BROOKINGS INST.: BROWN CTR. CHALKBOARD (Sept. 8, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/09/08/how-the-pandemic-has-changed-teachers-commitment-to-remaining-in-the-classroom/>.

Furthermore, the percentage of teachers who reported leaving their current teaching position within the next five years increased from an average of 24% in March 2020 to 30% in March 2021. *Id.* Thus, during the pandemic, teachers became less certain whether they would work a full career in the classroom. See Cresencio Rodriguez-Delgado et al., *Schools Across the Country Are Struggling to Find Staff. Here’s Why*, NEWSHOUR. (Nov. 23, 2021, 5:06 PM), <https://www.pbs.org/newshour/education/schools-across-the-country-are-struggling-to-find-staff-heres-why>.

101. Allison Auginbaugh & Donna S. Rothstein, *How did Employment Change During the COVID 19 Pandemic? Evidence from a New BLS Survey Supplement*, BEYOND THE NUMBERS, 11, U.S. Bureau of Labor Stats. (Jan. 2022).

102. Issac Mamaysky, *The Future of Work: Exploring the Post-Pandemic Workplace from an Employment Law and Human Resources Perspective*, 21 U.C. DAVIS BUS. L.J. 257, 261–62, 267, 272 (2021); see also Maxine Goodman, Essay, *The Expanding Role and Dwindling Protection for Private Religious School Teachers During the Pandemic: Rethinking the Ministerial Exception After Morrissey-Berru*, 54 U.C. DAVIS L. REV. ONLINE 61, 63 (2021).

103. Black, *supra* 27, at 1633.

104. Linda Darling-Hammond et al., *Access to Quality Teaching: An Analysis of Inequality in California’s Public Schools*, SANTA CLARA L. REV. 1045, 1050 (2003).

the rationale behind creating the teacher quality section of the George W. Bush era No Child Left Behind Act (NCLB), which George W. Bush signed into law in 2001.¹⁰⁵ Lawmakers concluded that schools with large numbers of inexperienced, uncertified, or out-of-field teachers place students at an acute disadvantage in their learning.¹⁰⁶ The NCLB was designed to address those issues by mandating that all public schools employ teachers that are fully qualified in their subject areas.¹⁰⁷ The consequence for failing to do so subjected those schools to federal financial sanctions.¹⁰⁸

The NCLB established standards of teacher performance, mandating that every teacher in our nation's public schools met the standard of being "highly qualified" by the 2005–2006 school year.¹⁰⁹ For teachers whose salaries are linked to federal Title 1 funds, those requirements must be met in 2002–2003.¹¹⁰ The U.S. Department of Education defined a highly qualified teacher as one who has earned at least a bachelor's degree and has obtained state certification or licensure to teach.¹¹¹ The rules also highlighted that teachers who taught core academic subjects such as math and biology had to demonstrate mastery of content knowledge.¹¹²

With this mandate, school districts that did not meet federal requirements for employing legally defined highly qualified teachers risked losing federal educational funding.¹¹³ This intensified the stakes for schools by increasing the challenge of not employing fully qualified teachers. Although it is difficult to pinpoint exactly when the teacher

105. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

106. H.R. Rep. No. 107-334, at 31, 43 (2001) (Conf. Rep.).

107. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425; *see also* Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEKLY (April 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

108. BARTLETT, *supra* note 58, at 3.

109. *See* Benjamin M. Superfine & Jessica L. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737, 751–52 (2014); David M. Malone, *The No Child Left Behind Act and the Teacher Shortage*, 2 DUKE UNIV. CTR. FOR CHILD & FAMILY POL'Y 1 (2002), <https://files.eric.ed.gov/fulltext/ED498828.pdf>.

110. U.S. Dep't of Educ., *Improving Basic Programs Operated by Local Education Agencies (Title I, Part A)* (Oct. 24, 2018), <https://www2.ed.gov/programs/titleiparta/index.html> ("Title I . . . provides financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families . . .").

111. U.S. Dep't of Educ. Office of Special Programs, *Highly Qualified Teachers 1*, 6 (2006), https://sites.ed.gov/idea/files/HQT_10-5-06.pdf.

112. 34 C.F.R. § 200.56(2)(3) (2009).

113. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1659-1660.

shortage began, the NCLB became the catalyst to the common practice of looking to new markets to establish new teacher pipelines to staff hard-to-fill positions.¹¹⁴ In 2015, the Every Student Succeeds Act (ESSA) formally replaced the NCLB.¹¹⁵ The ESSA removed the federally “highly qualified” requirement, leaving states to define teacher qualifications.¹¹⁶ Although states now have the sole authority to define teacher qualifications, many have kept some of the teacher qualification standards required by the NCLB.¹¹⁷

D. Mississippi, Virginia, & Arizona: Still Trying to Leave No Child Behind

School districts across the nation continue to feel the impact of the teacher shortage. Because states have the sole authority to define teacher qualifications, state education agencies are left to impose consequences for schools that fail to meet quality standards as a result of an insufficient teaching workforce.¹¹⁸ Several school districts in Mississippi, for example, were placed on probation for failing to meet accreditation standards.¹¹⁹ In one specific instance, Mississippi state

114. BARTLETT, *supra* note 58, at 41–42.

115. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802; U.S. Dep’t of Educ., *Every Student Succeeds Act (ESSA)*, <https://www.ed.gov/essa?src=rn> (last visited Mar. 29, 2022); Derek W. Black, *Abandoning The Federal Role In Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1311–12 (2017).

116. Black, *supra* note 115, at 1325.

117. *Id.*

118. See generally Arielle Dreher, *A Serious, Serious Teacher Shortage*, JACKSON FREE PRESS (Dec. 13, 2017), <https://www.jacksonfreepress.com/news/2017/dec/13/serious-serious-teacher-shortage/> (discussing that Jackson Public Schools was placed on probation by the state for, among other things, failing to have 95% of its staff teaching within their area of certification/endorsement. Because of the teacher shortage and consequently unable to meet that standard, they were penalized by the state); see generally Diana Pullin, *Key Questions in Implementing Teacher Testing and Licensing*, 30 J.L. & EDUC. 383, 394 (2001) (explaining that “each state controls the process of teacher education through the state’s mechanisms for approval of teacher education programs”).

119. In 2017, Jackson Public Schools (JPS) underscored the cause of the teacher shortage. During an interview with the Jackson Free Press, the JPS executive director of school improvement explained “As many of you are aware, we have a teacher shortage. That’s not a Jackson Public Schools issue, it’s a national issue.” Notably, JPS was on probation for failing to meet twenty-four accreditation standards. One of those standards “Licensed Professional Staff” requires each school to have no more than 5 percent of the professional staff working outside

regulators mandated that no more than 5% of their professional staff could be working outside of the areas of licensure.¹²⁰

Acknowledging the dilemma of districts like those in Mississippi, researchers and policy analysts must consider several factors to assess the effectiveness and the impact of these post-NCLB laws on the teacher shortage. First, the numbers of teachers who lack the credentials associated with highly effective teaching must be considered as a metric for quality.¹²¹ Another factor that speaks to the effect of these laws is the scant progress in increasing the number of qualified teachers over a period of time.¹²² And, finally, there are larger shares of the unqualified teachers in high-poverty, as compared to low-poverty, schools.¹²³

More direct effects of these laws on the teacher shortage have been felt in states like Arizona. Arizona alone had 7,000 vacancies going into 2018.¹²⁴ Those vacancies were filled, in part, by people who did not have a standard teaching certificate and by long-term substitutes.¹²⁵ In some

their areas of licensure. And the problem in Mississippi was not limited to just Jackson either. Thirteen school districts, including JPS, did not meet the “Licensed Professional Staff” standard. According to the executive director of school improvement, in order to meet the state’s (of Mississippi) standard “[y]ou must have 100 percent certified staff in place in every classroom for every child” a challenge most difficult to meet with you have 288 teacher vacancies and many of these vacancies were being filled by substitute teachers. *Id.*

120. MISS. DEP’T OF EDUC., ACCOUNTABILITY STANDARDS FOR SCHOOLS GOVERNED BY THE STATE BOARD OF EDUCATION 2 (June 2004), <https://sos.ms.gov/ACProposed/00019494b.pdf>.

121. U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Stat., *Teacher Quality: A Report on the Preparation and Qualifications of Public School Teachers* (1999) <https://nces.ed.gov/surveys/frss/publications/1999080/index.asp?sectionid=2>. Research from 1997, conducted using the NCES Fast Response Survey System (FRSS), indicates that “teacher qualifications and preparation are important elements of teacher effectiveness and important factors in determining student achievement . . . This study of teacher quality [sic] provides a national profile of the current state of teacher preparation and qualifications for full-time public school teachers, [and] several indicators of their work environment.”

122. Garcia & Weiss, *supra* note 28.

123. Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2401 (2021); accord Garcia & Weiss, *supra* note 28.

124. Holly Yan et al., *Desperate to fill teacher shortages, US schools are hiring teachers from overseas*, CNN (Oct. 6, 2019, 1:21 AM), <https://www.cnn.com/2019/10/06/us/international-teachers-us-shortage/index.html>.

125. *Id. But see* S., 1159, 55th Leg., 2nd Reg. (Ariz. 2022). In response to the continued dire need of teachers, Arizona’s Governor, Doug Ducey, has recently signed legislation which allows student enrolled in a teacher preparation program to now be able to teach in a classroom (in some cases as a co-teacher and supervised and in other cases without supervision) in order to address the state’s teacher shortage. This legislative action has garnered significant criticism because it undermines the integrity of the teaching profession as it allows for students who have not yet completed their undergraduate degrees to teach in classrooms. “While the law was

cases, existing teachers added an additional section to their day by eliminating a planning period or break.¹²⁶ Consequently, these factors add fuel to the ever-burning fire of reasons why school districts report a shortage of teachers.

In Virginia, a 2019 Virginia Department of Education “report on teacher shortages showed that there were more than 1,000 unfilled teaching positions across Virginia before the COVID-19 pandemic.”¹²⁷ The number has undoubtedly increased as a result of the impact of the COVID-19 pandemic.¹²⁸ “Rather than reinvent the way they teach or return to the classroom when they do not feel safe, some teachers who had been close to retirement or thinking about changing careers left the profession. Some young people who had dreamed of becoming teachers saw the struggles with virtual learning and changed their minds.”¹²⁹

Despite the obvious gravity implied by the numbers, assessing the teacher shortage solely based on the number of unfilled positions in a given school year fails to capture the full scope of the issue. Because school districts regularly report that there are significant teacher vacancies that need to be filled before the beginning of each school year, the available data speaks primarily to the count of unfilled positions and not necessarily whether those filled positions are filled by qualified

passed to address the state’s ongoing teacher shortage, this ‘unfathomable’ policy will likely only exacerbate the problem facing the profession” according to Jacqueline Rodriguez, vice president of research, policy and advocacy at the American Association of Colleges for Teacher Education. “‘It’s not only degrading the profession and the value of what it means to be a profession-ready educator — this is a double-edged sword’”; K-12 Dive Staff, *Arizona Law removes bachelor’s degree requirement for teachers*, K-12 DIVE (Jul. 13, 2022), <https://www.k12dive.com/news/arizona-law-removes-bachelors-degree-requirement-for-teachers/627128/> (“‘It’s not only degrading the profession and the value of what it means to be a profession-ready educator — this is a double-edged sword.’”).

126. The Virginian-Pilot & Daily Press Editorial Board, *Outreach needed to address Virginia’s teacher shortage*, VIRGINIAN-PILOT (May 6, 2021, 6:15 PM), <https://www.pilotonline.com/opinion/editorials/vp-ed-editorial-virginia-teacher-shortage-0507-20210506-g3svn5xefjzdhx4zeeidw6cku-story.html>.

127. Press Release, Off. of U.S. Senator Tim Kaine, Kaine & Collins Reintroduce Bipartisan Bill to Address Nationwide Teacher and Principal Shortages (June 24, 2021), <https://www.kaine.senate.gov/press-releases/kaine-and-collins-reintroduce-bipartisan-bill-to-address-nationwide-teacher-and-principal-shortages> (citing Editorial: Outreach needed to address Virginia’s teacher shortage).

128. Michael Pope, *New data shows teacher shortages are hitting Virginia, especially in southside*, RADIO IQ (Jul. 20, 2022), <https://www.wvtf.org/news/2022-07-20/new-data-shows-teacher-shortages-are-hitting-virginia-especially-in-southside>.

129. The Virginian-Pilot & Daily Press Editorial Board, *supra* note 126.

individuals.¹³⁰ The challenges in Mississippi, Virginia, and Arizona are not unusual, and cities and towns throughout the country are experiencing similar urgencies.¹³¹ Although districts often do not report on which subjects are most impacted by the shortage, it is clear that a shortage exists. Teachers are leaving the profession, and the effects of the departures are adversely affecting the students.

“Many school districts, straining under logistical challenges and uncertain budgets, have pointed to such staffing shortages as an ongoing challenge in supporting students who are struggling.”¹³² Although high teacher turnover can have a disruptive effect on all students, the teacher shortage is especially harmful to those students in certain geographic locations, and even within the same geographic region, the impact can be more significant in certain subject areas.¹³³ The correlation between the teacher shortage and the adverse effects on students, particularly in minority and underprivileged communities, is overwhelming.¹³⁴ On

130. For the purposes of this Article, a vacancy will be defined as the absence of a qualified (certified/licensed if required by the school district) individual to teach in the subject areas needed by the school.

131. To meet the pressures of filling the vacancies, school districts are going to what appears to be extreme measures in order to fill positions. In 2007, the New York Times reported that a school district in Guilford County, North Carolina, where they had some schools without one certified math teacher, resorted to nationwide advertising campaigns and hiring incentives of \$10,000 for instructors who signed up to teach Algebra I. Sam Dillon, *With Turnover High, Schools Fight for Teachers*, N.Y. TIMES (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/education/27teacher.html>. With the shortage growing exponentially, in July 2021, Guilford County is now offering enticing prospective applicants with \$20,000 signing bonus to try to fill their 120 teacher vacancies that they had as of July 2021. “We just don’t produce the number of teachers we really need in our schools. Folks are not choosing education as their career path, and that has always been a struggle for us.” Alliyah Sims, *It’s life changing’: Some Guilford County Schools teachers could see \$20K signing bonuses for the upcoming school year*, PIEDMONT TRIAD NEWS (July 21, 2021, 9:37 PM), <https://myfox8.com/news/north-carolina/piedmont-triad/its-life-changing-some-guilford-county-schools-teachers-could-see-20k-signing-bonuses-for-the-upcoming-school-year/>.

132. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students* (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

133. Zamarro et al., *How the pandemic has changed teachers’ commitment to remaining in the classroom*, BROOKINGS INST.: BROWN CTR. CHALKBOARD (Sept. 8, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/09/08/how-the-pandemic-has-changed-teachers-commitment-to-remaining-in-the-classroom/>.

134. See Richardson LaBruce, *Comment: Immigrant Teachers in High-Minority Schools: Using Immigration Law To Bypass Strict Scrutiny & The Colorblind Constitutionalism Of Parents Involved*, 79 MISS. L.J. 1073, 1075 (2010) (“[T]he mass exodus of quality teachers from low-income, high-minority schools to wealthier white schools. As a result, progress toward rectifying the achievement gap has become stagnant.”).

average, “[P]oor and minority students are exposed to inexperienced, uncredentialed, and unqualified teachers at twice the rate of other students.”¹³⁵ Those students most in need of qualified teachers—poor and minority students—have the least access to them.¹³⁶ “Teacher and principal shortages at schools across the country, particularly in rural communities, impede our students’ ability to reach their full potential”¹³⁷ Because the teacher shortage has a greater impact on high-poverty schools, it exacerbates existing opportunity and achievement gaps driven by underfunding, concentrated poverty, and inequality of resources.¹³⁸ Consequently, the teacher shortage is fueled by underfunding, limited resources, and poor working conditions.¹³⁹

“The teacher shortage in the nation’s public schools—particularly those districts in high-poverty rate localities—is a crisis for the teaching profession and a serious problem for the entire education system.”¹⁴⁰ It harms students and contributes to the opportunity and achievement gaps between students in high-poverty schools and their more affluent peers.¹⁴¹

E. District-Wide Efforts to Address School-Wide Shortages

Individual school districts have been taking significant, possibly even extreme, measures to address the teacher shortage. In 2006, New York City offered prospective educators in math, science, and special education a housing subsidy of \$14,600 to work in specifically identified high need schools.¹⁴² Los Angeles officials have offered a \$5,000 housing incentive to educators who agree to teach in

135. Black, *supra* note 27, at 1603; *see generally* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2021).

136. Black, *supra* note 27, at 1607; *accord* Rodriguez-Delgado et al., *supra* note 100.

137. *See generally* Press Release, *supra* note 127.

138. Garcia & Weiss, *supra* note 28.

139. Yarrell, *supra* note 23, at 231 (citing Black, *supra* note 27 and Linda Darling-Hammond, *The Flat World And Education: How America's Commitment To Equity Will Determine Our Future* 40–41 (James A. Banks ed., 2010)).

140. Garcia & Weiss, *supra* note 28.

141. *Id.*

142. David M. Herszenhorn, *New York Offers Housing Subsidy as Teacher Lure*, N.Y. TIMES (Apr. 19, 2006), <https://www.nytimes.com/2006/04/19/nyregion/new-york-offers-housing-subsidy-as-teacher-lure.html>.

underperforming schools.¹⁴³ During the 2021 recruiting year in Oklahoma, Union Public Schools offered to pay \$1,000 signing bonuses to teachers in several subject areas.¹⁴⁴ At LEAD Charter School in New Jersey, some teachers have been offered a \$4,000 bonus to work there.¹⁴⁵

In order to address the shortage in teachers in many rural and urban communities, districts also reach out to teacher pipeline organizations like the New Teacher Project,¹⁴⁶ Yes PREP Charter Network,¹⁴⁷ and Teach For America.¹⁴⁸ Teach For America, for example, recruits recent college graduates and career-changers for two-year stints in low-income classrooms.¹⁴⁹ These new teachers are not required to have any education or teaching pedagogy background and are not required to obtain it.¹⁵⁰ The only preparation to begin teaching in these high-need areas takes place the summer before these individuals enter the classroom.¹⁵¹ In contrast, the (ideal) conventional teaching hire is expected to possess a degree related to the subject they plan to teach or

143. Sam Dillon, *Teacher Turnover Leaves Void in U.S. Schools*, N.Y. TIMES, (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/world/americas/27iht-teachers.1.7266988.html>.

144. The same offer was extended to school nurses and speech pathologists. See Sarah Jackson, *School Districts Are Offering Perks Like \$20,000 Signing Bonuses to Staff Classrooms as Teachers Quit over Burnout and COVID Safety Concerns*, BUS. INSIDER (Sept. 1, 2020, 4:51 PM), <https://www.businessinsider.com/schools-giving-bonuses-other-perks-attract-teachers-burnout-2021-8>.

145. *Id.*

146. See generally TNTP, <https://tntp.org/about-tntp> (last visited Mar. 31, 2022).

147. See generally YES PREP PUB. SCHS., <https://www.yesprep.org/about> (last visited Mar. 31, 2022).

148. See generally TEACH FOR AMER., <https://www.teachforamerica.org/what-we-do> (last visited Mar. 31, 2022).

149. See generally Macke Raymond & Stephen Fletcher, *Teach for America*, EDUC. NEXT (July 17, 2006), <https://www.educationnext.org/teach-for-america/>; *Working Toward Excellence and Equity For All*, TEACH FOR AMERICA, <https://www.teachforamerica.org/what-we-do/our-work>.

150. TFA Editorial Team, *Am I Eligible?*, TEACH FOR AM. (August 1, 2019), <https://www.teachforamerica.org/stories/am-i-eligible#:~:text=I%20won't%20graduate%20by,depending%20on%20your%20assigned%20region>.

151. Katharine M. Conn et al., *How Teach for America Affects Beliefs About Education*, EDUC. NEXT (Oct. 8, 2019), <https://www.educationnext.org/how-teach-for-america-affects-beliefs-education-classroom-experience-opinions/>.

in a general education degree.¹⁵² A conventional teaching hire is also required to take education-related pedagogy classes.¹⁵³

To hire a Teach For America recruit, who may have neither teaching experience nor any doctrinal coursework in education, the district may pay up to \$5,000 per teacher to Teach For America.¹⁵⁴ That \$5,000 is in addition to the salaries those schools must pay to the teacher.¹⁵⁵ Despite the fee, school districts in underserved areas can be motivated to rely on the supply of teachers from organizations like Teach For America because, at a minimum, these individuals have a college education.¹⁵⁶ This may be more appealing than the alternative option, which would be to leave those positions vacant or to rely on substitute teachers to fill those roles.¹⁵⁷ Additionally, the salaries of these individuals are often reflective of entry-level teachers.¹⁵⁸ However, their investment in the

152. Rachel M. Cohen, *The True Cost of Teach For America Impact on Urban Schools*, AM. PROSPECT (January 5, 2015), <https://prospect.org/civil-rights/true-cost-teach-america-s-impact-urban-schools/> (“It is not uncommon to hear veteran teachers, who majored in education and often have advanced degrees, complain that their profession is diminished by what they see as a preference for TFA recruits who did not study education. Parents are heard to question the qualifications and commitment of TFA’s novice educators, given the assumption that their sign-up for a two-year stint suggests only a fleeting interest in teaching. And both veteran teachers and parents sometimes bemoan the fact that the racial and ethnic make-up of the TFA corps rarely matches that of the students they are assigned to teach. Advocates maintain that Teach For America provides well-educated teachers in areas where recruitment is difficult.”).

153. *See, e.g.*, Darling-Hammond et al., *supra* note 104, at 1054–56.

154. Cohen, *supra* note 152 (“The hiring contracts signed between TFA and school districts vary, and often depend on the level of bargaining power with which a district has to negotiate. For example, the Cleveland School District stipulated in a 2013 contract that it would pay TFA \$4,000 for each recruit during his or her first year, and \$5,000 per recruit for the second year. Chicago’s Board of Education signed a contract in 2013 committing to pay TFA \$3,000 per teacher in the first year, and \$2,500 per teacher in the second year. The contracts also vary within states.”).

155. Dana Goldstein, *Teacher Pay Is So Low in Some U.S. School Districts That They’re Recruiting Overseas*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2018/05/02/us/arizona-teachers-philippines.html?mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjw3MSHBhB3EiwAxcaEu-5neUcba7zfmOiH7GDz1SS4pOFpoNwk8X6GFUM9RbmLcYZp916VkhoCT2sQAvD_BwE&gclsrc=aw.ds.

156. TFA Editorial Team, *supra* note 150.

157. Julian Vasquez Heilig et al., *Alternative Certification and Teach For America: The Search for High Quality Teachers*, 20 KAN. J.L. & PUB. POL’Y 388, 397 (2011).

158. *Id.* at 398 (“[During eras] of massive budget shortfalls and cuts, TFA has begun placing teachers in jobs previously held by veteran teachers, who were laid off to ease school

school districts where they serve could be arguably minimal because the program only requires a two-year commitment.¹⁵⁹ Although the supply of teachers from organizations like Teach For America can provide a short-term fix, the often fledgling experience and possibly noncommittal devotion to teaching of these individuals “raise questions on how students are impacted academically.”¹⁶⁰

The teacher shortage can also adversely affect school budgets because addressing the need results in increased expenditures on hiring and increased expenditures on the training of replacement teachers.¹⁶¹ As a result, schools often have to cut what may be viewed as non-essentials like sports programs, summer school, music and art programs, and driver's education.¹⁶² In some circumstances, schools may even resort to terminating employees like custodians and food service personnel to mitigate the financial impact of the teacher shortage.¹⁶³ Consequently, the teacher shortage has created additional expenses for schools that far exceed teacher vacancies.

districts' financial problems. The practice of laying off experienced teachers and replacing them with inexperienced TFA teachers, referred to as 'laying off people to accommodate Teach For America,' has been reported in various cities including Boston, Charlotte-Mecklenburg, Chicago, Dallas, and Washington, D.C.”).

159. While teachers directly hired by a school district are not required to make an actual commitment, there is a presumption that those teachers are otherwise tied to the community and are therefore likely to be invested to an extent greater than those on an employment contract with another organization. See Helen Baxendale, *Backlash and Beyond: What Lies Ahead for Teach For America*, EDUC. WK.: RICK HESS STRAIGHT UP (May 29, 2020), <https://www.edweek.org/education/opinion-backlash-and-beyond-what-lies-ahead-for-teach-for-america/2020/05>; see also Conn et al., *supra* note 151.

160. Anna Lee, *Students Should Be Wary of Teach For America*, DAILY TROJAN (Oct. 6, 2019), <https://dailytrojan.com/2019/10/06/students-should-be-wary-of-teach-for-america/>.

161. LaBruce, *supra* note 134, at 1098.

162. *Id.*

163. *Id.*; see Andrea Billups, *School Budget Cuts Threaten Gains*, WASH. TIMES (Mar. 11, 2009), <https://www.washingtontimes.com/news/2009/mar/11/schools-cut-budgets-where-it-hurts-children-most/>.

III. POLICYMAKERS ARE AWARE OF THE PROBLEM: HOW CURRENT DOMESTIC POLICY LIMITATIONS EXACERBATE THE EDUCATIONAL DEARTH/TEACHER SHORTAGE

Over the years, there have been attempts at both the local and federal level to curtail the teacher shortage.¹⁶⁴ State and federal legislators and policymakers have proposed a variety of approaches to address the shortage with the aim of recruiting and retaining highly qualified teachers.¹⁶⁵ However, to date, none of these attempts have fully succeeded in solving, or significantly decreasing, teacher shortages across the United States.¹⁶⁶

A. Congressional Efforts to Address the Shortage

The U.S. Congress recently acknowledged the growing teaching shortage crisis by introducing teacher-focused bills on the Senate floor. As recently as 2019—nine months prior to the onset of the COVID-19 pandemic, which turned education in the United States upside down—Minnesota Senator Tina Smith introduced Bill S. 2367, the Addressing

164. See, e.g., Jeannie Oakes, *Education Inadequacy, Inequality, and Failed State Policy: A synthesis of Expert Reports Prepared for Williams v. State of California*, 43 SANTA CLARA L. REV. 1305, 1362–63 (2003); Lara K. Omph, Note, *Holding Teachers Accountable and Rewarding Those Who Perform: Evaluating a Performance-Based Pay System for West Virginia*, 114 W. VA. L. REV. 1053 (2012); CITIZENS RSCH. COUNCIL MICH., *supra* note 79.

165. One previous policy approach to address teacher shortages was legislative increases in teacher qualifications and licensure, with the intent of creating a more “highly qualified” teaching force. While many stakeholders were initially optimistic about the merits of this approach, some states have since found that the long-term impact of this policy has actually been an overall decrease in the numbers of practicing teachers. Joseph H. Hanks et al., *Law and Policy Impacts on Teacher Attrition in Public Education: Data Suggesting a New Focus Beyond Silver Bullets of Targeted STEM and Other Salary Increases*, 2020 B.Y.U. EDUC. & L.J. 115, 117; see also No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1659–60; A second policy approach to the teacher shortage problem involved the assumption that policymakers and legislators can explain and solve teacher shortages by gaining an understanding of teacher behaviors that are traceable to the personal characteristics of the teachers themselves. This led to much research and effort invested in identifying the most desirable traits in potential new teachers, and then recruiting individuals possessing those traits. There has been, however, little consequent improvement in teacher shortages as a result of this investment of resources. *Id.*

166. *Id.*

Teacher Shortages Act.¹⁶⁷ Bill S. 2367, among other things, underscored the causes of the shortage.¹⁶⁸ It acknowledged that “there are not enough teachers to meet the demand for teachers in all locations and in all fields, creating a teacher shortage.”¹⁶⁹ Despite forwarding to the Health, Education, Labor and Pensions committee, to date, the bill has not been released for a vote.¹⁷⁰

In 2021, Senator Tim Kaine (D-VA) and Susan Collins (R-ME) subsequently reintroduced Bill S. 752, the Preparing and Retaining Educational Professionals (PREP) Act (2019).¹⁷¹ Originally introduced on March 12, 2019, this bill reauthorizes and revises certain grant programs to address shortages of teachers and school leaders (e.g., principals) in elementary and secondary schools, including shortages in rural areas and related to specific positions (e.g., special education and English language instruction).¹⁷² If passed into law, it would expand the definition of “high need” districts under ESSA to include schools experiencing teacher shortages in rural communities as well as in areas like special education, English language, science, technology, engineering, math, and career and technical education to give schools access to additional support.¹⁷³

In drafting this bill, the bipartisan senators acknowledged that “[t]eacher and principal shortages at schools across the country,

167. S. 2367, 116th Cong § 1 (2019), <https://www.billsponsor.com/bills/21076/senate-bill-2367-congress-116/text/is>; *Legislation Would Help Recruit and Retain STEM, Special Education Educators, Help Rural Schools Attract Teachers, Diversify Nation’s Teacher Workforce*, TINA SMITH U.S. SENATOR FOR MINNESOTA, (Aug. 2, 2022) <https://www.smith.senate.gov/u-s-senator-tina-smith-reintroduces-bill-to-help-schools-overcome-teacher-shortages-in-minnesota-across-the-country/>. The author notes that on August 2, 2022, Senator Smith reintroduced the bill to assist schools in Minnesota and across the country who are facing tremendous teacher shortages. *Id.*

168. S. 2367, *supra* note 167. S. 2367 was introduced on July 31, 2019—the Addressing Teacher Shortages Act of 2019. *Id.*

169. *Id.* Specifically, the bill highlighted that “[t]he teacher shortage is a result of growing student enrollment, shrinking pupil-teacher ratios, declining enrollment in teacher preparation programs, and high levels of attrition from the field” and that “[t]eacher shortages are particularly acute in rural schools and in certain subject areas, such as the fields of STEM, special education, and English as a second language.” *Id.* To address the issues of the teacher shortage, the initial proposed bill aimed “[t]o support the preparation and retention of outstanding educators in all fields to ensure a bright future for children and youth in under-resourced and underserved communities in the United States.” *Id.*

170. *Id.*

171. Press Release, *supra* note 127.

172. S. 751, 116th Cong. § 202(5)(B) (2019).

173. Press Release, *supra* note 127.

particularly in rural communities, impede our students' ability to reach their full potential."¹⁷⁴ However, as of the date of this writing, this bill has also not yet been put up for a vote before the Senate.¹⁷⁵

Policy choices, or better stated, policy inaction, are contributing factors to the erosion of the appeal of the teaching profession.¹⁷⁶ It will take a comprehensive policy agenda to address those factors.¹⁷⁷ Despite the introduction of many bills to address the teacher shortage Congress has failed to deliver on these issues.¹⁷⁸

B. Presidential Prodding but Legislative Action is Required

On April 28, 2021, President Biden introduced the American Families Plan.¹⁷⁹ The American Families Plan sets aside \$9 billion to address the country's increasingly acute teacher shortage, which, although not created by, was worsened by the pandemic.¹⁸⁰ The American Families Plan represents a critical investment for the White House.¹⁸¹

President Biden's plan acknowledges the teacher shortage and notes that "shortages of certified teachers disproportionately impact schools with highest percentages of students of color, which have a higher proportion of teachers that are uncertified and in their first or second year, exacerbating educational disparities."¹⁸² Biden's characterization of the disparate impact of the teacher shortage on disadvantaged students and schools with high-minority populations is supported by

174. *Id.*

175. See S. 2367, *supra* note 167.

176. Garcia & Weiss, *supra* note 28.

177. *Id.*; see also, Black, *supra* note 27.

178. S. 2367, *supra* note 167; Press Release, *supra* note 127.

179. See Press Release, White House Briefing Room, FACT SHEET: American Families Plan (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/> [hereinafter Press Release, White House Briefing Room].

180. Rodriguez-Delgado et al., *supra* note 100. In contrast, President Trump proposed to eliminate the major federal funding stream that districts use to support and train their teacher workforces in 2018. Kami Spicklemire & Stephanie Johnson, *Are Trump and DeVos Waging a War on Teachers?* CTR. FOR AM. PROGRESS (June 5, 2017), <https://www.americanprogress.org/article/trump-devos-waging-war-teachers/>.

181. Edelman, *supra* note 1.

182. Press Release, White House Briefing Room, *supra* note 179.

researchers and legal scholars alike.¹⁸³ The plan calls on Congress “to invest \$9 billion in American teachers, addressing teacher shortages, improving training and support for teachers, and boosting teacher diversity.”¹⁸⁴ Specifically, the American Families Plan will (1) “address teacher shortages, improve teacher preparation, and strengthen pipelines for teachers of color”; (2) “help current teachers earn in-demand credentials, like in special education and bilingual education”; and (3) “invest in educator leadership.”¹⁸⁵ The proposed money includes \$1.6 billion to help increase the pipeline of particularly in-demand educators, like special education teachers and bilingual teachers, as well as \$2 billion for support programs, like formal mentorship programs for new teachers and teachers of color, aimed at helping keep existing teachers in the field.¹⁸⁶

The investments President Biden hopes to make through his American Families Plan “[w]ill improve the quality of new teachers entering the profession.”¹⁸⁷ It will also likely increase retention rates and increase the number of teachers of color.¹⁸⁸ All of these interventions will, in turn, aim to improve student outcomes as measured by academic achievement, and high graduation rates.¹⁸⁹ Ultimately, these changes will likely “result[] in higher long-term earnings, job creation, and will boost the economy.”¹⁹⁰ Should Congress collaborate to actualize the

183. See Black, *supra* note 27. This article goes on to acknowledge that the challenge of the teacher shortage is not just in numbers of vacancies, but whether students have “access to competent, caring, qualified teaching in schools organized for success.” *Id.* at 1608 (internal citation omitted). The article acknowledges that students in poor and predominantly minority communities have access to the most novice teachers and those who are teaching outside of the field of certification or qualifications. *Id.*

184. Press Release, White House Briefing Room, *supra* note 179.

185. *Id.*

186. Edelman, *supra* note 1.

187. Press Release, White House Briefing Room, *supra* note 179.; accord Jim Tankersley & Dana Goldstein, *Biden Details \$1.8 Trillion Plan for Workers, Students and Families*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/04/28/us/politics/biden-american-families-plan.html> (“As with Mr. Biden’s previous policy proposals, the American Families Plan offers something to many traditional Democratic Party constituencies. The administration is closely tied to teachers’ unions, and while many early childhood educators are not unionized, the proposal also calls for investments in K-12 teacher education, training and pay, which are all union priorities. One goal is to bring more teachers of color into a public education system where a majority of students are nonwhite.”).

188. Edelman, *supra* note 1.

189. See Tankersley & Goldstein, *supra* note 187.

190. Press Release, White House Briefing Room, *supra* note 179.

promise of the American Families Plan, they may go a long way to restore our teacher pipeline.

Though laudable, these policy goals are best characterized as “generational investments” that will take time and will render dividends in the future. Generational investments are those that grow and develop over time, particularly with further research and financial support.¹⁹¹ We, however, are still faced with the immediate (and, yes, generational) needs in our classrooms.

Our current domestic policy proposals remain insufficient for three reasons. First, the American Families Plan and other domestic policy proposals appear to be long term investments and do not *immediately* address the overcrowded classrooms.¹⁹² Second, our current domestic policy proposals do not *immediately* address the understaffed rural and urban classroom.¹⁹³ Finally, our current domestic policy solutions do not *immediately* address the under licensed, underqualified teachers who are teaching outside of their content areas solely to fill vacant positions.¹⁹⁴ Thus, in times like these, it is necessary to look to strategies used in the past and in other industries¹⁹⁵ to actively restore a meaningful pipeline of teachers,¹⁹⁶ wherever they may lie.

While the American Families Plan passed the U.S. House of Representatives as part of H.R. 5376, the Build Back Better Act, in November of 2021, it has yet to become law because the President was

191. Colby Itkowitz et al., *Biden says his economic plan is working but urges additional ‘generational investments’*, WASH. POST (May 27, 2021), <https://www.washingtonpost.com/politics/2021/05/27/joe-biden-live-updates/>.

192. See Press Release, White House Briefing Room, *supra* note 179.; see also Edelman, *supra* note 1.

193. See discussion *supra* Section III.A.

194. See discussion *supra* Section II.C.

195. See, e.g., Nicole Jacoby, *America's De Facto Guest Workers: Lessons from Germany's Gastarbeiter For U.S. Immigration Reform*, 27 FORDHAM INT'L L.J. 1569, 1571 (2004); see also Stephen Groves & Sophia Tareen, *U.S. Meatpacking Industry Relies on Immigrant Workers. But a Labor Shortage Looms.*, LA TIMES. (May 26, 2020), <https://www.latimes.com/food/story/2020-05-26/meatpacking-industry-immigrant-undocumented-workers>; Dany Bahar, *President Biden, tear down those wall and let immigrants take jobs in high demand*, BROOKINGS INST. (Feb. 24, 2002), <https://www.brookings.edu/blog/up-front/2022/02/24/president-biden-tear-down-those-walls-and-let-immigrants-take-jobs-in-high-demand/#:~:text=Other%20industries%20where%20there%20are,work%20in%20the%20Unit ed%20States.>

196. McVey & Trinidad, *supra* note 90.

unable to garner the votes needed to proceed to its consideration on the Senate floor.¹⁹⁷

IV. LOOKING ABROAD: PAST AND CURRENT EFFORTS TO USE FOREIGN WORKERS TO MEET LABOR SHORTAGES

Recruiting an international teacher, who likely has no ties to the community, may seem more radical than using a college graduate from a domestic teacher supply program like Teach For America.¹⁹⁸ However, it must be noted that the international teacher who seeks to work in the United States is not only educated, but the international teacher is also trained and specifically prepared to instruct students.¹⁹⁹

Foreign recruitment to meet U.S. labor shortages is not a new concept for the United States. It has happened with some success in the nursing field with the Nursing Relief Act of 1989.²⁰⁰ It also happened in the late 1990's when Congress addressed the nursing shortage with the creation of the H-1C visa, a special visa created to address the nursing shortage.²⁰¹ Ultimately, the intended effects of these legislative interventions were blunted by an influx of American trained nurses into the nursing workforce after an economic recession.²⁰² During this economic downturn, U.S. nurses who had previously left the field were

197. Kesley Snell et al., *Democrats are Forced to Regroup as Biden's Signature Spending Bill Stalls*, NPR (Dec. 16, 2021, 7:23 PM), <https://www.npr.org/2021/12/16/1064927774/democrats-forced-to-regroup-as-bidens-signature-spending-bill-stalls>.

198. See discussion *supra* Section II.E.

199. Yukiko Furuya et al., GEO. MASON UNIV., INST. FOR IMMIGR. RSCH., A PORTRAIT OF FOREIGN-BORN TEACHERS IN THE UNITED STATES 13 (Jan. 2019), https://www.immigrationresearch.org/system/files/Teacher_Paper.pdf.

200. Masselink & Jones, *supra* note 17, at 40 ("The 1989 Immigration Nursing Relief Act allowed nurses with H-1 work visas with at least 3 years' residency in the United States to adjust their status to permanent residency, and it exempted nurses and their families from H-1 visa quotas and backlogs. The Immigration Nursing Relief Act also created the H-1A visa, the first visa category specifically for nurses. The H-1A visa required prospective employers of IENs to attest to protections for U.S.-educated nurses (USENs) and to document their plans to reduce dependency on International Educated Nurses.") (internal citations omitted).

201. Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat 1312 (1999) (West) (codified at 8 C.F.R. § 214.2(h)(8)(i)(E)). Despite the creation of a visa to address a nursing shortage, the H-1C program only permitted 500 nurses to enter the United States in a fiscal year. *Id.*

202. Masselink & Jones, *supra* note 17, at 43. Following the Great Recession of 2007, the nursing workforce saw a sudden return of nurses who had previously retired from nursing or changed industries. *Id.*

forced to return to nursing work in order to care for their families.²⁰³ In some ways, the H-1C program was not as successful as Congress intended it to be because of legislative lag.²⁰⁴ But, overall, the number foreign trained nurses working in the United States has increased since the 1980s because of these U.S. immigration policies.²⁰⁵

Similarly, foreign recruitment to address a teacher labor shortage is not entirely new for American education. In the past, to meet the growing shortage of teachers across the United States, particularly in hard to fill subject areas, some school districts have successfully solicited foreign educators to fill their vacancies.²⁰⁶ The practice has especially been successful in rural and urban areas.²⁰⁷ Like the H-1C nursing visa that was created to address the nursing shortage,²⁰⁸

203. Peter I. Buerhaus et al., *State of the Registered Nurse Workforce as a New Era of Health Reform Emerges*, 28 NURSING ECON. 229, 230 (2017); NAT'L ADVISORY COUNCIL NURSING EDUC. & PRAC., *THE IMPACT OF THE NURSING FACULTY SHORTAGE ON NURSE EDUCATION AND PRACTICE*, 7–8 (2010); Masselink & Jones, *supra* note 17, at 43.

204. *But see* Masselink & Jones, *supra* note 17. This article argues that legislative efforts to create immigration policies to address labor shortages are a slow way of addressing nursing shortages in the United States because legislation can take time to enact. However, it also notes that while Congressional efforts may be stalled due to economic recessions in the United States that may return some nurses back to work after departed, “[n]ursing workforce projections suggest that the reduced demand for nurses by U.S. health care organizations during [any] recessions is likely temporary. Continued shortages are predicted because of the aging of the U.S. population, stagnant nursing education capacity, and the retirement of an aging nursing workforce.” *Id.* at 43–44.

205. *See* Linda H. Aiken, *U.S. Nurse Labor Market Dynamics Are Key to Global Nurse Sufficiency*, 42 HEALTH SERVS. RSCH. 1299 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1955371/pdf/hesr0042-1299.pdf>. As of the time of the writing of this article, the author recognizes that the nursing field is experiencing an unprecedented shortage, especially following the COVID-19 pandemic, an impact which has not yet been studied. *See* Sanchez, *supra* note 22.

206. LaBruce, *supra* note 134, at 1098. The geographic placement of foreign teachers in hard to fill positions and locations, is similar to that of nurses during the late 1980's; most H-1A visas were issued to Filipinos coming to the United States to work in hospitals and nursing homes. Masselink & Jones, *supra* note 17, at 40. “Because H-1A nurses often worked in undesirable locations and shifts, they were not perceived as taking jobs from US nurses, and the program was found to have no adverse effects on U.S. nurses’ wages, benefits, or working conditions.” *Id.*

207. *See* discussion *infra* Section V.A.i.

208. *See* H-1C Registered Nurse Working in a Health Professional Shortage Area as Determined by the Department of Labor, U.S. CITIZEN & IMMIGR. SERVS. (June 17, 2013), <https://www.uscis.gov/archive/h-1c-registered-nurse-working-in-a-health-professional-shortage-area-as-determined-by-the-department> [hereinafter *H-1C Registered Nurse*]. The

challenges remain in getting political buy-in to use foreign workers to fill a need in an industry where U.S. workers should be available.²⁰⁹ Although it may appear counterintuitive to actively solicit the assistance of foreign teachers to teach American children in the U.S., foreign educators are well educated and have the work experience to satisfy the criteria and certification requirements of American public school districts.²¹⁰

factors contributing to the nursing shortage are complex, but the events leading to the H-1C program have been explained as follows:

[D]eclining nursing school enrollments and the departure of many experienced [U.S.-educated nurses] because of low salaries, poor working conditions, and increased paperwork and administrative duties limited the supply of nurses. The supply of nursing labor was further stretched as economic conditions improved and some experienced nurses retired early. The resulting shortage of nurses set the stage for a new period of expanded opportunities for [internationally-educated nurses] during the mid to late 1990s when new trade and immigration legislation gave them access to two new visa categories, the TN (or “Trade NAFTA [North American Free Trade Agreement]”) and H-1C visas

. . . .

After the expiration of the H-1A program in 1997, legislators also sought to create another visa category specifically for nurses. They succeeded in crafting a new program with the Health Professions Shortage Area Nursing Release Act of 1997, which created the temporary H-1C visa category for nurses. The program’s provisions meant that its impact was extremely limited; however, it allowed 500 nurses per year to work at U.S. hospitals on H-1C visas provided that hiring hospitals could attest to the protection of U.S.-educated nurses. Participating hospitals were also required to be located in designated health professional shortage areas, to have a minimum of 190 licensed beds, and to treat a minimum of 35% Medicare and 28% Medicaid patients.

Masselink & Jones, *supra* note 17, at 40–41 (internal citations omitted).

209. Masselink & Jones, *supra* note 17, at 42. President Barack Obama was quoted as rejecting the idea of bringing more foreign nurses into the United States: “The notion that we would have to import nurses makes absolutely no sense. There are a lot of people [in the U.S.] who would love to be in that helping profession, and yet we just aren’t providing the resources to get them trained—that’s something we’ve got to fix.” *Id.* While some argue that he was not so much rejecting the proposed solution but aspiring to fill the dearth with U.S. nurses, the sentiment remained the same. *Id.* at 43.

210. Holly Yan et al., *supra* note 124; see generally *How to Become a High School Teacher*, U.S. BUREAU LAB. STATS.: OCCUPATIONAL OUTLOOK HANDBOOK (Apr. 18, 2022), <https://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm#tab-4> (“High school teachers typically must have at least a bachelor’s degree. In addition, public school teachers must have a state-issued certification or license.”).

Despite the documented benefit of using foreign national teachers to alleviate the strain of the teacher shortage, there are still those who believe that utilizing foreign national teachers undermines American education.²¹¹ Their criticisms are of varied types but seem to focus primarily on the argument that foreign nationals in American education will encourage subpar working conditions and salary (as school districts will be motivated to use foreign workers to staff schools at the already low salary, instead of raising teacher pay to meet the demands of teacher unions and other groups lobbying for change).²¹² Furthermore, some criticize the temporary nature of such a solution and do not agree that this will solve the teacher shortage crisis.²¹³ Those critics believe that hiring foreign teachers is counterintuitive to the overall issues causing the shortage of teachers.²¹⁴ Overseas trained teachers are not inherently a short-term or destabilizing source of labor—but in current practice they are primarily used as a stopgap measure, framed as interchangeable and treated as low status.²¹⁵

Randi Wiengarten, the president of the American Federation of Teachers (AFT),²¹⁶ one of the largest unions for educators in the country, has echoed these sentiments that visas harm U.S. teachers.²¹⁷ She calls the program an “abuse of an exchange program.”²¹⁸ She is quoted as saying,

211. Craft, *supra* note 55.

212. See Goldstein, *supra* note 155 (describing how the J-1 visa program has enabled Arizona to pay teachers \$10,000 below the national average) (“Rather than increase salaries, districts may once again resort to recruiting internationally as a way to solve the teacher shortage,” Randi Weingarten, president of the American Federation of Teachers, a national teachers’ union, said in a statement.”); see also Andrew Craft, *Teacher shortages are forcing schools to import educators*, N.Y. POST (May 15, 2018, 1:30 PM), <https://nypost.com/2018/05/15/teacher-shortages-are-forcing-schools-to-import-educators/> (“As debate over low teacher salaries makes its way across the country – there have been statewide protests in at least four states the past two months – this little-known US program for foreign teachers is growing.”).

213. *Id.* (“[W]e need to have a system that the visas that are allocated for the workers who are coming in for work actually match the job that they’re doing. So does it make sense to have teachers who are H-1B visa holders, teachers who are in temporary positions who are not—teaching is not a temporary job. So we have a mismatch right now between what our immigration system allows and the kinds of jobs that workers are getting these visas for.”).

214. See *infra* note 294 for a discussion of issues of teacher turnover through this program.

215. BARTLETT, *supra* note 58, at 116, 121–22, 124.

216. AM. FED’N TCHRS., <https://www.aft.org/>.

217. Craft, *supra* note 55; see also Goldstein, *supra* note 155.

218. Craft, *supra* note 55.

Every classroom in America needs a well-supported, well-trained, well-paid educator helping students learn and thrive. Teachers fight every day for the resources to do their job, and we fight for and with them — that includes solving shortages by improving wages and working conditions and giving teachers the professional respect, voice, and latitude they need to succeed.²¹⁹

Thus, the AFT president seems to suggest that the teacher shortage would be resolved if only those items were met.

Focusing solely on teacher salary may be misguided, however. As previously discussed, though the pay may motivate and incentivize excellent foreign nationals to dive into the American pool,²²⁰ teacher salary is not the only reason U.S. teachers are leaving the profession or why new American higher education graduates are not pursuing teaching careers in the United States.²²¹ Even if the U.S. government's priority is to focus its efforts in recruiting domestically by investing in the domestic teacher education programs,²²² initiatives to secure quality teachers through foreign labor pipelines *may* serve to reach an immediate goal of addressing the teacher shortage are not mutually

219. *Id.*

220. See Black, *supra* note 27, at 1615 (“Raising teacher salaries is intuitively the most obvious strategy to increase the quality and quantity of teachers. Research shows that teachers, like any other professionals, generally respond to salary.”).

221. *Id.* at 1616–17. As Professor Black explains:

[S]alaries are just one of several factors that affect teachers' employment decisions. In fact, within currently existing salary scales and incentives, salary may be the least important of the relevant factors. Geographic location, the demographics of the students they teach, and the conditions under which they teach—such as class size, support staff, and facilities—may all be more important. Studies show that although teachers respond to wages, they respond to differing wages within a region more than they do across regions. In other words, geography trumps salary. Likewise, a large body of literature identifies poor working conditions as a primary determinant of why teachers switch schools or quit the profession altogether. Salary incentives in these schools are really just an attempt to offset the burden of the undesirable environment and thus must be large enough to create a net positive offset for relevant teachers.

Id. (internal citations omitted).

222. See discussion *supra* Part III.

exclusive. The United States can easily reevaluate its efforts to grow its own teachers while also reaching out to teachers abroad to help fill vacancies that we have an urgent need to fill now.²²³ Unfortunately, there does seem to be enough vacancies to go around.²²⁴

V. ADDRESSING THE TEACHER SHORTAGE—HOW FOREIGN TEACHERS MAY HELP?

Debates may rage regarding the extent and causes of the shortage, but scholars agree that there is, nonetheless, a shortage.²²⁵ As discussed above, the shortage particularly exists in hard to fill positions and in low income, underserved communities.²²⁶ Those hard to fill positions are generally in the areas of math, science, technology (STEM related subjects), special education, and foreign language (including teaching English as a second language).²²⁷ Unfortunately, these positions are vital to the development and success of American students.²²⁸ Meaningful access to qualified teachers in public education results in higher academic achievement, “build[ing] students’ skills in ways that will help them become more productive workers,” and ultimately resulting in a boost to our economy.²²⁹

Staffing vacancies with foreign teachers will not take any positions from U.S. workers because “[t]hese teachers aren’t competing with people who want these jobs; they’re filling jobs that are empty, that nobody’s taken, that we need.”²³⁰ U.S. Congresswoman, and former teacher, Dana Titus explained that, in delaying meaningful utilization of

223. See, e.g., Rodriguez-Delgado et al., *supra* note 100 (reporting on Michigan’s Grow Your Own program).

224. *US has 300,000 teacher, school staff and vacancies*, NEA President Rebecca Pringle says, ABC NEWS (Aug. 11, 2022), <https://abcnews.go.com/US/us-300000-teacher-school-staff-vacancies-nea-president/story?id=88242614>.

225. McVey & Trinidad, *supra* note 90.

226. See discussion *supra* Section II.C.

227. See discussion *supra* Section II.B.

228. See *Types of teachers in highest demand by 2030.*, WGU (Dec. 18, 2020), <https://www.wgu.edu/blog/teachers-high-demand-20201712.html#close>.

229. Tankersley & Goldstein, *supra* note 187.

230. Hannah Critchfield & Liz Donovan, *Trump’s Ban on Foreign Workers has Left Schools with Teacher Shortages*, INTERCEPT (Dec. 12, 2020, 8:00 AM), <https://theintercept.com/2020/12/12/j-1-visa-ban-teachers/>.

a foreign teacher pipeline, “[Y]ou’ve got children who are falling behind, especially those with special needs.”²³¹

Recruiting foreign educators, indeed, provides an immediate, short-term answer to the urgent need.²³² This respite allows for the new generation of teachers to be cultivated and, perhaps, be born.²³³ However, the investment does not have to be short-term. School districts can make concerted efforts to welcome and embrace the foreign teachers they recruited. Such efforts can include providing mentorship programs specifically designed for foreign teachers.²³⁴ School districts could also invest in cross-cultural training for all staff and take steps to ensure that these teachers are treated as members of the community, rather than transient visitors.²³⁵ If fully embraced, the foreign teachers recruited by local communities will become invested in each community they serve.²³⁶ Through this investment, foreign-trained teachers can become a true asset to the school and larger community.

231. *Id.* In a letter written to Trump after he implemented a ban on J-1 visas in an effort to preserve jobs for American workers during the height of the pandemic in July 2020, Representative Dana Titus, a congresswoman from Nevada, explained the urgent need to allow foreign teachers recently hired by the Clark County School District to enter the United States for the upcoming school year. Press Release, Off. U.S. Representative Dina Titus, Reps. Titus & Lee Urge President Trump to Allow Foreign Tch. Hired by CCSD to Enter U.S. (July 7, 2020), <https://titus.house.gov/news/documentsingle.aspx?DocumentID=1952>. Congresswoman Titus explained,

As in years past, CCSD has extended offers of employment to foreign teachers through a J-1 visa for the 2020-2021 school year. At present, there are roughly 250 J-1 teachers serving students in the Clark County School District. While these individuals, fortunately, will not be affected, none of the 95 invitees, 51 of whom are special education teachers, will be able to come to Southern Nevada and teach due to your proclamation . . . Without the 95 planned additions to its staff, the district will now have approximately 772 licensed vacancies, 188 of which are special education teachers.

Id.; see also *One State Has Thousands of Vacant Teaching Jobs Ahead of School Year, Officials Say*, ABC NEWS (Aug. 4, 2022), <https://www.msn.com/en-us/money/careersandeducation/one-state-has-thousands-of-vacant-teaching-jobs-ahead-of-school-year-officials-say/ar-AA10jFt8?li=BBnb7Kz>.

232. McVey & Trinidad, *supra* note 90.

233. See TX. COMPREHENSIVE CTR. AM. INSTS. FOR RSCH., *supra* note 52.

234. BARTLETT, *supra* note 58, at 109.

235. *Id.* at 107, 118, 125.

236. *Id.* at 118–20.

A. If You Recruit Them, They Will Come: Current Visa Statuses Used by Teachers

There is no clear and simple visa for teachers, unlike the visas designated for other industries that have historically suffered shortages: the H-2A visa for agriculture workers²³⁷ and the H-1C visa for nurses.²³⁸ As discussed above, the United States has used visas to facilitate international labor recruitment to address existing domestic labor needs.²³⁹ This practice extends as far back as the 1940s with the U.S. Braceros program, which recruited foreign farm workers,²⁴⁰ through the first decade of the 2000s with the labor shortages involving nurses and physical therapists.²⁴¹ Thus, the United States has a strong history of creating visas to address industries where we have a severe shortage of workers. However, it has yet to create a similar visa program for teachers, to the detriment of the American education system. This section of the Article will address the feasibility of creating a specialized visa for America's twenty-first century teacher shortage.

At present, most teachers enter the United States by utilizing the J-1 visa²⁴² or the H-1B visa²⁴³ status. Generally, these visa statuses will

237. *H-2A Temporary Agricultural Workers*, U.S. CITIZEN & IMMIG. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Sept. 15, 2022).

238. See *H-1C Registered Nurse*, *supra* note 208.

239. See discussion *supra* Section III.B; see also, Nicole Jacoby, Note, *America's De Facto Guest Workers: Lessons From Germany's Gastarbeiter For U.S. Immigration Reform*, 27 *FORDHAM INT'L L.J.* 1569, 1571–73 (2004).

240. *1942: Bracero Program*, Resource Guide in *A Latinx Resource Guide: Civil Rights Cases and Events in the United States*, LIBR. CONGR., <https://guides.loc.gov/latinx-civil-rights/bracero-program> (last visited Oct. 15, 2022). “[T]he Mexican Farm Labor Program established the *Bracero Program* in 1942,” a “diplomatic accord[] between Mexico and the United States [which] permitted millions of Mexican men to work legally in the United States on short-term labor contracts,” which ultimately addressed the agricultural labor shortage. *Id.*

241. The H-1C nonimmigrant temporary worker classification was created for foreign nurses and physical therapists coming to the United States temporarily to perform services as a registered nurse in a health professional shortage area as determined by the Department of Labor (DOL). See *H-1C Registered Nurse*, *supra* note 208; see also BARTLETT, *supra* note 58 at 108.

242. *Teacher*, BRIDGEUSA, <https://j1visa.state.gov/programs/teacher> (last visited Oct. 15, 2022); see also discussion *infra* Section V.A.i.

243. See discussion *infra* Section V.A.ii.

provide the teacher with up to five²⁴⁴ or six²⁴⁵ years, respectively, in lawful immigration status to be able to teach in the United States.

i. Jumping Through Hoops: The J-1 Visa

The J-1 visa program is facilitated and managed through the U.S. Department of State.²⁴⁶ The J-1 visa is a cultural exchange visa designed to enable an intercultural exchange.²⁴⁷ Yet, school districts are relying on the J-1 visa program to recruit foreign teachers intended to staff hard to fill positions.²⁴⁸ In essence, the J-1 visa is used to fill teacher labor shortages despite the fact that it is a cultural exchange visa.²⁴⁹

The J-1 visa for teachers program was established to, among other things, foster global understanding through educational and cultural exchanges by providing foreign teachers with an opportunity to teach in an accredited primary or secondary school in the United States.²⁵⁰ Upon the conclusion of their time in the United States, all exchange visitors are expected to return to their home country to share their exchange experiences.²⁵¹ Regardless of its intended purpose, school districts have been using the J-1 visa program to fill vacancies, and they are doing so with extraordinarily experienced and competent teachers.²⁵²

To apply for a J-1 visa to teach in a primary or secondary school, the applicant must: be working as a teacher in their home country or country of legal residence at the time of application, or, if not working as a teacher, otherwise meet the eligibility qualifications.²⁵³ The foreign teacher must (a) have recently (within twelve months of application)

244. 22 C.F.R. § 62.24(j)–(k) (2016).

245. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1).

246. 22 C.F.R. § 62.24.

247. *FACT SHEET: The Exchange Visitor Program and J-1 Visas*, AM. IMMIGR. COUNCIL (June 18, 2020), <https://www.americanimmigrationcouncil.org/research/exchange-visitor-program-and-j-1-visas>.

248. Craft, *supra* note 55.

249. *Id.*

250. *Introducing BridgeUSA: A New Brand Identity for the Exchange Visitor Program*, U.S. DEP'T STATE, <https://j1visa.state.gov/introducing-bridgeusa-a-new-brand-identity-for-the-exchange-visitor-program/> (last visited Oct. 22, 2021) [hereinafter *BridgeUSA*].

251. *Id.*; see also Julie Wooten Greener, *Cortez Mastro calls for J-1 visa changes to keep teachers at CCSD*, LAS VEGAS REV. J. (February 25, 2022), <https://www.reviewjournal.com/news/politics-and-government/nevada/cortez-mastro-calls-for-j-1-visa-changes-to-keep-teachers-at-ccsd-2535419/>.

252. 22 C.F.R. § 62.24(d); see also *BridgeUSA*, *supra* note 250.

253. 22 C.F.R. § 62.24(d).

completed an advanced degree and (b) have two years of full-time teaching experience within the past eight years.²⁵⁴ Additionally, they must have a degree-equivalent to a U.S. bachelor's degree in either education or the academic subject field in which they intend to teach.²⁵⁵ They must also have a minimum of two years (twenty-four months) of teaching or related professional experience and satisfy the standards of the U.S. state in which they will teach.²⁵⁶ Additionally, the J-1 visa applicant must also pass good reputation and character standards and possess sufficient proficiency in the English language.²⁵⁷

Notably, while the minimum qualifications for a U.S. teacher to be hired by a school is a bachelor's degree (in any subject) with only student teaching experience, teachers who enter the United States on a J-1 visa are required to have experience and education far and above what is required of U.S. teachers.²⁵⁸ Thus, the argument that the use of foreign teachers leads to subpar performance ignores the disparity in qualifications between international teachers and their U.S.-trained counterparts.

Teachers who pursue this visa category are eligible to remain in the U.S. for up to three years, with a possibility for an extension for two additional years for a total of five years.²⁵⁹ Theoretically,²⁶⁰ once they are finished participating in the J-1 visa program, teachers are required to depart the United States for two years before beginning a new J-1 visa

254. *Id.*; see also *BridgeUSA*, *supra* note 250.

255. *Id.*

256. *Id.*

257. *Id.*

258. *How to Become a High School Teacher*, *supra* note 210.

259. 22 C.F.R. § 62.24(j)–(k).

260. Ordinarily J-1 visas for teachers can be issued for up to five years (three years with a potential for two additional years). *BridgeUSA*, *supra* note 250. However, should an applicant wish to remain in the United States longer or to switch to another immigration status like H-1B or pursue a Lawful Permanent Residence (green card), the individual may be required to apply for a waiver of the 2-year foreign residency requirement imposed by section 212(e) of the Immigration and Nationality Act. *Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor.html> (last visited Sept. 5, 2022); see also *FACT SHEET: The Exchange Visitor Program and J-1 Visas*, *supra* note 247.

status, or before switching to other types of work visas or permanent residence status.²⁶¹

Over the years, the number of schools using the program has fluctuated. In 2019, “there were 3,454 teachers hired through the J-1 visa.”²⁶² The next year, however, the Trump Administration restricted new visa issuance for J-1 visa holders.²⁶³ As a result, in September 2020, six months after the start of the COVID-19 pandemic, many schools had to readjust their teaching rosters (regardless of whether they were offering virtual or hybrid learning) because there were just 1,620 J-1 visa teachers were in U.S. classrooms.²⁶⁴

Foreign national teachers who have come to the United States bring education and extraordinary teaching experience and, in some cases, are more educated than the average U.S. teacher.²⁶⁵ Media has reported on the many ways highly educated international teachers provide quality education and fill critical needs. For example, there were reports of an Arizona teacher from the Philippines who “holds one bachelor’s degree in education, with a focus on physics, and another in philosophy; he has also studied theology.”²⁶⁶ He has over twenty years of classroom experience.²⁶⁷ Another report highlighted a former teacher and principal

261. Under these laws, J-1 visa holders who meet certain criteria are not able to change status to or receive visas in the following categories until they have returned to their home countries for at least 2 years or until they receive waivers from USCIS: H, L, K, or immigrant lawful permanent resident (LPR) Eligibility for a Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement. 22 C.F.R. § 41.63 (2022); 22 C.F.R. § 40.202 (2022).

262. Critchfield & Donovan, *supra* note 230.

263. Brett Samuels, *Trump Signs Executive Order Suspending Certain Work Visas Through 2020*, HILL (June 22, 2020, 3:32 PM), <https://thehill.com/homenews/administration/503914-trump-signs-executive-order-suspending-certain-work-visas-through/>; *see also* Michael D. Shear & Miriam Jordan, *Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S.*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html>.

264. Critchfield & Donovan, *supra* note 230.

265. *See* Furuya et al., *supra* note 199 (“Foreign-born teachers in the United States tend to be highly educated. Overall, 57 percent of foreign-born teachers have a master’s, professional, or doctoral degree, compared to 49 percent of native-born teachers.”).

266. Goldstein, *supra* note 155.

267. *Id.*; *see also* Yan et al., *supra* note 124 (explaining that the recruitment of foreign teachers is another sign of the difficulty some districts are having staffing classrooms). Despite the fact that Arizona, for example, is one of the lowest paying states for teachers, the lure for the Filipino worker is that the pay is ten times more than what they make doing the same work back home. The school districts, like Arizona, that recruit foreign teachers say that they have few other options, because they can’t find enough American educators willing to work for the pay that’s offered. *Id.*

who spent years as an educator in Kinshasa, Congo, yet returned to the classroom in Portland, Maine, more than 6,000 miles from where he started.²⁶⁸ In Chefnak, Alaska, a rural fishing community in Alaska, a group of Filipino teachers teach critical-need subjects like math and science.²⁶⁹ At least one of the teachers had been a college math professor in one of the provinces in the Philippines.²⁷⁰

Teachers with this level of expertise and experience could, in some geographic locations, command significantly high teacher salaries (although those salaries are usually offered in regions with high costs of living), but they find themselves working in geographic locations who are having a hard time recruiting U.S. teachers.²⁷¹ In some districts, such as in New York, Massachusetts, and California, where the current average salary is more than \$80,000, some teachers earn more than six figures.²⁷² On the contrary in Arizona, the estimated average teacher salary is approximately \$52,157, one of the lowest in the nation,²⁷³ and Maine has an estimated average salary of \$57,052, both are notably

268. Noble Ingram, *This City Is Short of Teachers. It's Tapping Immigrants to Help*, CHRISTIAN SCI. MONITOR (Mar. 12, 2019), <https://www.csmonitor.com/EqualEd/2019/0312/This-city-is-short-of-teachers.-It-s-tapping-immigrants-to-help>.

269. Greg Kim, *Filipino Teachers Fill Staffing Gaps in Lower Kuskokwim Schools*, KTOO (Sept. 16, 2021), <https://www.ktoo.org/2021/09/16/alaska-school-district-hires-filipino-teachers/>.

270. *Id.*

271. *See id.*; *see also* Jenny Brundin, *Colorado's Rural Schools Use International Teachers To Fill The Gaps*, CPR NEWS (Sept. 30, 2015), <https://www.cpr.org/2015/09/30/colorados-rural-schools-use-international-teachers-to-fill-the-gaps/> (discussing how Cabahug, a Philippines native, had a job in Baltimore when he first came to America but was recruited to teach in Bethune, Colorado where almost 25% of its teachers are from outside of the continental United States. Similarly, Jose Rivera-Acosta from Puerto Rico, who formerly taught in San Juan, Puerto Rico was recruited to teach in Bethune); *see also* Yan et al., *supra* note 124 (sharing the stories of Alvarado and Que who have “year of expertise in science” from their previous careers in the Philippines. Alvarado taught for a decade before teaching in Casa Grande, Arizona, which had 7,000 teacher vacancies going into 2019. Que taught for almost 30 years in the Philippines, and now, lives with roommates while teaching biology and biotechnology in Casa Grande); *see also* Goldstein, *supra* note 155 (sharing the story of Donato Soberano, a Philippines native, who is paid around \$40,000 to teach seventh-grade science in the Pendergast Elementary School District in Arizona. He has over 20 years of classroom experience).

272. *Id.*

273. Madeline Will, *Teacher Salaries Are Increasing. See How Your State Compares*, EDUC. WK. (Apr. 26, 2021), <https://www.edweek.org/teaching-learning/teacher-salaries-are-increasing-see-how-your-state-compares/2021/04>.

below the national average of \$65,000.²⁷⁴ But teachers who enter from countries such as the Philippines are not discouraged by the discrepancies in district salaries but are grateful for the opportunity to work (anywhere) in the United States, earning significantly more money than in their own countries, despite the many personal sacrifices they must make to be here.²⁷⁵ In fact, some teachers proclaim, “I only have one reason [to migrate from the Philippines]. That is the salary . . . the salary here is much, much better compared to the salary in the Philippines.”²⁷⁶

Human resources recruiters and potential principals of foreign national teachers are clear regarding their intentions. ““Our mentality when we’re there is hiring the best for all our kids.””²⁷⁷ Pursuant to the J-1 visa eligibility requirements, the foreign teachers must “have a master’s degree and at least three years of teaching experience . . . —if you’re a special education teacher trained here in the United States, you don’t have to have that.”²⁷⁸ And when districts can use the foreign national teachers as resources to staff their schools, at least some of the void can be filled with super qualified applicants. Were these districts and schools limited only to U.S. worker pools, ensuring this caliber of candidate would be otherwise impossible as they may have to rely on

274. *Id.*

275. Kim, *supra* note 269. Foreign teachers often go into debt paying a recruitment company, airfare to the United States as well as rent for a few months in their host city. Oftentimes the teacher will leave their families back in their countries but will share an apartment with several other similarly situated people. Miranda Cyr, *Lawsuit: New Mexico Attorney General Accuses Recruitment Agency of Exploiting Foreigner Teachers*, LAS CRUCES SUN NEWS (Jan. 31, 2021), <https://www.lcsun-news.com/story/news/education/2021/01/31/filipino-teachers-speak-about-total-teaching-solutions-international-lawsuit/4231232001/>.

276. BARTLETT, *supra* note 58, at 46. Teachers migrating from the Philippines can increase their annual income from anywhere from \$2,000 to \$4,000 in the Philippines a year to over \$50,000–\$60,000, depending on the U.S. school system. As a result, their spouses, who oftentimes remain in the Philippines with their children, may quit their jobs to provide childcare while the Filipino teacher living in the U.S. sends money home to pay for private school education and household expenses.

277. Critchfield & Donovan, *supra* note 230.

278. *Id.* Three years of experience and a master’s degree is required in instances where the foreign teacher is not currently teaching. *J-1 Teacher Exchange*, TEACHERS COUNCIL, <https://teacherscouncil.com/j1/> (last visited Aug. 2, 2022). If they are currently teaching, only two years of experience is required along with a bachelor’s degree in the field. *Id.*

alternative licensees or long-term substitutes.²⁷⁹ To wit, school districts are now finding themselves recruiting outside of the United States in order to ensure that they are presented with teacher applicants who have high academic and professional qualifications.²⁸⁰

ii. *H-1B Visas*

School districts have also relied upon the H-1B visa to secure foreign national teachers to fill their empty classrooms.²⁸¹ The H-1B visa program allows employers in the United States to directly employ, albeit temporarily in three-year increments for up to a total of six years, foreign workers in occupations that require the “[t]heoretical and practical application of a body of highly specialized knowledge” and thus it requires a “bachelor’s degree or higher in the specific specialty,” or its equivalent.²⁸² “H-1B specialty occupations²⁸³ may include fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.”²⁸⁴ To that end, educators who apply for an H-1B visa to teach in the United States must have earned a minimum of a bachelor's degree or higher, or its equivalent to a U.S.

279. Neal Morton, *More than a warm body’: Schools Try Long-Term Solutions to Substitute Teacher Shortage*, HECHINGER REP. (April 26, 2022), <https://hechingerreport.org/more-than-a-warm-body-schools-try-long-term-solutions-to-substitute-teacher-shortage/>.

280. “The Philippines and the United States have similar school calendars, curriculums and grading systems, which is why U.S. schools have hired more than 1,000 Filipino teachers in the past few years. Most Filipino teachers have master’s degrees or doctorates.” Eli Saslow, *An American Education*, WASH. POST (Oct. 2, 2022), <https://www.washingtonpost.com/nation/2022/10/02/teacher-shortage-bullhead-city-arizona/>.

281. See, e.g., *2019 H1B Visa Reports: Elementary and Secondary Schools*, MYVISAJOBS.COM, <https://www.myvisajobs.com/Elementary-and-Secondary-Schools-6111-2019IN.htm> (last visited Aug. 2, 2022).

282. 8 U.S.C. § 1184(g)(4) (2020); *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 21, 2022), <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations>. See also *The H-1B Program, Wage and Hour Division*, U.S. DEP’T. LAB., <https://www.dol.gov/agencies/whd/immigration/h1b> (last visited Oct. 14, 2022).

283. 8 U.S.C.A. § 118(i) (2020).

284. *H-1B Cap Season*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 23, 2022), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season>.

degree if earned abroad, in a field related to the area in which they plan to teach.²⁸⁵

The H-1B differs from the J-1 visa in that the J-1 visa is a cultural exchange program that is designed “to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges.”²⁸⁶ Because of the variety of employment opportunities available for J-1 visa holders, ranging from au pairs and camp counselors to researcher scholars and professors, the eligibility and visa duration varies for each position.²⁸⁷ The actual sponsor for J-1 visa holders are not necessarily the employers themselves, but can be a third-party organization who has been designated by the U.S. Department of State.²⁸⁸

On the other hand, H-1B visas are specifically for beneficiaries who are applying for a specific specialty occupation position,²⁸⁹ and beneficiaries are directly sponsored by the petitioning employer rather than being sponsored by a third-party employer who is regulated by the U.S. Department of State.²⁹⁰

In addition to meeting the requirements for both visas, regarding teachers, all states require teachers who plan to teach in public schools

285. See *H-1B Visa*, TEACHERS COUNCIL, <https://teacherscouncil.com/visaservices/h1b-visa/> (last visited Aug. 2, 2022).

286. 22 C.F.R. § 62.1(a) (2021).

287. 22 C.F.R. § 62.4.

288. 22 C.F.R. § 61.1(b). The Secretary of State of the Department of State facilitates activities specified in the Act, in part, by designating public and private entities to act as sponsors of the Exchange Visitor Program. Sponsors may act independently or with the assistance of third parties. *Designated Sponsor Organizations*, BRIDGEUSA <https://j1visa.state.gov/participants/how-to-apply/sponsor-search/?program=Teacher> (listing the designated sponsor organizations) (last visited Jan. 5, 2022).

289. *H-1B Specialty Occupations*, *supra* note 282. The Author notes that given that the J-1 visa for teachers requires at least a bachelor’s degree and that an H-1B visa also requires at least a bachelor’s degree, it may appear, on face value that there is little difference between the two visa categories with the exception of the duration of stay: five versus six years. There are several other differences, such as annual financial obligations as well as the third-party sponsor involved in the J-1 visa process or the specialty occupation requirement for the H-1B that highlights the significant differences to participants in each of the program. For a comparative review of each program, see TEACHER COUNCIL, <https://teacherscouncil.com/> (last visited Aug. 2, 2022).

290. Raymond G. Lahoud, *New Jersey School District Votes to Utilize H-1B Program for Teaching Vacancies*, NAT’L L. REV. (Mar. 3, 2022), <https://www.natlawreview.com/article/new-jersey-school-district-votes-to-utilize-h-1b-program-teaching-vacancies> (“The H-1B is a temporary, nonimmigrant visa category that enables employers to petition on behalf of highly educated foreign professionals who work in specialty occupations requiring at least a bachelor’s degree.”).

to be licensed or certified in the specific grade level or subject matter that they will teach²⁹¹ and obtaining this license is often required before filing for the H-1B since the employer is the actual petitioning sponsor.²⁹² Those who teach in private or charter schools, however, may not be required to be licensed per their state's guidelines. Thus, private or charter schools can avoid the challenge of licensing altogether, whereas public schools must go through this process.²⁹³

iii. Commonly Used Visas are Not Making the Grade

The most commonly used visas serve at best as temporary fixes with no incentive to create permanent employment (and thus further contributing to high teacher turnover rates within schools).²⁹⁴

291. *How to Become a High School Teacher*, *supra* note 210.

292. *H-1B Visa for Teachers*, VISANATION, <https://www.immi-usa.com/h1b-visa/h1b-visa-for-teachers/> (last visited Feb. 10, 2023) (“[I]n order to qualify [for the H-1B visa] the teacher must . . . Possess any required licenses or permissions to work within that educational sector. If the foreign worker has not procured the license prior to arriving in the country, they may have the ability to demonstrate that they meet all the conditions for licensing.”). There are some instances where the state’s law will allow for exceptions to the licensure requirement specifically for foreign national teachers. See *The Teacher Certification Reciprocity Guide*, TEACHER CERTIFICATION DEGREES, <https://www.teachercertificationdegrees.com/reciprocity/> (last visited Feb. 10, 2023) (“Select [U.S.] jurisdictions do offer teaching certification reciprocity for foreign teaching licenses. The New York State Department of Education, for example, recognizes specific teaching credentials from Australia, Germany, the United Kingdom, and other countries. In addition, as certain Canadian provinces are members of the NASDTEC Interstate Agreement, teachers certified in Canada may receive teaching certificate reciprocity from participating [U.S.] states.”).

293. See Elizabeth Huebeck, *School Districts Look Overseas to Fill Teacher Shortages*, EDUC. WK. (Oct. 21, 2022), <https://www.edweek.org/leadership/school-districts-look-overseas-to-fill-teacher-shortages/2022/10>. Every state education licensing agency is different in how they issue (or whether they issue) provisional licenses for specifically foreign national teachers or even for new teacher hires at all. See *The Teacher Certification Reciprocity Guide*, *supra* note 292 (“Teacher certification for foreign-educated teachers and foreign-certified teachers varies based on state guidelines. Many states will issue provisional or temporary teaching certificates to foreign teachers who can demonstrate that their background and experience meet the state’s standards for teacher reciprocity.”).

294. BARTLETT, *supra* note 58, at 16 (“Documenting the distribution of OTT’s requires accounting for teachers working on both H1B labor shortage visas and J-1 cultural exchange visas- neither of which is readily documented, though for different reasons”); see also Mario Koran, *Anxiety Looms for Thousands of Migrant Teachers as Trump Administration Pushes ‘Zero Tolerance’ Enforcement Program*, THE74 (June 26, 2018), <https://www.the74million.org/article/anxiety-looms-for-thousands-of-migrant-teachers-as->

Furthermore, each of these visa programs are time-limited: The J-1 visa has a maximum duration of five years while the H-1B has a maximum validity of six years.²⁹⁵

Furthermore, the recruitment of those foreign nationals who pursue J-1 visas makes them particularly vulnerable. J-1 visas are actually sponsored by third party organizations which are vetted and regulated by the U.S. Department of State.²⁹⁶ However, they are often solicited and recruited by unregulated recruitment agencies, which are not necessarily bound by prevailing wage requirements, among other things.²⁹⁷ As a result, some J-1 visa holders may be subject to exploitation by abusive agencies and subject to high-interest debts for recruitment fees before they even begin working in the United States.²⁹⁸ Because the J-1 program appears to be a frequently used mechanism to enter into the United States due to the many recruitment agencies offering a variety of opportunities, the potential for exploitation is far greater. But the more connected the foreign national is with his U.S. (and school) community, the less susceptible he is to being exploited.²⁹⁹

“Local reception influences worker success. Workers who are framed by the local labor community as essential and important to the success of the community and perhaps even the nation are more likely to be well received.”³⁰⁰ A good reception helps ensure successful labor migration, while a poor reception can negate the chances of even the

trump-administration-pushes-zero-tolerance-enforcement-of-visa-program/ (“High teacher turnover leads to lower levels of student achievement. If we continue viewing these teachers as short-term stopgaps and allow them to turn over at high rates, we are going to undermine the opportunity for low-income students with the highest needs.”); Mary Hendrie, *Q&A: Lora Bartlett on Migrant Teachers: How American Schools Import Labor*, EDUC. WK. (Mar. 24, 2014), <https://www.edweek.org/leadership/q-a-lora-bartlett-on-migrant-teachers-how-american-schools-import-labor/2014/03> (“[The use of] [o]verseas trained migrant teachers . . . [is a] short-term, high turnover labor market solution[] that place transient teachers in high poverty low achieving schools.”, emphasizing the high turnover issue); *see also* Yan et al., *supra* note 124 (A mother whose children attend Casa Grande said, “I think we need to change [that the Filipino teachers have to leave in two years] . . . [b]ecause if you don’t change that . . . we’re going to be doomed with education here in Arizona.”).

295. *Cf. J-1 Teacher Exchange, supra* note 278, with *H-1B Visa, supra* note 281.

296. *J-1 Teacher Exchange, supra* note 278.

297. *2021 Fact Sheet: Use and Abuse of the J-1 Exchange Visitor Teacher Program*, DEP’T FOR PROF. EMPS., (Mar. 24, 2021), https://www.dpeaflcio.org/factsheets/use-and-abuse-of-the-j-1-exchange-visitor-teacher-program#_edn7.

298. *Id.*

299. BARTLETT, *supra* note 58, at 108.

300. *Id.* at 107.

most determined individual.³⁰¹ Thus, if the federal government promotes and supports the value of foreign national teachers to help staff hard to fill teacher vacancies,³⁰² then there is a greater likelihood of success for the teacher and for the greater school community.

On the other hand, schools that treat foreign national teachers as transients have “higher teacher turnover at the schools and are at greater risk of low student achievement.”³⁰³ “Currently, most U.S. schools drawing on the overseas market are organized for high turnover, short-term, subject specialist teachers. Assuming and getting transience, the schools minimize investment in teachers and undervalue the importance of cultural adjustment, community connection, student relationships, and induction.”³⁰⁴

Temporary status turns teachers into transient visitors—here today and gone tomorrow. Thus, many foreign teachers travel far to stay only a short period of time and then leave.³⁰⁵ This inhibits their ability to connect with their students, colleagues, communities, or new country, which reduces their effectiveness and their sponsoring school’s investment in their teaching, which then thwarts teacher retention.³⁰⁶ Therefore temporary status kicks the can down the road in building a stable teaching staff.³⁰⁷

“Schools that frame and treat transnational teachers as individuals who can and will stay as part of the teaching faculty, have lower teacher turnover at the school level and have increased student achievement patterns.”³⁰⁸ To prevent the constant turnover, and thus prevent recreating the wheel at the expiration of each visa term, the United States needs a visa that goes beyond providing a temporary status, but one that encourages schools and foreign teachers alike to feel mutually invested.

301. *Id.*

302. *See id.* This federal support could be conveyed through federal grant conditions geared toward funding visa-based teacher recruitment. *See, e.g., Grants*, U.S. DEP’T EDUC. (Aug. 1, 2022), <https://www2.ed.gov/fund/grants-apply.html?src=ft>.

303. BARTLETT, *supra* note 58, at 118.

304. *Id.* at 121.

305. *Id.* at 118.

306. *Id.* at 121.

307. *Id.*

308. *Id.* at 118.

VI. A NEW VISA OPTION

Despite the American Families Plan, part of an important long-term strategy, U.S. classrooms are presently still left with a considerable number of vacancies in classrooms. In an effort to address one of the many causes of the teacher shortage, unfilled classrooms, tapping foreign labor in order to provide additional qualified teachers to schools will reduce the number of overcrowded classrooms. Providing districts with the resources to recruit internationally with trained and educated teachers is an underutilized resource available to meet immediate needs in the United States.

By introducing a new, teacher-specific visa program option, which acknowledges and supports those districts in need, will provide access to resources for districts to fill hard-to-staff positions or positions in high-need urban or rural areas.³⁰⁹ Augmenting the pipeline of teachers with visa-based teachers would enable financially disadvantaged districts to immediately meet their staffing needs.³¹⁰ While Congress enjoys the power of the purse, there may be some instances where grant-making federal agencies can place grant conditions geared toward foreign teacher recruitment.³¹¹

Arguably, using federal funds to support the recruitment of foreign teachers may also present a policy shift; however, it is not so far-fetched. The J-1 visa program is one that is already managed and regulated by the U.S. Department of State and provides opportunities for the exchange of teachers, among other occupations.³¹² The H-1B visa is another common avenue, but districts must bear substantial costs³¹³ payable to the U.S. Department of Homeland Security while also

309. See, e.g., *id.* Notably, Professor Lora Bartlett briefly raised the idea of a teacher-specific visa in her book *Migrant Teachers. Id.* Thus, the conversation around creating a new visa to alleviate the teaching shortage is not entirely new. However, as a practitioner, the Author writes this section to dive further into this idea by providing more context regarding options for those teachers looking for either temporary work or those migrant teachers who are looking for a more long-term option to permanently immigrate to the United States.

310. See discussion *supra* Section II.D.

311. See, e.g., *Grants, supra* note 302.

312. 22 C.F.R. § 62.1 (2015).

313. 8 C.F.R. § 106.2(a)(3)(i) (2021).

possibly competing for the one of the coveted 65,000 new H-1B visas issued each year, unless they qualify for one of the few exceptions.³¹⁴

While continuing to emphasize strengthening the domestic teaching shortage by investing in grow your own programs and providing financial incentives to college education programs with hopes of improving working conditions, the U.S. can continue to tap additional resources that can address our constantly growing vacancies to meet our acute needs.

A. Case Study: The Nursing Visa Solution

“The H-1C nonimmigrant category was introduced in 1999 specifically to address the shortage of nurses in the United States.”³¹⁵ As a part of the visa process, prior to filing a petition with United States Citizenship and Immigration Services (USCIS) for an H-1C visa, the Department of Labor provides an attestation “to petitioning hospitals certifying that they meet the qualifications as required by regulation,” which, among other qualifications, requires hospitals to be in a “health professional shortage area.”³¹⁶ Unfortunately, the H-1C for nurses expired on December 20, 2009, and while it may need to be resumed for the nursing industry, which is also finding itself in a crisis, especially following the pandemic, a similar category or a combination of the two

314. In many instances, foreign recruitment may be limited due to the 65,000 numerical limitation imposed on new H-1B visas issued each year. *H-1B Specialty Occupations*, *supra* note 280. However, in many instances, public school districts are affiliated with an institute of higher education pursuant to 8 C.F.R. § 214.2(h)(19)(iii)(B) and are therefore not subject to the H-1B numerical limitation as defined in the Immigration and Nationality Act (INA) § 214(g)(1). This Author/Practitioner has personally represented many school districts, both public and charter, who are able to recruit teachers year around because of their relationship with local colleges and universities, which allows them to be exempt from the numerical limitation imposed by the H-1B. Modification of Registration Requirements for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1676-01, 1684, n. 34 (Jan. 8, 2021) (to be codified at 8 C.F.R. pt. 214) (showing “the following breakdown for cap-exempt H-1B approvals: 20,097 for institution of higher education; 11,847 for affiliated or related non-profit entities; 5,131 for non-profit research organizations or government research organization; and 3,998 for beneficiaries employed at a qualifying cap exempt entity”).

315. *H-1C Registered Nurse*, *supra* note 208; *see* 8 C.F.R. § 214.2(h)(ii)(A) (202).

316. *Id.*

essential worker industries³¹⁷ needs to be created to include the K–12 education industry.

Just as the nurses have experienced, and have continued to experience, a nursing shortage, the U.S. Congress can create a visa category for teachers like that of the H-1C for registered nurses working in a health professional shortage area as determined by the Department of Labor.³¹⁸ “Nursing and teaching are professional labor categories that require advanced education and skills [and an individual's] visa approval [was] dependent on the individual demonstrating that they [had] the education and experience required to merit admission.”³¹⁹ Unlike the H-1C, which had a maximum validity of three years,³²⁰ with no extensions beyond that time period, because teaching requires an investment in the local community, teacher applicants should not be limited to a specific number of years of visa validity.

B. A Visa with Dual Intent: A Nonimmigrant Visa with Indefinite Renewals (If visas for temporary work visas for Australian nationals can have indefinite renewals, so too can the teachers)

The J-1 and the H-1B visas are often subject to criticism regarding how long the beneficiary may remain in visa status, as individuals in those statuses have a maximum period of staying for five and six years, respectively.³²¹ Therefore, Congress can create a visa category exclusively for teachers which includes similar unlimited nonimmigrant (temporary) visa renewal provisions as the E-3 visa for Australian nationals.³²² The E category of visas is reserved for immigrants who “enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States” and in this case, Australia, foreign nationals of a “specialty

317. While this Article argues for a single specialized visa designation for teachers, another possibility could be for a special visa category specifically for “essential workers” which could also include nurses and teachers. For a discussion about the parallel needs for both nurses and teachers, see discussion *supra* Sections IV and V.A.

318. 8 C.F.R. § 214.2(h)(ii)(A).

319. BARTLETT, *supra* note 58, at 108.

320. § 214.2(h)(15)(ii)(A).

321. Greener, *supra* note 251 (regarding recent challenges to the time limitation imposed by J-1 visas).

322. *E-3 Specialty Occupation Workers from Australia*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-3-specialty-occupation-workers-from-australia>. (last visited Oct. 24, 2021).

occupation” and the labor attestation process used for H-1B visas.³²³ Because teachers qualify as a specialty occupation used for the H-1B visa, a specific visa category specially designated to address the teacher shortage, allowing for infinite renewals like that of the E-3 visa, will allow qualified applicants to indefinitely address the shortage while not exhausting the H-1B numbers,³²⁴ which can be used for other industries.

C. Why Teaching-Specific Visas Work

By recognizing that there are a variety of workers who come to the United States to teach, offering a visa that provides for the long-term immigrant seeking to settle in while also providing for the shorter term worker working during an extended holiday, there needs to be a visa that appeals to the distinct types of migrant worker. For foreign national teachers from other industrialized countries, such as Spain and France, migration is predominantly an opportunity for travel, adventure, and cultural exchange, and once they return home, they have jobs that pay adequately.³²⁵ For foreign national “teachers from developing countries, migration is an opportunity for gains in economic and social status.”³²⁶ “These teachers embrace their short-term visas and intend to go home after enjoying an extended working holiday.”³²⁷

Like nurses, a vast majority of teachers are women, who are searching for “better pay and working conditions, career mobility, professional development, a better quality of life, personal safety”³²⁸ For other workers, teaching in the United States serves “as an opportunity to move away from poverty and deprivation.”³²⁹ In pursuit of better opportunities, the efforts can result in “lower status, difficult working conditions and economic hardship” in the new country, in this

323. INA § 101(a)(15)(E); *see also E-3 Specialty Occupation Workers from Australia*, *supra* note 322.

324. *H-1B Specialty Occupations*, *supra* note 282 (select “H-1B Cap”); *see also E-3 Specialty Occupation Workers from Australia*, *supra* note 322.

325. BARTLETT, *supra* note 58, at 118.

326. *Id.*

327. *Id.*

328. Mireille Kingma, *Nurses on the Move: Historical Perspective and Current Issues*, OJIN: ONLINE J. ISSUES IN NURSING (May 31, 2008), <https://ojin.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/vol132008/No2May08/NursesontheMove.html>.

329. BARTLETT, *supra* note 58, at 118.

case, the United States, and in some cases, even exploitation.³³⁰ “Many migrant teachers aspire to stay in the new country and, consequently, they are willing to endure poor working conditions and treatment to retain their overseas posts and visas.”³³¹

Therefore, in recognizing two distinct types of migrant teachers, a new visa category³³² designated exclusively for teachers can include the nonimmigrant requirements of a specialty occupation visa.³³³ However, this “new” visa can have important components that will address the needs of everyone who may utilize it. Specifically, it can allow for generally indefinite renewal options for our *working holiday/adventure seeking* teachers who are eager to share their culture yet eventually return home (and perhaps return again).³³⁴ But then it can also provide a path to a green card or an automatic path to citizenship for those teachers who serve in hard to fill areas or in geographically underserved communities.³³⁵

In keeping with the U.S.’s attempt to *grow your own*, scholars have similarly proposed paths to a green card for those foreign national

330. *Id.*; see also Eunice Barbara C. Novio, *Award Winning Filipino Teacher Nearly Gave Up American Dream*, INQUIRER.NET (May 16, 2017), <https://usa.inquirer.net/3713/award-winning-filipino-teacher-nearly-gave-american-dream>.

331. BARTLETT, *supra* note 58.

332. This Article aims to only raise the idea of a new visa specifically for teachers, providing both immigrant and nonimmigrant options with a direct pathway to permanent residence and even US citizenship. It also offers the novel aspect of providing nonimmigrant teachers with the ability to indefinitely renew their visas, an option that is offered Australian nationals, for example and their E-3 visa. See discussion *supra* Section VI.B. Another conversation may follow to further explore the details of a new visa option for teachers and to further explore the practical details of the teacher specific visa.

333. 8 C.F.R. § 214.2(h)(4)(i)(A)(1).

334. BARTLETT, *supra* note 58, at 118.

335. LaBruce, *supra* note 134, at 1096–97 (proposing a new statute allocating “[a]n additional 40,000 H-1B visas to nonimmigrant foreign students currently within the United States institution on F-1 visas[, or student visas,] who have (1) either (a) earned a bachelor’s or higher degree from a U.S. institution of higher education, or (b) are scheduled to earn a bachelor’s or higher degree from a U.S. institution of higher education . . . (2) have received an offer of full-time employment to teach in a school that (a) has a predominantly minority student body[.]” and among other things, has a high academic need and a demonstrated teacher shortage. The foreign teacher must agree to remain employed by this school as a teacher for six years and as a result of this commitment, the H-1B would automatically convert to lawful permanent residence (green card). This article characterizes this proposition as “the ‘golden doors’ and the chance for permanent resident status or even citizenship, therefore, can work as a lure to entice highly educated immigrant students to remain in the U.S. and work in areas where there is a critical need: low income, high-minority public schools[.]” thereby addressing another cause of the teacher shortage: low enrollment in teacher preparation programs.).

students who are attending U.S. colleges.³³⁶ Foreign national students could be encouraged with grants and scholarships (or loan forgiveness) if they pursue teacher education programs and commit to teaching in high need subjects and geographically underserved areas for a period of at least ten years. This proposal addresses issues raised by Biden's American Families Act in two ways: (1) it addresses the teacher shortages by providing another pipeline of teachers, and by encouraging foreign teachers to teach in the United States, it (2) potentially strengthens pipelines for teachers of color.³³⁷ Consequently, it encourages some of brightest minds who come to the United States to live "the American Dream" by routing them into a profession that can benefit from their experience and subject matter expertise. And by capitalizing on foreign college students who will have already culturally assimilated into U.S. culture upon graduation from college, those teachers will be a step ahead of those foreign-educated teachers who otherwise enter the U.S. with the primary goal of teaching but with no prior opportunity to adjust to our school culture. Upon the conclusion of teaching for the minimum of ten years, the foreign national can then be immediately eligible (without having to follow the labor certification process that is normally required for the employment-based green card)³³⁸ for lawful permanent residency, akin to service to the U.S. in

336. *Id.*

337. Press Release, White House Briefing Room, *supra* note 179.

338. The labor certification process that is normally required for the employment-based green card is described as follows:

Current labor certification requirements prevent U.S. companies from hiring and sponsoring a foreign worker if there is [a willing,] *minimally* qualified [and able] U.S. worker for the position, regardless of whether the U.S. candidate is less qualified or less suited for the position than the foreign worker. The U.S. Department of Labor created this condition within the labor certification process to protect U.S. workers by ensuring that hiring foreign workers does not adversely affect employment rates, nor take jobs from qualified U.S. workers. However, because this condition does not require the U.S. company to actually hire the U.S. worker in place of the foreign worker, it does not necessarily protect the interests of U.S. workers.

[These limitations are] significant because employers are often seeking to sponsor foreign workers who already live and work in the United

exchange for a green card.³³⁹ Either option provides opportunities to meet teachers at their true intentions rather than pretend that ulterior motives do not exist.

VII. CONCLUSION

The U.S.'s current domestic policy proposals provide an opportunity for the United States to take a long-term generational approach to mitigating current shortages. However, while matters are debated in Congress, we can include resources to assist districts with recruiting foreign national teachers to staff hard-to-fill positions, as well as meet staffing needs in geographically underserved communities. While it appears we are outsourcing the teaching of our children to non-Americans, we have quite a bit to gain while we work to *grow our own*, namely providing qualified and licensed teachers in classrooms. Ultimately, preventing and solving teacher shortages so that all children receive high-quality instruction is essential in a twenty-first century economy for the success of individuals, as well as for society.

The new visa category proposed above serves two purposes: to address the teacher shortage by providing a specialized visa option for those teachers who intend to only come temporarily to the U.S. to share their culture and experience and to appeal to those teachers who are looking toward more permanent migration opportunities. By providing an option for a green card or citizenship, the U.S. is demonstrating a

States. For example, a company may already have an employment relationship with a foreign worker who entered as a temporary worker with an H-1B visa, which is valid for a maximum of six years. Having trained and developed a relationship with this individual, the company may seek to sponsor her for permanent residency. If the labor certification is denied, the company, preferring to hire the foreign worker, can simply not fill the position: "PERM labor certification operates outside of the realm of typical real world recruitment efforts. Whereas employers in the real world normally look to hire the most qualified applicant, PERM requires employers to only assess whether a worker is minimally qualified for the position, regardless of whether they're a good fit for the job."

Christina Fulponi, Note, *No Help Wanted: Fixing the Labor Certification Paradox and Other Barriers to an Effective Employment Immigration System*, 82 U. PITT. L. REV. 459, 476–77 (2020) (quoting Cyrus Mehta & Sophia Genovese, *Labor Certification: Mustn't the US Job Applicant Be Able to Perform the Job Even If Qualified on Paper?*, INSIGHTFUL IMMIGR. BLOG (Nov. 6, 2018), <http://blog.cyrusmehta.com/2018/11/labor-certification-mustnt-the-us-job-applicant-be-able-to-perform-the-job-even-if-qualified-on-paper.html>).

339. See LaBruce, *supra* note 134.

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commitment to invest into the foreign national teacher, thereby encouraging the school community to do the same. In turn, the foreign nationals will be more invested in the community they serve as we work to build a strong, sustainable teaching force.