UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,	)	
Plaintiff,	)	Civil Action No. 16-1170-RBW
v.	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
Defendants.		

DEFENDANTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS

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INTRODUCTION

One thing is clear from Washington Alliance of Technology Workers (Washtech)'s opposition to the motion to dismiss: Washtech disagrees on policy grounds with the Executive's exercise of its longstanding authority under the immigration laws to set the conditions for all nonimmigrant visas, including student visas issued pursuant to 8 U.S.C. § 1101(a)(15)(F)(i). 8 U.S.C. §§ 1103, 1184, to create rules permitting an optional training program (OPT), last amended in 1992, *see Pre-Completion Interval Training; F-1 Student Work Authorization*, 57 Fed. Reg. 31,954 (July 20, 1992) (OPT Rule or 1992 Rule), and a 2016 Rule that allows an additional 24-month OPT period for a limited class of students with qualifying science, technology, engineering, or mathematics (STEM) degrees. *See Pre-Completion Interval Training; F-1 Student Work Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 Fed. Reg. 13040 (March 11, 2016) (STEM OPT Rule or 2016 Rule). Washtech's attempt to air this generalized policy disagreement in Federal court has been rejected by every Court to address some version of the merits of their claims. *See Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, 244 (3d Cir. 2009); *Wash. Alliance of Tech. Workers v. DHS* (Washtech), 2015 U.S. Dist. LEXIS 105602, *7-54 (Aug. 12, 2015, D.D.C.); *Programmers Guild v. Chertoff*, No. 08-2666 (Oct. 31, 2008, D.N.J.) (attached as Ex. 1).

Now, seeking yet another bite at this policy apple, Washtech lodges the same old thrice-rejected, meritless arguments in its APA challenge to the 1992 and 2016 Rules. But before the Court may reach the merits of any of these recycled claims, Plaintiff must satisfy its burden of demonstrating actual or imminent concrete and *particularized* injury that is in fact *caused* by the 2016 or 1992 Rules and is *redressable* by a decision in their favor. They fail to do so. Instead they copy and paste their allegations and claims of injury lodged against the now-defunct 2008 STEM

OPT Rule, listing a litany of alleged harms dated 2008-2016 which are explicitly tied to the 2008 Rule and predate the effective date of the 2016 Rule. By definition these cookie-cutter allegations cannot form the basis for Article III standing to challenge a Rule that did not exist at the time those allegations were lodged. This fundamental defect forecloses *every* theory of injury invoked. Washtech simply cannot demonstrate actual or imminent injury as its allegations are unrelated to, and not caused by, the actual Rule being challenged. Absent such allegations, Plaintiff's copycat lawsuit is nothing more than generalized policy grievances devoid of any cognizable allegation as to how the 2016 or 1992 Rules affect Plaintiff's members in any "personal and individual way" that is any different than how they affect the "public at large." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

Compounding that defect is the fact that Plaintiff's 1992 Rule challenge is time-barred and that the 2016 Rule challenge is not ripe for review given the absence of a single allegation concerning any action taken by Plaintiff's three affiants, Sawade, Blatt, and Smith, in response to the 2016 Rule. And even assuming justiciability, as in *Programmers*, Plaintiff fails to allege a cause of action within 8 U.S.C. § 1101(a)(15)(F)(i)'s zone of interests. Unlike other specific, limited provisions cited by Plaintiff which govern other nonimmigrant visas not at issue here, section 1101(a)(15)(F)(i) does not contain any provision designed to protect American labor. Indeed, Congress has time and again revisited the F-1 provision and taken testimony concerning its effects, and has never once amended the provision to include protections for American labor.

Three identical cases is enough and the Complaint should be dismissed with prejudice.

ARGUMENT

I. Plaintiff fails to allege redressable injury caused by the 2016 Rule under any theory

a. Plaintiff fails to demonstrate Competitor Standing

Plaintiff correctly identifies the D.C. Circuit's "competitor standing" case law as dictating

whether their claims are justiciable. ECF 20 at 14-17, 22-24. However, in Plaintiff's view of this doctrine, all Plaintiff must do to allege standing is declare, without a single allegation in support, that Government action allows increased competition in Plaintiff's relevant market. ECF 18 at 14. In Plaintiff's telling, it is "basic economic logic" that the hypothetical *future* presence of STEM OPT students in *entry-level* STEM jobs as part of pedagogical training connected to their study at a U.S. university will cause increased competition to STEM workers like Sawade, Blatt, and Smith who have been in the STEM industry for approximately 30 years. This claim is contrary to fact, law, and common sense, and requires the Court to assume a chain of contingencies connecting the 2016 Rule to Plaintiff that cannot provide Article III standing. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015).

Despite clearly being aware of the D.C. Circuit's *Mendoza* decision, nowhere in its brief does Plaintiff cite the actual standard that decision establishes: Plaintiff must "demonstrate that [Sawade, Blatt and Smith are] *direct* and *current* competitor[s]" with beneficiaries of the 2016 Rule, "whose bottom line may be adversely affected by the challenged government action," *Mendoza*, 754 F.3d at 1013 (emphasis added). Moreover, the competitive injury must be "certainly impending," *Nat'l Treas. Employ. Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996), which requires more than "imagin[ing] circumstances [where] it could be affected by the agency's action." *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). "Claiming that regulatory action creates a skewed playing field," is insufficient; such claims are "bare assertion[s] of competition." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 (D.C. Cir. 2006). Instead, the alleged competition must "almost certainly" occur. *Arpaio*, 797 F.3d at 23. Most critically, where, as here, standing depends "on the independent actions of third parties," *i.e.*, employers and F-1 nonimmigrants, Plaintiff may not ask the court to "acknowledge a chain of causation firmly rooted in the basic law of economics," but must instead demonstrate such causation. *See New World*

Radio, 294 F.3d at 172. Indeed, "[b]ecause of the generally contingent nature of predictions of future third-party action, we have remained sparing in crediting claims of anticipated injury by market actors and other parties alike." *Arpaio*, 797 F.3d at 23. Baldly alleging that "more [non]immigrants mean more" competition fails that test. *See id.*

But simply alleging the presence of nonimmigrant students must mean increased competition for the entire STEM field is what Plaintiff does. Plaintiff alleges that: (1) its three members, Sawade, Blatt, and Smith are "computer programmer[s,]" or a "computer systems and networking administrator," with degrees in "computer science," "information technology," or "business administration," *id.*, ¶¶ 106, 137, 184-85; (2) these individuals, between 2008-2016, have applied for a number of jobs in the STEM field they did not receive, with each last seeking employment, respectively, in June, 2014, March, 2016, and May, 2015, 23 months, 2 months, and 12 months prior to this lawsuit, *id.*, ¶¶ 137-219; and (3) during that same time span, STEM employers, sometimes through headhunters, solicited STEM OPT students in advertisements, along with U.S. citizens, and filed STEM OPT extensions on behalf of F-1 nonimmigrants.[1] *Id.*, ¶¶ 101-02, 10-11, 113, 115, 117-19, 120-22, 124, 126, 128-31, 139-40, 142-43, 145-47, 149-50, 152-53, 155, 157-58, 189-90, 192-93, 195, 197-98, 200-01, 204, 206-07, 210, 213, 215.

What is apparent from this list of allegations is that they are *backward* looking, focusing exclusively on events that precede the existence of the 2016 Rule, that arise entirely under the now-defunct 2008 regime, and that focus specifically on that rule rather than the 2016 Rule. What is notably absent is any allegation whatsoever concerning actual, ongoing, or imminent harm flowing

[1] Plaintiff also claims the Rule "allows all alien graduates to work in F-1 student visa status from the time an H-1B visa petition is made on their behalf until a decision is made on the petition." ECF 20 at 5. That is facially incorrect. The Rule is far more limited, extending so-called "cap gap" eligibility only to students who are beneficiaries of a timely-filed change of status request. The Cap-Gap extension only temporarily extends the OPT period until the beginning of the new fiscal year (i.e., October 1 of the following FY). 81 Fed. Reg. at 13,100.

from the 2016 Rule. That is fatal to Plaintiff's standing, as past conduct alone never "show[s] a present case or controversy regarding injunctive relief" if unaccompanied by "continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Claims of past job applications or actions by third parties through advertisements or otherwise do "nothing to establish a real and immediate threat that [its members] would again be [injured in the future.]" *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Thus, past job applications and advertisements are insufficient, because at a minimum, Plaintiff "must make a concrete showing that it is in fact likely to suffer financial injury as a result of the challenged action" going forward. *KERM, Inc. v. FCC*, 353 F.3d 57, 60-61 (D.C. Cir. 2004); *see Snake River Farmers' Ass'n*, 9 F.3d 792, 796-98 (9th Cir. 1993) (speculative possibility of future employment insufficient). Indeed, nothing cited demonstrates that Sawade, Blatt, and Smith are *direct* and *current* competitors with beneficiaries of the 2016 Rule, *see Mendoza*, 754 F.3d at 1012-13, or that they "personally compete[] in the same arena" as beneficiaries of the 2016 Rule, *see Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998); *accord Comité de Apoyo a los Trabajadores Agrícolas v. Perez*, 148 F. Supp. 3d 361, 372 (D.N.J. 2015) (no standing if no "evidence linking an imminent threat of harm to [Plaintiff] to specific provisions of the [] Rule").[2]

Even assuming that *backward* looking allegations alone could ever be sufficient to establish standing, *i.e.*, that a plaintiff may challenge government action by alleging injuries that by their terms precede and are totally unrelated to the challenged government action, Plaintiff's allegations are inadequate. As an initial matter, it bears noting that Sawade, Blatt, and Smith graduated from college in 1986, 1986, and 1988, respectively, and at least Sawade and Blatt received advanced degrees from Devry University and the University of Phoenix, both in 2004, and Smith a degree in

[2] As another Court recognized, "[i]t would therefore be 'patently advisory' for this Court to substantively analyze" the challenged regulation absent evidence of an actual, imminent impact, rather than generalized claims of presumed harm." *Comite*, 148 F. Supp. 3d at 372.

business administration in 1993 from Columbia College, Missouri.[3] Sawade, Blatt, and Smith have thus been in the STEM employment market for 30, 30, and 28 years respectively. Yet nowhere in the Complaint does Washtech provide any allegation that these experienced computer programmers and network administrators are *currently* applying for any job that entry-level F-1 nonimmigrants subject to the 2016 Rule are applying for, that they are willing to move from their home regions to where these jobs exist, that they possess the educational requirements these jobs might require, etc. Moreover, the Complaint is devoid of any allegation that Sawade, Blatt, and Smith are applying for jobs or willing to relocate for jobs that recent graduates participating in the OPT program generally are applying to fill, which could be *any* job in *any* field *anywhere* in the United States.[4] Thus it is impossible to conclude, even at the motion to dismiss stage, that three extremely *experienced* STEM workers are in fact *direct* and *current* competitors with recent graduates of a U.S. educational program engaged in on-the-job training, either as STEM OPT participants, or as OPT participants generally.[5]

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[3] Plaintiff conveniently fails to indicate when its affiants entered the computer market, although the Complaint makes clear that Sawade, Blatt, and Smith have been in the market at least since 2008, since their allegations of harm all refer to job applications filed in the period of 2008-2016. ECF 1 at ¶¶ 106-219. However, Plaintiff previously informed Judge Huvelle when Sawade, Blatt, and Smith had graduated and entered the computer market, *See* Ex. 2, Affidavits of Sawade, Blatt, and Smith, ECF 25-1, *Washtech I*, 14-529. Moreover, Messrs. Sawade and Blatt have profiles on linkedin.com which indicate when they entered the job market. *See* Exs. 3-5. The Court should consider these prior statements and personal admissions given that they are referenced in support of the Government's jurisdictional argument. *Finca Santa Elena, Inc. v. United States Army Corps of Engrs.*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012). Alternatively, the Court should take judicial notice of these documents.

[4] Plaintiff's broad claim that the 2016 Rule allows for F-1 nonimmigrants to be unemployed is off-base. The Rule ties lawful status to STEM OPT-related employment, and sensibly permits brief, temporary non-employment to account for situations beyond students' control. 81 Fed. Reg. 13,066-67. STEM OPT students must submit new training plans and comply with all reporting requirements should they secure new training-based employment. Plaintiff proffers *zero* allegations that Sawade, Blatt, and Smith are *direct* and *current* competitors with any such individual under the new Rule. And employing aliens who are not employment authorized is illegal, and cannot establish injury. *See Arpaio*, 797 F.3d at 22; *Comite*, 148 F. Supp. 3d at 373.

[5] This is equally relevant to the Government's ripeness argument. ECF 18 at 32-34. Plaintiff proffers no allegations concerning actual, present, competition from beneficiaries of the 2016 Rule, so its challenge "depends on future events that may never come to pass, or that may not occur in

Washtech dismisses this flaw, suggesting Sawade, Blatt, and Smith must be in direct and current competition with entry-level STEM OPT participants because Washtech says so. See ECF 18 at 14. But the most relevant cases in this Circuit reject that claim. In *Mendoza*, the plaintiffs were required to actually demonstrate they were participants in the relevant market – herding – by proving that their "bottom line" was "affected by the challenged government action," and that they were qualified to hold the herding positions at issue and actively involved in the relevant market. 754 F.3d at 1013. Plaintiffs demonstrated they were *direct* and *current* competitors by alleging that their wages as herders would not be lower but for the presence of foreign-born herders by "attest[ing] to specific experience that qualifie[d] them to work as herders; the particular working conditions that led them to leave the industry; the specific wages and conditions they would require to accept new employment as workers; the manner in which they have kept abreast of conditions in the industry; and, . . . a specific possible avenue for obtaining reemployment as a herder." 754 F.3d at 1014. Accordingly, *Mendoza* found plaintiffs were active and ongoing participants in the relevant market and were "willing and available to work as herders" in the precise *types* of jobs foreign laborers had *already taken* at depressed wages. 754 F.3d at 1013-14, 1015 & n. 8. Plaintiff makes no such allegations, and fails to cite a single instance of any F-1 nonimmigrant subject to the 2016 Rule employed in a job Sawade, Blatt, and Smith were "willing and available" to fill.

Similarly, *Int'l Union of Bricklayers & Allied Craftsmen v. Meese* ("*Bricklayers*"), 761 F.2d 798 (D.C. Cir. 1985), found a union possessed standing to challenge the admission of aliens for employment purposes on a visa that did not permit that employment if the union demonstrated its

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the form forecasted, then the claim is unripe." *Devia v. NRC*, 492 F.3d 421, 424-25 (D.C. Cir. 2007). But an F-1 nonimmigrant's possible future use of the STEM OPT extension does not satisfy ripeness. *See Delta Air Lines, Inc. v. Export-Import Bank*, 85 F. Supp. 3d 250, (D.D.C. 2015). Absent actual allegations concerning how the 2016 rule actually impacts Plaintiff, there is no basis to conclude "the contested action impose[s] an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Alascom, v. FCC*, 727 F.2d 1212, 1217 (D.C. Cir. 1984).

members were "ready, willing and able" to perform the actual work that went to aliens instead. That fact of that *present* competition readily distinguishes this case from *Bricklayers*.

Finally, in *Washtech I*, Plaintiff, through Sawade, Blatt, and Smith, alleged far more concerning their actual *direct* and *current* competition with STEM OPT participants subject to the now-defunct 2008 Rule. *See* 74 F. Supp. 3d at 250-53. In particular, they alleged that: (1) "they have sought out a wide variety of STEM positions with numerous employers, but have failed to obtain these positions following the promulgation of the OPT STEM extension in 2008," and (2) "the specific employers with whom these members sought STEM positions" in fact *"employed students who applied to DHS for STEM extensions during the relevant time frame*," such that it was "reasonable to infer that the named members, who have technology-related degrees in the computer programming field and have applied for STEM employment *during the relevant time period*, were in direct and current competition with OPT students on a STEM extension." *Id.* at 252-53 (emphasis added). Here, Sawade, Blatt, and Smith allege nothing remotely similar as to job applications over the relevant period of time. Indeed, they do not allege a single example of a job they applied for or a job advertisement on which they relied during the "relevant period," *i.e.* on or after the effective date of the 2016 Rule. All of their allegations are similar if not identical to their allegations concerning the 2008 Rule in *Washtech I*, in that they specifically invoke the period of 2008-2016 subject to that Rule. *See id.*; 2015 U.S. Dist. LEXIS 105602 at *7-16.

What *Mendoza*, *Bricklayers*, and *Washtech I* indicate is that, at the bare minimum, Plaintiff must allege sufficient facts to indicate its members are in fact in competition with the beneficiary of the government action for the same type of jobs, and that they are ready, willing, and able to relocate for said jobs, possess the educational requirements for those jobs, and are willing to accept the terms of employment those jobs may require. Sawade, Blatt and Smith do no such thing. They simply ask the court to assume that three extremely experienced STEM workers are actual, current,

direct competitors with entry-level STEM OPT participants.

Plaintiff cannot rely on such declarations because the D.C. Circuit has never applied a presumption of competitive injury to a complex, multi-faceted labor market. The universe of STEM jobs includes hundreds of job categories and many tiers of experience and education levels among participants, spread broadly geographically. That complexity does not permit direct comparisons of alleged competitors. Conversely, in *Mendoza* and *Bricklayers* the simplicity of the labor markets at issue – apple-to-apple comparisons of foreign and domestic herders and masons, respectively – permitted application of binary economic logic: foreign herders and masons working in U.S. jobs means domestic herders and masons cannot work in those same jobs. *See United Transp.*, 891 F.2d at 913 n.7. But the broad, dynamic nature of the "STEM" designation does not support apple-to-apple comparisons of hundreds of STEM occupations and their competitive effects. *See* ECF 18 at 21-25. Indeed, Plaintiff's injury theory ignores obvious distinctions between occupations, and postulates instead that it may sue on the generalized theory that its members in the *past* applied for programming jobs, regardless of whether they are the jobs the Complaint refers to, or whether its members are qualified and willing to relocate anywhere in the country for them, or to seek the same, often *entry-level*, employment that F-1 nonimmigrants would be eligible for, let alone whether they are *currently* applying for the same jobs as STEM OPT students subject to the 2016 Rule.

Because Plaintiff's (lack of) allegations depend on a "chain of events" of speculative, future conduct by third parties of wildly varying backgrounds, educations, and geographic commitments,[6]

[6] Plaintiff's allegations do nothing to account for the possibility that its members may not in fact face competition from participants in the STEM OPT program, but may face competition from OPT participants here under the 12-month OPT program last altered in 1992, other employment-authorized foreign nationals, *see* 8 C.F.R. § 274a.12, and countless other job market participants lawfully present here. Moreover, Plaintiff's members' underemployment may be due to their

Plaintiff may not rely on the "'garden variety competitor standing cases' which require a court to simply acknowledge a chain of causation 'firmly rooted in the basic law of economics," but must actually allege such facts with specificity.[7] *See New World*, 294 F.3d at 172; *Finkelman v. NFL*, 810 F.3d 187, 201 (2016) ("there is a difference between allegations that stand on well-pleaded facts" concerning "economic logic," and "allegations that stand on nothing more than supposition"). To hold otherwise permits any domestic worker to challenge any government program on the bare theory that an increase in the population must equate with an increase in competition.[8] *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013).

b. Plaintiff's remaining injury theories are meritless

Plaintiff's opposition raises a number of additional standing theories without addressing any of the arguments raised by the Government. First, Plaintiff alleges the 2016 Rule "deprive[s] them of statutory protections from foreign labor." ECF 20 at 9. Judge Huvelle rightly declined to address this theory in *Washtech I*, analyzing instead only Plaintiff's competitor standing claims, and for good reason: a claim alleging deprivation of alleged statutory protections "goes to the merits," and cannot serve as the basis of Plaintiff's injury theory. *Sherley v. Sebelius*, 610 F.3d 69, 73-74 (D.C.

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insufficient qualifications or skills, macroeconomic trends, increased industry demand for entry-level rather than experienced computer programmers, etc., such that they cannot satisfy Article III standing without far more specific allegations concerning their actual job market. *See Renal*, 489 F.3d at 1277. Likewise, Plaintiff fails to account, with any specificity, for the fact that the absence of STEM workers could just as easily contract the pool of available jobs in the United States by removing the multiplier effect the presence of highly educated foreign-born students has on the economy. *See* 80 Fed. Reg. at 63,383. The absence of such individuals could just as easily diminish the relevant job market, such that causation and redressability are absent. *See Florida*, 94 F.3d at 670 (no standing if allegations cannot "be easily described as true or false").

[7] Plaintiff nowhere alleges an actual shortage of STEM jobs sufficient to suggest that STEM OPT nonimmigrants are actually taking jobs that Sawade, Blatt, or Smith would otherwise apply for.

[8] For similar reasons, ECF 18 at 22-25, Plaintiff cannot show causation or redressability. Given that Plaintiff fails to allege *any* allegations concerning harm flowing from the 2016 or 1992 Rules, the Court cannot "wade into this morass of marketplace analysis, and emerge with the conclusion" that Plaintiff's members' difficulties in securing employment in their preferred positions is caused by DHS or would be redressed by a Court order. *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 494 (D.C. Cir. 2004).

Cir. 2010). The Government raised this point in its motion, but Plaintiff declined to respond to it.[9] Plaintiff appears to claim otherwise by citing *Warth v. Seldin*, 422 U.S. 490, 514 (1975), to assert that Congress can create statutory entitlements the deprivation of which can confer Article III standing, ECF 20 at 10, but this is a misreading of the case. *Warth* addressed "statutory standing," *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006), a prudential, not Article III concept, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998), which as the Supreme Court has explained, is a *merits* question. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014).

Undeterred by this binding law, Plaintiff claims the so-called "union standing" doctrine of *Bhd. of Locomotive Eng'rs v. U.S.*, 101 F.3d 718, 724 (D.C. Cir. 1996), and *Simmons v. ICC*, 934 F.2d 363, 367 (D.C. 1991), confers standing on them. ECF 20 at 10-11. But these cases are inapt, as they arise in the context of labor-protective arrangements governing unions and the Interstate Commerce Commission, a unique body of administrative law inapplicable here. Plaintiff cites no case applying this line of cases to the INA. *Id.* Second, even assuming "labor protective arrangement" cases might apply here, there must in fact be a "labor protective arrangement" before such an arrangement can serve as the basis for standing. *See Locomotive*, 101 F.3d at 724. As explained in the motion to dismiss, ECF 18 at 3-5, 29-34, and below, the F-1 provision has never in its near 70-year history had such a provision, and Congress has repeatedly declined to add such a provision, even while adding such provisions to some other visa categories. Thus, the fact that the H-1B visa provision, which governs the admission of nonimmigrants for *employment* purposes, contains explicit domestic labor protections, *see* 8 U.S.C. § 1182(n), in no way creates a labor protection requirement for a separate, unrelated statute, the F-1 provision, which contains no such explicit requirement, and governs the entire different statutory purpose of the admission of

[9] A sur-reply would be inappropriate, as Plaintiff could have addressed the issue, but chose not to.

nonimmigrant's for *educational* purposes.[10] *See* 338 Fed. Appx. at 243 n.1.

Washtech also argues that the Rules create "unfair competition" because of alleged difference in tax treatment between F-1 nonimmigrants and American workers. ECF 18 at 17-19. However, as explained at length in the motion to dismiss, it is specific, explicit Acts of Congress, not the 2016 Rule, which creates any differential tax treatment. ECF 18 at 25-30. Enjoining the Rule would do nothing to redress any alleged injury, because the Acts of Congress exempting employers from paying certain taxes when they employ F-1 nonimmigrants in certain situations would remain on the books. *See, e.g.*, *Comite*, 2016 U.S. Dist. LEXIS 104690 at *9, n.5. The absence of the OPT rules thus in no way eliminates the purported injury of an alleged "incentive" for employers to hire F-1 nonimmigrants because it is an Act of Congress that caused any purported "taxation" injury, not the OPT rules, and thus causation as to DHS is lacking. *See, e.g.*, *Transp. Workers Union of Am. v. Transp. Sec. Admin*., 492 F.3d 471, 475 (D.C. Cir 2007); *Von Aulock v. Smith*, 720 F.2d 176, 181-84 (D.C. Cir. 1983); *accord Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 440-41 (D.C. Cir 1998) ("challenged agency rule" that "permitted the activity that allegedly injured" Washtech, would not "have been illegal otherwise").

Plaintiff asks the court to impute Acts of Congress legislated in 1961, *see* Pub.L. No. 87-256, § 110(b) (26 U.S.C. § 3121(b)(19)); Pub. L. No. 87-256, § 110(f)(3) (26 U.S.C. § 3306(c)(19)); Pub .L. No. 87-256, § 110(e)(1), (f)(3) (42 U.S.C. § 410(a)(19)), to agency rules

[10] Relying on *Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998), a case that concerned the line item veto, Plaintiff suggests that "the denial of a benefit in the bargaining process" can create injury. ECF 20 at 10-11. However, as the Supreme Court went on to explain, this "benefit" theory was articulated in *Northeastern Fla. Chapter, Assoc. Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993), a case where an "association of contractors challenged a city ordinance that accorded preferential treatment to certain minority-owned businesses in the award of city contracts." *Clinton*, 524 U.S. at 433 n. 22. The Court found standing because of "the harm to the contractors in the negotiation process." *Id*. But Plaintiff does not allege its members were part of some "negotiation process" in bidding for state-offered contracts, or participants in a collective bargaining agreement or other administrative proceeding concerning the intricacies of union law before the relevant agency. Thus *Clinton*, like *Locomotive* and *Simmons*, does not help Plaintiff.

promulgated many years later, suggesting the elimination of the 2016 or 1992 rule will completely redress their injury. ECF 20 at 24-25. But the D.C. Circuit disagrees: at this stage, Plaintiff must "demonstrate a substantial likelihood that the third party directly injuring the plaintiff, would cease doing so as a result of the relief the plaintiff sought," and must show that any incentive to hire F-1 nonimmigrants would cease to exist. *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1275 (D.C. Cir. 2007). The fact that the party "directly" injuring the plaintiff, *i.e.* third-party employers who may in the future employ F-1 nonimmigrants or F-1 nonimmigrants benefitting from the STEM OPT program, makes that showing "substantially more difficult to establish." *Lujan*, 504 U.S. at 561-62. And as explained, given the myriad interlocking variables that affect the taxation issue, ECF 18 at 29-30, the Court "cannot wade into this morass of marketplace analysis, and emerge with the conclusion" that Plaintiff's members' difficulties in securing employment in their preferred positions would be redressed by invalidating the Rule. *Crete*, 363 F.3d at 494. Plaintiff cannot rely on a blanket assumption of monolithic application of the tax laws; it must proffer evidence or allegations supporting that assumption as to F-1 nonimmigrants *actually* subject to some tax exemption who are *actually* in direct and current competition with Plaintiff's members. *See Arpaio*, 797 F.3d at 21. They have not so,[11] so any allegation that third party employers would hire Washtech members, notwithstanding Acts of Congress permitting differential tax treatment, is "speculative at best." *Simon v. Eastern Ky. Welf. Rights Org.*, 426 U.S. 26, 38, 41, 48 (1976).

Plaintiff also repeats its "procedural rights" claim, again asserting that the public notice and

[11] Plaintiff's reliance on *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), and *Nat'l Milk Producers Fed'n v. Shultz*, 372 F. Supp. 745, 746 (D.D.C. 1974), is misplaced. *Garment Workers* is a Fair Labor Standards Act (FLSA) case holding that plaintiffs in that case were within the FLSA's zone of interests where the Court observed that redressability is lacking where the relief sought could not render the conduct complained of illegal. 722 F.2d at 811. Obviously a challenge to a DHS regulation cannot render an Act of Congress illegal. *Schultz* is inapt, as it involved a challenge to the Secretary of the Treasury's refusal to comply with an Act of Congress, the Countervailing Duties section of the Tariff Act of 1930, and, as in *Garment*, whether the challengers were with the "zone of interests" of the relevant statute. 372 F. Supp. at 745-48.

comment process DHS undertook in the 2016 Rule, which elicited more than 50,000 comments, did not provide Plaintiff notice and an opportunity to comment. ECF 20 at 19. The argument is absurd, particularly given the fact that Plaintiff's counsel, among some 50,000 others, commented on the proposed rule extensively, and received an extensive response. ECF 18 at 31-32. In any event, the D.C. Circuit has made clear that any procedural injury theory of standing requires demonstrating, "that the defendant's acts omitted some procedural requirement . . . ." *Florida*, 94 F.3d at 664-65. Thus Plaintiff cannot hide behind its frivolous allegation that notice and comment did not occur; the court must look behind that allegation for jurisdictional purposes to ascertain whether in fact that allegation is correct. *See id.* Here, because Plaintiff's procedural injury claim is contrary to reality, it fails as a matter of law. *See Ctr. For Law*, 396 F.3d at 1160.

Finally, Plaintiff repeats its confusing "employment discrimination" theory, alleging that experienced workers who have been in the STEM industry for years are injured when *students* who lack any significant work experience and seek post-graduation employment as part of their U.S. educational experience through STEM OPT receive mandatory training (*not* mentoring) in accordance with the 2016 Rule's "training plan" obligation placed on would-be employers. ECF 20 at 20. As noted, Sawade, Blatt, and Smith have been in the STEM employment market for 30, 30, and 23 years respectively. They proffer *zero* allegations that they would like to avail themselves of basic entry-level training, despite their dozens of years of experience, such that this theory fails at the threshold. *See Lujan*, 504 U.S. at 561-62. Even assuming entry-level students could be deemed "competitors" with experienced workers like Sawade, Blatt, and Smith, it is elementary that increased regulation of one's competitors does not confer standing to challenge that regulation.[12] *See State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

[12] Plaintiff has not alleged plausibly why a future employer would prefer an F-1 nonimmigrant to an American worker, given all the new requirements the 2016 Rule places on employers if they choose to hire a beneficiary of the 2016 Rule.

Nevertheless, Plaintiff claims that the 2016 Rule's training, part of the U.S. educational experience offered F-1 nonimmigrants, exposes Plaintiff to "disparate treatment," thus violating 8 U.S.C. § 1324b(a)(3). But Plaintiff's members have no "legally protected interest" in student training, *see Lujan*, 504 U.S. at 560, – they graduated decades ago – and certainly can avail themselves of further educational programs should they be so inclined.[13]

II. Plaintiff's 1992 Rule challenge is non-justiciable and time-barred

As noted, Plaintiff utterly fails to satisfy any element of Article III standing as to its challenge to the 1992 Rule. ECF 18, at 34-35; *Washtech I*, 74 F. Supp. 3d at 252. Plaintiff's opposition fails to grapple with this fact, and so appears to have forfeited the issue.[14] *See Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (new "claim to standing" not raised in brief may be "forfeited"). Plaintiff does, however, address the time-bar issue, although it yet again fails to address any of the arguments raised by the Government and instead authors its brief as though it is writing on a blank slate. ECF 20 at 34-40. It is not. Notably, Judge Huvelle readily rejected the identical argument Plaintiff makes here, as to the 2008 Rule. *Washtech I*, 74 F. Supp. 3d at 252 n.3. ("DHS did not reconsider the substance of the existing [1992] rule").

Nevertheless, Plaintiff raises four arguments, each meritless. First, Plaintiff alleges the 2016

[13] Plaintiff cites irrelevant cases which address equal protection and Title VII. ECF 20 at 21. For example, the only D.C. Circuit case Plaintiff cites, *Lutheran Church-Missouri Synod v. Fed. Commc'ns Comm'n*, 154 F.3d 487, 493 (D.C. Cir. 1998), involved a challenge to *racial* quotas in hiring decisions, a classic equal protection violation subject to strict scrutiny. *Id.* Plaintiffs fail to actually plead such a claim, because they cannot, but even if they did, they must at the very least allege they are a protected class subject to a discriminatory classification. *See, e.g.*, *City of Jacksonville*, 508 U.S. 656, 664-66 (1993). Should Plaintiff wish to allege that experienced computer programmers are a protected class, it should do so in the appropriate lawsuit.

[14] As to the 1992 Rule, Judge Huvelle emphatically held that Plaintiff failed to allege standing, because: (1) "the three named WashTech members only applied for STEM positions between 2008 and 2012 and were unable to obtain those positions because they were filled by OPT 17-month extension recipients," (2) "[t]here is no allegation that any injury to the named members occurred prior to the 2008 OPT extension for STEM students," and (3) "[t]hus, because plaintiff has not identified a member of its association who suffered any harm from the twelve-month OPT program, it does not have standing to challenge the OPT program on behalf of its members." *Id.* at 252. Plaintiff's allegations are identical to those in *Washtech I*, so the same applies here.

Rule "reiterates the policy of authorizing" F-1 nonimmigrants to work. ECF 20 at 36. Plaintiff again resorts to bald conclusions unsupported by even a cursory review of the Rule it incorporates into its Complaint. Just as in 2008, *see Washtech I*, 74 F. Supp. 3d at 252 n.3, DHS did not seek comment on and never reconsidered the substantive provisions of the 12-month OPT program in 2016. Nothing in the NPRM purports to question the 12-month OPT program, implies any intent to alter or reconsider it, or seeks any comment on the subject. *See, e.g.*, 80 Fed. Reg. at 63,377 ("proposed rule would affect F-1 nonimmigrant students who seek to obtain a STEM OPT extension, as well as F-1 nonimmigrant students who seek so-called Cap-Gap relief"); 81 Fed. Reg. at 13,059 ("To the extent that comments challenging DHS's legal authority concerned the OPT program generally, such comments are outside the scope of this rulemaking, which relates specifically to the availability of STEM OPT extensions. DHS did not propose to modify the general post-completion OPT program in the proposed rule"). Instead, the 2016 Rule allowed STEM students a 24-month extension of OPT and provided a limited work authorization bridge for OPT participants with certain pending H-1B petitions. 81 Fed. Reg. 13,039. Plaintiff declares this "absurd," but it is black letter law: mechanically describing the history of a regulatory program does not reopen prior iterations of a rule to challenge.[15] *See Nat'l Ass'n of Mfrs. v. DOI*, 134 F.3d 1095, 1103 (D.C. Cir. 1998); *accord Kennecott*, 88 F.3d at 1213.

Plaintiff also claims that the 1992 Rule has been reopened because the 1992 Rule was issued without notice and comment. ECF 20 at 40. That is yet another factually incorrect claim. The 1992 Rule has been on the books for over 20 years and INS clearly sought comments on all relevant issues at the time. *See* 57 Fed. Reg. at 31,954. Where the public has been "put on fair

[15] To the extent Plaintiff construes other peripheral aspects of the 2016 Rule as having any impact upon the OPT program generally, it is incontestable that these would not have reopened the 12-month OPT program established in the 1992 OPT rule (or reopened any other OPT rule), but would instead be a direct reinstatement of aspects of the 2008 STEM OPT IFR.

notice that the rule in question is applicable to" it, the reopener doctrine has no application. *Nat'l Ass'n*, 134 F.3d at 1104. Here, the public, and Washtech, had notice in 1992 of the OPT Rule. *See* 44 U.S.C. § 1507; *Lyng v. Payne*, 476 U.S. 926, 942–43 (1986). No reopening follows.

Next, Plaintiff suggests that reopening must apply because the question of whether the INS had authority to issue the 1992 Rule in 1992 is similar to the question of whether DHS had authority to issue the 2016 Rule in 2016. ECF 20 at 41. However, Plaintiff points to no case that supports its assertion of an "inextricably linked" exception to bedrock reopening principles. *See id.* That is for good reason: no such exception exists.[16] *See Kennecott*, 88 F.3d at 1212 (agency does not "reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter").

Fourth, Plaintiff argues that DHS must have reopened the 1992 Rule because the 2008 Rule no longer exists, and therefore, if this Court were to invalidate the 2016 Rule, the 2008 Rule would exist anew and could no longer be moot. ECF 20 at 42. To quote Plaintiff, "[t]hat is codswallop!" ECF 20 at 39. The 2008 Rule is no more, and what this Court may decide with respect to the 2016 Rule cannot resurrect a rule the D.C. Circuit has found to no longer exist. Should the Court find the new Rule unlawful, the last valid rule would govern, which means that no STEM OPT extension would exist. *See Kennecott*, 88 F.3d at 1220 (vacatur reinstates prior binding rule). Finally, the D.C. Circuit has repeatedly explained that "the appropriate way to challenge a longstanding regulation on the ground that it is violative of statute" is "by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition." *Id.* Plaintiff

[16] Plaintiff claims the new Rule alters the 1992 Rule by modifying the OPT program's treatment of temporary unemployment. ECF 20 at 38. Plaintiff, again, misstates the fact. The Rule limits any such alteration to STEM OPT students, *i.e.* that limited class of individuals actually governed by the 2016 Rule and eligible for STEM OPT extensions. 81 Fed. Reg. at 13,042. It did not change the permissible unemployment period for students subject to the OPT Rule. Plaintiff's concern with out of status aliens notwithstanding, that is an enforcement issue, not an APA issue.

conceded that at the Court of Appeals, *see* Br. of App., 2016 WL 722135, *49, and offers no explanation as to why it cannot file such a petition, nor could it.

III. Plaintiff's claims do not fall within the zone of interests of 8 U.S.C. § 1101(a)(15)(F)(i)

In its opposition, Plaintiff concedes, as it must, that whether its APA challenge to the 2016 and 1992 Rules is within the zone of interests of 8 U.S.C. § 1101(a)(15)(F)(i) is guided by "traditional tools of statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim," *Lexmark*, 134 S. Ct. at 1387 n.4, and that "the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Where Plaintiff stumbles, however, is by asserting that the Court should consider not just section 1101(a)(15)(F)(i), but also "any provision" in the INA, including irrelevant provisions that do not govern the F-1 program or evince any intent by Congress as to F-1 visas. *See* ECF 20 at 27 (citing *Clarke*, 479 U.S. at 401). The Supreme Court and D.C. Circuit have both clarified that courts should not zoom out to such a "level of generality in defining the 'relevant statute' [so as to] deprive the zone-of-interests test of virtually all meaning." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 529-30 (1991); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012) (similar). Instead, at the least, Plaintiff must establish an "'integral relationship' between the statute a petitioner claims is protecting its interests and the statute actually in question." *Grocery*, 693 F.3d at 179; *accord Conf. Group, LLC v. FCC*, 720 F.3d 957, 963 (D.C. Cir. 2013) (similar); *Nat'l Petrochem. Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (similar). Thus, it is reversible error to focus on "the broad purpose" of a statutory regime, rather than "the more specific interest protected by" the relevant subsection of the "statutory provision whose violation forms the basis for the complaint." *Amgen, Inc. v. Smith*, 357 F.3d 103, 109-10, 360 U.S. App. D.C. 88 (D.C. Cir. 2004); *accord AICPA v. IRS*, 2016 U.S. Dist.

LEXIS 101661, *23 (D.D.C. Aug. 3, 2016); *Vemuri*, 845 F. Supp. 2d at 133 (same).

With this mind, it is readily apparent that Plaintiff fails to satisfy the zone of interest test with respect to section 1101(a)(15)(F)(i). At the outset, although Plaintiff repeatedly refers to the F-1 classification as a pernicious guest worker program, it is no such things. *See Programmers*, 338 Fed. Appx. at 242 ("F-1 status provision addresses eligibility to enter the country to study, whereas the labor-certification provisions address eligibility to enter the country to work."); *Washtech I*, 156 F. Supp. 3d at 143-45 (Congress charged DHS with "ensur[ing] that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland," and reading F-1 provision to "permit[] employment for training purposes without requiring ongoing school enrollment" serves that purpose).

Even so, Plaintiff argues it must be within that section's zone of interests because DHS has "acknowledged that protecting the working conditions of Americans is an interest under the F-1 visa." ECF 20 at 27. This greatly oversimplifies the careful balancing of interests at issue, *see* 81 Fed. Reg. 13,055, and is irrelevant. DHS is not required by statute to consider the interests of domestic labor, but may nevertheless do so as an exercise of discretion, *see Bayou Lawn & Landscape Servs. v. Johnson*, 2016 U.S. Dist. LEXIS 50608, *38-40 (Mar. 25, 2016),[17] but that DHS considered such concerns cannot drive the zone of interests analysis, which must examine the *statute, not* the regulation. *Town of Stratford v. Fed. Aviation Admin.*, 285 F.3d 84, 89 (D.C. Cir. 2002); *Nat'l Fed'n of Fed. Employs. v. Cheney*, 883 F.2d 1038, 1052 (D.C. Cir. 1989).

Plaintiff nevertheless cites a 1994 INS report to Congress indicating that a pilot program for F-1 students created under the Immigration Act of 1990 potentially impacted American workers. ECF 20 at 28. This argument is not derived from any statutory text, and Plaintiff elides the fact that

[17] Plaintiffs' allegation that the 2016 Rule is a "sanitized" version of the 2008 Rule is baseless. ECF 20 at 12. The 2016 Rule reflects a wholesale reconsideration of the 2008 Rule, including the introduction of a formal training plan, labor protections, and a range of other provisions.

Congress's actions in 1990 temporarily *expanded* F-1 employment beyond the INS's OPT program to permit F-1 nonimmigrants to work in fields *unrelated* to their course of study, and that this pilot program in fact *included* domestic labor protections similar to those covering H-1B nonimmigrants. *See* Immigration Act of 1990 § 205 (H-1B); *id.* § 221 (F-1); ECF 18 at 39-40. That Congress elected such requirements *only* for F-1 employment *unrelated* to a course of study explicitly *outside* the OPT program – which had already existed for years – and declined to apply domestic labor protections to students employed in a field directly related to their course of study make clear that the H-1B labor protections have no connection to the F-1 provision as currently drafted. *See* H.R. Rep. No. 101-723, pt. 1, 1990 WL 200418, *6746 ("expanding the current authority of students to work off-campus"). Congress let the program lapse, but did not alter the F-1 program's *absence* of labor protections. *See* Pub. L. No. 101-649, § 221(a).[18]

Next, Plaintiff claims that because partial legislative history from 1952 indicates that one of the INA's purposes was to protect domestic labor, then necessarily *every* single provision of the INA must incorporate a requirement that any alien admitted to the United States by DHS must not impact domestic labor. ECF 20 at 29-30. This "kitchen-sink approach" fails at the threshold, as "Plaintiff cannot invoke the 'zone of interests' protected by the INA at large to establish prudential standing in this case." *Vemuri*, 845 F. Supp. 2d at 130-31; *accord Programmers*, 338 Fed. Appx. at

[18] Plaintiff alleges that it must be within §1101(a)(15)(F)(i)'s zone of interests because a purpose of the INA "is to preserve jobs for American workers." ECF 20 at 28. But they derive this out-of-context quotation from *Reno v. Flores*, 507 U.S. 292, 334 (1993), which says nothing about zone of interests, and the quotation is found in the *dissent*. Cases Plaintiff cites are inapt. *Mendoza* and *Bricklayers* turn on *express* statutory language aimed at protecting American workers, notably absent here, from the nonimmigrant labor at issue in those cases. *See Mendoza*, 754 F.3d at 1017 (relying on 8 U.S.C. § 1188(a)(1), which explicitly "protect[s] American workers"); *Bricklayers*, 761 F.2d at 804-05 (addressing express statutory language in the then existing B-visa program precluding the foreign labor permitted there"); *accord Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989) (similar, D-visa program). *Shalom Pentecostal* does not address nonimmigrant labor, but rather *immigrant* labor performed by special immigrant religious workers, and similar explicit text demonstrating an intent to protect their interests. 783 F.3d at 164. *N. Mariana* does not address zone of interests at all. 670 F. Supp. 2d at 85.

242 (plaintiff not premise zone of interests on argument that "relevant statute is the entire INA"). In any event, Plaintiff's singular focus on abstract concern with job preservation misconstrues the INA, which "affects basically foreign policy, constitutional guarantees, public welfare, the health, the economy, and the productivity of the Nation" and does not solely exist to prevent "aliens without labor certification from being authorized to accept employment." Congressional and Administrative News, 82nd Congress, Second Session, 1952, v. 2, p. 1750. Indeed, the INA is replete with statutes permitting foreign workers to seek employment, undermining any suggestion that the INA as a whole is exclusively focused on domestic labor. *See* 8 C.F.R. § 274a.12 (listing dozens of such categories with statutory citation). And a relevant (and recent) statute, 6 U.S.C. § 111(b)(1)(F), demonstrates Congress's intent that DHS "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." The OPT program generally and the 2016 Rule specifically do just that by ensuring that the U.S. educational system remain globally competitive in attracting international students in STEM fields, which enhances the nation's economic, scientific, and technological competitiveness, 80 Fed. Reg. at 63,386; 81 Fed. Reg. at 13,047-50, plainly a goal DHS is charged with pursuing.

Undeterred, Plaintiff claims section 1101(a)(15)(F)(i) evinces a clear intent by Congress to confer a cause of action on Plaintiff to challenge the 1992 and 2016 Rules because the Rules at issue alleged "violat[e]" other provisions of the INA, including 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 1184(a), 1184(g), 1227(a)(1)(C)(i), and 1324b. ECF 20 at 26. None of these provisions are related to section 1101(a)(15)(F)(i). Section 1101(a)(15)(H)(i)(b), which permits employers to file petitions to admit highly skilled nonimmigrants for labor, and section 1182(n), which requires H-1B petitioners to demonstrate that employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed," are integrally related

to *each other*, but they bear no relationship to section 1101(a)(15)(F)(i).[19]

The remaining provisions Plaintiff cites also bear no relationship to section 1101(a)(15)(F)(i). Section 1184(a) establishes DHS's broad authority over "the admission to the United States of any alien as a nonimmigrant," and contains no requirement that the admission of F-1 nonimmigrants be subject to labor protection provisions. Section 1184(g) contains limitations on the annual admission of H-1B skilled and H-2B unskilled labor, and H-1b1 and E-3 nonimmigrants and, again, says nothing about F-1 visas. Section 1227(a)(1)(C)(i) provides that aliens out of status are deportable, but that says nothing about its integral relation to section 1101(a)(15)(F)(i).[20] And section 1324b forbids discrimination on the basis of national origin in employment; it says nothing about F-1 nonimmigrants and is in no way related to that provision.

What is relevant to the inquiry, however, is the fact that some temporary nonimmigrant worker categories are subject to statutory standards for the protection of the domestic labor market, *see, e.g.*, §§ 1101(a)(15)(E)(iii) (Australians in specialty occupations), (Q) (international cultural exchange program), but others are not, *see, e.g.*, 8 U.S.C. §§ 1101(a)(15)(E)(i) (treaty trader nonimmigrants carrying out substantial trade), (ii) (treaty investors), (15)(L) (intracompany

[19] *See Programmers*, 338 Fed. Appx. at 243 n.1 ("F-1 status is neither necessary nor sufficient to obtain H-1B status," "plaintiffs point to no legislative history linking the purpose of the labor-certification provisions with the purpose of the F-1 status provision," and "the labor-certification provisions are located in an INA subsection different from that containing the F-1 status provision"); *FAIR*, 93 F.3d at 903-04 (INA immigration quota provision not integrally related "to INA provision allowing Attorney General to parole aliens into the country for a limited time because the provisions address different subject matter, no legislative history links the purpose of one provision with the other, and the provisions were located in different subsections of the INA).

[20] Section 1227(a)(1)(c)(i), coupled with 8 U.S.C. §§ 1103(a)(1),1103(a)(3), and 1184(a)(1), simply address an F-1 nonimmigrant's conditions of admission set by the Secretary and the consequences when an alien fails to maintain F-1 status based on those conditions. DHS has measures in place to require F-1 nonimmigrants who have completed a course of study and no longer are in status must depart the country after a 60-day grace period, 8 C.F.R. § 214.2(f)(5)(iv); 67 Fed. Reg. 76,263, and has established many other conditions that must be satisfied in order to remain in F-1 status and not become subject to removal. However, that DHS performs its statutory duties – as § 214.2(f)(5)(iv) demonstrates – says nothing about whether section 1227(a)(1)(c)(i) is integrally related to § 1101(a)(15)(F). As to § 1227(a)(1)(C)(i), the actual "removal process is entrusted to the discretion of the Federal Government," *Arizona*, 132 S.Ct. at 2506, and the possibility of future prosecutorial discretion does not somehow render § 1101(a)(15)(F) integrally related to section 1227(a)(1)(C)(i).

transferees), (15)(R) (religious workers). The fact that Congress knows how to say what it means indicates that if Congress does not specifically require a visa classification to be subject to domestic labor protection requirements, it means that visa classification is not subject to a domestic labor protection requirement.[21] *See Dean v. United States*, 556 U.S. 568, 573 (2009). This is but an application of the fact that the Constitution allocates to the Federal Government the exclusive authority to regulate the "admission, naturalization, and residence of aliens in the United States or the several states," leaving the States and individuals no power to "add to [or] take from the conditions lawfully imposed by Congress." *Toll v. Moreno*, 458 U.S. 1, 11 (1982). Pursuant to this authority, Congress enacted the INA, a "comprehensive and complete code covering all aspects of admission of aliens to this country." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978). Of course, that proviso is subject to an exception: where Congress does *not* explicitly occupy the field, 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), 1184(a)(1), 1324a(h)(3) establish that Congress delegates plenary authority to the Executive to fill in the gap. *See Creekstone*, 539 F.3d at 500 (holding that where Congress "authorize[es] the agency to promulgate regulations necessary to 'carry out' the statute" it delegates authority to the agency to issue regulations where Congress has not spoken on the issue). Simply put, unless Congress has said no, the Executive may say yes.[22] *See Catawba*, 571 F.3d 20, at 387 ("silence is meant to convey nothing more than a refusal to tie the agency's hands"). This all

[21] Congress has established a procedure whereby an individual may challenge hiring decisions based on discrimination in hiring or recruitment based on national origin or citizenship status, *see* 8 U.S.C. §§ 1324b(a)(1), 1324b(b), further demonstrating that Congress did not intend for section 1101(a)(15)(F)(i) to convey a free-standing cause of action under the APA.

[22] As noted in the motion, ECF 18 at 39-40, even when Congress reenacted § 1101(a)(15)(F)(i) in December 2010, it took no action to limit the employment of F-1 students or establish domestic labor protections within the statute. Plaintiff's arguments to the contrary are disingenuous, given that the Senate Committee on the Judiciary took testimony concerning the F-1 nonimmigrant visa, including testimony from Plaintiff's counsel asserting that STEM OPT "circumvent[s] the statutory limits on H-1B visas." *Id.* That is significant because in December 2015, Congress explicitly amended the H-1B provision to increase application fees based on concern that H-1B employers were abusing the H-1B program, *see* 2016 DHS Appropriations Act, P.L. 114-113; Div. H, Title I, § 411, but yet again, fully aware of the STEM OPT program and its alleged effect on STEM employment, explicitly declined to make any changes to the F-1 nonimmigrant visa.

suggests "that protection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress [] was concerned with increasing the country's pool of available STEM workers." *Programmers*, 338 Fed. Appx. at 244.

Finally, perhaps because *Programmers* and *FAIR* are the most directly on point appellate decisions, Plaintiff dismisses them as "outliers." ECF 20 at 31-34. That Plaintiff does not agree with the binding authority of *FAIR* and the persuasive authority of *Programmers* does not render them inapplicable. ECF 18 at 37-42. But in any event, to call them outliers is to ignore the many recent decisions in this Circuit relying on them explicitly or adopting similar rationales. *See infra*. Thus, Plaintiff fails to plead a claim within the zone of interests of section 1101(a)(15)(F)(i).

IV. Plaintiff fails to plead a plausible APA claim and has waived its other claims

Finally, Plaintiff's opposition fails to address all but one of the Government's 12(b)(6) arguments. ECF 20 at 43-44. Specifically, the Government argued Plaintiff fails to plead cognizable, let alone plausible, claims of procedural APA violations in Count III, including Plaintiff's claim that the 2016 Rule was issued in violation of the Congressional Review Act (CRA), without notice and comment, and without complying with incorporation by reference requirements (Count III), and the separate claims that the 2016 Rule exceeds DHS's authority under the INA (Count II) and is substantively arbitrary and capricious (Count IV).

Plaintiff only addresses the last of these claims, failing to respond to each of the Government's argument concerning Counts II and III, and therefore as a matter of law, Plaintiff has waived all claims in Count III.[23] As to the only claim Plaintiff in fact addresses, Count IV, Plaintiff

[23] *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, 958 F. Supp. 895, 907 n. 11 (S.D.N.Y. 1997) ("failure to provide argument on a point at issue constitutes abandonment of the issue" and "provides an independent basis for dismissal"), *aff'd*, 130 F.3d 1101; *Jackson v. Bank of Am.*, 2015 U.S. Dist. LEXIS 129853, *10 (M.D. Ga. Sept. 28, 2015) (collecting cases). Even if not a waiver, Plaintiff's failure to address the Government's argument "is a telling indication" that Plaintiff's claims are meritless. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534

essentially concedes its pleading flaws, admitting that it pled only that "the 2016 OPT Rule singles out STEM occupations for an increase in foreign labor through longer works periods with no justification." ECF 20 at 43. The Complaint and Plaintiff's opposition is devoid of any further allegation as to what "justification" is lacking from the 80 pages of single-spaced text in the 2016 Rule. *See* 81 Fed. Reg. at 13,040-122. Such threadbare conclusions are quintessential examples of allegations that fail to state a claim for relief under the APA. *See, e.g., Ness Inv. Corp. v. U.S. Dep't of Agr., Forest Serv*., 512 F.2d 706, 717 (9th Cir. 1975) ("A general allegation that agency action was arbitrary, capricious or contrary to law adds nothing to a complaint.").

Plaintiff bizarrely claims that the Court cannot expect it to plead a plausible APA claim because it "has not yet received a copy of the full administrative record." ECF 20 at 44. But Plaintiff bears the burden of pleading plausible claims. The plausibility standard does not contain an exception that renders all APA claims plausible simply because the record has yet to be served. *Cf. Green v. McHugh*, 793 F. Supp. 2d 346, 350-51 (D.D.C. 2011). Plaintiff has clearly reviewed the 2016 Rule at issue. The Complaint cites it repeatedly and incorporates it by reference, and Plaintiff's opposition includes a 17-page appendix of excerpts from the 2016 Rule, including from the NPRM, which was not final agency action subject to challenge. *See* ECF 1, 20. Indeed, Plaintiff repeatedly refers to a "record" when it suits. *E.g.*, ECF 20 at 13. Plaintiff's failure to identify any specific "justification" missing from the final rule is simply willful ignorance. No authority permits a party to refuse to plausibly plead its APA claim until after an administrative record is served and the Court should therefore dismiss these claims as either abandoned or implausible on their face.

CONCLUSION

For these reasons, the Court should dismiss the Complaint in its entirety.

F.3d 779, 793 (D.C. Cir. 2008). Plaintiff is "deemed to have consented to defendants' argument" and "defendants must only satisfy their 'modest threshold burden' of demonstrating the facial merit of their argument." *Cornell v. Kapral*, 2011 U.S. Dist. LEXIS 2616, *49 (N.D.N.Y. Jan. 11, 2011).

DATED: September 16, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this September 16, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

s/ *Erez Reuveni*
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