In the
United States District Court
for the
District of Columbia

Washington Alliance of Technology Workers; 21520 30th Drive SE Suite 102 Bothell, WA 98021 *Plaintiff*, *v.* U.S. Dep't of Homeland Security, Secretary of Homeland Security, U.S. Immigration and Customs Enforcement, Director of U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Director of U.S. Citizenship and Immigration Services; Office of General Counsel Washington, DC 20258. *Defendant*.	Civil Action No. 1:16-cv-1170 (RBW)

Plaintiff's Response to Defendant's Motion to Dismiss

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INTRODUCTION

The central issue in this case is whether the Defendant, U.S. Department of Homeland Security ("DHS"), has the authority to transform student visas into a guestworker program to supply labor for industry by allowing aliens to remain in the country for years after graduation and granting them authorization to work (or be unemployed and looking for work) while in student visa status. After eight years of litigation, including journeys through two different circuits, this question still remains unanswered.

Statutory Background

Aliens are admitted into the United States as *immigrants*, *non-immigrants* or *refugees*. 8 U.S.C. §§ 1101(a)(15) and 1157. Section 1101(a)(15) was created in the Immigration and Nationality Act of 1952 ("INA") and authorizes DHS to admit non-immigrants for various purposes (*e.g.*, diplomats, crewmen, visitors, and journalists). Pub. L. No. 82-414, § 101, 66 Stat. 163. The common name associated with a non-immigrant visa category is derived from its subsection within 8 U.S.C. § 1101(a)(15). 8 C.F.R. § 214.1(a)(2). For example, 8 U.S.C.§ 1101(a)(15)(B) defines B visitor visa status and 8 U.S.C. § 1101(a)(15)(H)(ii)(a) defines H-2A agricultural guestworker visa status.

The H-1B visa is the statutory vehicle for admitting college-educated guestworker labor into the United States. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1184(i). To protect American labor, Congress imposes statutory limits on the number of H-1B visas issued annually. 8 U.S.C. § 1184(g). However, industry demand for such foreign labor has grown so great that these quotas are routinely exhausted. *E.g.*, 72 Fed. Reg. 18,946 (Apr. 8, 2008).

The F-1 student visa authorizes admission to *bona fide* students, who are solely pursuing a course of study, at an approved academic institution that will report termination of attendance. 8 U.S.C. § 1101(a)(15)(F)(i). There is no

statutory authorization for aliens to be employed while in student visa status. 42 Fed. Reg. 26,411 (May 24, 1977).

Regulatory History

While no statute authorizes aliens to work on student visas, DHS and its predecessor agencies have promulgated various regulations allowing aliens in F-1 student visa status to remain in the United States for years after graduation, and function as guestworkers to supply labor to industry. *E.g.*, 8 C.F.R. § 274a.12(c)(3)(i)(B)). In doing so, such regulations have flagrantly disregarded explicit congressional intent and statutory enactments restricting student visas and the admission of alien workers. *E.g.*, INA, § 212, 66 Stat. 183; Immigration Act of 1965, Pub. L. No. 89-236, § 10, 79 Stat. 911, 917–18, Pub. L. No. 97-116, §§ 2(a)(1), 18(a)(1), 95 Stat. 1611 and 1618 (1981). DHS regulations use the euphemism *practical training* to refer to work by an alien in student visa status. *E.g.*, 12 Fed. Reg. 5,347 (Aug. 7, 1947).

The work program at issue is Post-Completion Optional Practical Training ("OPT"). 8 C.F.R. § 214.2(f)(10)(ii). OPT was created in 1992 as an interim rule made without public notice and comment that is largely in effect today. Pre-Completion Interval Training, F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. §§ 214 and 274a) ("1992 OPT Rule"). From 1992 until 2007, the OPT program authorized aliens in F-1 student visa status to remain in the United States and work for one year after graduation. 8 C.F.R. § 214.2(f)(11) (2007).

In 2007 Microsoft Corporation devised a scheme to use OPT to circumvent the H-1B visa quotas. *Wash. Alliance of Technology Workers v. U.S. Dep't of Homeland Security*, No. 1:14-cv-529, A.R. 120–23 (D.D.C) ("*Washtech I*"). Microsoft's plan was to increase the duration of the OPT program so that it would be long enough to be a substitute for an H-1B visa. *Id.* Microsoft pro-

posed its scheme to the Secretary of DHS at a dinner party. *Id*. From there, the regulatory process became a secret, backroom deal cut with industry lobbyists. *See Washtech I*, A.R. 124–27, 132–34. The public received no notice whatsoever that DHS was considering such regulations until this massive new guestworker program was promulgated as a *fait accompli*, without public notice and comment. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214 and 274a) ("2008 OPT Rule"). The 2008 OPT Rule was specifically designed to circumvent the H-1B quotas, 73 Fed. Reg. 18,946–47, with the goal of creating "a significant expansion of the available pool of skilled workers." *Id*. at 18,953.

The 2008 OPT Rule created two extensions to the existing one-year OPT work period established in the 1992 OPT Rule. The first extension applied from the time an H-1B petition was filed on the alien guestworker's behalf until a final decision was made on the petition. 73 Fed. Reg. 18,949. This extension could last for six months, from April 1st (when DHS starts accepting H-1B visa petitions for the next fiscal year) until October 1st (the start of the fiscal year). The second extension was for seventeen months and applied only to guestworkers with degrees in fields DHS designated as *STEM* (science/technology/engineering/mathematics). 73 Fed. Reg. 18,948. Under the 2008 OPT Rule, alien guestworkers could be employed in student visa status for a total of up to 35 months.

On March 11, 2016, DHS promulgated the rule central to this lawsuit in response to the 2008 OPT Rule being vacated by the Court for failure to give public notice and comment. 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. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a) ("2016 OPT Rule"). The 2016 OPT Rule retained both of the work period extensions of the 2008 OPT Rule but it increased the duration of the STEM extension from seventeen months to twenty-four months. 81 Fed. Reg. 13,040. The 2016 OPT Rule also allows OPT guestworkers to be unemployed and looking for work while maintaining student visa status. *Id*. at 13,042.

Litigation History

Plaintiff, Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO ("Washtech") is a labor union that represents American workers in technology (STEM) fields that are targeted by DHS OPT regulations. Compl. ¶¶ 8–9 and 85–226. Washtech filed a complaint challenging the 2008 OPT Rule on procedural and substantive grounds. *Washtech I*, complaint, ECF 1 (D.D.C. Mar. 28, 2014). On August 12, 2015 the Court issued an opinion and order finding that DHS had violated the Administrative Procedure Act ("APA"). *Washtech I*, order, ECF 44. The Court vacated the 2008 OPT Rule for failure to give public notice and comment but stayed vacatur to allow DHS to promulgate a new rule. *Washtech I*, order, ECF 44 (D.D.C. Aug. 12, 2015).

On Aug. 18, 2015 Washtech filed a notice of appeal. *Washtech I*, ECF 45. In its appeal, Washtech challenged whether the Court had improperly allowed DHS to continue the policies unlawfully put in place in the 2008 OPT Rule and whether the OPT program was within DHS authority. *Wash. Alliance of Technology Workers v. U.S. Dep't of Homeland Security*, No. 15-5239, statement of the issues (D.C. Cir. Sept. 23, 2015) ("*Washtech II*").

On May 13, 2016, the D.C. Circuit issued an opinion holding the issues raised in *Washtech I* were moot because the 2008 OPT Rule was replaced by

the 2016 OPT Rule. *Washtech II*, slip op. (D.C. Cir. May 13, 2016). The D.C. Circuit also vacated the Court's judgment in *Washtech I*. *Id*.

On June 17, 2016, Washtech filed the complaint in this case pursuant to the APA. *Wash. Alliance of Technology Workers v. U.S. Dep't of Homeland Security, et al*. No. 1:16-cv-1170, complaint, ECF 1 (D.D.C. June 17, 2016) ("*Washtech III*"). The complaint alleges (Count I) the transformation of student visas into a guestworker program through OPT regulations is in excess of DHS authority; (Count II) the 2016 OPT Rule is in excess of DHS authority; (Count III) the 2016 OPT Rule was promulgated without following the procedures required by law; and (Count IV) the 2016 OPT Rule was arbitrary and capricious.

The Effect of the Regulations at Issue

Pursuant to the 1992 OPT Rule and subsequent amendments, all alien graduates are eligible to work in the United States under F-1 student visa status for one year after graduation. 8 C.F.R. § 214.2(f)(10). The 2016 OPT Rule adds two extensions to that work period. First, it 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. 8 C.F.R. § 214.2(f)(5)(vi). Second, the 2016 OPT Rule allows guestworkers with degrees in fields DHS designates as STEM occupations to work in F-1 student visa status for an additional two years. 8 C.F.R. § 214.2(f)(10)(ii)(C). In total, an OPT guestworker can be employed after graduation in F-1 student visa status for a maximum of 42 months. Under this system, an alien must work under the one-year OPT program created by the 1992 OPT Rule before he can work under either of the extensions created by the 2016 OPT Rule. 81 Fed. Reg. 13,117–18 (codified at 8 C.F.R. §§ 214.2(f)(5)(vi) and (f)(10(ii)(C)). Yet the 2016 OPT Rule does not stop there when it comes to increasing the

amount of foreign labor available to industry. It also authorizes OPT guestworkers to be unemployed while in F-1 visa status and not attending school, thus keeping guestworkers who lose their jobs in the job market. 81 Fed. Reg. 13,119 (codified at 8 C.F.R. § 214.2(f)(10)(ii)(E)).

The effect of the OPT program is to massively increase the amount of foreign labor in occupations requiring college degrees and to specifically increase the amount of foreign labor in STEM occupations. 81 Fed. Reg. 13,040. The White House stated that there are already 34,000 foreign guestworkers in F-1 student visa status working under the STEM OPT extension and that it expects the 2016 OPT Rule to cause that to grow to 92,000 guestworkers. Press Release, *Impact Report: 100 Examples of President Obama's Leadership in Science, Technology, and Innovation*, The White House, June 21, 2016, available at https://www.whitehouse.gov/the-press-office/2016/06/21/impact-report-100-examples-president-obamas-leadership-science (last visited Sept 2, 2016) ("White House Press Release").

In lieu of an answer to the complaint, DHS moved to dismiss Washtech's lawsuit under Fed. R. Civ. P. 12(b)(1) and (6).

ARGUMENT

I. Washtech's injuries fall squarely within precedent establishing injury in fact.

A party invoking a court's jurisdiction has the burden of demonstrating that it satisfies the irreducible constitutional minimum of standing: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir.

2014). The injury in fact "need not be large or intense." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986). Alternatively, when plaintiffs challenge that an administrative action was made without required procedural safeguards (*e.g.*, Compl. Count III), a lesser standard applies where the plaintiff must only establish the agency action threatens its concrete interest. *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). At the pleadings stage, the burden imposed on plaintiffs to establish standing is not onerous and general factual allegations of injury resulting from the defendant's conduct may suffice. *NB v. D.C.*, 682 F.3d 77, 82 (D.C. Cir. 2012). "In analyzing whether [a plaintiff] has standing at the dismissal stage, [a court] must assume that [the plaintiff] states a valid legal claim and 'must accept the factual allegations in the complaint as true.'" *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003) (citations omitted) (quoting *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002)).

Washtech is a labor union that represents American workers in technology fields. Compl. ¶ 8. Through this action, Washtech seeks to protect its members from foreign labor admitted into the market solely by DHS *ultra vires* regulation. Compl. ¶¶ 85–226. Washtech's complaint enumerates five specific injuries recognized by the D.C. Circuit resulting from the challenged administrative record:

> First, OPT deprives Washtech members of statutory labor protective arrangements. Second, OPT allows increased competition with Washtech Members with foreign workers. Third, OPT injures Washtech members by creating unfair competition with foreign workers. Fourth, in promulgating the 2016 OPT Rule, DHS deprived Washtech members of their procedural right to proper notice and comment. Fifth, the 2016 OPT Rule discriminates against Washtech members because it requires employers to provide mentoring programs to OPT participants that are not available to Washtech members.

Compl. ¶¶ 85–89.

A. Washtech has standing to bring this suit on behalf of its members because protecting the working conditions of its members is a primary purpose of a labor union and Washtech has identified specific members who have standing to bring this suit on their own.

"An organization has standing to bring suit on behalf of its members if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *In re Idaho Conservation League*, 811 F.3d 502, 508 (D.C. Cir. 2016) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Washtech's complaint identifies three of its members who would have standing to bring this action on their own: Rennie Sawade, Douglas Blatt, and Ceasar Smith. Compl. ¶¶ 106, 137, and 184. The complaint includes specific allegations that Sawade, Blatt, and Smith are active participants in the STEM labor market.[1] *See Mendoza*, 754 F.3d at 1013–14 (D.C. Cir. 2014). These individual representatives are all members of a union for technology workers. Compl. ¶¶ 105, 137, and 184. Mr. Sawade and Mr. Blatt[2] are currently employed as computer programmers. Compl. ¶¶ 106 and 137. Mr. Smith is currently employed as a network and systems administrator. Compl. ¶ 184. DHS designates both computer programming and systems and network administration as STEM occupations under the 2016 OPT Rule, targeting those specific fields for an increase in foreign labor. 81 Fed. Reg. 13,118; 8 C.F.R. § 214.2(f)(10)(ii)(C)(2)(ii).

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1 Washtech uses the redundant, lobbyist-speak acronym *STEM* to describe its job market solely because that is how the 2016 OPT Rule refers to it. STEM has no standard definition. DHS defines STEM using a list of fields on a web site. 81 Fed. Reg. 13,118. The specific fields in which the representative Washtech members work are on this list, making them *STEM workers* as defined by DHS. Whenever Washtech uses the term *STEM* here, it does so using DHS's definition of the term.

2 Mr. Blatt lost his job since the filing of the complaint and is now looking for a new computer programming job.

These Washtech members frequently apply for jobs in the STEM labor market as it is defined by the 2016 OPT Rule. 81 Fed. Reg. 13,118 and Compl. ¶¶ 107–209. Mr. Blatt and Mr. Smith are employed as contract (*i.e.*, temporary) workers, so their job search is inherently continuous. Compl. ¶¶ 137 and 184. Mr. Blatt is seeking a full-time position. Compl. ¶ 137. Mr. Sawade became employed in a full-time position last year. Compl. ¶ 106. Prior to taking that position, Mr. Sawade had to work as a contract programmer and had to change jobs frequently. ¶ 107. As such, these Washtech members are active participants in the computer programming and systems and network administration job market (*i.e.*, a subset of the STEM job market as defined by DHS). *Cf. Mendoza*, 754 F.3d at 1013–14 (D.C. Cir. 2014) (plaintiffs were participants in the herder job market even though they had not applied for any jobs and did not work as herders because they monitored the herder job market and hoped to return to it if market conditions improved).

Protecting the economic security and working conditions of its members is one of Washtech's core purposes as a labor union. Compl. ¶ 8; *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (Unions exist to protect the economic interests of their members). Relief under the APA does not require an individual member to participate in the suit. 5 U.S.C. § 702. Therefore, Washtech can represent the interests of its members in this suit.

B. Injury 1: DHS OPT regulations injure Washtech members by depriving them of statutory protections from foreign labor.

Washtech members are injured from the loss of statutory protections for domestic labor created by the OPT program. Compl. ¶ 55. "Even where the prospect of job loss is uncertain, [the D.C. Circuit has] repeatedly held that the loss of labor-protective arrangements may by itself afford a basis for standing." *Bhd. of Locomotive Eng'rs v. United States*, 101 F.3d 718, 724 (D.C. Cir. 1996)

("*BLE*"); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 852–55 (D.C. Cir. 2006); *Simmons v. Interstate Commerce Comm'n*, 934 F.2d 363, 367 (D.C. Cir. 1991). In the economic context, "where [] a statutory provision reflects a legislative purpose to protect a competitive interest, the protected competitor has standing to require compliance with that provision." *Bristol-Myers Squibb v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996). Indeed, this is just a labor-specific variant of the bedrock rule that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). As the *BLE* Court explained, "as long as there is a reasonable possibility that union members will receive and benefit from labor-protective arrangements, the loss of those arrangements stemming from [government action] provides a sufficient basis for union standing." *BLE*, 101 F.3d at 724; *see also, Simmons*, 934 F.2d at 367 (stating one only need "[t]he possibility" of greater labor protections to create a justiciable injury). In situations like this, it is the denial of the statutory protection itself that is the injury in fact, not the secondary question of whether that denial causes a harm, such as being hired for a specific job or winning a contract:

> We have held, however, that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result. In [*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*] an association of contractors challenged a city ordinance that accorded preferential treatment to certain minority-owned businesses in the award of city contracts.... Even though the preference applied to only a small percentage of the city's business, and even though there was no showing that any party would have received a contract absent the ordinance, we held that the prospective bidders had standing; the "injury in fact" was the harm to the contractors in the negotiation process, "not the ultimate inability to obtain the benefit."

Clinton v. New York, 524 U.S. 417, 433 & n.22 (1998) (citations omitted). Under these circumstances, "each injury is traceable to the [agency's] cancellation of [the statutory protections] and would be redressed by a declaratory judgment that the cancellations are invalid." *Id*.

The injury here is that DHS OPT regulations deprive Washtech members—and American STEM workers generally—of numerous statutory protections that should rightly be applied to such foreign labor. Congress established the H-1B visa program to admit college-educated foreign labor, the very type of guestworker labor allowed to enter the U.S. job market under OPT. *Compare* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1184(i)(2) *with* 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). The H-1B visa program requires foreign labor to respect domestic labor protections prescribed by Congress. These protections include the requirements for a Labor Condition Application, § 1182(n), and limits on the number of guest worker admissions, § 1184(g). But for DHS's unlawful regulations, OPT guestworkers would have to obtain a work visa authorized by Congress and conform to its labor protections—which in in nearly all cases would be an H-1B visa. *Cf.* 81 Fed. Reg. 13,042 (linking the OPT program to the H-1B visa).

The very purpose of expanding OPT beyond a year in 2008 was to circumvent the limits on guest worker admissions by authorizing aliens, who would have been prevented to work in the United States by the H-1B quotas, to work on an F-1 student visa instead. In promulgating the 2008 OPT Rule, DHS stated its concern that employers could not get all the H-1B workers they want—

> The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

73 Fed. Reg. 18,946—and that DHS would remedy this concern by using F-1 student visas instead:

> This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries.... It does this by allowing an F-1 student already in a period of approved post-completion OPT to apply to extend that period by up to 17 months.

73 Fed. Reg. 18,947. While the findings of the 2016 OPT Rule have been sanitized to remove descriptions of deliberate circumvention of H-1B quotas, doing the same thing has the same effect: the 2016 OPT Rule (like the 2008 OPT Rule and 1992 OPT Rule) allows alien guestworkers to enter Washtech members' job market without complying with the statutory protections established for such labor. *E.g.*, 8 U.S.C. §§ 1182(n) and 1184(g). Likewise, provisions of the 1992 OPT Rule remain in effect (allowing all graduates to work for a year) and create the same injury.[3] 57 Fed. Reg. 31,956 (codified at 8 C.F.R. § 214.2(f)(10)(ii)(A)(3)).

Just as in *Clinton*, DHS's cancellation of statutory protections (by using the OPT program to circumvent the labor protections under the H-1B program) confers standing on those whom Congress intended to protect: American workers including Washtech members. *E.g.*, H.R. Rept. 101-723 at 44 (Sept. 19, 1990) (describing the caps on H category visas). The injury here is analogous to the injury in *BLE* with visas substituting for railroad transactions. In *BLE*, the plaintiffs suffered an injury in fact when the Interstate Commerce Commission classified a railroad transaction under 49 U.S.C § 10907(a) (a section that did not impose labor protective arrangements), rather than § 11347 (a section that required certain labor protective arrangements). *Id.* at 720. Similarly, DHS's classifying non-student alien guestworkers under F-1 student visa sta-

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3 An alien must work on the one-year OPT program originally created in the 1992 OPT Rule (and reenacted in the 2016 OPT Rule) before working on the two-year STEM extension created in the 2016 OPT Rule. 8 C.F.R. § 214.2(f)(10)(C).

tus, instead of as H-1B visa status, results in Washtech members losing the labor protections to which they are entitled under the H-1B statutory provisions. This is an injury in fact under *BLE* and *Clinton*.

The record establishes that the 2016 OPT Rule targets the *specific fields represented by Washtech members* for an increase in foreign labor without complying with the statutory protections for American labor established for this class of workers. 81 Fed. Reg. 13,040–122. Under the 2016 OPT Rule, DHS defines *STEM* using a list at http://www.ice.gov/sevis.[4] 81 Fed. Reg. 13,118. That list defines *Programming* and *Network and System Administration* as STEM fields. *Id*. In addition, the one-year OPT term created in the 1992 OPT Rule is still in effect and is available to college graduates in *any field*, thus it allows the entry of programmers and systems administrators into the job market as well. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3).

Washtech is a union that represents STEM workers. Compl. ¶ 8. Washtech also has identified two of its members who are computer programmers and one who is a computer systems and networking administrator. Compl. ¶¶ 106, 137, and 184. These Washtech members are active market participants who are employed in these computer occupations and are frequently applying for new jobs. Comp. ¶¶ 105–194. At the motion to dismiss stage, those allegations are sufficient to establish that Washtech members work in specific fields targeted for additional foreign labor and, therefore, suffer the injury of deprivation of statutory labor protections caused by DHS OPT regulations. *See NB*, 682 F.3d at 82.

Traceability and redressability are trivial for this injury. But for DHS OPT regulations the foreign labor at issue would not be in Washtech's market. If

4 As of Aug. 28, 2016, there is no STEM field list at that location. However, there is a "STEM Designated Degree Program List Effective May 10, 2016" located at https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf (last visited July 14, 2016) ("STEM Field List").

DHS OPT regulations be vacated, this labor will be removed from Washtech's market. *See Honeywell Int'l, Inc. v. Envtl. Prot. Agency*, 374 F.3d 1363, 1369–70 (D.C. Cir. 2004) (finding traceability requirement satisfied when agency allows competitors into plaintiff's market and redressability satisfied when vacating the regulations will remove those competitors).

C. Injury 2: DHS OPT Regulations injure Washtech members by allowing additional competitors into their markets.

The OPT program creates an injury in fact because it allows additional competitors into its members' job market. Compl. ¶86. "The competitor standing doctrine recognizes 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Mendoza*, 754 F.3d at 1011 (quoting *La. Energy and Power Auth. v. Fed. Energy Regulatory Comm'n*, 141 F.3d 364, 367 (D.C. Cir. 1998)). Even where an agency action has allowed just one competitor into a plaintiff's market, there has been no dispute that the plaintiff suffered an injury in fact. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 n.4 (1998). The injury in fact is the mere "exposure to competition" created by regulatory actions. *Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001) (quoting *Bristol-Myers*, 91 F.3d at 1499).[5] A plaintiff does not have to demonstrate specific lost sales to establish an injury in fact from increased competition; only that the agency action permits a competitor to enter the market. *Bristol-Myers*, 91 F.3d at 1499. The economic injury from increased competition is clear from the laws of supply and demand. *See United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989) (stating "courts rou-

5 This is where DHS's entire standing argument breaks down. Its motion to dismiss relies entirely on the false premise that Washtech must demonstrate that its members applied for and did not receive specific jobs as a result of an OPT applicant. That is not the law in this circuit. Washtech need merely show that DHS opened the door to more competition. DHS does not and cannot dispute that it has in fact done this. *See, e.g.*, White House Press Release (stating there are already 34,000 OPT guestworkers with an expected increase to 92,000).

tinely credit" "basic economic logic" to find standing); *cf. Sugar Cane Growers*, 289 F.3d at 94 (stating "basic economic logic" establishes a "*prima facie* claim of injury," which defendants bear the burden of rebutting).

The record makes indisputable the fact that the 2016 OPT Rule and the 1992 OPT Rule allow additional competitors into Washtech members' job market. The very purpose of expanding the duration of OPT beyond a year was to increase the supply of foreign labor available to industry. *E.g.*, 73 Fed. Reg. 18,953. The Executive Branch claims there are already 34,000 guestworkers in the country under the 2016 OPT Rule's STEM extension and predicts that number will grow to 92,000 guestworkers.[6] White House Press Release. As shown above, the 2016 OPT Rule specifically targets the fields of the named Washtech members (computer programming and network and systems administration) for more foreign guestworkers. 81 Fed. Reg. 13,118 and STEM Field List. In addition, the one-year work period created in the 1992 OPT Rule allows college graduate aliens with degrees in any field to become OPT guestworkers while in student visa status. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). Therefore, it also *allows* alien guestworkers under the OPT program to compete with Washtech members in the programming and systems administration job markets, creating injury as well. *See La. Energy,* 141 F.3d at 367. Worse yet, the 2016 OPT Rule allows aliens guestworkers to be unemployed and looking for work while in student visa status, ensuring that such aliens can remain in the job market even if they are laid off. 81 Fed. Reg. 13,042. As such, the administrative record at issue establishes that the regulations in question allow additional competitors into Washtech member's job markets, creating an injury in fact. *See La. Energy*, 141 F.3d at 367 (stating that the D.C. Circuit has "repeatedly held" that an agency action that allows competitors into a plaintiff's market creates an injury in fact).

6 For comparison, the current H-1B quota is 65,000 with an additional 20,000 visas set aside for U.S. Graduates. 8 U.S.C. § 1184(g).

American workers routinely have had standing in the D.C. Circuit to challenge agency actions that expose them to additional competitors in a wide range of markets and competitive situations. *E.g., Mendoza*, 754 F.3d at 1010–16; *Int'l Bhd. of Teamsters*, 724 F.3d at 211–12; *AFL-CIO v. Dole*, 923 F.2d 182 (D.C. Cir. 1991) (standing not raised as an issue); *AFL-CIO v. Brock*, 835 F.2d 912 (D.C. Cir. 1987) (standing not raised as an issue); *Int'l Bhd. of Teamsters v. Pena,* 17 F.3d 1478, 1483 (D.C. Cir. 1994); *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985) (standing not raised as an issue); *Int'l Union of Bricklayers v. Meese*, 761 F.2d 798, 802–04 (D.C. Cir. 1985); *Autolog v. Reagan*, 731 F.2d 25, 28–31 (D.C. Cir. 1984); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 809–10 (D.C. Cir. 1983); *Bustos v. Mitchell*, 481 F.2d 479, 486 (D.C. Cir. 1973); *Curran v. Laird*, 420 F.2d 122, 124–27 (D.C. Cir. 1969); *see also Gooch v. Clark*, 433 F.2d 74, 76 (9th Cir. 1970) (agency dropped standing challenges to labor group after the Supreme Court held increased competition is an injury giving rise to standing in *Ass'n of Data Processing Serv. Orgs v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins* 397 U.S. 159 (1970)). For example, in *Mendoza*, the plaintiffs were not currently working in the relevant job market (herding) and were seeking an improvement in the herding job market in the hope of returning to it. 754 F.3d at 1013. In *Int'l Ladies' Garment Workers' Union* the alleged unlawful addition of competitors was nationwide, affected many different fields, and the plaintiffs were among many competitors. 722 F.2d at 809–10. In *Teamsters*, the competition spanned border zones where the union members might, but were not guaranteed, to receive the jobs otherwise going to the foreign competitors. 17 F.3d at 1483. In *Bricklayers* additional foreign labor entered a local market where the union member plaintiffs were nearly certain to have filled the jobs in question. 761 F.2d at 799.

Therefore an individual in the STEM labor market would have standing to challenge DHS rules that lead to an increase in labor in that market. *Cf. Mendoza*, 754 F.3d at 1011 (stating "an individual in the labor market for open-range herding jobs would have standing to challenge Department of Labor rules that lead to an increased supply of labor—and thus competition—in that market."). As described above, Washtech represents STEM workers and has identified members who are computer programmers and one who is a systems and networking administrator and are currently active participants in the STEM labor market. Compl. ¶¶ 8, 106, 137, and 184. At the motion to dismiss stage, those allegations are sufficient to establish that Washtech members work in those specific fields. *See NB*, 682 F.3d at 82. The record fills in all of the remaining facts needed to establish an injury in fact (*i.e.*, that the OPT program allows aliens to enter Washtech members' job market). 81 Fed. Reg. 13,040–122.

Here again, traceability and redressability are trivial for the injury. But for DHS OPT regulations the foreign labor at issue would not be in Washtech's market. If DHS OPT regulations be vacated, this labor will be removed from Washtech's market. *See Honeywell*, 374 F.3d at 1369–70 (finding the traceability requirement satisfied when agency allows competitors into plaintiff's market and redressability is satisfied when vacating the regulations will remove those competitors).

D. Injury 3: DHS OPT regulations create unfair competition for Washtech members because of taxation differences.

Washtech members suffer an injury in fact from the OPT regulations because they create unfair competition from alien guestworkers. Compl. ¶ 87. The inability to compete on equal footing is an injury in fact. *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995); *Int'l Ladies' Garment Workers' Union*, 722 F.2d at 810–11. As with statutory protections in *Clinton*, the injury here is the unequal playing field, not the end result for a specific lost job opportunity or contract:

> The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

Adarand, 515 U.S. at 211 (citations omitted). As such, Washtech members do not have to show any job loss or that they would have (or might have) obtained a job absent this unequal treatment. Washtech only needs to demonstrate that DHS's rule creates unequal treatment, which the unequal rates of taxation plainly provide. *Id*.

Under both the 1992 OPT Rule and the 2016 OPT Rule Washtech members suffer injury from unfair competition due to disparate taxation treatment. Employers do not have to pay Medicare and Social Security taxes for aliens on student visas. 26 U.S.C. § 3121(b)(19). However, employers must pay those taxes when they employ Washtech members, 26 U.S.C. § 3121(b). The direct effect is that workers under the OPT program are 15.3% cheaper to employ than comparably compensated Washtech members. By allowing foreign labor unlawful entry into the United States labor market under student visas, OPT puts Washtech members at a competitive disadvantage because of taxation rules. Many universities promote this taxation disparity as an incentive for employers to hire their foreign student graduates. Compl. ¶ 222. This disparity creates the injury in fact of unfair competition. *See Int'l Ladies' Garment Workers' Union*, 722 F.2d at 810–11 (stating that allegations of unfair competition present an injury in fact); *Nat'l Milk Producers Fed'n v. Shultz*, 372 F. Supp. 745, 746 (D.D.C. 1974) (finding plaintiffs were "subjected to unfair competition and injury when foreign exporters are granted subsidies for the express purpose of disposing of dairy products in the United States market"). Furthermore, employers place job advertisement seeking alien guestworkers on the OPT program to the exclusion of American workers. *E.g.*, Compl. ¶¶ 100–102. While such advertisements are unlawful, 8 U.S.C. § 1324b, the huge tax disadvantage DHS has created for American workers *vis-à-vis* guest-

workers on the OPT program has proven a powerful incentive for employers to violate the discrimination provisions of the INA that make American workers a protected class. *E.g.*, Press Release, "Justice Department Settles Citizenship Status Discrimination Claim Against IBM," U.S. Department of Justice, Sept. 27, 2013, *available at* http://www.justice.gov/opa/pr/2013/September/13-crt-1091.html (last visited July 16, 2016) (describing how IBM placed job advertisements exclusively seeking aliens on F-1 (OPT) and H-1B visas).

As before, traceability and redressability are trivial for the injury. But for DHS OPT regulations the foreign labor at issue would not be in Washtech's market creating unfair competition. If DHS OPT regulations be vacated, this labor will be removed from Washtech's market. *See Honeywell*, 374 F.3d at 1369–70 (finding the traceability requirement satisfied when agency allows competitors into plaintiff's market and redressability is satisfied when vacating the regulations will remove those competitors).

E. Injury 4: DHS deprived Washtech of its procedural rights in the 2016 rulemaking by relying on the conclusions it made without public notice and comment in the 2008 OPT Rule.

Washtech's suffers the injury in fact of deprivation of its procedural rights during the promulgation of the 2016 OPT Rule. Compl. ¶ 88. If an agency relies on substantive conclusions made in a rule vacated for failure to give notice and comment in subsequent rulemaking, it deprives the plaintiff of its procedural rights. *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 37 (D.D.C. 2003). After the Court ordered the 2008 OPT Rule vacated, DHS simply did a go-through-the-motions notice and comment process to ratify the decision it had made secretly with industry lobbyists: that the duration of OPT should be extended long enough that OPT could serve as a viable replacement for an H-1B visa. Compl. ¶¶ 67–68. DHS's reliance in the 2016 OPT Rule on its conclusions made without public notice and comment in the 2008

OPT Rule deprived Washtech of its procedural right to proper public notice and comment. *Haw. Longline Ass'n,* 281 F. Supp. 2d at 37. "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). The plaintiff must simply show that it has a concrete interest greater than that of the general public. *Mendoza*, 754 F.3d at 1010. As the plaintiff in the action that triggered the 2016 OPT Rule and as direct competitors with beneficiaries of the Rule, Washtech clearly has an interest greater than that of the general public and is directly injured by defective remedial notice and comment. *Haw. Longline,* 281 F. Supp. 2d at 37.

F. Injury 5: DHS OPT regulations create unlawful employment discrimination for Washtech members.

The 2016 OPT Rule subjects Washtech members to employment discrimination. Compl. ¶ 88. The 2016 OPT Rule requires employers establish mentoring programs for OPT guestworkers. 81 Fed. Reg. 13,119. "Mentoring is a time-tested and widely used strategic approach to developing professional skills." Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,376, 83,387 (proposed Oct. 19, 2015). However, DHS did not require that employers make the same mentoring programs available to American workers and rejected numerous public comments calling for them to do so.[7] 81 Fed. Reg. 13,098. As such, the 2016 OPT Rule effectively mandates disparate treatment for American workers *vis-à-vis* OPT guestworkers by requiring the latter receive the benefit of mentoring. Discrimination in em-

7 DHS writes, "Plaintiff repeatedly refers to a 'mentoring program' obligation even though the 2016 rule does not formally establish one." DHS Br. at 31. Washtech uses the term *mentoring* because the 2016 OPT Rule and proposed rule uses it or the phrase "mentoring and training." *E.g.,* 80 Fed. Reg. 83,387, 81 Fed. Reg. 13,042

ployment based upon immigration status is unlawful and American workers are the protected class. 8 U.S.C. § 1324b(a)(3). Such disparate treatment is an injury in fact.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *see also Lutheran Church-Missouri Synod v. Fed. Commc'ns Comm'n*, 154 F.3d 487, 493 (D.C. Cir. 1998) ("[T]he claim that the litigant was denied equal treatment is sufficient to constitute Article III 'injury in-fact.'"); *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015) ("[E]qual treatment under law is a judicially cognizable interest … even if it brings no tangible benefit to the party asserting it."); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004) ("Discriminatory treatment … qualif[ies] as an actual injury for standing purposes."); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991) ("[I]llegitimate unequal treatment is an injury unto itself ….").

G. DHS ignores the settled law in the D.C. Circuit and the pleadings in the complaint to argue against Washtech's standing.

DHS's standing argument mentions the deprivation of statutory protections injury but then immediately skips to the competitive injury and does not address the first injury pled. DHS Br. at 14. Should DHS address this injury in reply, Washtech prays the court will permit a surreply. In regard to the fourth injury (procedural injury) DHS argues the merits of the case to assert there

is no injury. DHS Br. at 32. However, in analyzing standing, the court must assume the plaintiff makes a valid legal claim. *Info. Handling Servs.,* 338 F.3d at 1029. Washtech responds to DHS on the remaining three injuries pled.

1. The injuries pled are actual, making the case ripe for review.

DHS argues that the injury of allowing increased competition with Washtech members caused by OPT is not impending. DHS Br. at 15; *see also, id*. at 32–34 (claiming the case is not ripe for the same reasons). The hard fact is that the 2016 OPT Rule at issue has been *allowing* competitors into Washtech's market since, May 10, 2016. 81 Fed. Reg. 13,040. Allowing competitors into Washtech's market is an actual injury in fact. *La. Energy*, 141 F.3d at 367. Furthermore, the 2016 OPT Rule explicitly authorizes aliens working prior to that date under the 2008 OPT Rule's 17-month extension to continue to work under the 2016 OPT Rule and to extend the work period to 24-months. 73 Fed. Reg. 13,121. The pled injuries occur at this very moment and the case is ripe for review.

2. Washtech members are current and active participants in the programming and systems administration job markets.

In its memorandum, DHS repeatedly refers to the extensive history of Washtech members applying for computer and systems administration jobs documented in the complaint. *E.g.*, DHS Br. at 16, 17, and 19. In spite of clearly being aware of this employment history, DHS cites *Mendoza* for the proposition that Washtech members are not active market participants. DHS Br. at 16–17. As noted above, in *Mendoza*, the plaintiffs were not currently working in the relevant job market (herding) but they were active market participants because they were monitoring the herding job market in the hope of returning to it if conditions improved. 754 F.3d at 1013. In contrast, the Washtech members are members of a labor union, they are currently working in specific fields in which aliens with degrees under the 2016 OPT Rule are authorized for

extended work periods, and frequently apply for jobs in those fields. Compl. ¶¶ 106–209. The Washtech members are much more active participants in the programming and systems administration job market than the *Mendoza* plaintiffs (who had standing) did in the herding market.

3. DHS ignores D.C. Circuit precedent holding a plaintiff must only show an agency action allows increased competition to establish competitive injury.

Faced with the indisputable fact that the 2016 OPT Rule *allows* additional competitors into the programming and systems administration job markets, DHS transmogrifies the pled injury from increased competition to one of specific lost jobs. DHS Br. at 17–22 (stating, "Plaintiff essentially asserts that past, failed efforts at securing preferable employment demonstrate injury."). DHS's transmogrification argument ignores the extensive precedent in this circuit that a plaintiff does not need to show specific lost sales to establish injury; only that the government action at issue *allows* increased competition. *E.g.*, *Tozzi*, 271 F.3d at 308; *Bristol-Myers*, 91 F.3d at 1499. Not only does DHS ignore the pled injury of allowing increased competition but also DHS focuses exclusively on the harm of specific job losses, DHS Br. at 14–24, to the exclusion of other harms that the courts implicitly attribute to the injury of increased competition. *E.g., Sugar Cane Growers*, 289 F.3d at 94 (describing the harm of reduced prices resulting from increased competition). Under the law of supply and demand, even fully employed workers suffer economic injury from an increase in labor through depressed industry wages. Courts use economic logic to infer such harms from the injury in fact of increased competition. *United Transp. Union*, 891 F.2d at 912 n.7. Following the law in this circuit, Washtech has only pled the injury of allowing increased competition and has not pled harms that flow from that injury. Compl. ¶¶ 85–226.

DHS uses this same technique of transmogrifying the injury from *allowing increased competition* to *identifiable lost jobs* to argue against causation and redressability. *E.g.*, DHS Br. at 23 (describing the injury as "underemployment and past failure to secure preferable jobs"). Under the injury actually pled in the complaint—*allowing* increased competition—causation and redress are trivial. Compl. ¶ 98. But for DHS regulations, Washtech members would not be exposed to increased competition from OPT guestworkers in their job market. If the regulations be vacated, the increased competition from OPT guestworkers will be removed from the job market. *See Honeywell*, 374 F.3d at 1369–70.

4. DHS OPT rules are the cause of unfair competition with Washtech members.

For the third injury of unfair competition due to taxation, DHS employs the technique of blame shifting to a third party (*i.e.*, Congress). DHS Br. 26–30. Congress only exempted aliens in student visa status from payroll taxes. "There is no statute under which employment of nonimmigrant students for practical training is authorized." 42 Fed. Reg. 26,411. The foreign OPT guestworkers are only in the market under F-1 student visa status due to the DHS regulations at issue. 8 C.F.R § 214.2(f)(10). The injury here is caused by the taxation difference enacted by Congress *and* the OPT regulations promulgated by DHS and does not occur without *both* causes. Because vacating the regulations at issue will remove this unfair competition, the injury is completely redressable.

DHS raises a couple of other issues in regard to the taxation difference. First, DHS argues that the student tax exemption only applies for five years. DHS Br. at 29. Even if only limited to five years, the tax benefit exists during part of the alien's work period and injures Washtech members. More

importantly, the five-year period is just the automatic exemption. An alien in F-1 student visa status may remain exempt from payroll taxes beyond five years if the "individual establishes to the satisfaction of the Secretary that such individual does not intend to permanently reside in the United States." 26 U.S.C. § 7701(b)(5)(E)(ii).

Second, DHS asserts that employers are not aware of the guestworker's visa status stating, "Washtech fails to recognize that employers do not commonly have access to specific documentation confirming whether a job applicant was an F-1 nonimmigrant during the recruitment process, because requesting such evidence is typically barred as an unfair immigration-related employment practice." DHS Br. at 29. DHS fails to recognize that when an employer puts out a job advertisement stating applicants, "Should have a valid OPT work permit for legal work authorization in the US," it knows the likely applicants are aliens in F-1 visa status. Compl. ¶ 102.

5. Equal employment opportunity is a legally protected interest of Washtech members.

DHS dismisses the injury of discrimination resulting from the 2016 OPT Rule requiring employer to provide OPT guestworkers formal "mentoring and training" and not requiring the same for American workers, stating, "Plaintiff's members have no 'legally protected interest' in receiving 'mentoring programs'" simply because someone else in the population benefits from such programs." DHS Br. at 30. To the contrary, American citizens *have the right* to the same employment opportunities DHS requires be offered to foreign guestworkers under the OPT program. 8 U.S.C. § 1324b (prohibiting employment discrimination against American workers based upon immigration status).

II. Washtech's interest of protecting American workers from foreign competitors is within the zone of interests of the statutory provisions violated.

A party suing under the APA must assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that it says was violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *Gunpowder Riverkeeper v. Fed. Energy Regulatory Comm'n*, 807 F.3d 267, 273 (D.C. Cir. 2015). "Whether a plaintiff comes within the 'zone of interests' is an issue that requires [a court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). "[The D.C. Circuit applies] the zone of interests test in a manner consistent with 'Congress's evident intent when enacting the APA to make agency action presumptively reviewable.'" *Mendoza*, 754 F.3d at 1016 (quoting *Patchak* 132 S. Ct. at 2201). The Supreme Court has

> always conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."

Patchak 132 S. Ct. at 2201 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

The OPT regulations are in violation of several provisions of the INA: 8 U.S.C. §§ 1101(a)(15)(F)(i) (definition of student visas status), 1101(a)(15)(H)(i)(B) (definition of H-1B visa status), 1182(n) (protections for American workers), 1184(a) (DHS regulations are required to ensure aliens leave the country when they no longer conform to the status in which they were admitted), 1184(g) (limits on the number of foreign guestworkers), 1227(a)(1)(C)(i) (making aliens deport-

able when they no longer conform to the status in which they were admitted), and 1324b (ban on employment discrimination against American workers). Compl. ¶ 4.[8] In determining whether a plaintiff satisfies the zone of interests test, the court's analysis is not limited to "the statute under which respondents sued but may consider any provision that helps us to understand Congress' overall purposes" in the INA. *Clarke*, 479 U.S. at 401.

A. The agency has acknowledged Washtech's interest of protecting American workers is within the zone of interest of the relevant statutes.

The administering agency has repeatedly acknowledged that protecting the working conditions of Americans is an interest under the F-1 visa (8 U.S.C. § 1101(a)(15)(F)(i)). The 2016 OPT rule itself acknowledges the goal of protecting American workers from aliens working on student visas. 81 Fed. Reg. 13,055 ("the basic approach in this rule appropriately balances the goals of protecting American workers…."). In 1977, DHS's predecessor agency, the Immigration and Naturalization Service ("INS"), reduced the period of work on student visas[9] from eighteen months to twelve months in response to concern "that employment of nonresident alien students presents unfair competition to U.S. resident workers." Nonimmigrant Students; Authorization of Employment for Practical Training; Petitions for Approval of Schools; Supporting Documents, 42 Fed. Reg. 26,411 (May 24, 1977) (codified at 8 C.F.R. § 214).

In 1991 the INS changed plans to expand employment for aliens on student visas, stating:

> The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every

8 Oddly, while the complaint explicitly identifies the specific provisions DHS has violated, DHS argues they have not been stated with "some particularity." DHS Br. at 37–38.

9 At that time "practical training" required a certification from the school that "the employment is recommended for that purpose" and "would not be available to the student in the country of his foreign residence." 42 Fed. Reg. 26,413 (codified at 8 C.F.R. § 214.2(f)6)).

> opportunity to further their educational objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 … demonstrated a clear Congressional concern about the Service's plan to expand student employment authorization without any built-in labor safeguards.

Nonimmigrant Classes; Students, F and M Classifications, 56 Fed. Reg. 55,608, 55,610 (Oct. 29, 1991) (codified at 8 C.F.R. §§ 214 and 274a) (referring to H.R. Rept. 101-723 at 67).

In 1994, the Secretary of Labor and Commissioner of the INS submitted a joint report to Congress on the trial work authorization for aliens in student visa status created in the Immigration Act of 1990. *An Evaluation of the Pilot Program of Off-Campus Work Authorization for Foreign Students (F-1 Nonimmigrants)*, Aug. 10, 1994. The report stated that the work program "did not adequately safeguard U.S. workers' access to the job opportunities," *id*. at 4, and "can undermine the working conditions of other workers in affected industries," *id*. at 5. The report concluded that such an authorization for aliens to work in student visa status "runs counter to this Administration's commitment to an affirmative policy of U.S. labor force development" *id*. at 8, and recommended that the program not be renewed, *id*. at 9.

Washtech's interest of protecting its American worker members clearly is "arguably" within the zone of interests of 8 U.S.C. § 1011(a)(15)(F)(i) because the agency itself has repeatedly argued it, including in the regulation at issue. *See Patchak* 132 S. Ct. at 2201.

B. The courts have acknowledged that Washtech's interest of protecting American workers is within the zone of interest of the relevant statutes.

The courts have "'often recognized' [the] principle that 'a primary purpose in restricting immigration is to preserve jobs for American workers.'" *Reno v.*

Flores, 507 U.S. 292, 334 (1993); *see also Mendoza*, 754 F.3d at 1016–18; *N. Mariana Islands v. United States*, 670 F. Supp. 2d 65, 85 (D.D.C. 2009).

> The legislative history of that [INA] … clearly evinces a congressional purpose to keep American labor stalwart in the face of foreign competition in the United States.… Congress has thus been concerned with the impact of competition by foreigners on the American labor force since 1885, and has passed increasingly restrictive legislation on the entry of nonimmigrant alien workers. This court has held that statutes designed for the protection of the American workers create a sufficient "zone of interest" to confer upon those workers a proper ground for standing.

Bricklayers, 761 F.2d at 804. *See also Shalom Pentecostal Church v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 163–64 (3d Cir. 2015) (recognizing the government had asserted the "INA's 'primary purpose' is 'to protect American workers, while providing employers with limited access to foreign labor, only when absolutely necessary.").

C. Washtech's interest of protecting American workers from foreign labor is at the heart of the overall purpose of the INA.

Both the Senate and House reports on the INA describe at length how the Act was designed to protect American workers from foreign labor. S. Rep. 82-1137 at 11 (Jan. 29, 1952) and H.R. Rep. 82-1365 at 50–54 (Feb. 14, 1952). Both reports state that the INA

> provides for the exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has. determined that there are sufficient available workers in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed.

S. Rep. 82-1137 at 11 and H.R. Rep. 82-1365 at 50–51 (identical text). Over the years Congress has continued to place protecting American workers at the core of the immigration system. *E.g.*, Immigration and Nationality Act of 1965,

§ 9, 79 Stat. 917 (requiring a certification by the Secretary of Labor prior to the admission of foreign labor); Miscellaneous and Technical Immigration and Nationalization Amendments of 1991, Pub. L. No. 102-232, § 302, 105 Stat. 1733. 1746 (making "any alien" seeking to enter the United States inadmissible unless the Secretary of Labor has certified the alien will not adversely affect American workers).

Specifically under the F-1 visa, Congress criticized proposals to expand student employment that "did not contain any labor safeguards." H.R. Rept. 101-723 at 67. Congress responded by creating its own trial work program (now expired) for aliens on student visas incorporating protections for American workers. Immigration Act of 1990, Pub. L. No. 101-649, § 221, 104 Stat. 4978, 5027.

D. DHS's zone of interest argument depends upon outlier interpretations for law and ignoring explicit agency and congressional intent to protect American workers under the F-1 visa program.

The 2016 OPT Rule explicitly acknowledges the "the goal[] of protecting American workers," 81 Fed. Reg. 13,055. Right there, Washtech has satisfied the "arguably" with "the benefit of any doubt go[ing] to the plaintiff" standard for the zone of interest test because DHS, itself, has argued it. *Patchak* 132 S. Ct. at 2201. Nonetheless, DHS goes on at length, contradicting the findings of the 2016 OPT Rule, to argue that protecting American workers is not within the zone of interests. DHS Br. at 37–42.

DHS's zone of interest argument requires relying on two outlier opinions: *Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897 (D.C. Cir. 1996) ("*FAIR*") and the non-precedential *Programmers Guild v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009). DHS Br. at 39. DHS's argument requires the Court look *only* at these two opinions for the zone of interests test. As

soon as one looks the weight of binding authority, DHS's argument falls apart. While coming four years afterwards, *FAIR* was the first of a small number of opinions to interpret a passing comment in *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991) as creating a new *integral relationship* requirement in the zone of interests test, resulting in a more stringent test. *FAIR* 93 F.3d. at 903–04. Even at the time, it was noted that the *FAIR* opinion was inconsistent with the existing "suitable challenger" standard established by this circuit. *FAIR*, 93 F.3d. at 906 (Rogers, J. dissenting). Before *Air Courier*, the Supreme Court had never (nor has it since) used the phrase "integral relationship" or a variant in the context of the zone of interest test. *Air Courier's* use of the phrase "integral relationship," 498 U.S. at 530, was clearly a rebuttal to similar language in the decision being reversed, *Am. Postal Workers Union v. U.S. Postal Serv.*, 891 F.2d 304, 306 (D.C. Cir. 1989).

In the period between *Air Courier* and *FAIR*, the D.C. Circuit held that the zone of interest test required asking whether the plaintiff was among the class of persons entitled to enforce the statutory provisions at issue. *First Nat'l Bank & Trust v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) *aff'd* 522 U.S. 479 (1998); *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1507 (D.C. Cir. 1995); *Scheduled Airlines Traffic Offices v. U.S. Dep't of Defense*, 87 F.3d 1356, 1359 (D.C. Cir. 1996); *Nat'l Recycling Coal. v. Browner*, 984 F.2d 1243, 1248 (D.C. Cir. 1993). This formulation is consistent with the most recent Supreme Court pronouncement of the zone of interest test: "Whether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 134 S. Ct. at 1387. Thus, *FAIR* is an aberration in a long line of zone of interest opinions from the court.

"[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail." *Sierra Club & Valley Watch v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). Furthermore, no *en banc* statement of the zone of interest test in the D.C. Circuit has incorporated an "integral relationship" requirement. *E.g.*, *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 444–45 (D.C. Cir. 1998); *Akins v. Fed. Election Comm'n*, 101 F.3d 731, 739–40 (D.C. Cir. 1996) *rev'd on other grounds* 524 U.S. 11 (1998). As a later, inconsistent panel decision, *FAIR* cannot be controlling. *Sierra Club*, 648 F.3d at 854.

DHS also relies on an aberration in the Third Circuit, the non-precedential *Programmers Guild*, 338 F. App'x 239 that takes an extreme approach to the zone of interest test variant created in *FAIR*. In addition to being non-precedential in the Third Circuit, *Programmers Guild* is utterly inconsistent with the Third Circuit's zone of interest precedent. *Compare Programmers Guild*, 338 F. App'x at 243 n.1 (3d. Cir. 2009) (stating *Air Courier* prohibited considering a sub-sub-section of the INA (8 U.S.C. § 1101(a)(15)) as one statute for the zone of interest test) with *UPS Worldwide Forwarding v. U.S. Postal Serv.*, 66 F.3d 621, 630 n.11 (3d Cir. 1995) (stating Air Courier "merely held that a recodification of an entire title of the United States Code, covering hundreds of statutory provisions developed over the course of two centuries, did not constitute one 'statute'").

To find American workers were not within the zone of interest of the relevant statute, the non-precedential *Programmers Guild* opinion follows a series of extraordinary steps. First, the court ignored its own precedent governing the scope of analysis for the zone of interest test. *E.g.*, *UPS*, 66 F.3d at 630 n.11; *Davis by Davis v. Philadelphia Hous. Auth.*, 121 F.3d 92, 98–99 (3d Cir. 1997). Second, it pared the statute-in-question for the zone of interest analysis down to such

a fine level of granularity that it does not make any sense standing on its own. 8 U.S.C. § 1101(a)(15)(F)(i) (beginning "an alien having a residence in a foreign country.…"). Third, the court refused to consider any other provisions in the INA in its analysis. *Programmers Guild*, 338 Fed. App'x at 243 n.1 (3d Cir. 2009) *contra Clarke*, 479 U.S. at 401 (stating in the zone of interest analysis a court is "not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes."). Finally, the Third Circuit ignored evidence presented showing explicit congressional and agency intent to protect American workers under that very same provision. *Programmers Guild*, No. 08-4642, Brief on Behalf of Appellants, at 26 (3d Cir. Aug. 1, 2009) (quoting 56 Fed. Reg. 55,610). Even the Third Circuit does not follow its own non-precedential *Programmers Guild* opinion. *E.g., Shalom Pentecostal Church*, 783 F.3d at 164 (holding the employment of special immigrant religious workers was within the zone of interests of the INA); *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, No. 09-240, slip op. (E.D. Pa. Aug. 30, 2010) (holding protecting American workers was within the zone of interests of the INA); *accord Mendoza*, 754 F.3d at 1016–17 (holding plaintiffs were within the zone of interest of the INA); *contra Programmers Guild*, 338 Fed. App'x at 242 (holding the zone of interest test cannot use the INA as the statute in question).[10]

The fatal flaw in DHS's zone of interest argument is that Washtech satisfies the zone of interest test even under the extreme *Programmers Guild* interpretation of the *FAIR* standard. Even if the court were to limit the zone of interest analysis to 8 U.S.C. § 1101(a)(15)(F)(i) and exclude all other provisions alleged to be violated and related provisions, both Congress and the adminis-

10 Like the D.C. Circuit in *Mendoza*, the Supreme Court routinely has used entire statutes as the statute in question for the zone of interest test, a "kitchen sink approach" the *Programmers Guild* opinion says the Court prohibits. *E.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990) (the statutes in question were the Federal Land Policy and Management Act of 1976 and National Environmental Policy Act of 1969), *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (the statute in question was the Federal Election Campaign Act of 1971).

tering agency have explicitly stated intent to protect American workers under that very provision. *See supra* (quoting H.R. Rept. 101-723, 42 Fed. Reg. 26,411, 56 Fed. Reg. 55,610, 81 Fed. Reg. 13,055, *An Evaluation of the Pilot Program of Off-Campus Work Authorization for Foreign Students*, and H.R. Rept. 101-723). The conclusion that protecting working conditions of American workers is not within the zone of interest of the statute in question requires taking *both* the extreme measure of limiting the analysis to a single sub-sub-sub-subsection (8 U.S.C. § 1011(a)(15)(F)(i)) *and* ignoring the explicit congressional and agency intent to protect American workers under that very provision.

III. Washtech may challenge the entire policy of authorizing non-student alien guestworkers using student visas under the reopening doctrine.

The complaint alleges the entire policy of authorizing alien guestworkers (who are not attending school) to remain and work in the United States in F-1 student visa status is in excess of DHS authority. Compl. Count I. The current system of using student visas to provide industry with a source of alien guestworkers was put in place in two regulations. In 1992 the INS created the OPT program, authorizing alien guestworkers to be employed while in F-1 student visa status for one year. 1992 OPT Rule, 57 Fed. Reg. 31,955–57. These regulations were put in place as an interim rule, without public notice and comment. *Id*. The 2016 OPT Rule reenacts the one-year work period and adds two extensions, allowing a total of up to 42 months of employment. 81 Fed. Reg. 13,041–42.

The applicable statute of limitations under the APA is six years. 28 U.S.C. § 2401. However, in the context of the APA, the statute of limitations is only a complete bar to procedural defects. A party may explicitly reset the statute of limitations for a claim of excess of authority by filing a rulemaking petition with the agency and have that petition be denied. *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152–53 (D.C. Cir. 1990). Nonetheless, in

circumstances where a rulemaking petition would be "a waste of time and resources," the statute of limitations may be reset without a rulemaking petition under the *reopening doctrine*. *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996)

> The reopening doctrine is well established in this circuit, creating an exception to statutory limits on the time for seeking review of an agency decision. Questions of its application arise in situations where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision. We have said that when the later proceeding explicitly or implicitly shows that the agency actually reconsidered the rule, the matter has been reopened and the time period for seeking judicial review begins anew.

Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd., 158 F.3d 135, 141 (D.C. Cir. 1998) (internal edits and citations omitted). "The purpose[] of the reopening doctrine is to ensure that 'when the agency … by some new promulgation creates the opportunity for renewed comment and objection on a regulation that could not be challenged otherwise because of the passage of time, affected parties may seek judicial review." *Am. Petroleum Inst. v. Joh*nson, 541 F. Supp. 2d 165, 186–87 (D.D.C. 2008) (quoting *P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008)).

There are a number of specific circumstances where the D.C. Circuit has held the reopening doctrine applies. First, the reopening doctrine applies where an agency reiterates a rule or policy. *Pub. Citizen*, 901 F.2d at 152–53. Second, "An agency may be deemed to have 'constructively reopened' a previously unchallenged decision if its original rulemaking did not give adequate notice or incentive to contest the agency's decision." *Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095, 1104 (D.C. Cir. 1998). Third, when "an agency's action 'necessarily raises' the question of whether an earlier ac-

tion was lawful, review of the earlier action for lawfulness is not time-barred." *Pub. Citizen*, 901 F.2d at 151–52 (quoting *Envtl. Defense Fund v. Envtl. Prot. Agency,* 852 F.2d 1316, 1325 (D.C. Cir. 1988)).

A. The reopening doctrine applies because the 2016 OPT Rule reiterates the policy of authorizing alien guestworkers on student visas established in the 1992 OPT Rule.

"[W]here an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period." *Pub. Citizen*, 901 F.2d at 152–53 (D.C. Cir. 1990); *see also Reversionary Prop. Owners*, 158 F.3d at 141 (stating when a "later proceeding explicitly or implicitly shows that the agency actually reconsidered the rule, the matter has been reopened and the time period for seeking judicial review begins anew."). "In determining 'whether an agency reconsidered a previously decided matter,' [a court] 'must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency.'" *CTIA—The Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 110 (D.C. Cir. 2006) (quoting *Reversionary Property Owners*, 158 F.3d at 141).

In *State of Ohio v. U.S. Envtl. Prot. Agency*, the D.C. Circuit identified four factors to consider whether the agency has reopened an issue: The agency (1) proposed to make some change in its rules or policies, (2) called for comments only on new or changed provisions, but at the same time (3) explained the unchanged, republished portions, and (4) responded to at least one comment aimed at the previously decided issue. 838 F.2d 1325, 1328 (D.C. Cir. 1988). In *Pub. Citizen*, the D.C. Circuit identified additional factors to consider:

> [A court] must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency to determine whether an issue was in fact reopened. If in proposing a rule the agency uses language that can reasonably be read as an invitation to comment on por-

> tions the agency does not explicitly propose to change, or if in responding to comments the agency uses language that shows that it did in fact reconsider an issue, a renewed challenge to the underlying rule or policy will be allowed.

901 F.2d 147, 150 (D.C. Cir. 1990).

The 2016 OPT Rule unquestionably reiterates the previous policy of authorizing alien guestworkers under student visa status. The 2016 OPT Rule explicitly reauthorizes the one-year work period created in the 1992 OPT Rule. 81 Fed. Reg. 13,121–22; *Compare* 57 Fed. Reg. 31,956 *with* 81 Fed. Reg. 13,117 (modifying 8 C.F.R. § 214.2(f)(10)(ii)(A)(3)); 81 Fed. Reg. 13,122 (codified at 8 C.F.R. § 274a.12(c)(3)(i)(B)). Such an affirmation of the previous policy of allowing alien guestworkers in the American job market for one year while in student visa status was clearly an invitation to the public to comment on whether such a policy was within DHS authority. *See Pub. Citizen,* 901 F.2d at 150. When DHS invites comment on regulations expanding the period of time aliens may be employed as guestworkers in student visa status, it is perfectly reasonable to ask whether DHS has authority to allow such work at all.

All of the *State of Ohio* factors for the reopening doctrine are present here. *See,* 838 F.2d at 1328. DHS obviously proposed changes to its OPT policies. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,376 (proposed Oct. 19, 2015). DHS called for comments on the changed policies (80 Fed. Reg. 63,376) but it also explained the previous policy of one-year employment under the 1992 OPT Rule (80 Fed. Reg. 63,380). Finally, DHS responded at length to comments questioning whether the OPT program was lawful at all. 81 Fed. Reg. 13,058–60.

DHS also satisfied the *Pub. Citizen* factors for the reopening doctrine. *See* 901 F.2d 147, 150. For the 2016 OPT Rule, "DHS received many comments

concerning the legal authority underpinning the OPT program." 81 Fed. Reg. 13,058. In response to those comments, DHS went on at length justifying and reiterating its previous policy of authorizing alien guestworkers on student visas. *Id*. at 13,058–60. DHS concluded that it had authority to authorize guestworker employment on student visas (relying on the vacated *Washtech I* opinion). *Id*. Clearly "many" people viewed the 2016 rulemaking as an invitation to ask whether DHS had the authority to authorize guestworkers in student visa status through regulation. 81 Fed. Reg. 13,058 Furthermore, the length of DHS's response to such comments (over 2,200 words) shows that DHS thought such comments were significant. 81 Fed. Reg. 13,058–60. By reiterating the policy of allowing guestworker labor to enter the job market under the OPT program, inviting public comment on that policy, and responding to public comment on that policy, DHS has reset the time period for judicial review of that policy. *Pub. Citizen*, 901 F.2d at 150.

DHS's argument that it did not solicit comment on the OPT program in general is entirely unconvincing. Citing 80 Fed. Reg. 63,377, DHS claims that it declined to seek comments on the OPT program in general. DHS Br. at 36. In point of fact, DHS made no such restriction in its request for comments. 80 Fed. Reg. 63,377. DHS tried to explain away the fact that it received many comments on the OPT program in general by asserting, "DHS did not propose to modify the general post-completion OPT program in the proposed rule." DHS Br. at 36 (quoting 81 Fed. Reg. 13,059). That statement is patently incorrect because the proposed rule *does modify* the general OPT program. *E.g.*, 80 Fed. Reg. 63,400–01 (proposed extension of OPT to those with pending H-1B petitions), 64,402 (proposed authorization for aliens on OPT to be unemployed), 63,402–03 (proposed modifications to the OPT application procedure), 63,403 (proposed changes to the school's responsibilities). In addition,

the proposed rule explicitly reauthorizes the one-year work period created in the 1992 OPT Rule. 80 Fed. Reg. 63,401 and 63,404 (codified at 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3) and 274a.12(c)(3)(i)(B)).

Appendix A contains the Amendments section of the proposed rule with provisions applying to the general OPT program (as opposed to the STEM extension) highlighted. A reasonable observer would conclude the proposed changes and reenactments to the general OPT program are an invitation to comment on the OPT program in general.

The result of proposing these changes to the general OPT program was entirely predictable: DHS received "many" comments on the general OPT program. 81 Fed. Reg. 13,058. In response to those, DHS proclaimed, "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." 81 Fed. Reg. 13,059. That is codswallop! As with the proposed rule, the final 2016 OPT Rule is replete with provisions that do not relate to the "availability of STEM OPT extensions" and address the OPT program generally. *E.g.* modifications to 8 C.F.R. §§ 214.2(f)(5)(vi) (granting an extension of the OPT term when an H-1B petition is filed on the guestworker's behalf), 214.2(f)(10)(ii)(D) (granting OPT guestworkers a 60 day grace period after the end of employment), (E) (authorizing OPT guestworkers to be unemployed), (11) (changing the OPT application requirements). The 2016 OPT Rule also explicitly reauthorizes the one-year work period for the OPT program under the 1992 OPT Rule. 81 Fed. Reg. 13,117 and 13,121–22 (codified at 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3) and 274a.12(c)(3)(i)(B)).

Here we have the absurd situation where DHS proposed a rule that modifies the OPT program in general, 80 Fed. Reg. 63,400–04; solicited comments on

the rule, 80 Fed. Reg. 63,376; received "many" comments on the OPT program in general, 81 Fed. Reg. 13,058; then DHS arbitrarily declared that comments on the general OPT program were outside the scope of the proposed rulemaking, DHS Br. at 11 and 36, 81 Fed. Reg. 13,059; and yet the final rule modified and reenacted the OPT program in general—that DHS says was outside of the scope of rulemaking. 81 Fed. Reg. 13,117–22.

Appendix B contains the Amendments section from the 2016 OPT Rule. Changes that affect the OPT program in general (as opposed to STEM OPT extensions) are highlighted. The extent of these changes disproves DHS's claim that "the 2016 Rule adds nothing new substantively to the OPT program generally, and expressly disclaims reconsideration of that program." DHS Br. at 37.

B. DHS constructively reopened the policy of authorizing alien guestworker employment on student visas because the OPT program was created without public notice and comment.

The large number of comments on the lawfulness of OPT in general during the 2015–16 rulemaking process is not surprising because this was the first real opportunity the public has ever had to make such comments. Both the 2008 OPT Rule that triggered this chain of litigation and the 1992 OPT Rule creating the OPT program were promulgated as interim rules without public notice and comment. 57 Fed. Reg. 31,954. This is another situation where the statute of limitations can be reset under the reopening doctrine. "An agency may be deemed to have 'constructively reopened' a previously unchallenged decision if its original rulemaking did not give adequate notice or incentive to contest the agency's decision." *Nat'l Ass'n of Mfrs.*, 134 F.3d at 1104. Because the agency failed to give public notice and comment when it created the OPT program, the 2016 OPT Rule constructively reopens the policies put forth in the OPT program, resetting the clock for judicial review. *Nat'l Ass'n of Mfrs.*, 134 F.3d at 1104.

C. The reopening doctrine applies because the question of whether DHS has the authority to authorize guestworkers on student visas for one year is the same as whether it has the authority to authorize guestworkers for three years on student visas.

"[T]o the extent that an agency's action 'necessarily raises' the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred." *Reversionary Prop. Owners*, 158 F.3d at 141. Here the question of whether the one-year guestworker period created in the 1992 OPT Rule (57 Fed. Reg. 31,956) is within DHS authority is inseparable from the question of whether the reauthorization of that work period and the two extensions to it in the 2016 OPT Rule are within DHS authority. 81 Fed. Reg. 13,117–122. Because the only relevant difference between the 1992 OPT Rule and the 2016 OPT Rule is the duration of work, the authority for granting work authorizations under the 1992 OPT Rule and 2016 OPT Rule must flow from the same statutory provisions. Indeed, one can fully expect that DHS will argue on the merits that its previous practices of authorizing alien guestworkers on student visas provides justification for continuing the practice under the 2016 OPT Rule. *See e.g., Washtech II*, Defendant-Appellee's Response Brief, at 44–52 (D.C. Cir. Feb. 24, 2016); 81 Fed. Reg. 13,044–45.

The provisions of the 1992 OPT Rule and the 2016 OPT Rule are inextricably linked. An alien guestworker must work on the one-year OPT program created in the 1992 OPT Rule before he can work on the extensions created in the 2016 OPT Rule. 8 C.F.R. §§ 214.2(f)(5)(vi) and (f)(10)(ii)(C). In addition, the 2016 OPT Rule modifies provisions of the 1992 OPT Rule and explicitly reauthorizes its twelve-month work period. *Compare* 57 Fed. Reg. 31,955–57 *with* 81 Fed. Reg. 13,117–22 and 81 Fed. Reg. 13,122 (codified at 8 C.F.R. § 274a.12(c)(3)(i)(B)); *see also*, Appendix B. As such, the 2016 rulemaking necessarily raises the question of whether the 1992 rulemaking was

lawful, resetting the statute of limitations for an excess of authority challenge under the reopening doctrine. *See Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 141.

D. An order dismissing Washtech's challenge to the entire OPT program would be inconsistent with the D.C. Circuit's holding in *Washtech II* that the issues with the 2008 OPT Rule are moot.

On Aug. 12, 2015, the Court vacated the 2008 OPT Rule because DHS failed to give notice and comment. *Washtech I*, order (D.D.C. Aug. 12, 2015). The Court stayed vacatur until Feb. 12, 2016. *Id*. The Court later extended that stay until May 10, 2016. *Washtech I*, order (D.D.C. Jan. 23, 2016). On May 10, 2016 DHS replaced the vacated 2008 OPT Rule with the 2016 OPT Rule. On May 13, 2016, the D.C. Circuit vacated the Court's judgment of Aug. 12, 2015, holding the 2016 OPT Rule made the issues with the 2008 OPT Rule moot.

If Washtech can only challenge the provisions of the 2016 OPT Rule (and not the entire policy of authorizing guestworkers on F-1 student visas), the only thing Washtech can accomplish in this action is to invalidate the 2016 OPT Rule. 5 U.S.C. § 706. The effect of invalidating an agency rule is to "reinstate the rules previously in force." *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987) (citing agreement by the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits). Vacating the 2016 OPT Rule would then restore the regulatory scheme that was previously in place: the 2008 OPT Rule that the D.C. Circuit held was moot. *Washtech II*, slip op. Therefore, if Count I of the complaint be dismissed, the 2008 OPT Rule is no longer moot and an order of dismissal would then be inconsistent with the D.C. Circuit's holding in *Washtech II* that the 2008 OPT Rule was, in fact, moot. *Washtech II*, slip op.

IV. Washtech has sufficiently pled causes of action under the APA.

Under Federal Rules of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). The complaint contains four counts invoking three different causes of action, explicitly authorized under the APA. 5 U.S.C. §§ 706(2)(A), (C), and (D). Each count contains both a legal and factual basis. Compl. ¶¶ 54–84.

To argue insufficiency in the pleadings, DHS makes cursory arguments on the merits of the case. DHS Br. at 42–45. These arguments rely on distorting what was actually pled. For example, DHS states

> Plaintiff's claim that the 2016 Rule is unreasonable because it was issued "with no justification" is simply bizarre.... Plaintiff's failure to allege a single "justification" that is somehow unreasonable renders this claim implausible on its face, and utterly fails to plead a claim that the final rule is not reasonable.

This claim is only "bizarre" because of how DHS has mistated Washtech's allegation by taking it out of context. Before that editing, the complaint raises an entirely different issue:

> 83. The 2016 OPT Rule singles out STEM occupations for an increase in foreign labor through longer worker periods with no justification.

This allegation—as made in the complaint and before DHS's pruning—is a legitimate factual allegation in support of a claim of arbitrary and capricious agency action. *See Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 468 F.3d 831, 839 (D.C. Cir. 2006) (stating that a court must ensure the agency made a satisfactory explanation for its action). In addition,

Washtech has not yet received a copy of the full administrative record necessary to determine the full extent of arbitrary and capricious action.

CONCLUSION

This is a case where standing should be obvious: American workers are challenging regulations designed to increase the amount of foreign labor in their specific fields. Compl. ¶¶ 96–225. DHS's tortured standing analysis in the face of settled law confirms Chief Justice Robert's observation that standing has become "a lawyer's game." *Arpaio v. Obama*, 797 F.3d 11, 31 (D.C. Cir. 2015) (Brown, J. concurring) (quoting *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 548 (2007) (Roberts, C.J. dissenting)). Furthermore, Washtech has sufficiently pled causes of action under the APA. Therefore, DHS's motion should be denied.

Respectfully submitted,

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John M. Miano
D.C. Bar No. 1003068
Attorney of Record for
Washington Alliance of
Technology Workers
(908) 273-9207
miano@colosseumbuilders.com

Dale Wilcox
D.C. Bar No. 1029412
Michael Hethmon,
D.C. Bar No. 1019386
Immigration Reform Law Institute
25 Massachusetts Ave., N.W.
Suite 335
Washington, D.C. 20001
(202) 232-5590