IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendant; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., *Amicus Curiae.*	)	Civil Action No. 1:14-cv-0529-ESH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF BY *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC.

Lawrence J. Joseph, D.C. Bar No. 464777
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund, Inc.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum") is a nonprofit organization founded in 1981 and headquartered in St. Louis, Missouri. For more than thirty years, Eagle Forum and its allied state chapters have defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, they have consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For all these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

INTRODUCTION

Plaintiff Washington Alliance of Technology Workers ("Washtech") sues the federal Department of Homeland Security ("DHS") to challenge a DHS rule expanding – from twelve months to twenty-nine months – the Optional Practical Training ("OPT") program that allows foreign students in science, technology, engineering, and mathematics ("STEM") fields to work in the United States after graduation under their "F-1" student visas, 8 U.S.C. §1101(a)(15)(F)(i), rather than requiring them to obtain the "H-1B" visa, *id.* at §1101(a)(15)(H)(1)(b), that is appropriate under the Immigration and Nationality Act, 8 U.S.C. §§1101-1537 ("INA"), for this type of specialized worker. Unlike the F-1 visa program, the H-1B program is designed to protect the U.S. domestic workforce from foreign competition, including caps on the number of foreign workers allowed annually. Moreover, the Internal Revenue Code exempts F-1 visa holders from Social Security and Medicare taxes, 26 U.S.C. §3121(b)(19), to which both the U.S. domestic workers and H-1B visa holders are subject, *id.* at §3121(b), which makes work

under an F-1 visa less expensive to employers.[1]

In addition to challenging the substantive validity of the OPT program on the theory that students who graduate are no longer students, Washtech also challenges DHS's failure to engage in notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), when adopting various elements of the OPT program. Specifically, in promulgating the 17-month expansion, DHS invoked APA's "good-cause" exception to notice-and-comment rulemaking, which applies if notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B). Specifically, DHS found that the following situation provided the required "good cause" to forgo notice-and-comment rulemaking:

> Currently, DHS estimates, through data collected by SEVP's Student and Visitor Exchange Information System (SEVIS), that there are approximately 70,000 F-1 students on OPT in the United States. About one-third have earned a degree in a STEM field. Many of these students currently are in the United States under a valid post-completion OPT period that was granted immediately prior to the conclusion of their studies last year. Those students soon will be concluding the end of their post-completion OPT and will need to leave the United States unless they are able to obtain an H-1B visa for FY09 or otherwise maintain their lawful nonimmigrant status. DHS estimates that there are 30,205 F-1 students with OPT expiring between April 1 and July 31 of this year. The 17-month extension could more than double the total period of post-completion OPT for F-1 students in STEM fields. Even if only a portion of these students choose to apply for the extension, this extension has the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy.
>
> This interim rule also provides a permanent solution to the "cap-gap" issue by an automatic extension of the duration of status and employment authorization to the beginning of the next fiscal year for F-1 students who have an approved or pending H-1B petition. This provision allows U.S. employers and affected students to avoid the gap in continuous employment and the resulting possible violation of status. This increases the ability of U.S. employers to compete for highly qualified employees and makes the United States more competitive in

[1] Washtech indicates that F-1 visa holders' tax advantage amounts to a 15.3% disparity in their relative costs to employers. Pl.'s Memo. at 14 (*citing id.* App. B, 166-67).

> attracting foreign students. Based on the historical numbers of "cap-gap" students taking advantage of a Federal Register Notice extending F-1 status, ICE estimates that up to 10,000 students will have approved H-1B petitions with FY09 start dates. At the end of their OPT, these students must terminate employment and either depart the United States within 60 days or extend their F-1 status by enrolling in another course of study. Unless this rule, and the cap gap relief it affords, is implemented this Spring, all these students must interrupt their employment and those who leave the United States will not be allowed to return until the October 1, 2008 start date on their H-1B petitions.
>
> The ability of U.S. high-tech employers to retain skilled technical workers, rather than losing such workers to foreign business, is an important economic interest for the United States. This interest would be seriously damaged if the extension of the maximum OPT period to twenty-nine months for F-1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F-1 students complete their studies and, without this rule in place and effective, would be required to leave the United States.

73 Fed. Reg. 18,944, 18,950 (2008). In addition, the OPT program's 17-month STEM extension applies to "STEM" degrees, which DHS defines by referring to the "current STEM Designated Degree Program List, published on the SEVP Web site at http://www.ice.gov/sevis." 8 C.F.R. §214.2(f)(10)(ii)(C)(2). Without conducting notice-and-comment rulemaking to amend its STEM list, DHS has – instead – simply revised the list of degrees on its website.

The facts are not in dispute, making this litigation appropriate for summary judgment. Indeed, when district courts review administrative agencies' actions, the court sits as an appellate court reviewing the administrative record on which the agency acted. *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Although they dispute *the import* of jurisdictional facts that support Washtech's standing, the parties do not dispute the underlying jurisdictional facts themselves.

ARGUMENT

I. WASHTECH HAS BOTH CONSTITUTIONAL AND PRUDENTIAL STANDING

The standing inquiry consists not only of the minimum requirements for a federal case or

controversy under Article III, but also several judicially imposed prudential limits on the exercise of the judicial power. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). In evaluating Washtech's standing, this Court must consider the question under Washtech's view of the merits: "one must assume the validity of a plaintiff's substantive claim at the standing inquiry." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994) (courts "must assume the validity of a plaintiff's substantive claim at the standing inquiry," even if that "substantive claim may be difficult to establish"); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In other words, the question is not which party is correct but, assuming *arguendo* that Washtech is correct, whether the Court has a live case or controversy appropriate for the federal judicial power.[2] Thus, here this Court must evaluate standing under the assumption that DHS lacks authority to authorize post-graduate employment on student visas under the F-1 program and instead must proceed under the H-1B program. When properly viewed from that perspective, Washtech clearly has standing.

A. Washtech Has Constitutional Standing

Constitutional standing consists of a cognizable injury in fact caused by the defendant and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury "need not be to economic or… comparably tangible" because an "identifiable trifle" suffices. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989). While direct injuries pose "little

[2] Federal courts evaluate most, if not all, jurisdictional questions under the plaintiff's view of the merits. *Smith v. Horner*, 846 F.2d 1521, 1523 (D.C. Cir. 1988) (federal question); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 (D.C. Cir. 1986) ("we must assume the challenging party's view of the merits in determining ripeness"); *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983) ("EPA's position – that final action has not been taken – does not affect our jurisdiction").

question" of causation or redressability, plaintiffs have a heightened showing when government action affects third parties, who then cause injury. *Defenders of Wildlife*, 504 U.S. at 561-62. Standing can be expanded by associational standing and narrowed by prudential concerns such as the zone-of-interest test. *See* Sections I.A.2, I.B, *infra.* The following subsections identify the cognizable injuries in fact that Washtech's members suffer from the OPT program.

1. Washtech Members Have Suffered Cognizable Injuries in Fact

Consistent with Circuit precedent, this Court already has recognized that U.S. domestic workers like Washtech's members suffer competitive injury from exposure to foreign students working here after graduation on F-1 visas under the OPT program. In this subsection, *amicus* Eagle Forum identifies additional injuries that the OPT program inflicts on Washtech members and identifies the effects of those injuries on the Article III standing analysis.

Significantly, although "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), standing doctrine has no nexus requirement outside taxpayer standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978). Accordingly, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006) (interior quotations omitted); *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). Accordingly, Washtech's economic standing provides standing to challenge the OPT program under any legal theory, and so do the equal-protection injuries discussed in Section I.A.1.b, *infra.*[3]

[3] Significantly, this action easily falls within the zone of interests protected by the equal-protection component of the Fifth Amendment's Due Process Clause. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (referencing "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

a. Washtech Members Have Been Exposed to Unlawful Conduct

Because the jurisdictional analysis assumes Washtech's merits views, *Catholic Social Service*, 12 F.3d at 1126, the competition to which the OPT program exposes Washtech's members would be unlawful in the absence of the OPT program. That distinction eliminates any difficulty that Washtech otherwise may have in proving that a third-party employer acted for its own reasons – as opposed to its acting because of the OPT program – in hiring a recent foreign graduate over a Washtech member. Injury is "fairly traceable to the administrative action contested…. if that action *authorized* the conduct or established its legality." *Tel. & Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (emphasis added); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (private injury traceable to government action if injurious conduct "would have been illegal without that action"); *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 441-42 (D.C. Cir. 1998) (*en banc*) ("*ALDF*"). Thus, whatever injury that Washtech members suffer from the OPT program, that injury is the result of conduct that would be unlawful in the absence of the OPT program, which makes causation and redressability flow from DHS just as surely as if DHS had inflicted the injury directly.

b. Washtech Members Have Suffered Equal-Protection Injuries

As this Court recognized in denying the motion to dismiss as to the counts against the 2008 OPT program expansion, exposure to unlawful competition from F-1 visa holders is the primary injury that Washtech puts forward. Under this theory, these F-1 workers lack the right to work here legally but for the OPT program, which therefore causes the exposure to unlawful competition. That exposure is not the only injury that Washtech members complain against. Even accepting *arguendo* DHS's authority to allow F-1 visa holders to work here, the fact remains that those visa holders are taxed at a different rate from not only U.S. domestic workers but also H-1B visa holders.

As explained in note 1, *supra*, and the accompanying text, F-1 visa holders are exempt from taxes that other U.S. workers must pay. Clearly "tax schemes with exemptions may be discriminatory," *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S.Ct. 1101, 1109 (2011), and in such equal-protection contexts, "the appropriate remedy is a mandate of *equal* treatment, [which] can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original). Plaintiffs clearly have standing to challenge agency action that causes equal-protection injuries.

c. Washtech Has Suffered Procedural Injuries

If (and only if) Washtech has concrete injuries, it also can have standing to assert procedural injuries such as the denial of the required APA rulemakings. *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (*en banc*); *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7. Again using Washtech's merits views (namely, that the H-1B program rather than the F-1 program applies to OPT workers), the rulemaking would have allowed Washtech to stress the H-1B program's worker protections that Congress "designed to protect [the] threatened concrete interest of his that is the basis of [the plaintiff's] standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8. Given its concrete injuries, *see* Sections I.A.1.a-I.A.1.b, *supra*, Washtech can assert APA-based procedural injuries. With procedural injuries, Article III's redressability and immediacy tests apply to the *present procedural violation*, which may someday injure the concrete interest, rather than to the concrete (but less certain) future injury. *Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Procedural standing simply reinforces the competitive standing that this Court already has found.

2. Representational and Associational Standing

Under representational or associational standing, "an association may have standing

solely as the representative of its members." *Warth,* 422 U.S. at 511; *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). Associational standing requires that "(a) [the association's] 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." *Hunt,* 432 U.S. at 343. As Washtech explains, Pl.'s Memo. at 12-13, there is no question that labor unions meet these conditions for the purely legal challenges relevant to the terms of members' employment (*e.g.,* the differential rates of federal taxation with OPT participants) or to allegations of illegal competition.

B. Washtech Has Prudential Standing

In addition to meeting the constitutional minima of Article III standing, Washtech also must satisfy the judicially developed "prudential" limits on standing. *Elk Grove,* 542 U.S. at 11-12. This "prudential standing" doctrine includes limitations on asserting the rights of absent third parties and requiring suits to be brought by those "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Org'ns v. Camp,* 397 U.S. 150, 153 (1970); *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004) (third-party standing). The following subsections address the various arguments for Washtech's satisfying the zone-of-interest test, which is the only prudential limit on standing that is potentially at issue here.[4]

Although it cannot statutorily waive the Article III minima for standing, Congress can

[4] Although representational or associational standing may sound similar to *jus tertii* or third-party standing, the two are different. *Lipsman v. Sec'y of Army,* 257 F.Supp.2d 3, 6 (D.D.C. 2003); *Compare, e.g., Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1361-62 (D.C. 2000) (third-party standing) with *Hunt,* 432 U.S. at 343 (associational standing, quoted *supra*).

statutorily eliminate the judiciary's prudential limits on standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982) (when a statute extends "standing under [a section] … to the full limits of Art. III," "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section"); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1335-36 (D.C. Cir. 1986). Because Congress has not done so for immigration laws, Washtech must also satisfy prudential standing.

Amicus Eagle Forum endorses the arguments that Washtech makes under the zone-of-interest inquiry, but supplements them here with additional arguments (a) that Washtech's injuries would be within the relevant statutory zones of interest, (b) but that, for *ultra vires* agency actions, the zone-of-interest test either is inapposite or implicates the broader zone of interests corresponding to the *constitutional* principles that the agency action violated, and (c) that Washtech would nonetheless qualify as a "suitable challenger" for purposes of the zone-of-interest test, even if the challenged agency actions fell outside the relevant zone of interests. Although it respectfully submits that the first argument would suffice, *amicus* Eagle Forum makes the second and third arguments because the Court asked the parties to address the zone-of-interest test.

1. Washtech's Injuries Fall within the Relevant INA Zone of Interests

The zone-of-interest test is a prudential doctrine that asks "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected… by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (emphasis and alteration in original) ("*NCUA*"). The test "struck the balance in a manner favoring review, but excluding those would-be plaintiffs not even arguably within the zone of interests to be protected or regulated by the statute." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-397 (1987).

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the 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. *The test is not meant to be especially demanding;* in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke, 479 U.S. at 399-400 (footnotes and citations omitted; emphasis added). Under the test, "it suffic[es] to establish reviewability that the general policy implicit in the [relevant statutes] was 'apparent' and that 'those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable.'" *Clarke*, 479 U.S. at 399 n.14. This generous and undemanding test focuses not on Congress' intended beneficiary, but on those who in practice can be expected to police the interests that the statute protects. *ALDF*, 154 F.3d at 444; *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 52 (D.C. Cir. 1983). To show that they are *arguably* "protected" by a statute, plaintiffs may demonstrate that they are either the statute's intended beneficiaries or "suitable challengers" to enforce the statute. *See* Section I.B.3, *infra* (discussing suitable-challenger test). For intended beneficiaries, "'slight beneficiary indicia' are sufficient to sustain standing." *Am. Friends Serv. Comm.*, 720 F.2d at 50 & n.37. Here, Washtech members are the intended beneficiaries of the U.S.-worker protections enacted into the H-1B program and therefore easily satisfy the zone-of-interest test.

The entire basis for DHS's zone-of-interest argument is that Washtech members are not within the zone of interests protected *by the F-1 program.* As explained in Section I.B.3, *infra*, DHS's position is not supportable because Washtech would be a suitable challenger under the F-1 program, even if the F-1 program applied here. But the H-1B program is the appropriate metric because that is the standard *that Washtech presses.* As indicated, courts evaluate standing by assuming the merits views of the plaintiff. *City of Waukesha*, 320 F.3d at 235; *Catholic Social*

Service, 12 F.3d at 1126; *Warth*, 422 U.S. at 500. It is not surprising – and entirely beside the point – that DHS would win under its merits views. The jurisdictional question is whether the Court has jurisdiction to hear the case, assuming *arguendo* that the plaintiff is right on the merits.

2. The Zone-of-Interest Test Is Easily Met for *Ultra Vires* Agency Action

Because the standing analysis assumes Washtech's merits views, *see* Section I (at 3), *supra; cf. Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) ("inquiry into whether suit lies [for judicial review] under *Ex parte Young* does not include [merits] analysis"), this Court must evaluate whether Washtech's injuries fall within the relevant zone of interests *under Washtech's merits views*, not under DHS's merits views. As explained in Section III, *infra*, Washtech credibly argues that DHS's OPT program is *ultra vires* DHS's authority, both substantively and procedurally. When properly evaluated in that light, it becomes clear that Washtech readily meets the law (or inapposite) zone-of-interest test for *ultra vires* acts.

a. DHS's Actions Are *Ultra Vires* under Washtech's Legal Theory

Before arguing that the zone-of-interest test applies differently to *ultra vires* agency action – as opposed to, say, merely arbitrary and capricious agency action – *amicus* Eagle Forum first rebuts a potential DHS counterargument. When faced with claims that their agency clients acted *ultra vires*, the Department of Justice occasionally argues that the particular transgression at issue is merely a garden-variety mistake in using a delegated power, as opposed to a full-fledged *ultra vires* agency action. Rejecting that view, the Supreme Court recently clarified that there is no sliding scale of *ultra vires* conduct: "Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires.*" *City of Arlington v. FCC*, 133 S.Ct. 1863, 1869 (2013) (emphasis added). At least under Washtech's merits views, the OPT program is no mere mistaken exercise of a delegated power. It is a wholesale power grab, in

violation of separation-of-powers principles that only Congress makes law: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). That suffices to trigger the evaluation of the zone-of-interest test for *ultra vires* actions.

b. The Zone-of-Interest Test Either Is Inapposite or Implicates to a Broad, Constitutional Zone of Interests

When an agency acts *ultra vires* its authority, the zone-of-interest test is easily met. Specifically, because standing assumes the plaintiffs' merits views – here, that DHS lacks substantive and procedural authority for OPT program – either the zone-of-interest test is inapplicable or it applies the zone from the overarching constitutional issues raised by lawless agency action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *accord Catholic Social Serv.*, 12 F.3d at 1126; *Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989); *Law Offices of Seymour M. Chase, PC v. FCC*, 843 F.2d 517, 524 (D.C. Cir. 1988) (Williams, J., concurring) ("the zone-of-interests test is inapposite because the challenger contends (in effect) that *ultra vires* acts of the agency have interfered with some common law or possibly constitutional interest"). By operating outside its delegation, DHS purports to make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect… the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) (internal quotations omitted). Washtech thus easily meets the zone-of-interest test for not only the OPT program but also the separation-of-powers and due-process issues raised by a mere agency's

purporting to enact law without the constitutional steps for making law.

3. Washtech Would Be a Suitable Challenger Even If Its Members' Injuries Fell Outside the Relevant Zone of Interests

As explained in the prior two subsections, Washtech easily satisfies the zone-of-interest test for this challenge to the OPT program. But even if that were not so, Washtech still could challenge the OPT program as a "suitable challenger."

Specifically, plaintiffs who are not a statute's intended beneficiaries can satisfy the zone-of-interest test as "suitable challengers" if they have "interests… sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." *First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993). With respect to the bright-line legal issue of whether DHS has authority to regulate post-graduation employment by former students under the F-1 program, the zone-of-interest test poses no barrier to the Washtech suit to enforce INA's statutory demarcations:

> Irrespective of whether the statutory scheme contemplates that competitive interests will advance statutory goals, the court has held that the *Hazardous Waste Treatment Council* line of cases is inapposite when a competitor sues to enforce a *statutory demarcation, such as an entry restriction,* because the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation.

Honeywell Int'l, Inc. v. EPA, 374 F.3d 1363, 1370 (D.C. Cir. 2004) (citing cases) (emphasis added, alteration in original), *withdrawn in part on other grounds,* 393 F.3d 1315 (D.C Cir. 2005); *N.C.U.A.*, 988 F.2d at 1278; *Scheduled Airlines Traffic Offices, Inc. v. D.O.D.*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996). Even if it did not readily meet the zone-of-interest test (which it does), Washtech would nonetheless be able to sue here because "entry-like restrictions" are less subject to manipulation than the open-ended safety standards. *Id. Amicus* Eagle Forum respectfully submits that the H-1B/F-1 dichotomy between workers and students in the

immigration context is a classic statutory entry restriction that Washtech could litigate even if the F-1 program defined the relevant zone of interests.

II. DHS'S INTERPRETATIONS OF THE INA HERE ARE NOT ENTITLED TO DEFERENCE

DHS claims entitlement to deference based on a variety of factors, including the OPT program's precursor's having originated in 1947 and congressional acquiescence to that program, the ambiguity in the statutory terms, DHS's obligations to safeguard the national infrastructure and economy, and 6 U.S.C. §522.[5] *See* Def.'s Memo., *passim.* Indeed, DHS claims an entitlement not merely to this Court's deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but even this Court's "particular deference" under *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Under the circumstances here, none of these factors warrant this Court's deference for the OPT program's expansion in 2008. Several of these claims are easily addressed as general matters; the following three subsections then address the deference that is proper to DHS's OPT program under *Chevron* and *Skidmore* based on the unique circumstances here.

First, DHS claims that its longstanding interpretation of the INA warrants "particular deference" under *Barnhart.* Def.'s Memo. at 27. Standing alone, divorced from the other relevant factors, longevity itself is no guarantee of deference: "Arbitrary agency action becomes no less

[5] DHS also gratuitously cites 8 U.S.C. §1324a(h)(3) – which provides in pertinent part that the "term 'unauthorized alien' means, with respect to the employment of an alien … that the alien is not … authorized to be so employed by this chapter or by the Attorney General" – as delegating authority to the Attorney General to determine which aliens are authorized to work in the U.S. *See* Def.'s Memo. at 5. This mere definition of "unauthorized alien," enacted as part of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(a), 100 Stat. 3359, 3360-74 (1986), recognizes that the Attorney General had relevant authority under other provisions of federal law in 1986, but does not itself delegate any authority.

so by simple dint of repetition." *Judulang v. Holder*, 132 S.Ct. 476, 488 (2011); *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996) ("applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation"). Moreover, as explained in Section II.A, *infra*, the question of whether INA would countenance a 12-month OPT program *for all F-1 visa holders* is an entirely different thing from whether STEM graduates (but not F-1 visa holders with other majors or degrees) need another 17 months – not for the educational purposes outlined in 8 U.S.C. §1101(a)(15)(F)(i) – but to meet the needs of U.S. industry.

Second, the congressional acquiescence that DHS cites would "more appropriately be called Congress's failure to express any opinion." *Rapanos v. U.S.*, 547 U.S. 715, 750 (2006). It is entirely possible that, rather than acquiescing to the OPT program (and especially its 2008 expansion), Congress believed that "the courts would eliminate any excesses, or indeed simply to [a congressional] unwillingness to confront the [high-tech employers] lobby." *Id.; Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994). DHS has not cited evidence that "Congress considered and rejected the 'precise issue' presented before the Court," which is what an acquiescence theory requires to be forceful. *Rapanos*, 547 U.S. at 750. Accordingly, this Court should reject DHS's argument that Congress acquiesced to the OPT program generally and the 2008 OPT expansion specifically.

Third, with great respect to the various important tasks that DHS does in service of the Nation, the DHS's memorandum of law characterizes DHS as the indispensable agency on issues of labor, technology, and the economy, in addition to its core homeland-security functions. Courts often must "remind [an agency] that its mission is not a roving commission to achieve [certain statutory goals] or any other laudable goal," *Michigan v. U.S. EPA*, 213 F.3d 663, 696 (D.C. Cir. 2000), and this might be an occasion for this Court to do so with DHS. At worst, some

of DHS's claimed powers step on the authorities delegated to other federal agencies, such as the Departments of Commerce and Labor. In any event, when more than one agency has delegated authority, no one agency can claim deference. *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993). As such, whether because the authority was not delegated in the first place or because it was delegated more than once, this Court does not owe deference to DHS's efforts to optimize the U.S. technology sector or the economy.

Fourth, 6 U.S.C. §522 dissuades courts' construing various provisions "to limit judicial deference" to actions by DHS or the Attorney General. Deference to administrative agencies is a judicially derived principle under the separation-of-powers doctrine. Congress can change the authority that it delegates to federal agencies, but it cannot legislate all factors that would incline a court to believe that a federal agency has overstepped its constitutional authority to make laws outside the scope of its delegation.

A. Congress Did Not Delegate Authority for DHS to Regulate Student Visa Holders' Post-Graduation Employment to Meet the Needs of U.S. Industry

DHS considers it relevant that Congress did not identify a level of specificity for regulating student employment, which DHS (twice) claims to warrant broad deference to the agency to pick the level of specificity. Def.'s Memo. at 22, 35-36. It is not entirely clear what DHS means, but *amicus* Eagle Forum assumes that DHS means that Congress failed to specify how long, exactly, after graduation a student ceases to be a student. Given the clear meaning of the term, *see* Section III.A, *infra*, this claim is specious, which vitiates whatever deference a DHS rulemaking otherwise might claim.

Specifically, *Chevron* analysis "is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to

deference." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995); *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014) ("[e]ven under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation") (internal quotations omitted). Any perceived (or, at least, claimed) statutory ambiguity can be clarified by the rest of the statute if "'only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Id.* (*quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). By contrast, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole, does not merit deference." *Id.* (internal quotations and alterations omitted).

As indicated in Section II, *supra*, the OPT program that existed prior to 2008 treated all foreign F-1 visa holders equally, whereas the 2008 OPT program grants special treatment to STEM degrees. If DHS had not been so candid in providing the rationalization for this differential treatment of similarly situated F-1 visa holders, this Court likely would have rejected the OPT expansion as a "discrimination of an unusual character." *U.S. v. Windsor*, 133 S.Ct. 2675, 2693 (2013). But DHS has expressly acknowledged that what defines a STEM degree's entitlement to employment for an additional 17 months has nothing to do with the educational focus of §1101(a)(15)(F)(i), but rather with the perceived needs of the U.S. economy. This Court easily can reject that rationale as having literally nothing to do with §1101(a)(15)(F)(i). *See* Section III.A, *infra.*

B. DHS's Views Do Not Warrant *Skidmore* Deference

For agency actions that do not trigger *Chevron* deference, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), counsels for lesser deference based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to

control." Consistency of interpretation can increase deference, and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). As explained in Section II, *supra,* longevity alone would not require deference for an arbitrary interpretation, and the longstanding OPT program involved an across-the-board 12-month OPT program for education purposes, not a selective 29-month OPT program for industrial purposes. Here, DHS's reasoning appears to be that, because the STEM-based OPT expansion is good for U.S. industry, it must be legal. That argument has absolutely no grounding in the INA. *See* Section III.A, *infra.* Accordingly, the OPT program expansion does not warrant even *Skidmore* deference.

C. Deference Does Not Apply to Procedurally Defective Rulemakings Such as the OPT Rulemaking

When an agency fails to follow required APA rulemaking procedures, that failure renders the resulting agency action void *ab initio. Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94-95 (D.C. Cir. 1997). Accordingly, if DHS violated required notice-and-comment procedures, *see* Section III.B, *infra,* there is no OPT rulemaking to which this Court can defer. Simply put, there is no there there.

III. DHS'S OPT RULEMAKMINGS ARE SUBSTANTIVELY AND PROCEDURALLY INVALID AND THUS VOID UNDER THE APA

As explained in this section, the OPT expansion was both substantively and procedurally invalid. Substantively, the INA does not give DHS leave to define the duration of "student" status to extend beyond graduation to employment that is outside the degree program for which the student received an F-1 visa, with no targeted education benefit for the student. (In its focus on the U.S. economy's needs for certain degree types, DHS essentially admits that the 17-month extension has nothing to do with education.) Procedurally, the OPT expansion did not satisfy the good-cause exception's stringent criteria for avoiding otherwise-required notice-and-comment

rulemaking, and the incorporation of an internet-based list of covered STEM degrees violates the notice-and-comment requirements as well.

A. The Statutory Term "Student" Does Not Include Post-Graduates Who Are Not Engaged in a School's Ongoing Supervision

The OPT program's premise lies in the word "student" bearing some ambiguity, which is simply not the case: "A school graduation marks, by definition, the end of a student's association with a school." *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383 (6th Cir. 1999). Moreover, the F-1 program statutory applies only to education programs, which do not include blanket approval for employment by STEM students, without regard for the educational benefits of that employment for the specific student.

Specifically, the INA's F-1 provisions are concerned with the individual student's bona fide educational course, applying only to "an alien … who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and *solely for the purpose of pursuing such a course of study … at an established … academic institution.*" 8 U.S.C. §1101(a)(15)(F)(i) (emphasis added). A parallel portion of the F-1 program applies to "an accredited language training program in the United States, particularly designated by [the student] and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student." *Id.* Nothing in this language suggests that F-1 visa holders can get any job regardless of its educational benefit to them.

Although DHS cites the legislative history as supporting its interpretation of the F-1 program, the discussions of student work in the cited legislative history all are indistinguishable from students' working *during* their degree program (*i.e.*, when the visa holder is a student) and thus do not clearly contemplate post-graduation work (*i.e.*, when the visa holder is no longer a

student). *See, e.g.*, Def.'s Memo. at 28-29. Indeed, in 2004, Congress expressly set aside 20,000 H-1B visas for the type of post-graduation holders of F-1 visas that benefit from the OPT program, 8 U.S.C. §1184(g)(5)(c), which implied that the H-1B program applies to such F-1 visa holders after they graduate. Such post-enactment legislation is "entitled to great weight in statutory construction" of the original law, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969), and compels this Court to reject DHS's merits position.

Amicus Eagle Forum respectfully submits that the litigation history of Social Security taxation for medical interns could inform this Court's views on the scope of the student exemption. Under those cases, a medical resident may or may not qualify for a student-based exemption from taxation based on the educational nature of the internship or residency. *See, e.g., U.S. v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2d Cir. 2009) (the "student exemption relies, in part, on the identities of the employees and employers to define the scope of the exemption, … [and], [a]lthough all interns may be students, not all hospitals [or employers] are schools, colleges, or universities"); *Univ. of Chicago Hosps. v. U.S.*, 545 F.3d 564, 570 (7th Cir. 2008) (Social Security's "student exception is not *per se* inapplicable to medical residents as a matter of law; rather, a case-by-case analysis is required to determine whether medical residents qualify for the statutory exemption from FICA taxation") (citations omitted); *U.S. v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1253 (11th Cir. 2007) ("a case-by-case analysis is necessary to determine whether a medical resident enrolled in a GMEP qualifies for a FICA tax exemption pursuant to the student exemption"). Whatever play at the margins that puts into the word "student," the required analysis consists of an individualized, case-by-case determination whether a particular job and employer are educational, consistent with the INA's F-1 provisions (*e.g.*, academic supervision). Some STEM jobs – such as some post-doctoral

positions – likely could qualify as educational. Unlike the medical-resident context relevant to the student-exemption cases under Social Security, however, not all STEM graduates are even remotely engaged in post-graduation work that qualifies as educational for an employer that qualifies as an educator. What the INA's F-1 provisions do not allow is an across-the-board rule that any post-graduation employment by any STEM-educated worker qualifies as an extension of that graduate's student life.

B. The 17-Month OPT Expansion Is Procedurally Invalid under the APA

As explained in the next two subsections, the OPT program is procedurally invalid for failing to undergo required notice-and-comment rulemaking: "A rule [that] is subject to the APA's procedural requirements, but was adopted without them, is invalid." *U.S. v. Picciotto,* 875 F.2d 345, 346 (D.C. Cir. 1989). Indeed, failing to follow required APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *See* Section II.C, *supra* (collecting cases for voidness *ab initio*); *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). While the main APA issues that the parties brief concern APA procedural requirements, this Court should recognize the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving,* 517 U.S. at 771. If DHS has failed to qualify its actions for the exception to congressional lawmaking that Congress itself has enacted, 5 U.S.C. §553(b), the resulting violation is constitutional.

1. DHS Lacked Good Cause to Avoid Notice-and-Comment Rulemaking

This Court should not sustain DHS's invocation of APA's good-cause exception because DHS has not cited a credible cause that meets the stringent requirements for avoiding notice-and-comment rulemaking. *See* Pl.'s Memo. at 22-27. An agency's good-cause findings are reviewable, *Consumer Energy Council of America v. F.E.R.C.,* 673 F.2d 425, 447 (D.C. Cir.

1982), and "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dep't of Environmental Protection v. U.S. Environmental Protection Agency*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same). *Amicus* Eagle Forum respectfully submits that DHS's good-cause does not meet the relevant tests.

By way of background, the APA's legislative history shows just how narrow these exceptions are:

> *"'Impracticable'* means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. *'Unnecessary'* means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. *'Public interest'* supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."

Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis in *Hodel).* Under these three prongs, the OPT program's 17-month expansion nowhere reaches the required levels of "good cause" to avoid notice-and-comment rulemaking.

Nothing made notice-and-comment rulemaking either impractical for DHS to undertake or unnecessary to the public. Indeed, the lengthy gap between the H-1B changes for fiscal 2004 and the 2008 rulemaking (Def.'s Memo. at 42-43) demonstrate *a five-year window* in which DHS could have acted, without negating public input. DHS claims of an "emergency," *id.*, are simply preposterous. Significantly, while the second prong (lack of necessity for a rulemaking) is not met, given the disadvantage to U.S. workers such as Washtech members, it is just as clearly not met (albeit in the opposite direction) for the technology employers that DHS sought to aid.

Although the two sets of interest groups – workers and employers – may prefer opposite substantive outcomes, the rulemaking itself was "particularly interest[ing]" to both groups. Put another way, the rulemaking was certainly not a "minor or merely technical amendment" to either group. Finally, since the third prong (public interest) supplements the other two prongs, nothing in the public interest justified avoiding notice-and-comment requirements.

2. The OPT Program's STEM-Degree Definition Violates the APA

The OPT program's STEM-degree list on ice.gov, 8 C.F.R. §214.2(f)(10)(ii)(C)(2), violates the APA because adding or removing degrees from that list requires notice-and-comment rulemaking, as opposed to merely amending text on an agency website. Specifically, this Circuit recognizes four general criteria as triggering the notice-and-comment procedure: (1) whether, absent the rule, the agency would lack adequate authority to confer benefits or require performance; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general legislative authority; and (4) whether the rule effectively amends prior legislative rules. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("*AMC*"). Without a new degree's being listed as a STEM degree, there would be no basis for allowing foreign degree holders with F-1 visas to work the OPT program's additional 17 months. Thus, under the first *AMC* criterion, revising the STEM-degree list would require notice-and-comment rulemaking. To the extent that the STEM list exists as a regulation, amending that list to include (or to exclude) a degree constitutes the amendment of a legislative rule, which triggers the fourth *AMC* criterion.

As Washtech explains, DHS's attempted incorporation of a non-static list of regulatory criteria violates the rules for incorporations by reference. Pl.'s Memo. at 28-30. This attempted incorporation by reference also violates APA notice-and-comment rulemaking requirements. The fact that the OPT regulation provides for an internet-based list does not save regulation from

invalidity because an agency cannot "replace the statutory scheme [for rulemaking] with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969); *accord Picciotto*, 875 F.2d at 346-49. In *Picciotto*, the National Park Service ("NPS") relied on a catch-all clause in its regulations for permit conditions to argue that it could add a new blanket permit condition without going through a new rulemaking:

> The Park Service interprets clause 13 as granting it the authority to impose new substantive restrictions uniformly on all demonstrators in any national capital region park, without engaging in notice and comment procedures. It claims that since clause 13 went through notice and comment, the new restrictions do not need to. In essence, the Park Service is claiming that an agency can grant itself a valid exemption to the APA for all future regulations, and be free of APA's troublesome rulemaking procedures forever after, simply by announcing its independence in a general rule. That is not the law. Such agency-generated exemptions would frustrate Congress' underlying policy in enacting the APA by rendering compliance optional.

Picciotto, 875 F.2d at 346-347. As the D.C. Circuit held, "[t]hat is not the law." *Id.* The same applies to DHS's attempt to allow its regulations to point to its website for an easily revisable list of STEM degrees that APA requires DHS to promulgate via notice-and-comment rulemaking.

CONCLUSION

For the foregoing reasons and those argued by plaintiff Washtech, *amicus* Eagle Forum respectfully submits that this Court should grant Washtech's motion for summary judgment.

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Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund, Inc.