Oral Argument Not Yet Scheduled
No. 17-5110

United States Court of Appeals

for the

District of Columbia Circuit

Washington Alliance of Technology Workers,

Appellant,

v.

United States Department of Homeland Security, *et al.*,

Appellees.

On appeal from an order entered in the
United States District Court for the District of Columbia
No. 1:16-cv-01170-RBW
The Hon. Reggie Walton

Opening Brief

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October 24, 2017

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO ("Washtech") has no shareholders.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici Curiae

The following are all the parties and *amici curiae* that appeared before the District Court:

1. Plaintiff-Appellant is Washtech.
2. Defendant-Appellee is the U.S. Department of Homeland Security ("DHS").

Rulings Under Review

Washtech seeks review of an order by the United States District Court for the District of Columbia of April 19, 2017 in Case No. 1:16-cv-01170-RBW, (the Hon. Reggie Walton) that was accompanied by a Memorandum Opinion issued the same day. That opinion is reported as *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 249 F. Supp. 3d 524 (D.D.C. 2017) and is reproduced at Appendix [31] and the order is reproduced at Appendix [30].

Related Cases

Washtech is aware of three other pending cases that raise the same issue of whether DHS has authority to allow classes of aliens to work in the United States without a statutory grant of authority. *Save Jobs USA*

v. U.S. Dep't of Homeland Security, No. 16-5287 is pending in this Court and addresses this question within the context of regulations authorizing spouses of H-1B guestworkers to be employed. *Nat'l Venture Capital Ass'n v. Duke*, No. 1:17-cv-01912-JEB is pending in the United States District Court for the District of Columbia. It raises this question in the context of regulations that grant admission through parole and employment to aliens classified as entrepreneurs. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) addressed this issue in the context of work authorizations for illegal aliens. That case is ongoing in the Southern District of Texas as No. B-14-254.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2); because it is a federal question under 28 U.S.C. § 1331; and because the defendant is the United States, 28 U.S.C. § 1346. This court has jurisdiction over appeals from final decisions of a district court under 28 U.S.C. § 1291. The final order appealed was filed on April 19, 2017. The notice of appeal was filed on May 9, 2017.

STATEMENT OF THE ISSUES

1. Whether the District Court erred when it held that the complaint did not state a claim upon which relief can be granted.
2. Whether the District Court erred when it held Washtech did not have standing to challenge the entire Optional Practical Training Program.
3. Whether the District Court erred when it held Washtech did not suffer an injury-in-fact from deprivation of procedural rights; discrimination; and unfair competition.
4. Whether the Optional Practical Training Program is within DHS authority.

STATUTES AND REGULATIONS

Statutes and regulations at issue are reproduced in a separate addendum.

GLOSSARY

1992 OPT Rule	Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992)
2008 OPT Rule	Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008)
2016 OPT Rule	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)
A.R.	Administrative Record for the 2008 OPT Rule
APA	Administrative Procedure Act
B visa	B visitor visa: 8 U.S.C. § 1101(a)(15)(B)
Compl.	Complaint, Docket 1, June 17, 2016
DAPA	Deferred Action for Parents of Americans and Lawful Permanent Residents
DHS	U.S. Department of Homeland Security
F-1	F-1 student visa: 8 U.S.C. § 1101(a)(15)(F)
H-1B	H-1B visa for guestworker in speciality ocupations (*i.e.*, those requiring a college degree): 8 U.S.C. § 1101(a)(15)(H)(i)(b).

H-4	Visa for dependents of H visa holders: 8 U.S.C. § 1101(a)(15)(H)
INA	Immigration and Nationality Act of 1952
IRCA	Immigration Reform and Control Act of 1986
Mem. Op.	District Court's Memorandum Opinion of Apr. 19, 2017, Docket 32. *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 249 F. Supp. 3d 524 (D.D.C. 2017)
OPT	Optional Practical Training. A work authorization created by regulation for student visas.
Pl. Resp.	Plaintiff's Response, Docket 20
Practical Training	Work
STEM	Science/Technology/Mathematics/Engineering

STATEMENT OF THE CASE

This case presents the seemingly simple question of whether the Department of Homeland Security ("DHS") has authority to permit aliens in student visa status to remain in the United States and work for years after they have graduated and are no longer students. It also raises the broader question of whether the Secretary of Homeland Security has unlimited authority to authorize alien employment in the United States, as has been claimed in several recent regulations.

Statutory Background

Aliens are admitted into the United States as immigrants, non-immigrants, or refugees. 8 U.S.C. §§ 1101(a)(15) and 1157. The Immigration Act and Nationality of 1952 ("INA") authorizes DHS to admit various classes of non-immigrants *(for example*, diplomats, crewmen, visitors, and journalists). Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (codified at 8 U.S.C. § 1101(a)(15)). The common name associated with a non-immigrant visa category is derived from its subsection within § 1101(a)(15). 8 C.F.R. § 214.1(a)(2). For example, § 1101(a)(15)(B) defines B visitor visas and § 1101(a)(15)(H)(ii)(a) defines H-2A agricultural guestworker visas.

DHS is authorized to set the duration of non-immigrant admission through regulation. § 1184(a)(1). However, DHS regulations must "insure that at the expiration of such time or upon [an alien's] *failure to maintain the status under which he was admitted* … such alien will depart from the United States." *Id.* (emphasis added). Aliens who do not main-

tain the status under which they were admitted are deportable. 8 U.S.C. § 1227(a)(1)(C)(i).

The F-1 student visa authorizes the temporary admission of *bona fide* students solely to pursue a full course of study at an approved academic institution that will report termination of attendance. 8 U.S.C. § 1101(a)(15)(F)(i). No statute authorizes employment by aliens in F-1 visa status. Nonimmigrant Students; Authorization of Employment for Practical Training; Petitions for Approval of Schools; Supporting Documents, 42 Fed. Reg. 26,411 (May 24, 1977). In 1981, Congress explicitly limited the course of study under student visas to that taking place at academic institutions. Pub. L No. 97-116, 95 Stat. 1611 (1981) (codified at 8 U.S.C. § 1101(a)(15)(F)(i)). The purpose of this change was to "specifically limit [F-1 visas] to academic students." S. Rep. 96-859 at 7 (1980).

The H-1B guestworker visa is the primary statutory path for admitting college-educated, non-immigrant labor. § 1101(a)(15)(H)(i)(b). To protect American workers, the H-1B program requires the employer to submit a Labor Condition Application, § 1182(n), and imposes annual quotas that limit the number of visas, § 1184(g). Industry demand for such foreign labor is so great that the annual quotas are usually reached. *E.g.*, 73 Fed. Reg. 18,946.

The OPT Program

Despite the lack of any statutory authorization for aliens to engage in employment while in F-1 student visa status, agencies have created student

visa work programs through regulation. *See e.g.*, *Immigrants Get Student Visas From Colleges But Never Attend Class*, KPIX-5, Mar. 24, 2015 (describing how aliens work while in student visa status).[1] The work program at issue here is Post Completion Optional Practical Training ("OPT"). 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). The OPT program was created in 1992 without notice and comment. Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) ("1992 OPT Rule'). OPT originally authorized all aliens in student visa status to remain in the United States and work for a year after graduation. *Id.*

Since the 1990's, the use of foreign labor has become one of the most contentious issues in the computer industry. *See e.g.*, Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, NY Times, Sept. 29, 2015 (describing how Toys 'R' Us, Disney, and New York Life Insurance replaced American computer programmers using the H-1B visa program).[2] Historically, the primary vehicle for importing foreign computer programmers was the H-1B visa. 8 U.S.C. § 1101(a)(15)(H)(i)(b). Both the statutory H-1B visa program and the OPT program apply to the same class of workers: college graduates. 8 U.S.C. § 1184(i).

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1 Available at http://sanfrancisco.cbslocal.com/2015/04/24/international-technological-university-san-jose-college-foreign-students/ (last visited Oct. 5, 2017)

2 Available at https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html (last visited Oct. 5, 2017)

In 2007, Microsoft concocted a scheme to circumvent the H-1B quotas through regulation. Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56, A.R. at 130–23 (Apr. 8, 2008) ("2008 OPT Rule"). Microsoft's plan was for DHS to increase the duration of OPT by 17 months (from a year to 29 months) so that it could serve as a substitute for H-1B visas. *Id.* Microsoft presented its plan to the DHS secretary at a dinner party. *Id.* Thereafter, DHS worked in secret with industry lobbyists to craft regulations implementing Microsoft's scheme. 2008 OPT Rule, A.R. 124–27, 130–34. The first notice the public received that DHS was considering such regulations came when DHS promulgated them without notice and comment. 73 Fed. Reg. at 18,944.

The 2008 regulations created a 17-month work extension for aliens with degrees in STEM (science/technology/engineering/mathematics) fields, created another extension for all aliens with pending H-1B petitions, and authorized aliens who were unemployed after graduation to maintain their student visa status (for a maximum of 35 months). *Id.*

In 2016, as the 2008 OPT Rule was to be vacated by the United States District Court for the District of Columbia because of DHS's failure to provide notice and comment, *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 156 F. Supp. 3d. 123, 149 (D.D.C. 2015)

("*Washtech I*"), DHS promulgated new OPT rules that reauthorized the original 12-month work period, expanded the STEM work period from 17 months to 24 months, reauthorized the work period for those beneficiaries of a pending petition for H-1B status, and reauthorized aliens to be unemployed while maintaining student visa status. 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. 13,040–122 (Mar. 11, 2016) ("2016 OPT Rule"). These regulations are the subject of the complaint in this action.

Currently, the OPT program confers three distinct periods of continued F-1 status and work authorization. First, all graduates are authorized to work for one year. 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3), 274a.12(c)(3)(i)(B). Second, graduates with degrees in fields DHS designates as *STEM* are eligible for an additional two-year period of F-1 status and work authorization. 8 C.F.R. § 214.2(f)(10)(ii)(C). Finally, all graduates with pending H-1B petitions may continue in F-1 status and remain eligible to work until the start of the fiscal year (when new H-1B visas become available) or until their petitions are denied (April 1st–October 1st). 8 C.F.R. § 214.2(f)(5)(vi). Guestworkers who are eligible for all three authorizations can work in student visa status for up to three and a half years after graduation.

Since the 2008 OPT Rule created extended periods of work, the number of guestworkers entering the U.S. workforce each year under the

OPT program has exploded. In FY 2008, the OPT program allowed 28,497 guestworkers to enter the U.S. labor force. Ruth Ellen Wasem, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*, Congressional Research Service, Jan. 13, 2016 at 14. In FY 2016, 154,120 guestworkers entered the labor market under OPT—a 441% increase. U.S. Citizenship and Immigration Services, *Number of Approved Employment Authorization Documents, by Classification and Basis for Eligibility*.[3] Measured by the number of workers entering the labor force each year, OPT is now larger than the H-1B program, whose provisions it was designed to circumvent. *Characteristics of H-1B Specialty Occupation Workers: FY 2016*, USCIS, May 5, 2017, p. 5 (114,503 petitions for new H-1B workers were approved in FY 2016).

Litigation History

Shortly after the 2008 regulations were promulgated, several groups of computer programmers challenged them in the U.S. District Court for the District of New Jersey under the Administrative Procedure Act ("APA"). *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009). In a nonprecedential opinion, the Third Circuit affirmed the district court's dismissal of the case under Fed. R. Civ. P. 12(b)(1), holding that the plaintiffs lacked standing because their interest of protecting American workers was not within the zone of interest of the statute in question. *Id.*

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3 Available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/eads-by-basis-for-eligibility.pdf (last visited Oct. 5, 2017)

On March 28, 2014, another group of computer workers, Washtech, filed a nearly identical challenge to the 2008 OPT Rule in the U.S. District Court for the District of Columbia. *Washtech I*, Compl. (D.D.C. Mar. 28, 2014). This time the district court held the plaintiffs had standing to bring the case. *Washtech I*, 156 F. Supp. 3d at 130–34. On the merits, the district court held that the 2008 OPT Rule was promulgated unlawfully without notice and comment, *id.* at 147, but that the regulations were within DHS authority, *id.* at 149. The district court ordered the 2008 OPT Rule vacated but stayed vacatur so that DHS could resubmit the rule for notice and comment. *Id.* at 149.

Washtech filed a timely appeal, raising the questions of whether the district court had erred by holding the 2008 regulations were within DHS authority and whether the court's simply directing the agency to resubmit the rule for notice and comment was authorized under the APA. *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, No. 16-5235, Statement of the Issues, (D.C. Cir. Sept. 23, 2015). While the appeal was pending, on March 11, 2016, DHS promulgated a new regulation to replace the 2008 regulation. 2016 OPT Rule, 81 Fed. Reg. at 13,040. This Court dismissed the appeal as moot and vacated the opinions of the district court. *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, No. 16-5235 (D.C. Cir. May 26, 2016).

On June 17, 2016, Washtech filed another complaint challenging the new regulation with nearly the same claims as in *Washtech I* and *Program-*

mers Guild. Wash. Alliance of Technology Workers v. U.S. Dep't of Homeland Security, No. 16-1170, complaint, Docket 1 (D.D.C. June 17, 2016) ("*Washtech II*") [1]. In this third case, the district court held that the complaint failed to state a claim and dismissed under Fed. R. Civ. P. 12(b)(6). *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 249 F. Supp. 3d 524 (D.D.C. 2017) [30]. Washtech made this timely appeal of that opinion.

SUMMARY OF THE ARGUMENT

The district court erred in holding that Washtech had conceded standing to challenge the entire OPT program, including the 1992 OPT Rule, because it ignored Washtech's briefing on that issue. Mem. Op. at 10 [40]. In addition, the district court's standing analysis, concluding that Washtech had standing to challenge the 2016 OPT Rule but not the entire OPT program, creates the improbable result that Washtech did not suffer injury from the first post-graduation year an alien worked but did suffer injury from subsequent years of work. Mem. Op. at 11–12 [41–42].

The district court's holding that Washtech did not suffer the deprivation of statutory protections because Congress did not incorporate worker protections into the definition of student visa status is in error; Congress explicitly protected American workers under that provision by excluding aliens in student visa from the labor market entirely. 8 U.S.C. § 1101(a)(15)(F)(i). Student visa status is restricted solely to those pursuing a full course of study at an approved academic institution and does not authorize alien employment. *Id.*

Non-resident aliens, including students, are exempt from Medicare and Social Security taxes. 26 U.S.C. § 3121. When aliens are allowed to work on student visas, Washtech members suffer competitive injury because these alien workers are thus cheaper to employ. The district court erred in holding that this injury was not redressable because Washtech's complaint could not result in the removal of the statutory tax difference. Mem. Op. at 20. The district court failed to consider the obvious point that, even if 26 U.S.C. § 3121 remained on the books, the removal of these aliens from the job market would fully redress Washtech's injury.

The 2016 OPT Rule requires that OPT workers be provided mentoring and training, but does not require that such benefits be provided to American workers. 81 Fed. Reg. at 13,090. The district court held that this discrimination is not an injury because a mere benefit to a competitor does not confer standing. Mem. Op. at 16 [36]. Here, the district court failed to consider that American workers are a protected class and they are entitled to the same benefits as those provided to foreign workers. 8 U.S.C. § 1324b(a)(3). The disparate treatment of U.S. workers and alien workers under the 2016 OPT Rule is unlawful and an injury to Washtech members. *See id.*

Count II of Washtech's complaint alleges that the 2016 OPT Rule is in excess of DHS authority. The district court held that Washtech had conceded DHS's argument that this claim was not sufficiently pled. The

district court erred by ignoring Washtech's response to DHS's arguments and holding the claim had been waived. Mem. Op. at 42–43 [72–73].

Count III of Washtech's complaint alleges procedural violations in the 2016 OPT Rule. In regard to allegations involving the deprivation of notice and comment, the district court erred by making factual judgments, rather than judgments on the sufficiency of the pleadings. Mem. Op. at 14, 41 [44, 71]. In regard to allegations involving failure to comply with regulations governing incorporation by reference, the district court erred by interpreting Washtech's concession of irrelevant points raised by DHS as conceding the entire count. *Id.*

Count IV of the complaint alleges that the 2016 OPT Rule was arbitrary and capricious. Rather than setting the same work term for all aliens, the 2016 OPT Rule singles out STEM fields, such as those Washtech members work in, for an increased influx of foreign labor. The 2016 OPT Rule gives no explanation why American STEM workers are so singled out. This differential treatment of American STEM workers, without explanation, is arbitrary and capricious. The district court erred by brushing aside these as "conclusory allegations" and dismissing the count. Mem. Op. at 43 [73]. This is a clear error because what the district court called "conclusory allegations" are facts established in the record.

The ultimate question of whether the OPT program is lawful has now been before the courts for over nine and a half years, but it has never been decided. This is an exceptional circumstance: no facts are or have been in

dispute, and this Court should bring this needlessly long litigation to a conclusion by deciding this pure question of law.

DHS has no authority to allow aliens to remain in student visa status once they graduate. 8 U.S.C. § 1101(a)(15)(F)(i). Student visa status requires the alien to be a *bona fide* student, solely pursuing a course of study at an approved academic institution that will report termination of attendance. *Id.* After graduation, the aliens in question are not students, they are not pursuing a course of study, and their academic institution has no ability to report their termination of attendance. DHS regulations are required to insure that aliens leave the country when they do not maintain the status for which they were admitted. 8 U.S.C. § 1184(a)(1).

Even if DHS had the authority to allow aliens to remain in student visa status after graduation, it has no authority to allow such aliens to work. For this reason, too, the OPT program should be held in excess of DHS authority and set aside.

STANDARD OF REVIEW

The review of an agency record presents entirely questions of law. *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001). This Court reviews questions of law *de novo*. *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004). A district court's standing determinations are also reviewed *de novo*. *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016). This Court reviews determinations under Fed. R. Civ. P. 12(b)(6) *de novo*. *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007).

ARGUMENT

I. The district court erred by holding that Washtech's pleadings did not establish a legal basis for standing.

The district held that Washtech had established competitive injury standing to challenge the 2016 OPT Rule. Mem. Op. at 26–33 [56–63]. Nonetheless, the district court held that Washtech lacked standing to challenge the entire OPT program, and lacked standing to challenge the 2016 OPT Rule based on other injuries pled. Mem. Op. at 10–26 [40–56].[4]

A. Washtech did not concede that it lacked standing to challenge the OPT program.

The 2016 OPT Rule reenacted the provisions authorizing all alien graduates to work for a year created in the 1992 OPT Rule. 81 Fed. Reg. at 13,117. The 2016 OPT Rule also reenacted and expanded the provisions authorizing extended work and unemployment in the 2008 OPT Rule. 81 Fed. Reg. at 13,040. Because the effect of invalidating an agency rule is to "reinstate the rules previously in force," any success Washtech could have in invalidating provisions of the 2016 OPT Rule would have resulted in the restoration of nearly identical provisions of a previous rule. *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987). Washtech addressed this issue in Count I of its complaint by alleging that the entire OPT program was unlawful under the reopening doctrine. Compl. ¶¶ 54–61.

The district court rejected DHS's factual challenge to standing and held that Washtech had standing to challenge the 2016 OPT Rule. Mem. Op.

4 Washtech addresses the pleadings of procedural injury in conjunction with the procedural causes of action, § II.B *infra*.

at 26–33 [56–63]. Nonetheless, the district court held that Washtech did not have standing to challenge the entire OPT program with its one-year work authorization. *Id.* at 10–11 [40–51]. In support of that conclusion, the district court stated:

> Washtech, in its opposition, fails to address the Government's argument that it lacks standing to challenge the 1992 OPT Program Rule.... Accordingly, the Court may treat the Government's position regarding Washtech's lack of standing to pursue its challenge to the 1992 OPT Program Rule as conceded.

Mem. Op. at 10 [40]. In fact, Washtech did address that argument extensively:

> The record makes indisputable the fact that the 2016 OPT Rule and the 1992 OPT Rule allow additional competitors into Washtech members' job market .... 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.

Pl. Resp. at 15; *see also* Pl. Resp. at 12 & n.3 ("Likewise, provisions of the 1992 OPT Rule remain in effect … and create the same injury."); Pl. Resp. at 13 ("the one-year OPT term created in the 1992 OPT Rule is still in effect…"); Pl. Resp. at 18 ("Under both the 1992 OPT Rule and the 2016 OPT Rule Washtech members suffer injury from unfair competition due to disparate taxation treatment."). It is puzzling that the district court found that Washtech conceded this issue, when in fact Washtech addressed it repeatedly.

After holding that Washtech had conceded the issue, the district court made further analysis that directly conflicts with this circuit's precedent

on competitive injury. *E.g.*, *La. Energy and Power Auth. v. Fed. Energy Regulatory Comm'n*, 141 F.3d 364, 367 (D.C. Cir. 1998). The district court incorrectly summarized the complaint by stating that "Washtech's Complaint suggests that its named members were unable to obtain the jobs for which they had applied because those jobs were filled by beneficiaries of the extension provided by 2008 OPT Program Rule." Mem. Op. at 11 [41]. Actually, Washtech explained this injury in depth in its response. Pl. Resp. at 14–17, 23–24. The injury claimed is exposure to competition—not lost jobs. *Id.* at 14, 16, 24; *see also Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001) (stating exposure to competition caused by administrative action is an injury in fact). "[E]conomic logic" dictates that a party will likely suffer an injury when there are more competitors. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). Such injuries include "los[t] sales to rivals" (failure to secure a job in the labor context) and "forc[ing a] lower [] price" (depressed wages in the labor context). *Id.* Thus, Washtech members suffer injury from increased competition from OPT workers both when they are looking for work and when they are fully employed.

The pleadings of job applications and evidence submitted by DHS establish that Washtech members are active market participants and competitors with OPT STEM workers. *See Mendoza v. Perez*, 754 F.3d 1002, 1011–16 (D.C. Cir. 2014). The one-year work period of the 1992 OPT Rule (reenacted in the 2016 OPT Rule) and the expanded work periods under the 2016 OPT Rule both allow aliens into the job market,

exposing Washtech members to competition. *See Tozzi*, 271 F.3d at 308. Furthermore, adopting the district court's follow-up standing analysis on this issue (separating the one-year work period from the other OPT work periods) would create the improbable result that Washtech members have no injury from the first year that aliens work under the OPT program but do suffer injury from the second and following years of work. Mem. Op. at 11–12 [41–42].

B. The district court erred by holding Washtech's pleadings did not establish deprivation of statutory protections injury.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Washtech alleged that the OPT Program caused it the injury of the deprivation of statutory protections. Compl. ¶¶ 85, 96–97 [14, 16]; *see also* Pl. Resp. at 9–14. Congress has established protections for American workers from college-educated foreign labor. 8 U.S.C. §§ 1182(n), 1184(g). The very purpose of expanding the OPT duration beyond a year in the first place was to deprive American workers of the protective limits on foreign college-educated labor in the H-1B program, 8 U.S.C. § 1184(g), by allowing such labor to work on student visas instead. *E.g.*, 73 Fed. Reg. at 18,946 (stating that the H-1B quotas create "a competitive disadvantage for U.S. companies").

The district court rejected this injury, stating that "Washtech [has not] shown that there are 'labor-protective provisions at stake [that] are mandatory'.... Congress specifically created the F-1 visa program.... In so doing, Congress elected not to include language providing for domestic labor protections or to condition entry into the United States on the entry having no impact on domestic labor." Mem. Op. at 24–25 [54–55].

But of course, Congress had no reason to do so. Congress has created different visas for different purposes, and it restricted F-1 status to *bona fide* students pursuing a full course of study at an approved academic institution. 8 U.S.C. § 1101(a)(15)(F)(i). Thus, Congress has protected American workers from foreign students by excluding them from the job market entirely. *See id.* (authorizing admission "solely for the purpose of pursuing [] a course of study"); Nonimmigrant Students; Authorization of Employment for Practical Training; Petitions for Approval of Schools; Supporting Documents, 42 Fed. Reg. 26,411 (May 24, 1977) ("There is no statute under which employment of nonimmigrant students for practical training is authorized."). It would make no sense for Congress to "include language providing for domestic labor protections" that the district court sought in the definition of student visa status when Congress does not allow those aliens to work at all. *See id.* By using student visas *for the very purpose* of circumventing the labor protections in the H-1B program, DHS injures Washtech by depriving its members of those labor protections. 8 U.S.C. §§ 1184(g), 1182(n).

C. The district court erred by holding that Washtech's pleadings did not establish unfair competition injury.

Washtech alleged injury from unfair competition under the 2016 OPT Rule. Compl. ¶¶ 87, 220–23 [15, 27]; *see also* Pl. Resp. at 17–19. Because aliens on student visas and their employers are not subject to Social Security and Medicare tax, those aliens are cheaper to employ than Washtech members. *Id.*; *see also* San Francisco State Univ., *What Employers Should Know About Hiring International Students*,[5] ("[A] company may save money by hiring international students because the majority of them are exempt from Social Security (FICA) and Medicare tax requirements."). This taxation difference creates the conditions for an injury-in-fact to Washtech members. *See Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) ("The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing."); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810–11 (D.C. Cir. 1983) ("The appellants allege that unfair competition … from homeworker employers will injure factory employers paying lawful wages … will injure factory employees.").

In addressing this injury, the district court erred by shifting the causation to Congress: Because Congress created the taxation difference, there was no injury from the 2016 OPT Rule. Mem. Op. at 20 [50]; *see also* Pl. Resp. at 24 (addressing this point). The district court failed to consider

5 Available at http://www.sfsu.edu/~sicc/documents/handouts/employers/HiringIntlStudents.pdf (last visited Sept. 25, 2017)

that, but for the 2016 OPT Rule, these aliens would not be in the job market at all. Washtech's injury is caused not just by the taxation difference, but also by the unlawful allowance of foreign labor into the job market.

The district court also held that this injury was not redressable because, even if the OPT program were vacated, "the taxation treatment for F-1 visa holders would still remain." *Id.* Again, the district court missed the obvious point that, if Washtech prevailed, the aliens in question would not be in the job market at all. The tax differential might remain but foreign graduates would not be able to take advantage of it, and the injury would be completely redressed. *See Int'l Ladies' Garment Workers' Union*, 722 F.2d at 810 ("[T]he alleged injuries can be redressed by controlling the source of the unfair competition.").

D. The district court erred by holding Washtech's pleadings did not establish employment discrimination injury.

Washtech alleged employment discrimination injury on the ground that the 2016 OPT Rule requires employers to provide mentoring programs to foreign workers but does not require the same for Americans, including Washtech members. Compl. ¶¶ 89, 224–25 [15, 27–28]; *see also* Pl. Resp. at 19–20, 24–25. In response to DHS arguments that Washtech members had no legally protected interest against such discrimination, Def. Mot. to Dismiss, Docket 18-1 at 30, Washtech pointed out that 8 U.S.C. § 1324b(a)(3) makes American workers a protected class and bans discrimination against them based upon immigration status. Pl. Resp., at 21.

The district court held that this pleading was a "mere assertion that something unlawful benefited its competitors." Mem. Op. at 16 [46] (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013)). Yet, the situation here is entirely distinguishable from *Already*. The alleged injury rejected by the Supreme Court in *Already* was that the competitor received a benefit—and not a benefit that improved its competitive position *vis-à-vis* the plaintiff. *Id.* In contrast, here the injury is that the Washtech members do not receive the *same benefit* that its competitors receive as required by statute. 8 U.S.C. § 1324b(a)(3). The district court's opinion makes no mention of this provision that protects American workers and bans discrimination against them.

II. The district court erred by dismissing all of Washtech's remaining claims.

The district court held that Washtech had standing to challenge the 2016 OPT Rule. Mem. Op. at 26–40 [56–70]. But it also held that Washtech's complaint failed to state to state a claim upon which relief could be granted. Mem. Op. at 40–45 [70–75].

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief," in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds

of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations and quotation omitted).

A. The district court erred by dismissing Count II because Washtech did not concede that it had failed to state a claim that the 2016 OPT Rule is in excess of DHS authority.

Count II of Washtech's complaint alleged the 2016 OPT Rule was in excess of DHS authority. Compl. ¶¶ 62–63 [11]; *see also* 5 U.S.C. § 706(2)(C) (authorizing this cause of action). DHS challenged the sufficiency of Washtech's pleading, stating

> Washtech also asserts that the 2016 OPT STEM rule is *ultra vires* because it is "in excess of DHS authority" and "conflicts with the statutory provisions of 8 U.S.C. §§ 1182(a)(5), 1182(n), 1184(a)(1), 1184(g), and 1227(a)(1)(C)(i)," (Count II) .... Plaintiff's single, conclusory sentence in paragraph 63 asserting the Final Rule exceeds DHS's statutory authority (Count II) without more is facially implausible given the absence of any alleged facts supporting this conclusory legal claim.

Def. Mot. to Dismiss, Docket 18-1 at 43–44. It is not clear what DHS was even objecting to here; certainly, it made no argument that the rule in question did *not* conflict with or exceed the authority granted in the statutes Washtech cited. And it is difficult to image what more would need to be pled to claim that a rule is in excess of statutory authority than to identify relevant authority; there is no relevant *fact* except the existence of the rule itself. Washtech responded adequately but briefly to DHS's objection that it had failed to plead sufficient facts:

> 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. . . .

Pl. Resp., at 43. The district court then held:

> Washtech failed to address the Government's arguments regarding Count II in its opposition. *See generally* Washtech's Opp'n. Therefore, as previously indicated, the Court may treat the Government's position regarding Count II as conceded, [] which it deems appropriate to do.

Mem. Op. at 41–42 [71–72]. Thus, on the ground that Washtech had failed to address DHS's mere assertion that Washtech had failed to allege a "factual basis" for an ultra vires claim, where Washtech had pointed out that it had alleged such a basis, and where, by the nature of such claims, the only relevant fact is the existence of the challenged rule, the district court took the extreme measure of dismissal. *Id.*

The district court stated no basis in any rule of civil procedure, or in authoritative precedent, for its extraordinary action. Instead, citing its own opinion and a non-precedential opinion of this Court affirming it (but not addressing this issue) the district court repeatedly stated that "[i]t is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." Mem. Op. at 11, 41 [41–71]. Washtech cannot find any D.C. Circuit precedent addressing this point of law, let alone any precedent setting a standard for how detailed a response must be to avoid

concession or holding that a concession on one point is tantamount to the concession of an entire claim.

B. The District Court erred by dismissing Washtech's Count III claiming procedural violations in the 2016 OPT Rule and in holding that Washtech did not suffer procedural injury.

Count III of Washtech's complaint claimed that 2016 OPT Rule was promulgated without observing the procedures required by law. Compl. ¶¶ 64–80 [11–14]; *see also* 5 U.S.C. § 706(2)(D) (authorizing this cause of action). Washtech identified several procedural defects in the 2016 OPT Rule.

The most complex of these is the question of public notice and comment, an issue raised, but left undecided, in *Washtech I*. Compl. ¶¶ 67–68 [12]. In *Washtech I*, the district court responded to DHS's failure to provide notice and comment for the 2008 OPT Rule by directing the agency to resubmit the rule for after-the-fact notice and comment. *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 149 (D.D.C. 2015).

On appeal, Washtech raised the question of whether such after-the-fact notice and comment corrects the defects of prior rulemaking. *Washtech I*, Statement of the Issues, (D.C. Cir. Sept. 23, 2015). The purpose of notice and comment is to "ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration

to alternative ideas." *State of N.J., Dep't of Envtl. Prot. v. U.S. Envtl. Prot. Agency*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (quoting from and adopting the reasoning of *U.S. Steel Corp. v. U.S. Envt'l Prot. Agency*, 595 F.2d 207, 214–15 (5th Cir. 1979)). If, after failing to give notice and comment, a court directs an agency simply to resubmit notice and comment, the agency is just going to reach the same decision that it had reached before, and the after-the-fact public participation will be meaningless.

In an analogous situation, this court has required an agency to maintain an "open mind" standard when it engages in holding post-promulgation notice and comment. *Intermountain Ins. Serv. of Vail v. Comm'r*, 650 F.3d 691, 709 (D.C. Cir. 2011). In this actual situation, the practice in the D.C. District had been to require the agency "to conduct notice and comment rulemaking *ab initio*, *i.e.*, without giving preference to the conclusion in prior rule making." *Fertilizer Inst. v. U.S. Envtl. Prot. Agency*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *see also Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67, 90 (D.D.C. 2003) (rev'd on other grounds 411 F.3d 225 (D.C. Cir. 2005)) (after failure to give notice and comment, "[t]he appropriate remedy is to vacate the rule and remand it to the Services with instructions to truly begin anew the APA mandated notice and comment procedures, with the open mind required by the governing authorities.").

In *Washtech I*, the district court's remedies were tailored to the very purpose of allowing the agency to keep in place uninterrupted the policy that

was adopted without notice and comment. *See Washtect I*,, 156 F. Supp. 3d at 123, 148–49; *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 153 F. Supp. 3d 93, 99 (D.D.C. 2016). When DHS requested an extension of stay of vacatur, it did so to "ensure an uninterrupted regulatory transition to the new final rule and prevent 'substantial hardship for foreign students and a major labor disruption for the technology sector.'"—not for time for to consider the comments to determine whether the expanded work on student visas should be continue at all. *Washtech I*, Defendant's Motion Under Fed. R. Civ. P. 60(h)(6), Docket 47, (D.D.C, Dec. 12, 2015). As alleged in the complaint, "DHS has failed to subject the question of whether the OPT program should be expanded beyond a year to actual notice and comment." Compl. ¶ 67[12]. That question was decided in DHS's secret rulemaking with lobbyists and that question was never the subject of subsequent after-the-fact notice and comment.

The district court dismissed out of hand the allegations in Count III as "facially absurd." Mem. Op. at 41 [71]. This was error. "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). "The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and

'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Similarly, in rejecting addressing procedural injury, the district court stated:

> Washtech cannot genuinely demonstrate that DHS omitted or failed to subject the question of whether the OPT Program should be expanded beyond twelve months to notice and comment because DHS explicitly submitted this question for notice and comment.

Mem. Op. at 14 [44]. Here, the district court made a factual error that caused it to completely miss the objection raised in the complaint. DHS had already expanded OPT beyond 12 months by creating a 17-month extension to OPT and did so without notice and comment in the 2008 OPT Rule. 73 Fed. Reg. at 18,948. DHS then subjected the question of whether the 17 months should be expanded to 24 months to notice and comment—not whether OPT should be expanded from 12 months to 24 months as the district court stated. 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, 63,378 (proposed Oct. 19, 2015) ("The proposal would increase the OPT extension period for STEM OPT students from the 2008 IFR's 17 months to 24 months."). The question of whether OPT should have been expanded beyond a year at all was decided in secret, backroom discussions with lobbyists and has never been on the table and subjected to notice and comment. 73 Fed. Reg. at 18,950 (expanding OPT without

notice and comment); 2008 OPT Rule, A.R. 120–27 (communication between DHS and lobbying groups on the proposed OPT expansion made while the public was not informed that such a rule was being considered).

Washtech alleged additional procedural violations related to the 2016 OPT Rule's use of incorporation by reference to a web page. Compl. ¶¶ 69–80 [12–14]. In regard to those claims, the district court stated:

> The Government argues that this claim must fail because Washtech's Complaint does not allege that "(1) the STEM list is required to be published in full in the Federal Register (which it is not), (2) Washtech lacked actual and timely notice of the STEM list (which it had), or (3) how Washtech's members have been adversely affected by DHS's inserting a weblink into its Rule."

Mem. Op. at 41 [71]. DHS's Point (1) is correct; the complaint does not allege the STEM list had to be published in the Federal Register. DHS's Point (2) is correct; the complaint does not state Washtech lacked notice. Washtech conceded these points, but neither has any relevance to whether DHS complied with the incorporation by reference rules. 1 C.F.R. part 51. In regard to Point (3), Washtech addressed injury at length. Pl. Resp. at 6–26.

Without making any reference to the allegations actually made in the complaint, the district court dismissed all the claims related to the incorporation by reference violations. Mem. Op. at 41 [71] ("the Court may treat the Government's position with respect to Count III as conceded.").

C. The District Court erred by dismissing Washtech's Count IV that the 2016 OPT Rule was arbitrary and capricious.

Washtech's complaint alleges that the 2016 OPT Rule was arbitrary and capricious. Comp. ¶¶ 81–84 [14]; *see also* 5 U.S.C. § 706(2)(A) (authorizing this cause of action). The complaint makes two specific factual allegations in support of this claim. Compl. ¶¶ 82–83 [14]. In one, the complaint alleges that "[t]he 2016 OPT Rule singles out STEM occupations for an increase in foreign labor through longer worker periods with no justification." Compl. ¶ 83 [14]. The reasons a rule can be arbitrary and capricious include "entirely fail[ing] to consider an important aspect of the problem" and "rel[ying] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If DHS is going to single out Washtech's members' fields for a massive increase in foreign labor, surely it ought to give a reason for picking those fields. Otherwise it has failed to consider an important aspect of the problem. *See id.* If such a reason existed, DHS would likely have to rely on factors Congress did not intend it to consider while administering student visas because the statute does not authorize employment. *See* 8 U.S.C. § 1101(a)(15)(F)(i). Thus, this factual allegation set forth a claim for arbitrary and capricious rulemaking.

The district court brushed aside these allegations claiming, they are "conclusory allegations." Mem. Op. at 43 [73]. Here, the district court

confused factual allegations established by the record with the type of vague conclusions addressed by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007). The 2016 OPT Rule does single out STEM occupations for an increase in foreign labor, 81 Fed. Reg. at 13,041, and it does not provide a justification why American STEM workers are singled out for this dubious distinction, 81 Fed. Reg. at 13,040–122. These are not conclusory allegations. They are facts established by the record. *Id.* Furthermore, "Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke*, 490 U.S. at 327.

III. The OPT program is not within DHS's authority.

As explained above, the district court took it as *conceded* that Washtech had failed to allege a factual basis for its *ultra vires* claim (even though Washtech stated in its response that it had alleged such a factual basis). Needless to say, this non-concession was not an adequate ground for dismissing the claim. In any event, the point supposedly "conceded" was transparently false; in an *ultra vires* claim, the only relevant fact is the existence of the challenged regulation itself; all other questions are questions of law. Concession or no concession, the district court's dismissal of Count II on this transparently false ground was error.[6]

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6 The issue of whether the OPT program is *ultra vires* was certainly raised in the district court, and disposed of (erroneously) by that court. Even if this were not so, "[the D.C. Circuit] has resolved an issue not raised in the district court where it 'involved a straightforward legal question, and both parties have fully addressed the issue on appeal.'" *Lesesne*

Under the APA, "[t]he reviewing court shall … hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(C). The participants of the OPT program have graduated and are either employed in the labor market or are unemployed are looking for work. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). The OPT program is beyond DHS's authority, both because DHS was denied the authority to grant student visa status to non-students and because DHS lacks general authority to issue work permits.

DHS advanced the standing question past the pleading stage paving the way for a decision on this issue. In reply to its motion to dismiss, DHS made a factual challenge to Washtech's standing, submitting Washtech members' affidavits from *Washtech I* in evidence. Def. Reply, Docket 21, Exs. 1–5. The district court held that Washtech had established competitor standing. Mem. Op. at 26–37.

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v. Doe, 712 F.3d 584, 588 (D.C. Cir. 2013) (quoting *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010)). The review of an agency record presents entirely questions of law. *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001). Accordingly, this Court should decide this issue.

A. DHS has no authority to allow aliens to remain in the United States in student visa status after they have graduated.

The fundamental problem with the OPT program is obvious: Aliens on OPT are not *students* by any accepted definition of the term. OPT allows aliens to work, or even to be unemployed, for years "after the student graduates." 73 Fed. Reg. at 18,945. In plain English, OPT participants are *not students*.

By definition, the INA unambiguously restricts student visa status to aliens attending school. 8 U.S.C. § 1101(a)(15)(F)(i). Specifically, this definition requires the alien to be pursuing a full course of study at an approved academic institution that will report termination of attendance. *Id.* Work, under the euphemism *Practical training*, taking place outside a school does not suffice for student visa status. *See* S. Rep. 96-859 at 7 (1980) (stating Congress changed the definition of student visa status to "specifically limit it to academic students.").

Once aliens admitted on student visas are no longer students, the INA requires that those aliens leave the country unless they acquire another visa status. 8 U.S.C § 1184(a)(1). DHS regulations are required to "insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, … [the] alien will depart from the United States." *Id.* Furthermore, "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted … or to comply with the conditions of any such status, is deportable." 8 U.S.C. § 1227(a)(1)(C)(i).

The OPT program simply ignores these statutory provisions governing student visa status and its duration. Under the OPT program, DHS allows alien graduates to maintain student visa status for up to three and a half years while they are not attending school and are either working full time or are unemployed. Aliens working under OPT are not pursuing a full course of study at an academic institution, as required by statute. 8 U.S.C. § 1101(a)(15)(F)(i); *see also* 8 C.F.R. § 214.2(f)(6) (defining course of study as taking place at an academic institution). There is no way for academic institution to report an alien's termination of attendance, as required, if the alien is not attending school at all. Because graduates who are not attending school are not maintaining the status under which there were admitted, DHS regulation should ensure that such aliens leave the country. 8 U.S.C. §§ 1184(a)(1), and 1227(a)(1)(C)(i). For these reasons, the OPT regulations are in excess of DHS authority and should be set aside.

B. DHS has no authority to allow alien graduates to work in student visa status.

Even if DHS had authority to allow aliens to remain in the United States after graduation in student visa status, it would still lack the authority to allow such aliens to work. "There is no statute under which employment of nonimmigrant students for practical training is authorized." 42 Fed. Reg. at 26,411. Neither the definitional provision in the INA relied on in the 2016 OPT Rule nor the general authority to promulgate regulations confers such power.

1. The definition of the term "unauthorized alien" does not confer on DHS unlimited authority to permit alien employment.

The 2016 OPT Rule relies on a definitional provision of the INA for the proposition that DHS has unlimited authority to allow aliens to work in the United States, even without a specific authorization from Congress. 81 Fed. Reg. at 13,045, 13,059. By enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3445 ("IRCA") (creating the new section § 274a of the INA codified at 8 U.S.C. § 1324a), Congress, for the first time, criminalized and imposed civil sanctions on the act of hiring an alien who is not authorized to work in the United States. This section also created the definition of the term *unauthorized alien* (that is, those aliens not permitted to work), that DHS now claims as a source of unlimited authority to allow aliens to work in the United States. 8 U.S.C. § 1324a(h)(3). Section 1324a(h)(3) provides:

> (3) Definition of unauthorized alien
>
> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

As a purely definitional provision limited to its own section, § 1324a(h)(3) does not authorize anyone to do anything. Indeed, no regulation authorizing alien employment prior to 2014 had claimed § 1324a(h)(3) as a source of such authority. Employment Authorization for Certain H-4

Dependent Spouses, 79 Fed. Reg. 26,886 (proposed May 12, 2014).[7] The proposed 2016 OPT Rule was the first time since the program was created in 1992 to cite § 1324a(h)(3) as a source of authority for OPT. 80 Fed. Reg. at 63,376. In fact, the proposed rule was the first OPT regulation to identify any provision claiming to confer authority to allow aliens to work in student visa status. *Id.*

Because DHS's claim of vast authority under this provision is so new in rulemaking, the question of whether it exists is one of first impression in this circuit. The only circuit to address this question is the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (aff'd by an equally divided Court, *United States v. Texas*, 136 S. Ct. 2271 (2016)). The Fifth Circuit rejected the government's claim that § 1324a(h)(3) conferred on the executive branch authority to allow aliens to work in the context of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. *Id.* at 182–83 & n.185. The Fifth Circuit observed that § 1324a(h)(3) is a "'miscellaneous' definitional provision expressly limited to § 1324a, a section concerning the 'Unlawful employment of aliens,'" "does not mention lawful presence," and that "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 183 & n.186 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

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7 The question of whether this regulation is within DHS authority is also before the Court in *Save Jobs USA v. U.S. Dep't of Homeland Security*, No. 16-5287.

"[C]ourts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Loving v. Internal Revenue Serv.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). Yet DHS now claims to be Congress's equal in authorizing alien employment, based on a definitional provision restricted in scope to its own section. 8 U.S.C. § 1324a(h)(3). "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Soft Drink Workers Union Local 812 v. Nat'l Labor Relations Bd.*, 657 F.2d 1252, 1258 (D.C. Cir. 1980) (interpreting a definitional provision as one "designed to ensure uniform meaning to an important phrase that appears frequently and in very different contexts throughout the statute."). "[H]ad Congress wished to assign ['a question of deep "economic and political significance"] to an agency, it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

2. The general authority to promulgate regulations does not confer on DHS the authority to permit any class of aliens to work in the United States.

The only time prior to the 2016 OPT Rule that the agency addressed the question whether it had the authority to authorize employment at all on student visas was in 1977. 42 Fed. Reg. at 26,411. Commenters questioned the lack of authority in the proposed rule. Nonimmigrant Students: Authorization of Employment for Practical Training, 41 Fed. Reg. 29,149

(July 15, 1976). The Justice Department responded, "There is no statute under which employment of nonimmigrant students for practical training is authorized. However, … the Service did cite … 8 U.S.C. 1103, which provides the Attorney General … certain powers …, including the establishment of regulations." 42 Fed. Reg. at 26,411. However, general authorizations do not grant the Secretary unlimited authority to act as he sees fit with respect to all aspects of immigration policy. *See Motion Picture Ass'n of Am. v. Fed. Commc'ns Comm'n*, 309 F.3d 796, 798–99, 802–03 (D.C. Cir. 2002) (finding the general authority of the FCC to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions). Congress explicitly made regulatory actions taken by the Secretary reviewable under the APA. 6 U.S.C. § 112(e). Most importantly, the general authority under § 1103 that authorizes DHS to promulgate regulations is limited to that "necessary for carrying out his authority" under the INA. Granting work authorization to graduates is in no way necessary for DHS to carry out its authority to grant student visas.

C. The Court's eventual decision has major implication for the immigration system.

This Court has recognized that Congress has "plenary authority to regulate aliens" and that "the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Hotel & Rest. Emps. Union, Local 25 v. Attorney Gen. of United States*, 804 F.2d 1256, 1259 (D.C. Cir. 1986) (quoting *Galvan v. Press*,

347 U.S. 522, 531 (1954)). DHS has flipped this principle around by claiming equal authority with Congress to define classes of aliens that may be allowed enter, remain, and work in the United States. *E.g.*, International Entrepreneur Rule, 82 Fed. Reg. 5,238, 5,245 (Jan. 17, 2017); 81 Fed. Reg. at 13,045; Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,427 (Nov. 18, 2016). If the Court reverses its past holdings to uphold DHS's new claim of expansive authority, such a new two-headed system would have major implications for American workers.

1. If DHS has the unlimited authority it claims, there is no logical limit to the duration of student visa status.

In 1992, the INS determined that student visa status could extend to up to 12 months after graduation. In 2008, DHS determined that student visa status could extend to up to 35 months after graduation. In 2016, DHS determined that student visa status could extend up to 42 months after graduation. At what point after graduation does one cease to be a student?

If the definition of student visa status limiting it those attending school and the requirements that aliens maintain the status for which they were admitted does not apply, there is simply no limit to how long DHS can allow aliens to remain in the country and work as "students." *See* 8 U.S.C. §§ 1101(a)(15)(F)(i), 1184(a)(1), 1227(a)(1)(C)(i). If DHS had the authority to allow aliens to remain in student visa status for three and a half year after graduation to create a guestworker program to supply labor to industry, then it would have the authority to extend the term to 50 years to create

a permanent residency program—and the agency clearly should lack the power to do the latter.

2. If the Court holds DHS can authorize aliens to work without a statute from Congress, every protection for American workers in the immigration system can be wiped out by regulation.

The scope of authority DHS claims from a definition provision is vast. The 2016 OPT Rule is just one of several recent regulations in which DHS claimed it has the authority to authorize alien employment without a statute from Congress. *E.g.*, Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284, 10,294 (Feb. 25, 2015) ("8 U.S.C. 1324a(h)(3)(B), recognizes that employment may be authorized by statute or by the Secretary."); 82 Fed. Reg. at 5,245 (Jan. 17, 2017) ("8 U.S.C. 1324a(h)(3)(B) … presumes that employment may be authorized by the Secretary and not just by statute."); 81 Fed. Reg. at 82,427 (("8 U.S.C. 1324a(h)(3)(B) recognizes that employment may be authorized by statute or by the Secretary.").

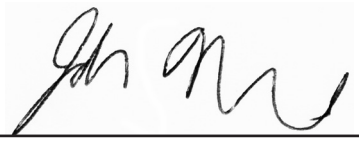
"A primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 893 (1984). Reflecting that purpose, Congress has created protections for Americans throughout the immigration system. *E.g.*, 8 U.S.C. §§ 1182(n), 1184(g), 1188. If DHS has the power to permit alien employment independent of an authorization from Congress, any protection for American workers could be wiped out through regulation using the same

procedure as DHS has taken here to circumvent those in the H-1B program: allow aliens to work through regulation on a visa (or even without a visa) that does not allow employment. *E.g.*, 73 Fed. Reg. at 18,946 (allowing aliens to work on student visas because the H-1B quotas "create[] a competitive disadvantage for U.S. companies."); 82 Fed. Reg. at 5,245 (authorizing admission and employment for aliens with no visa). DHS has no such power, either in general or in this case, to overthrow the protections Congress has enacted.

CONCLUSION

For the reasons stated above, this Court should reverse the dismissal of Washtech's complaint, enter a judgment that the OPT program is in excess of DHS authority, and set that program aside.

Respectfully submitted,
Dated: October 24, 2017



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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,508 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 using 14 pt. Caslon.

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