United States Court of Appeals

for the

Third Circuit

Case No. 08-4642

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION, INC.; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; HARRISON PICOT, II; PAUL E. POLAK; MIKE ROTHSCHILD; ROBERT SANCHEZ; STEPHEN BERRY; STEPHANIE M. BERRY,

Appellants,

–v.–

MICHAEL CHERTOFF, In his capacity as Secretary of Homeland Security, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY

Appellees

On appeal from an order entered in the United States District Court for the District of New Jersey, No. 2:08-cv-2666

Reply Brief on Behalf of Appellants

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ARGUMENT

I. COURTS ROUTINELY HOLD COMPETITION FOR JOBS SATISFIES ARTICLE III STANDING.

A. Case law shows increased competition to workers constitutes injury-in-fact.

Contrary to Appellants' assertions that "competitive injury is only an injury in fact to businesses" (Resp. Br. 3, 26-28), courts have routinely held that competitive injury confers standing to workers. In a case directly on point, *Int'l Union of Bricklayers v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), unions and individual workers challenged Immigration and Naturalization Service ("INS") procedures that allowed aliens admitted on B-1 visitor visas to work as bricklayers. *Id* at 799. The plaintiffs alleged that the rule "allow[ed] aliens into the country to perform work which would otherwise likely go to union members" and that "those alien workers represent[ed] competition that appellants would not face if DHS followed the procedures required by law." *Id.* at 802. The plaintiffs also alleged that this process circumvented the labor certification required for such alien labor. *Id.* at 800. Following *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), the court held that "[s]uch a competitive injury resulting from lost economic opportunities [can] form the foundation necessary for standing." *Bricklayers*, 761 F.2d at 802. The Court also held that "asserting the loss of employment opportunities to foreign laborers" constitutes "injury in fact." *Id.*

Similarly, the Ninth Circuit held in another case involving immigration that competition to union members caused by the admission of foreign crane operators conferred standing on the U.S. union members. *Int'l Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379-1380 (9th Cir. 1989). Also

following *Data Processing*, the court held that "[b]ecause of foreign competition [plaintiffs] have lost an opportunity to compete for what they contend are traditional longshore jobs" and that "allegations of injury resulting from lost opportunities to compete for economic benefits are sufficient for standing purposes." *Id.* at 1379.

Bricklayers and *Longshormen's* are not isolated cases where competition with U.S. workers established standing. *See Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (Potential loss of employment opportunities due to competition from foreign carriers conferred standing on merchant mariner's union); *Am. Postal Workers Union v. React Post Servs.*, 771 F.2d 1375,1380 (10th Cir. 1985) (Postal workers had standing where competition to Postal Service would have caused "outsiders to be doing the jobs that the postal workers' union members are allegedly entitled to"); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 805 (D.C. Cir. 1983) (Union had standing to challenge regulations allowing home manufacturing that increased competition to its members). Courts have also found competitive injury to create Article III standing outside of the business context entirely. *See* Appellant's Br. 19.

Even in *Air Courier Conference of America v. Am. Postal Workers Union*, 498 U.S. 517 (1991), cited by DHS (Resp. Br. 41-42), injury-in-fact was established where increased competition "might have an adverse effect on employment opportunities of postal workers," although prudential standing was not satisfied. *Id.* at 524.

No meaningful distinction can be made between *Bricklayers* or *Longshoremen's* and the case before this Court. Appellants are STEM workers and organizations representing STEM workers, directly competing with foreign workers in STEM fields. The district court plainly erred in accepting the unsupported claim that competitive injury has not been applied to individual workers, "As Defendants argue[d]" in their reply brief. A7.

B. Increased competition in itself is an injury that is "fairly traceable" to the Rule and "redressable" by declaring the Rule unlawful.

DHS argues that competition as injury-in-fact is a proxy for "purported harms that are entirely speculative in nature." Resp. Br. 28-39. Specifically, DHS claims competitive injury is not "concrete or particularized," "fairly traceable" and "not likely to be redressed." Resp. Br. 28-39. DHS reaches these flawed conclusions by looking solely at broad standing principles. DHS omits case law analyzing these points because case law consistently reaches the opposite conclusion that DHS does.

The *Bricklayers* court addressed the issues of "fairly traceable" and "redressability" in the foreign job competition context. In doing so, the *Bricklayers* court answered the same question that DHS raises here: the claim that appellants' competitive injury for jobs was speculative. 761 F.2d at 803; Resp. Br. 28-39. However, *Bricklayers* held such competitive injury was traceable to government action.

> Appellants need not be omniscient and pinpoint precisely when and where the next infraction will occur. The requirement is only that the injury be "fairly" traceable to governmental action and that it is "likely" to be assuaged by judicial resolution. Certainty is not a prerequisite.

Id. (Citations omitted). The court continued and held competitive injuries were redressable by a favorable decision because

> [I]f appellants [were] ultimately victorious, relief from the foreign competition engendered (or at least tolerated) by the challenged governmental action will not be conjectural, but immediate. That kind of competition will be stopped.

Id. The court came to the same conclusion in *Autolog,* 731 F.2d at 31. "It is well settled that a plaintiff has standing to challenge conduct that indirectly results in injury as long as the injury is fairly traceable to the challenged conduct … We are concerned here not with the length of the chain of causation, but on the plausibility of the links that comprise the chain." (Citations omitted).

Just as in *Bricklayers*, declaring the Rule in question unlawful would result in "relief from the foreign competition engendered … by the challenged governmental action [that] will … be … immediate" and "that *kind* of competition will be stopped." 761 F.2d at 803. (emphasis added). If the Rule be declared unlawful, aliens will no longer receive the Optional Practical Training ("OPT") extensions, reducing the number of Appellants' competitors by potentially "tens of thousands." A19. Those aliens who have already received the extension will have to return home, reducing competition with Appellants. That *kind* of competition, from aliens working under the extended OPT periods allowed by the Rule, will be eliminated from Appellants' job market.

DHS also presents an off-topic hypothetical question: whether an indirect increase in job competition resulting from an environmental regulation that restricts construction would confer standing for every construction worker. Resp. Br. 27-28. This hypothetical has no relevance to the present facts. The issue before the Court is whether competition resulting from a Regulation which directly in-

creases the number of competitors in a party's job field satisfies Article III standing. Appellants' Br. 13. This issue has been thoroughly addressed by the circuits and they have consistently found Article III standing resulting from an increased number of competitors. *See e.g. Bricklayers*, 761 F.2d 798; *Longshoremen's*, 891 F.2d 1374; *Adams v. Watson*, 10 F.3d 915, 919-922 (1st Cir. 1993) (Collecting cases involving competitive injury). What is more, DHS's hypothetical is not nearly as dire as suggested because such construction workers would have to establish prudential standing, the usual hurdle in competitive injury cases. *See e.g. Air Courier,* 498 U.S. 517 (Competitive injury to workers created Article III standing but workers did not have prudential standing under the zone-of-interest test).

C. Neither this Court nor the Supreme Court have required the showing for competitive injury that DHS advocates.

This Court does not apply the novel injury standard put forth by DHS in its competitive injury cases. Resp. Br. 28-30. In *Schering v. Food & Drug Admin*., 51 F.3d 390, 395 (3d Cir. 1995), this Court held that the potential loss of profits to Schering resulting from a competing generic drug approved by the Food and Drug Administration was sufficient to meet Article III standing requirements. This Court did not require Schering to identify specific losses of sales that went to the generic substitute, as DHS's interpretation of Article III standing would require. *Id. passim*.

DHS's standard is also completely at odds with more complex competitive situations such as in *Nat'l Credit Union Admin. v. First Nat'l Bank*, 522 U.S. 479 (1998). In that case, four banks had standing to challenge regulations allowing credit unions to enroll unrelated members. *Id.* at 930. DHS's proposed standard for showing injury would have required these plaintiffs in a national marketplace, with

multiple bank and credit union competitors, to prove instances of lost business that went from specific banks to specific credit unions. Resp. Br. 28-30. Neither the Supreme Court nor this Court recognizes DHS's Article III standing theories.

II. DHS AND THE DISTRICT COURT MISAPPLY THE ZONE-OF-INTEREST TEST TO A REGULATION RATHER THAN A STATUTE.

DHS accurately stated the zone-of-interest test for prudential standing. "[A] plaintiff must demonstrate the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the *statute*' in question." Resp. Br. 40 (emphasis added). However, both DHS and the district court (A9) go astray by applying the test to the *Rule* rather than the *statute*. Resp. Br. 42-43 ("[T]he purpose of the *IFR* is not to increase competition for jobs, depress wages or cause employers to prefer or recruit OPT students.") (emphasis added). This analysis fails not only because the Rule is not the "statute in question" but also because the Rule is a regulation, not a statute.

By adopting DHS's bizarre application of the zone-of-interest test, the district court made a plain error of law. A9 ("Because the DHS clearly explained that the purpose of the IFR is to make it easier for foreign students to continue working in OPT programs … it is clear that the interests of similarly skilled American workers were not the intended target of the IFR."). The paradox here is obvious: No one harmed by a regulation can challenge it because they are not protected by the regulation — That is not the zone-of-interest test as set down by the Supreme Court. *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153; *See also Bricklayers*,

761 F.2d at 804-805 (applying the zone of interest test to the Immigration and Nationality Act ("INA"), not the procedure being challenged).

A. Protecting the employment of U.S. workers is within the zone-of-interests of the INA.

DHS cites *Air Courier*, 498 U.S. 517, as authority for their misapplication of the zone-of-interests test. Resp. Br. 41-42. DHS overlooks the fact that the Supreme Court in *Air Courier* applied the zone-of-interest test to a statute (the Private Express Statutes—a statute unrelated to the dispute here) and not a regulation. *Air Courier*, 498 U.S. at 519.

The application of the zone-of-interest test in *Bricklayers* provides better clarity to this case. 761 F.2d at 804-805. The *Bricklayers* worker plaintiffs sought to protect employment opportunities, just like Appellants in the present case and the plaintiffs in *Air Courier. See Air Courier,* 49 U.S. at 512; *Bricklayers*, 761 F.2d at 802-803; Compl. ¶¶ 3-16. Unlike in *Air Courier*, the *Bricklayers* plaintiffs' challenge was brought under the INA — § 101 of the INA is the enabling statute for the F-1 visa under which OPT operates. 8 U.S.C. § 1101(a)(15)(F)(i) (the "Student Visa Statute").

Bricklayers concluded that "Congress has [] been concerned with the impact of competition by foreigners on the American labor force since 1885, and has passed increasingly restrictive legislation on the entry of nonimmigrant alien workers." *Id.* at 805. The court held that the workers' interest in protecting employment opportunities was within the zone-of-interest of the INA. *Id. See also Longshoremen's*, 891 F.2d at 1379 (Protection of workers from competition from foreign labor was within the zone-of-interest of the INA).

B. The INA is the "statute in question" for this action.

OPT is only available to F-1 visa holders. *See* 8 C.F.R. § 214.2(f)(10). F-1 visas are authorized under § 101 of the INA, making the INA, and its protections for Appellants, the enabling statute for the Rule. As such, the INA is the "statute in question" for this action.

DHS claims that the INA is not the pertinent statute for the zone-of-interest test, claiming it is unrelated to F-1 and H-1B visas. Resp. Br. 42. ("8 U.S.C. § 1182 is not the relevant statute here … as its purpose clearly differs from the purpose of the IFR, which pertains to the temporary F-1 and H-1B visas for nonimmigrants and does not involve labor certification."). This claim is nonsensical and is directly refuted by the statute DHS cites.

8 U.S.C § 1182(n)(1) (§ 212 of the INA) gives the labor certification requirements for H-1B visas. *Id*. ("No alien may be admitted or provided status as an *H-1B nonimmigrant* in an occupational classification unless the employer has filed with the Secretary of Labor [a Labor Condition Application]") (emphasis added). To claim that the protection of U.S. workers afforded by labor certification is unrelated to a Rule pertaining to H-1B visas makes no sense.

Additionally, DHS never identifies a possible alternative *statute* for the interests at issue. DHS simply repeats its misapplication of the zone-of-interest test citing the *Rule's* purpose. Resp. Br. 42-43.

III. DHS'S CHARACTERIZATION OF THE RULE AS A MERE EXTENSION OF OPT IS NOT CONSISTENT WITH THE RECORD.

DHS repeatedly characterizes the Rule as "merely extend[ing] by 17 months the time qualified nonimmigrants can remain in-status in this country." Resp. Br. 32, 33, 48.

C.f. Austin Fragomen, The New OPT Rule: New Options, Lingering Uncertainties, for Foreign Students, 85 Interpreter Releases 31, Aug. 11, 2008, pp. 2,173-2,180 ("On April 8, 2008 the Department of Homeland Security … published an interim final rule that made *substantial changes* to the … (OPT) system")(emphasis added). Characterizing the Rule as a mere extension directly conflicts with the record. Beyond the 17-month extension, the Rule allows purported "students" on OPT to remain in the country while unemployed and not furthering their education. A19. The Rule allows DHS to identify fields with labor shortages. A17. The Rule also contains two separate and distinct extensions to OPT. *See infra*.

A. The Rule creates two distinct extensions to OPT.

The Rule creates two distinct extensions to OPT. The first extension applies only to those in STEM fields ("STEM-Extension"). 8 C.F.R. § 214.2(f)(10)(ii)(C). Graduates with STEM degrees receive a 17-month extension to OPT, allowing those who are unable to obtain an H-1B visa to continue working on a student visa. *Id*. DHS says,

> [T]his 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.

A19. These additional workers compete with Appellants' completely outside of the H-1B statutory quota.

The second extension applies to anyone currently on OPT with a pending or approved H-1B application ("Cap-Gap-Extension"). 8 C.F.R. § 214.2 (f)(5)(vi). This extends the OPT period until either DHS rejects the H-1B visa application or until the October 1 fiscal year start date for the H-1B visa.

Appellants' briefs addressed the STEM-Extension and have not discussed the Cap-Gap-Extension, except to explain the differences between the two extensions and to explain OPT durations. This is not a tacit endorsement of the Cap-Gap-Extension but rather an attempt to avoid confusion.

B. DHS's brief seamlessly transitions between the two OPT extensions depending on their argument.

DHS's brief makes no distinction between the Cap-Gap-Extension and the STEM-Extension. Their response brief seamlessly jumps back and forth between the two extensions, using whichever one fits the argument, while ignoring the other. The general pattern is that DHS uses the STEM-Extension to portray the Rule as a mere change in duration to OPT. DHS then uses the Cap-Gap-Extension to minimize the Rule's effect or to portray the Rule as a mechanism to avoid having to leave the country to switch to an H-1B visa. For example, at p. 33, DHS explicitly references the STEM-Extension ("merely a 17-month extension") then segues to the Cap-Gap-Extension in the same paragraph ("simply allows them to avoid the hardship of leaving the country to change their status").

This lack of differentiation occurs throughout DHS's brief. *See* e.g. Resp. Br. 47-48 (Cap-Gap-Extension—"denied the smooth transition", STEM-Extension—"merely extends by 17 months"), p. 58 (Cap-Gap-Extension—"students holding approved H-1B petitions"). It is important to illustrate this jumping between extensions in the DHS's brief and the district court's opinion. Unless one is familiar with the H-1B visa program and the Rule, one could easily be confused by the uninterrupted transitions between the two OPT extensions.

IV. DHS HAS THE BURDEN OF ESTABLISHING "GOOD CAUSE" FOR WAIVER OF NOTICE AND COMMENT ON THE RECORD AND STILL CANNOT EXPLAIN HOW THIS REQUIREMENT IS SATISFIED.

A. DHS's own timeline shows there was more than ample time to prepare the Rule with notice and comment.

DHS has laid out the rulemaking timeline in a manner most favorable to them. Resp. Br. 57-58. They state that reaching the H-1B cap had not been an issue in years prior to 2007. Resp. Br. 57. Describing the exhaustion of the H-1B cap in one day on April 2, 2007, they claim that "these unprecedented developments necessitated the promulgation of the IFR as quickly as possible." Resp. Br. 58.

Giving DHS every benefit of the doubt and assuming that the events of April 2, 2007 were the very first notice they had that rulemaking needed to take place "as quickly as possible," the record does not explain *what prevented the Rule from being implemented with notice and comment by April 8, 2008.* A13-A25.

That is the absence of facts Appellants have alleged. Compl. ¶ 50 ("There were no circumstances that justified that waiver."). The agency has the burden of establishing good cause for waiver of notice and comment under 5 U.S.C. § 553(b)(B). DHS gives no explanation why more than a year was insufficient time to provide notice and comment. A19. This Court does not permit waiver of notice and comment where agencies "could reasonably have fulfilled their statutory duties while carrying out those procedures." *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877,883 (3d Cir. 1982).

B. ***The 49-day deadline creating good cause in*** *Philadelphia Citizens* ***is not comparable to the 372-day deadline claimed here.***

DHS grasps at *Phila. Citizens* as authority to waive notice and comment. Resp. Br. 51. However, in that case the agency faced a Congressionally-imposed deadline of only 49 days. *Id.* at *880*. The deadlines were even shorter in the cases *Phila. Citizens* cited as authority. *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981) (47 days notice to implement a rule to avoid a halt in airline flights to Washington National Airport); *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153 (D.C.Cir.1981) (Court order to take action "forthwith"); *Ariz. State Dep't of Pub. Welfare v. Dep't of Health, Educ. & Welfare*, 449 F.2d 456 (9th Cir. 1971) (41 days to promulgate procedural rules).

In the present case, DHS had over one year's notice to promulgate the Rule under their most favorable scenario and as much as five years' notice had they been tracking trends. *See* Appellant's Br. 5-6,44. To give the appearance of similarity to 49-day deadline *Phila. Citizens*, DHS shoehorns the record by claiming action was needed, "with so many visas expiring within a time frame of 0-90 days" from April 1, 2008. Resp. Br. 58. That ignores the advanced notice of the alleged problem DHS claimed it had on April 2, 2007. Resp. Br. 58. Any delay in taking action between April 2, 2007 and April 8, 2008 is of DHS's own making and cannot justify "good cause." *Phila. Citizens*, 669 F.2d at 885 (deadlines can constitute good cause when time is short "through no fault of the agency").

In *Sharon Steel v. U.S. Envtl. Prot. Agency*, 597 F.2d 377 (3d Cir. 1979), this Court based its analysis of good cause on a 60-day comment period and 90 days to review the comments. *Id* at 380. Applying the time allowances in *Sharon Steel* for

notice and comment (150 days) to the time frame of the DHS claim *sub judice* (372 days), DHS had 222 days (April 2, 2007 to November 10, 2007—over 7 months) to prepare for the Rule in advance of notice comment and still have it in place by their self-imposed deadline of April 8, 2008. This is not a case "[w]here time truly has been short" for notice and comment as in *Phila. Citizens*, 669 F.2d at 885.

Furthermore, DHS's deadline was self-imposed, not mandated by Congress as in *Phila. Citizens*. A19. *See also Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (concluding imminence of self-imposed deadline did not qualify as good cause to dispense with notice-and-comment before issuing final rule).

C. After the fact notice and comment does not satisfy the requirements of the APA.

There is another important distinction between *Phila. Citizens* and this case: The agency in *Phila. Citizens* solicited informal comments from the public in anticipation of the rule. *Id.* at 880. *See also Nw. Airlines,* 645 F.2d at 1313 (Two days after receiving notice of a 47-day deadline, agency solicited comments in the Federal Register for emergency regulation). In this case, the first notice the public received that the Rule was being considered came when the Rule was put into effect. A13.

DHS also claims that an after-the-fact comment period excuses their lack of prior notice. Resp 57. Notice and comment after a Rule is in place does not satisfy the Administrative Procedures Act ("APA") requirements in this Circuit. *Sharon Steel*, 597 F.2d at 380 ("We hold that the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA.")

D. The APA Requires the agency to establish good cause on the record.

To deflect the problem of timing, DHS attempts to shift the burden of proof. Resp. Br. 60 ("It is the burden of the appellants, not the Government, that is required and not met here.") DHS has the law backwards. The agency must "incorporate[] the finding and a brief statement of reasons" into the rule, when waiving notice and comment. 5 U.S.C. § 553(b)(B). Appellants need not make speculative allegations as to why DHS was unable to provide reasons that notice and comment could not be made. *See N. Arapahoe Tribe v. Hodel,* 808 F.2d 741,751(10th Cir. 1985) ("The Secretary bears the burden of demonstrating good cause under section 553(b)(B)").

E. DHS's only claim that "good cause" exists is a situation that has been occurring since 1999.

DHS claims that if they "did not promulgate the IFR under the 'good cause' exception … students holding approved H-1B petitions … would have … had to terminate employment and either depart the United States within 60 days or extend their F-1 status." Resp. Br. 58. This refers to the Cap-Gap-Extension because those holding approved H-1B visas would not need the STEM-Extension. However, their justification makes no sense.

Gaps caused by not being able to get a visa for the current fiscal year have occurred since 1999 (or by employer choice since the start of the program). A15-17; Fragomen at 2,176. This situation was identified years ago and addressed in regulations that allowed extension of F-1 status but not work on OPT. A16 ("USCIS is already authorized to extend the status of F-1 students caught in a cap-gap between graduation and the start date on his or her approved H-1B petition. 8 CFR §

214.2(f)(5)(vi)"). A situation that had existed for at least nine years cannot justify waiver of notice and comment.

V. THE BOGUS "CRITICAL SHORTAGE" CITATION USED TO JUSTIFY THE RULE WAS ON THE RECORD BEFORE THE DISTRICT COURT AND THE ISSUE OF LABOR SHORTAGES WAS RAISED IN APPELLANTS' COMPLAINT.

In their Opening Brief, Appellants pointed out that DHS's entire evidence that a "critical shortage" of STEM workers existed was a bogus citation misrepresenting a National Science Foundation report. Appellants' Br. 40. This purported "critical shortage" served as the justification for the Rule's promulgation. Rather than explain this bogus citation, DHS claims that Appellants raised a new issue that was not in their complaint. Resp. Br. 56. DHS is simply wrong.

The complaint directly addresses the issue of labor shortages. "8 U.S.C. 1101(a)(15)(F)(i) does not authorize Defendants to identify fields in which there may be labor shortages." Compl. ¶ 42. "8 U.S.C. 1101(a)(15)(F)(i) does not authorize Defendants to allow those admitted on F-1 visas to work in the United States for extended periods of time to solve labor shortages." Compl. ¶ 43. DHS's use of a bogus source was also on the record before the district court. A16. Identifying the bogus citation used to establish the justification for the Rule supports the sufficiency of Appellants' pleading of arbitrary and capricious action in the complaint. Compl. ¶¶ 42-43.

A. Appellants allege DHS failed to consider important factors—not that written findings for every conceivable factor are required.

Appellants do not dispute that agencies are not required to make a written finding on every piece of evidence that they consider. Resp. Br. 54. However, DHS's argument

dodges the allegation. DHS may not have to give written findings for every factor considered but they are required to consider the important factors. *CBS Corp. v. Federal Commc'n Comm'n*, 535 F.3d 167, 174 (3d Cir. 2008). The full administrative record, which was unavailable until two days before the district court dismissed the case, shows what was considered.

The enabling statute for the Rule is the Student Visa Statute. Under a statute authorizing admission *solely* for pursing a course of study, educational purpose should be the focus of the rulemaking findings. However, no educational purpose was mentioned in the Rule's findings. A13-A25. Appellants' allegation that there was no explanation how the Rule furthered a course of study (Compl. ¶¶ 25-26) should raise the claim above a speculative level that DHS "entirely failed to consider an important aspect of the problem." *CBS,* 535 F.3d at 175. The allegation that DHS is not authorized under the Student Visa Statute to identify and correct labor shortages (Compl . ¶¶ 42-43) should raise the claim above a speculative level that DHS "relied on factors which Congress has not intended it to consider." *CBS,* 535 F.3d at 175.

The main factor which DHS did consider was how to supply industry with labor. A26 ("The primary benefits to be derived from allowing the extension of OPT relates to maintaining and improving the United States competitive position in the market."). This factor might be appropriate consideration under a work visa. However, the F-1 visa cited by DHS authorizes admission of alien students *solely* to pursue a full course of study. Considering a factor that DHS should not have considered also raises above the speculative level that DHS acted arbitrarily and

capriciously. *CBS,* 535 F.3d at 174 (reliance on factors Congress had not intended to be considered is arbitrary and capricious).

This lack of educational purpose and focus on the need to solve alleged labor shortages (justified by a bogus citation in the findings) are highly suggestive of an arbitrary and capricious rulemaking process. A13-A25. These factors were pled and should be sufficient for a notice pleading of arbitrary and capricious action. Compl. ¶¶ 25-26, 42-43. "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).

VI. DHS'S JUSTIFICATION FOR THE RULE IGNORES THE INA'S STATUTORY RESTRICTIONS.

A. DHS's expansive theory of agency plenary rulemaking power cannot be reconciled with the controlling statute.

While agencies are entitled to some deference in rulemaking, they are not the final authority as to whether an action is lawful. The Court has a duty to "reject administrative constructions of the statute … that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 31-32 (1981) (citations omitted). DHS's exhibits show, "There is no express provision in the law for an F-1 student to engage in employment." A46. That lack of express DHS authority must be the starting point in determining the Rule's lawfulness.

DHS makes no attempt to show how the Rule conforms to the expressed provisions of the Student Visa Statute but rather relies on a nebulous claim that Congress has granted DHS, "broad regulatory authority to set the time in which

nonimmigrants may remain in the country." Resp. Br. 44, 47. DHS uses this flawed logic to claim that it has a duty to coordinate all visa statutes, including the H-1B visa statutes and the Student Visa Statute, Resp. Br. 48 n.6, and that these "overarching responsibilities" permit DHS to issue multi-purpose regulations. Resp. Br. 49. However, DHS then goes "On Beyond Zebra" to argue that its visa statute coordinating authority is so broad as to give DHS the discretion to administratively expand the scope of activities within which an alien admitted in F-1 status is restricted by statute. To the extent that Congress delegated the power to "coordinate" the provisions of the INA, as DHS argues, it intended that §§ 1101, 1103, and 1184 should be read together. Appellants' Br. 35.

The reliance by the District Court and DHS upon 8 U.S.C. § 1103(a)(3) as a source for this sweeping administrative plenary power over the nonimmigrant classification system is misplaced. A10; Resp. Br. 23. § 1103(a)(3) expressly limits the Secretary of Homeland Security to exercise her regulatory authority "under the provisions of this Act." The express provisions of the INA, in this case 8 U.S.C. § 1101(a)(15), impose precise and detailed restrictions on the content of DHS regulation. It also restricts the activities in which nonimmigrants are permitted to engage and which the Secretary must not ignore. Those restrictions are that an alien must be a *bona fide* student and pursuing a full course of study. *Id.* at (F)(i).

DHS's reliance on 8 U.S.C. § 1184(a)(1) is similarly flawed. Resp. Br. 44. That statute merely allows the Secretary to prescribe the time and conditions of admission by regulation. The Secretary is expressly required by that same subsection to prescribe regulations that "insure that … such alien will depart the United

States." Moreover, subsection 1184(a)(1) is to be read in conjunction with subsection 1184(b), which requires a nonimmigrant to establish that they meet the qualifications for admission under one of the nonimmigrant classifications in 8 U.S.C. § 1101(a)(15). Aliens admitted as students on F-1 visas must remain students while on F-1 visas. 8 U.S.C. § 1184(a)(1).

DHS next argues that Congress has "incorporated OPT into its own interpretation of the [INA]." Resp. Br. 45, citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1980). DHS cites no judicial interpretation regarding OPT and the Student Visa Statute nor any Attorney General or BIA opinion interpreting OPT scope consistent with the purported Rule. The only "administrative interpretation" DHS identifies to have been reaffirmed by Congress is a rhetorical reference to an "evolving policy that began during the Truman administration [by which] Congress has given its imprimatur to either the INS's or DHS's administering the program." Resp. Br. 46. DHS even ignores Congress's express concern in expanding student employment authorization in the way DHS has done here. *See* Appellants' Br. 26.

Appellants have no objection to the OPT program itself. However, possessing authority to administer the OPT program does not permit DHS to redefine its scope. DHS cannot waive its obligation to conform its regulation of foreign students to the restrictions on alien activity contained in the Student Visa Statute.

DHS's final line of defense is a claim that, in issuing the Rule, DHS

> [D]id nothing more than administer a section of the Code consistent with 60 years of prior practice. The agency's interpretation of its authority to do so should be given *Chevron* deference as recognized by the Supreme Court.

Resp. Br. 50-51. Again, DHS invokes a doctrine of statutory interpretation while identifying nothing in the record to which the doctrine might be applied.

DHS cannot point to a "statutory gap" within the Student Visa Statute, or between the Student Visa Statute and the H-1B statute. In addressing this point, DHS has hit upon the crux of the dispute between the parties: "Nothing in the IFR allows an alien to remain in the U.S. if not in status." Resp. Br. 49 n.7. *Appellants disagree entirely.*

The Rule is intended to and in practice allows foreign students to work under conditions that are not consistent with the requirements for F-1 status as set out in the Student Visa Statute. Compl. ¶¶ 41-42. The Student Visa Statute authorizes the temporary admission of *bona fide* students "*solely for the purpose of pursuing a course of study* consistent with section 214(l)[8 U.S.C. § 1184(m)] …." The scope of the authorized activity is defined as, "(6) Full course of study -- (i) General. Successful completion of the full course of study must lead to the attainment of a specific educational or professional objective." 8 C.F.R. § 214.2(f)(6)(i).

In contrast, the sole justification for the Rule is to provide workers to fill labor shortages identified by DHS. There is no mention of educational purpose in the record. A13-A25. The 17-month STEM extension applies to fields in which DHS determined there to be a labor shortage, not to fields where a longer period of work for a course of study was deemed necessary. A17.

DHS is asking this court to hold that an agency can ignore the statutory restrictions placed upon it when issuing a regulation, because the agency deems other purposes it conjures up to be more important.

B. The record shows the Rule's purpose is to provide labor to industry, not to support education with supplying labor as a side effect.

DHS attempts to rationalize the Rule's stated purpose by portraying it as a balancing regulation that brings some "educational benefit," with an additional benefit to employers as a helpful side effect. "The IFR bestows multiple benefits, both educational and industrial; the presence of a benefit that extends beyond education does not mean that it exceeds DHS's authority." Resp. Br. 49. *DHS has never made this argument before*, and it is completely contrary to the record. The findings in the record make no mention of educational benefit or purpose from the rule. A13-A25. The Rule's stated purpose was to supply industry with labor; not to further education with industry benefit as a side effect. *Id*. Even this new "educational benefit" does not comply with the Student Visa Statute. An F-1 visa holder must be a *bona fide* student pursuing a "full course of study". 8 U.S.C. § 1101(a)(15)(F)(i) (Student Visa Statute). DHS's desire to allow foreign students to merely experience an "educational benefit" is insufficient.

C. The Rule is an end-run around the H-1B visa quotas.

DHS writes that Appellants are "*suggesting*" that the Rule represents an end-run around the H-1B quotas. Resp. Br. 48. Evidently Appellants were not being clear. That is exactly what the Rule is:

> This rule will help ease this difficulty [in obtaining H-1B visas] by adding an estimated 12,000 OPT students to the STEM-related workforce. With only 65,000 H-1B visas available annually, this number represents a significant expansion of the available pool of skilled workers.

A19. It may be true that, "If OPT students do not obtain an H-1B visa by the time their F-1 status ends, they will be required to leave the country." Resp. Br. 48. The issue here

is that the Government has lengthened the F-1 period so that those who are not able to get an H-1B visa do not have to leave the country. A15. Furthermore, "[a] primary purpose of the immigration laws, with their quotas and certification procedures, is to protect American laborers." *Longshoremen's*, 891 F.2d at 1379. Through the Rule, DHS has circumvented those quotas and procedures. If an alien cannot get an H-1B visa due to Congress's statutory quota limits, DHS is now allowing him to continue to work on a student visa instead. The Rule is an end-run around the H-1B quota. 8 U.S.C. § 1184(g).

D. The H-1B end-run around is exacerbated by inherent cost incentives to hire OPT workers.

Comparing OPT work to H-1B visa work demonstrates the basis of Appellants concern over the Rule's change to OPT. Employers must certify they are paying H-1B workers the prevailing wage and that the H-1B workers will not adversely affect the working conditions for U.S. workers. 8 U.S.C § 1182(n). OPT does not have a similar requirement. Employers pay the same FICA taxes on H-1B workers and U.S. workers. Employers do not pay FICA taxes for OPT workers. 26 U.S.C. § 3121(b)(19). These cost saving incentives illustrate the unfairness Appellants face in competing with OPT workers for jobs under the Rule.

To offset these incentives for employers to hire OPT workers, OPT work was limited to one year. That short duration limited employment to essentially an internship. For example, a multinational corporation ccould hire someone under the OPT program to work in the corporate headquarters so as to prepare the employee for a career with the company in his home country. Because of the statutory F-1

visa restrictions, employers expected an OPT employee to leave the country after a year.

However, the Rule changes the OPT time limitations but not the cost-saving benefits employers enjoy. By changing OPT for the purpose of supplying labor, DHS has circumvented the protections built into the H-1B program, putting Appellants at a distinct disadvantage. Furthermore, allowing those on OPT to remain in the U.S. while unemployed so that they can search for new jobs is a dramatic and disturbing change to the OPT program with respect to the competition Appellants face. A19.

VII. APPELLANTS CHALLENGE ONE SPECIFIC RULE, NOT THE ENTIRE OPT PROGRAM AS DHS IMAGINES.

This action represents a challenge to *one specific 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. 18,944-18,956 (proposed April 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) (the "Rule"). The title of the Rule encompasses the entire scope of the complaint, which only challenges changes in the OPT program made after April 8, 2008.

DHS attempts to sidestep its lack of authority in promulgating the Rule by distracting the court with an irrelevant discussion of foreign student practical training programs dating back to 1947. Resp. Br. 45-46. The discussion is irrelevant because the legitimacy of the OPT program, as it existed prior to the Rule, was *never at issue*.

DHS also attempts to distract the Court as to the Appellants' actual complaint by repeatedly claiming that this lawsuit represents a challenge to the entire OPT program. *See* Resp. Br. 43 ("appellants are challenging the OPT program generally"); Resp. Br. 48 ("appellants are attempting a backdoor challenge to the OPT program in general"); Resp. Br. 51 ("appellants' arguments are directed … at the OPT program in general"). To support these recastings of the complaint, DHS attributes statements to Appellants—without citation—that Appellants never made. *See* e.g. Resp. Br. 7 ("Contrary to appellant's assertions, there is no absolute ban on employment for F-1 students"); Resp. Br. 9 ("contrary to appellants' claims, [OPT] has been available to foreign students for over 60 years").

Appellants' opening brief plainly states Appellant's position regarding a foreign student's employment:

> Generally, aliens admitted under F-1 visas may not lawfully work in the United States. However, a student on an F-1 visa can be authorized for employment under Optional Practical Training, "directly related to the student's major area of study."

Appellant's Br. 6. Appellants have been consistent on this point since the beginning of their action. *See* Appellants' Brief Supp. Motion for Prelim. Inj., Docket No.3, at 3 (identical text). DHS's claim that Appellants are arguing that students on F-1 visas are banned from employment is clearly false. Resp. Br. 7.

The relief sought by Appellants also makes it evident that this action is only a challenge to the April 8, 2008 Rule change. If Appellants prevail, the Rule would be declared unlawful. Compl. ¶ 54. The OPT program would still exist unhindered, as the regulations governing student visas would merely revert to the *status quo ante* as of April 7. 2008: A limited 12 month period of practical work experience to

allow foreign students to prepare for careers in their home countries. 56 Fed. Reg. 55,608.

CONCLUSION

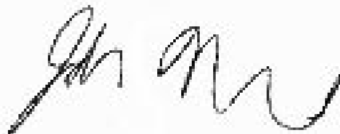
For the foregoing reasons and those stated in Appellants' opening brief, the District Court's order of dismissal on October 31, 2008 should be vacated and remanded; and

The District Court's holding of law that the Rule was authorized by statute be reversed and remanded; and

The District Court's holding of law that waiver of notice and comment was proper be reversed and remanded; and

Appellants should be granted leave to amend their complaint.

Respectfully submitted:



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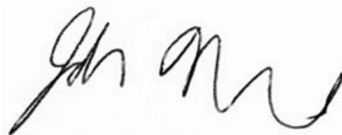
CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,757 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because it is typeset in the proportionally-spaced 14 pt. Times New Roman PS MT serif font.



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April 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2009 a true and correct copy of the foregoing Reply Brief on Behalf of Appellants was served on the following parties by by electronically filing with the Clerk of the United States Court of Appeals for the Third Circuit using its ECF System:

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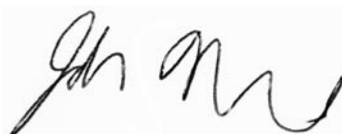

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