No. 15-5239

In the U.S. Court of Appeals for the District of Columbia Circuit

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Defendant-Appellee.

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, No. 1:14-cv-0529,
HON. ELLEN SEGAL HUVELLE

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") presents the following certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Eagle Forum adopts Appellant's statement of parties and *amici*, except that Eagle Forum also appears as *amicus curiae* in this Court.

B. Rulings Under Review

Eagle Forum adopts Appellant's statement of rulings under review.

C. Related Cases

Eagle Forum adopts the Appellant's statement of related cases.

Dated: December 28, 2015

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") states that (a) Eagle Forum is a non-profit, tax-exempt corporation under §501(c)(3) of the Internal Revenue Code with no parent corporation; (b) no publicly traded entity – or any other entity – holds a ten-percent ownership interest in Eagle Forum; and (c) Eagle Forum is an education and legal defense fund that – as relevant to this litigation – advocates for traditional American values and constitutional government, including governmental respect for freedom of religion and for the rule of law.

Dated: December 28, 2015

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§551-706
DHS	Department of Homeland Security
DHS Memo.	Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, *Washtech v. DHS*, 1:14-cv-00529-ESH (D.D.C.) (docket item #27)
Eagle Forum	Eagle Forum Education & Legal Defense Fund, Inc.
F-1 Visas	Visas under 8 U.S.C. §1101(a)(15)(F)(i)
H-1B Visas	Visas under 8 U.S.C. §1101(a)(15)(H)(1)(b)
INA	Immigration and Nationality Act, 8 U.S.C. §§1101-1537
OPT	Optional Practical Training
STEM	Science, technology, engineering, and mathematics
Washtech	Washington Alliance of Technology Workers

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc.[1] ("Eagle Forum"), a nonprofit organization founded in 1981 and headquartered in St. Louis, Missouri, submits this *amicus* brief with the accompanying motion for leave to file. For more than thirty years, Eagle Forum and its allied state chapters have defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, they have consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For all these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Appellant Washington Alliance of Technology Workers ("Washtech") challenges two Department of Homeland Security ("DHS") programs under the Immigration and Nationality Act, 8 U.S.C. §§1101-1537 ("INA"):

- A 2008 DHS rule expanding – from twelve months to twenty-nine months – the Optional Practical Training ("OPT") program that allows foreign students in science, technology, engineering, and mathematics ("STEM")

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

fields to work here after graduation under "F-1" student visas, 8 U.S.C. §1101(a)(15)(F)(i), rather than requiring the otherwise-applicable "H-1B" visas, *id.* §1101(a)(15)(H)(1)(b), that are appropriate under the INA for this type of specialized worker, and

- The underlying 1992 rule promulgated by DHS's predecessor to establish the underlying 12-month OPT program applicable to all F-1 visa holders.

Unlike the F-1 visa program, the H-1B program is designed to protect the U.S. domestic workforce from foreign competition, including caps on the number of foreign workers allowed annually. Moreover, the Internal Revenue Code exempts F-1 visa holders from Social Security and Medicare taxes, 26 U.S.C. §3121(b)(19), that apply to both U.S. domestic workers and H-1B visa holders, *id.* §3121(b). That differential taxation makes work under an F-1 visa less expensive to employers. Further, DHS candidly acknowledged in its OPT rulemaking that it acted not to enhance foreign students' education but to ensure that graduates would be available to domestic employers. 73 Fed. Reg. 18,944, 18,950 (2008).

In addition to challenging the substantive validity of the OPT program on the theory that students who graduate are no longer students, Washtech also challenged DHS's failure to engage in notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), when adopting various elements of the OPT program. Both the 1992 and 2008 rulemakings

suffered the same procedural inadequacies. 57 Fed. Reg. 31,954 (1992); 73 Fed. Reg. at 18,944.

Although Washtech challenged both the 1992 and 2008 rulemakings and OPT programs, the district court held Washtech to lack standing to challenge the 1992 rulemaking, also citing the statute of limitations as an alternative holding. As to 2008, the district court held the rulemaking substantively permissible under the INA, but procedurally invalid under APA notice-and-comment requirements; the district court also stayed its *vacatur* order for six months to allow DHS to issue a curative rulemaking under APA procedures. Washtech appealed the denial of relief on the 1992 rules, as well as the withholding of relief on the 2008 rules.

SUMMARY OF ARGUMENT

In addition to the reasons that Washtech argues to deny deference to DHS's INA interpretation, DHS cannot claim deference over the entire swaths of the economy that intrude into other agencies' jurisdictions because no deference applies to multiple-agency delegations; isolated private statements at subcommittee hearings do not qualify as sufficient congressional consideration for Congress to acquiesce to agency positions; and mere longevity does warrant deference (Section I).

On the merits, the procedural APA violations that DHS did not appeal are serious violations, which raise not only statutory APA issues but also constitutional

separation-of-powers issues (Section II.A); as such, these violations cannot be lightly dismissed or countenanced (Section IV). Substantively, the OPT program conflicts with INA's plain-language limitation to students at academic institutions (Section II.B.1); further, DHS's temporal verb-tense argument limiting the F-1 restrictions to the time when students enter the United States conflicts not only with INA's imposing ongoing visa requirements throughout aliens' stays but also with the Dictionary Act's directive that the present tense includes the future tense (Section II.B.2). Finally, the *individualized* analysis that federal courts use to determine "student" status for medical internships conflicts with DHS's proposed across-the-board eligibility (Section II.B.3).

On jurisdiction, the standing inquiry assumes the *plaintiff's* merits views (*e.g.*, assuming *arguendo* that the plaintiff is right on the merits, does a justiciable case or controversy exist?), and the prudential zone-of-interests test for allegedly *ultra vires* agency rules is wide because the agency violated the *Constitution* under the plaintiff's merits views, not merely a statutory subsection (Section III.A). Moreover, the United States has waived its sovereign immunity for declaratory relief, in addition to direct APA challenges, provided only that an Article III case or controversy exists (Section III.B); consequently, given that Washtech's complaint seeks declaratory relief against an ongoing DHS policy of extending student status to non-student workers, this action will not be mooted if DHS issues

a procedurally valid curative rulemaking (Section III.D). Finally, DHS's positions in its rulemakings and its merits opposition in this litigation make it futile for Washtech to attempt to exhaust any administrative remedies such as a petition for rulemaking under 5 U.S.C. §553(e) (Section III.C).

With respect to relief, substantive invalidation would not justify further delay of the *vacatur* remedy, and delaying *vacatur* for *procedurally* invalid rulemakings – as the district court did – would give agencies perverse incentives to evade the APA, conflicting with the clear judicial and legislative directives to construe – and *countenance* – APA exceptions narrowly (Section IV).

ARGUMENT

I. DHS'S VIEWS ARE NOT ENTITLED TO DEFERENCE.

The district court deferred to DHS's views under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), based on a subset of the rationales that DHS made to claim that (or even higher) deference. Because this Court will decide the deference issue *de novo*, *amicus* Eagle Forum addresses DHS's district-court claims in DHS's memorandum in support of summary judgment ("DHS Memo."), rather than the district court's holding. In sum, DHS's views here do not warrant this Court's deference.

In the district court, DHS claimed deference based on a variety of factors, including the OPT program's precursor's having originated in 1947 and

congressional acquiescence to that program, the ambiguity in the statutory terms, DHS's obligations to safeguard the national infrastructure and economy, and 6 U.S.C. §522. Indeed, DHS claimed an entitlement not merely to *Chevron* deference, but even to a "particular deference" under *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Under the circumstances here, none of these factors warrant this Court's deference for the OPT program generally or to that program's expansion in 2008. Several of these claims are easily addressed as general matters; after addressing three general issues, the next four subsections then address the deference that is proper to DHS's OPT program based on the circumstances here.

First, DHS claimed that its INA longstanding interpretation warrants "particular deference" under *Barnhart.* DHS Memo. at 27 (docket item #27). Standing alone, divorced from the other relevant factors, longevity itself is no guarantee of deference: "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 132 S.Ct. 476, 488 (2011); *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996) ("applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation"). Moreover, the question of whether INA would countenance a 12-month OPT program *for all F-1 visa holders* is a different thing from whether STEM graduates (but not F-1 visa holders with other majors or degrees) get another 17 months – not for the educational purposes outlined in 8 U.S.C.

§1101(a)(15)(F)(i) – but to meet the needs of U.S. industry. *See, e.g.*, *Glebe v. Frost*, 135 S.Ct. 429, 431 (2014) (rejecting "an 'in for a penny, in for a pound' approach"). While *amicus* Eagle Forum concurs with Washtech that both the 12-month program and the 17-month extension are unlawful, the hypothetical lawfulness of the 12-month program would not require the lawfulness of the 17-month STEM-only extension.

Second, with great respect to the various important tasks that DHS does in service of the Nation, DHS's memorandum of law characterizes DHS as the indispensable agency on issues of labor, technology, education, and the economy, in addition to its core homeland-security functions. Courts often must "remind [an agency] that its mission is not a roving commission to achieve [certain statutory goals] or any other laudable goal," *Michigan v. U.S. EPA*, 213 F.3d 663, 696 (D.C. Cir. 2000), and this is an occasion for this Court to do so with DHS. Indeed, some of DHS's claimed powers step on the authorities delegated to other federal agencies, such as the Departments of Commerce, Education, and Labor. When more than one agency has been delegated the same authority, no one agency can claim deference. *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993). As such, whether because the authority was not delegated in the first place or because it was delegated more than once to multiple agencies, this Court does not owe deference to DHS's efforts to optimize the U.S. technology sector or the economy.

Third, 6 U.S.C. §522 argues against construing INA provisions "to limit judicial deference" to actions by DHS or the Attorney General. Deference to administrative agencies is a judicially derived principle under the separation-of-powers doctrine. *See New York v. FCC*, 814 F.2d 720, 730 (D.C. Cir. 1987) ("separation-of-power concerns [are] at the heart of *Chevron* jurisprudence") (Mikva, J., concurring in part and dissenting in part); *In re Appletree Mkts.*, 19 F.3d 969, 973 (5th Cir. 1994) ("*Chevron* doctrine is based upon separation of powers"); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 28 (1983). Congress can change the authority that it delegates to federal agencies, but it cannot dictate to courts the factors that determine whether a federal agency has violated the Constitution by making laws outside the scope of the agency's delegation. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution … remains in the Judiciary"). For good reason, then, no court has *cited* 6 U.S.C. §522, much less based a decision on it.

A. Congress has not acquiesced to DHS's interpretations.

DHS argued below, and the district court held, that Congress has acquiesced to the OPT programs promulgated by DHS and its predecessors. *Amicus* Eagle Forum respectfully submits that Congress rejected DHS's position in 1981 and that any alleged subsequent congressional acquiescence would "more appropriately be called Congress's failure to express any opinion." *Rapanos v. U.S.*, 547 U.S. 715,

750 (2006). For two reasons, this Court should reject DHS's claim to congressional acquiescence.

First, it is entirely possible that, instead of acquiescing to the OPT program – especially its 2008 expansion – Congress believed that "the courts would eliminate any excesses," or that inaction "simply [reflects a congressional] unwillingness to confront the [high-tech employers] lobby." *Id.; Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994). DHS cannot cite evidence that "*Congress* considered and rejected the 'precise issue' presented before the Court," which is what an acquiescence theory requires to be forceful. *Rapanos*, 547 U.S. at 750 (emphasis added). As such, DHS's invocation of acquiescence has no force here.

Second, and quite to the contrary, in 1981, Congress *rejected* DHS's position by "amend[ing] subparagraph (F) of [INA] section 101(a)(15) relating to nonimmigrant students, to specifically limit it to *academic students*." S. Rep. 96-859, at 7 (1980) (emphasis added); Pub. L No. 97-116, §2(a)(1), 95 Stat. 1611 (1981). Specifically, for education other than language training and in pertinent part, the 1981 amendment struck "other recognized place[s] of study" potentially including on-the-job, practical training and replaced them with a "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution" for student visas:

> Subsection (a)(15) of section 101 … is amended—
> (1) by striking out "institution of learning or other

> recognized place of study" in subparagraph (F) and inserting in lieu thereof "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program[.]"

Pub. L No. 97-116, §2(a)(1), 95 Stat. at 1611. Significantly, all of the district court's post-1981 instances of congressional consideration of the OPT issue were hearing statements by trade associations before House or Senate subcommittees. *See* Slip Op. 28. In the unlikely event that the Department of Justice has the temerity to support that slender – indeed, nonexistent – reed on appeal, this Court should reject it. Three discrete *private* statements made to House or Senate *subcommittees* over eighteen years – and not presented to the full bodies by those subcommittees – cannot set precedent for even one-half of a bicameral legislature, much less the whole legislature. *Indep. Ins. Agents, Inc. v. Clarke*, 965 F.2d 1077, 1078 (D.C. Cir. 1992); *Sonoda v. Cabrera*, 255 F.3d 1035, 1043 (9th Cir. 2001). Congress rejected DHS's position in 1981, and has not spoken to it since. Regardless of how it rules on the OPT program's merits, this Court cannot find congressional acquiescence.

B. Congress did not delegate authority for DHS to regulate student visa holders' post-graduation employment to meet the needs of U.S. industry.

DHS considers it relevant that Congress did not identify a level of specificity for regulating student employment, which DHS (twice) claimed to warrant broad

deference to the agency to pick the level of specificity. DHS Memo. at 22, 35-36. While unclear, DHS apparently meant that Congress failed to specify how long, exactly, after graduation students cease to be students. Given the clear meaning of the statutory terms, *see* Section II.B, *infra*, this claim is specious, which vitiates whatever deference a DHS rulemaking otherwise might claim.

Specifically, *Chevron* "is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). Any perceived (or, at least, claimed) statutory ambiguity can be clarified by the rest of the statute if "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014) ("[e]ven under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation") (internal quotations omitted). By contrast, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole, does not merit deference." *Id.* (internal quotations and alterations omitted).

Further, the OPT program that existed prior to 2008 treated all foreign F-1 visa holders equally, whereas the 2008 OPT program grants special treatment to STEM degrees. If DHS had not been so candid in providing the rationale for

treating similarly situated F-1 visa holders differently, this Court likely would have rejected the OPT expansion as a "discrimination of an unusual character." *U.S. v. Windsor*, 133 S.Ct. 2675, 2693 (2013). But DHS has expressly acknowledged that what defines STEM degrees' entitlement to employment for an additional 17 months has nothing to do with the §1101(a)(15)(F)(i)'s educational focus, but rather with the perceived needs of the U.S. economy. This Court can easily reject that rationale as having literally nothing to do with §1101(a)(15)(F)(i). *See* Section II.B, *infra*.

C. DHS's views do not warrant *Skidmore* deference.

For agency actions that do not trigger *Chevron* deference, lesser deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), potentially can apply, based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." Consistency of interpretation can increase deference, and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz*, 415 U.S. 199, 237 (1974). As explained in this section's introduction, longevity alone would not require deference for an arbitrary interpretation, and the longstanding OPT program involved an across-the-board 12-month OPT program for education purposes, not a selective 29-month OPT program for industrial purposes. Here, DHS's reasoning appears to be that,

because the STEM-based OPT expansion is good for U.S. industry, it must be legal. That argument has absolutely no grounding in the INA. *Cf. McConnell v. FEC*, 540 U.S. 93, 262-63 (2003) (rejecting the "Charlie Wilson Phenomenon" under which "what's good for General Motors is good for the country") (Rehnquist, C.J., dissenting in part). *See* Section I.B, *supra.* Accordingly, the OPT program expansion does not warrant even *Skidmore* deference.

D. Deference does not apply to procedurally defective rulemakings such as the OPT rulemakings.

When an agency fails to follow required APA rulemaking procedures, that failure renders the resulting agency action void *ab initio. Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). Accordingly, if agency action violated notice-and-comment procedures,[2] there is no OPT rulemaking to which this Court can defer. Simply put, there is no there there.

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[2] The district court held the 2008 expansion to violate the APA, Slip Op. 34, and DHS did not appeal that holding. As such, it is now conclusive that the 2008 expansion did not comply with the APA. *Montana v. U.S.,* 440 U.S. 147, 153 (1979). Even assuming *arguendo* that a statute of limitations would bar a direct procedural challenge to the 1992 promulgation, that rulemaking suffered the same procedural defects and is thus equally invalid for deference purposes.

II. THE OPT PROGRAM IS PROCEDURALLY AND SUBSTANTIVELY *ULTRA VIRES* THE INA AND THE CONSTITUTION.

Washtech challenges the OPT program's substantive lawfulness, as it did below. Although the district court ruled for Washtech only under APA procedural standards, substantive invalidity is relevant here both to the availability of immediate relief, *see* Section IV, *infra*; *U.S. v. Williams*, 504 U.S. 36, 41 (1992) (appeals consider issues either pressed or passed upon below), and to the possibility that DHS will issue a *procedurally* valid curative rulemaking during this appeal. *See* Section III.D, *infra*. Unfortunately for DHS, all the procedure in the world cannot cure the OPT program's *substantive* invalidity.

A. The OPT program is procedurally *ultra vires*.

The "history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Before addressing the substantive merits, *amicus* Eagle Forum first reviews the procedural merits. Although DHS did not appeal the district court's adverse procedural ruling on the 2008 expansion, the procedural defects will help guide this Court's assessment of not only the overall merits but also the underlying issues of Article III jurisdiction and relief.

1. Promulgating the OPT program violated the Constitution.

Although the typically contested procedural issues concern compliance with statutory APA requirements, this Court cannot miss the underlying *constitutional*

issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). In this action, DHS unsuccessfully relied on exceptions to congressional lawmaking that Congress itself has enacted. *See* 5 U.S.C. §553(b). In doing so, an agency cannot "replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969); *accord U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (APA exceptions "must be narrowly construed"). As indicated, failure to follow APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. Thus, if DHS violated the APA, DHS's attempt to make law violates not only the APA but also the Constitution.

2. Promulgating the OPT program violated the APA.

Unless certain exceptions apply, agencies must undertake notice-and-comment rulemaking in order to issue "legislative rules" under the APA. The parties do not question that the OPT Program is a legislative rule or even that the OPT Program failed to qualify for the APA exceptions to the notice-and-comment requirements for an agency to promulgate such rules. Nor is this a mere oversight: "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Envtl. Protection v. U.S. Envtl. Protection Agency*, 626 F.2d

1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same). Procedurally infirm rules are a nullity, *McLouth Steel*, 838 F.2d at 1322-23, which applies to the OPT program.

B. The OPT program is substantively *ultra vires*.

The OPT program's justification rests on the word "student" bearing some ambiguity, which is simply not the case: "A school graduation marks, by definition, the end of a student's association with a school." *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383 (6th Cir. 1999). Moreover, the F-1 program statutorily applies only to education programs, which do not include blanket approval for employment by either STEM students specifically or foreign graduates generally, without regard for the educational benefits of that specific employment for the specific student. *See also* Section I.A, *supra* (1981 amendments limited the F-1 program to students at *academic* institutions). Thus, with respect not only to the 17-month extension for foreign STEM graduates but also to the initial 12-month program for all foreign graduates, the OPT Program is *ultra vires* the INA's requirements for the F-1 visa program.

1. The OPT program conflicts with INA's plain language.

The INA's F-1 provisions are concerned with the individual student's *bona fide* educational course, applying only to "an alien … who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States

temporarily and *solely for the purpose of pursuing such a course of study ... at an established ... academic institution.*" 8 U.S.C. §1101(a)(15)(F)(i) (emphasis added). A parallel portion of the F-1 program applies to "an accredited language training program in the United States, particularly designated by [the student] and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student." *Id.* Nothing in this language suggests that F-1 visa holders can get any post-graduation job regardless of its individualized educational benefit.

Although DHS cites the legislative history as supporting its interpretation of the F-1 program, the discussions of student work in the cited legislative history all are indistinguishable from students' working *during* their degree program (*i.e.*, when the visa holder is a student) and thus do not clearly contemplate post-graduation work (*i.e.*, when the visa holder is no longer a student). *See, e.g.*, DHS Memo. at 28-29. Indeed, in 2004, Congress expressly set aside 20,000 H-1B visas for the type of post-graduation holders of F-1 visas that benefit from the OPT program, 8 U.S.C. §1184(g)(5)(c), which implies that the H-1B program covers F-1 visa holders after they graduate. Such post-enactment legislation is "entitled to great weight in statutory construction" of the original law, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969), and compels this Court to reject DHS's merits

position.

2. The DHS's verb-tense, entry-based argument conflicts with the INA and the Dictionary Act.

The district court accepted DHS's argument that the restrictions on student status "could sensibly be read as an *entry requirement*" "to be proved at the time of admission to obtain a student visa." Slip Op. 21 (internal quotation omitted, emphasis in original). Under this view, foreign students may enter the U.S. with no fixed plans of post-graduation employment, only to abandon that intent upon graduation. *Amicus* Eagle Forum respectfully submits that this temporal verb-tense-based argument is foreclosed not only by the INA's specific, conflicting substantive provisions, but also by the general statutory-construction canons that Congress enacted in the Dictionary Act, 1 U.S.C. §1.

Three INA provisions nullify DHS's temporal entry-requirement argument. First, the F-1 visa program itself applies only to academic programs and requires the educational institution to "report … the termination of attendance of each nonimmigrant student." 8 U.S.C. §1101(a)(15)(F)(i). Second, the INA requires that its implementing regulations "insure that … upon failure to maintain the status under which [an alien] was admitted, … such alien will depart from the United States." 8 U.S.C. §1184(a)(1). Third, the INA makes deportable "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted." 8 U.S.C. §1227(a)(1)(C)(i). DHS has not

explained – and cannot explain – how the INA's expressly making entry requirements *continuing* requirements could support limiting those requirements only to when students first enter the country.

Under the Dictionary Act, moreover, when "determining the meaning of any Act of Congress," "words used in the present tense include the future as well as the present" "unless the context indicates otherwise." 1 U.S.C. §1. As explained above, the INA context here most decidedly supports the future and ongoing applicability of the INA's entry requirements, so DHS's and the district court's exploration of grammatical possibility has no bearing on this Court's independent obligation to determine the INA's meaning. *See Carr v. U.S.*, 560 U.S. 438, 447-48 (2010) ("[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"); *cf. Sherley v. Sebelius*, 644 F.3d 388, 394 (D.C. Cir. 2011). Because the INA's context does not indicate otherwise, this Court should follow the Dictionary Act – as well as the INA's continuing mandate to meet the tests for one's immigration status – to conclude that DHS has no INA warrant to grant student-visa status to *non-students*.

3. The OPT program's across-the-board educational treatment of post-graduate work conflicts with the tax cases on the educational nature of medical internships.

Amicus Eagle Forum respectfully submits that the litigation history of Social Security taxation for medical interns should inform this Court's views on the scope

of the student exemption. Under those cases, a medical resident may or may not qualify for a student-based exemption from taxation based on the educational nature of the internship or residency. *See, e.g.*, *U.S. v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2d Cir. 2009) (the "student exemption relies, in part, on the identities of the employees and employers to define the scope of the exemption, … [and], [a]lthough all interns may be students, not all hospitals [or employers] are schools, colleges, or universities").[3] DHS's proposed across-the-board determination of an educational benefit is, simply, preposterous.

Whatever play at the margins that the INA has for the word "student," the required and appropriate analysis consists of an individualized, case-by-case determination whether a particular job and employer are educational, consistent with the INA's F-1 provisions (*e.g.*, academic supervision). Some STEM jobs – such as some post-doctoral positions – likely could qualify as educational, provided that they were either educational in their own right or conducted under academic supervision from the student's educational program. As with the

[3] *See also Univ. of Chicago Hosps. v. U.S.*, 545 F.3d 564, 570 (7th Cir. 2008) (Social Security's "student exception is not *per se* inapplicable to medical residents as a matter of law; rather, a case-by-case analysis is required to determine whether medical residents qualify for the statutory exemption from FICA taxation") (citations omitted); *U.S. v. Mount Sinai Med. Ctr. of Fla., Inc.,* 486 F.3d 1248, 1253 (11th Cir. 2007) ("a case-by-case analysis is necessary to determine whether a medical resident enrolled in a GMEP qualifies for a FICA tax exemption pursuant to the student exemption").

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

III. WASHTECH'S CHALLENGE IS – AND WILL REMAIN – JUSTICIABLE.

In this section, *amicus* Eagle Forum addresses questions of justiciability that have or likely will arise on appeal. In summary, the issues that Washtech asks this Court to resolve are – and will remain – within this Court's jurisdiction to resolve.

A. Washtech has standing to challenge the OPT program.

The district court held that Washtech had standing to challenge the 2008 17-month OPT expansion for STEM workers, but not to challenge the initial 12-month OPT program for all foreign students. Leaving the statute of limitations aside, Washtech plainly has the same Article III case or controversy against both the 12-month and 17-month programs. From a strictly Article III perspective, month for month, the first 12 months of illegal competition hurt domestic workers every bit as much as the next 17 months.

The standing inquiry consists not only of the minimum requirements for a federal case or controversy under Article III, but also several judicially imposed

prudential limits on the exercise of the judicial power. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). In evaluating Washtech's standing, this Court must consider the question under *Washtech's* view of the merits: "one must assume the validity of a plaintiff's substantive claim at the standing inquiry." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In other words, the question is not which party is correct but, assuming *arguendo* that Washtech is correct, whether the Court has a case or controversy appropriate for a federal court.

1. Washtech has constitutional standing.

Constitutional standing consists of a cognizable injury in fact caused by the defendant and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury is "fairly traceable to the administrative action contested…. if that action *authorized* the conduct or established its legality." *Tel. & Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (emphasis added). Further, "an association may have standing solely as the representative of its members." *Warth*, 422 U.S. at 511. Here, Washtech has standing if its members have standing. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Washtech members suffer several cognizable injuries: (1) domestic workers suffer competitive injury from exposure to foreign students working here

illegally – under Washtech's merits views – after graduation on F-1 visas, *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014); (2) the tax advantage that F-1 visa holders enjoy creates an equal-protection violation vis-à-vis domestic workers, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S.Ct. 1101, 1109 (2011) ("tax schemes with exemptions may be discriminatory"); (3) the denial of the APA's and Constitution's procedural protections for promulgating rules with the force of law constitutes a procedural injury, given that Washtech members also suffer concrete injuries, *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (*en banc*); *Defenders of Wildlife*, 504 U.S. at 571-72 & nn.7-8. Significantly, for procedural injuries, Article III's redressability and immediacy tests apply to the *present procedural violation*, which may someday injure concrete interests, rather than to concrete (but less certain) future injuries. *Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1428-29 (D.C. Cir. 1996).

2. Washtech has prudential standing under the zone-of-interests test.

In addition to meeting the constitutional minima of Article III standing, Washtech also must satisfy the judicially developed "prudential" limits on standing, *Elk Grove*, 542 U.S. at 11-12. This "prudential standing" doctrine includes limitations on asserting the rights of absent third parties and requiring suits to be brought by those "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Kowalski v.*

Tesmer, 543 U.S. 125, 129 (2004) (third-party standing); *Ass'n of Data Processing Serv. Org'ns v. Camp*, 397 U.S. 150, 153 (1970). Because Washtech argues – and the standing inquiry thus assumes *arguendo*, *Waukesha*, 320 F.3d at 235 – that DHS's actions are *ultra vires*, this action meets the zone-of-interests test.

Here, Washtech members are the intended beneficiaries of the U.S.-worker protections enacted into the H-1B program and therefore satisfy the zone-of-interests test.[4] Moreover, when an agency acts *ultra vires*,[5] the zone-of-interests test is easily met. Specifically, the zone-of-interests test either is inapplicable or uses the wider zone for the overarching *constitutional* issues raised by lawless agency action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of

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[4] Significantly, the relevant zone is not the interests protected by DHS's views of the F-1 visa program, but rather the domestic-worker interests protected by the H-1B program under *Washtech's* merits views. *Waukesha*, 320 F.3d at 235.

[5] When faced with claims that their agency clients acted *ultra vires*, the Department of Justice occasionally argues that the particular transgression at issue is merely a garden-variety mistake in using a delegated power, as opposed to a full-fledged *ultra vires* agency action. Rejecting that view, the Supreme Court recently clarified that there is no sliding scale of *ultra vires* conduct: "Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington v. FCC*, 133 S.Ct. 1863, 1869 (2013) (emphasis added).

> interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989); *Law Offices of Seymour M. Chase, PC v. FCC*, 843 F.2d 517, 524 (D.C. Cir. 1988) (Williams, J., concurring) ("the zone-of-interests test is inapposite because the challenger contends (in effect) that ultra vires acts of the agency have interfered with some common law or possibly constitutional interest"). By operating outside its delegation, DHS purports to make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect… the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) (internal quotations omitted). Washtech thus easily meets the zone-of-interests test.

B. The United States has waived sovereign immunity for prospective declaratory and injunctive relief.

In the 1976 APA amendments, Congress "*eliminated* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (internal quotations and alterations

omitted, emphasis added). While statutes of limitations for judicial review can go to sovereign immunity, Washtech credibly – and, *amicus* Eagle Forum believes, correctly – counters DHS's statute-of-limitations defense with the reopener doctrine. Washtech Br. 48-52, In addition, the APA waiver of sovereign immunity applies not only to APA actions, but also to declaratory-judgment actions. *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 906 (D.C. Cir. 1992). Although the Declaratory Judgment Act does not expand a court's jurisdiction, it provides a remedy where jurisdiction otherwise exists in the form of a federal question presented in an Article III case or controversy. Indeed, the availability of such declaratory relief predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE § 25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace it. *See* Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., 37, 212, 276 (1946); *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). As explained in Section III.D, *infra*, Washtech and DHS have a live Article III case or controversy, making declaratory relief appropriate.

C. Requiring exhaustion or deferring judicial relief to allow DHS to act would be futile.

DHS plainly believes it has authority for the OPT program and, frankly, has shown that it will not end the program voluntarily based on opposing views of its legal authority. It "obviously would have been futile for [plaintiff] to have

petitioned the agency… to repeal" agency actions "where [the agency] had just determined that the [actions] in question were still necessary in the public interest." *Fox Tel. Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1040 (D.C. Cir. 2002); *Consolid. Coal Co. v. Fed'l Mine Safety & Health Review Comm'n*, 824 F.2d 1071, 1080 n.8 (D.C. Cir. 1987) ("[n]othing in *Chevron* suggests that a court should hesitate to decide a properly presented issue of statutory construction in hopes that the agency will someday offer its own interpretation"). Moreover, with DHS having rejected Washtech's merits position in this litigation, nothing productive can come from waiting for DHS to act: "in view of Attorney General's submission that the challenged rules … were 'validly and correctly applied to petitioner,' requiring administrative review through a process culminating with the Attorney General 'would be to demand a futile act.'" *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (quoting *Houghton v. Shafer*, 392 U.S. 639, 640 (1968)). Accordingly, the issues raised here are ready for judicial determination, subject only to the limits of Article III.

D. The Article III case or controversy between DHS and Washtech will survive the issuance of a curative rulemaking.

Although the timing is unclear, DHS likely will promulgate a procedurally APA-compliant rulemaking before this appeal concludes, thus potentially mooting any procedurally-based relief. Significantly, Washtech not only presses substantive arguments that will not become moot but also seeks "a declaratory judgment that

[DHS] exceeded its statutory authority when it allowed F-1 student visa holders to work after completing their course of study by creating the OPT Program." First Am. Compl. at 40 (Prayer for Relief). Under these two circumstances, a new DHS rulemaking will not moot the substantive dispute between the parties:

> It is well-established that if a plaintiff challenges both a specific agency action and the policy that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot.

City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1428 (D.C. Cir. 1994) (collecting cases). Although "requests for declaratory relief which aim to prevent future illegal acts often will implicate standing concerns," *id.* 1429 n.6, Article III presents no problems where DHS's allegedly illegal OPT program is ongoing and, indeed, being *extended*.

Mootness is a high bar: "if an event occurs while a case is pending on appeal that makes it *impossible* for the court to grant *any* effectual relief whatever …, the appeal must be dismissed." *Church of Scientology of California v. U.S.*, 506 U.S. 9, 11 (1992) (internal quotations omitted, emphasis added). As the emphasized terms signal, moot cases are gone *altogether*, not *partially* gone. Thus, while "not … fully satisfactory" to plaintiffs, "even the availability of a partial remedy is sufficient to prevent … case[s] from being moot." *Chafin v. Chafin*, 133 S.Ct. 1017, 1026 (2013) (interior quotations omitted). Here, this Court could award

ample declaratory relief, which would aid Washtech in its ongoing dispute with DHS. Moreover, even if a subsequent final action would moot *procedural* challenges to a prior DHS action, the existence of an ongoing merits dispute would not be moot: "[an agency's] issuance of that rule does not moot [plaintiffs'] challenges, which are equally applicable to the final rule and the interim rule." *Am. Maritime Ass'n v. U.S.*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985) (*citing Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 377-79 (D.C. Cir. 1983)). The merits dispute between Washtech and DHS will continue in any new final rule, and this Court should issue a substantive, merits-based judgment.

IV. THE DISTRICT COURT'S EXTENDED DELAY OF THE *VACATUR* GIVES AGENCIES IMPROPER INCENTIVES TO VIOLATE NOT ONLY THE APA BUT ALSO THE CONSTITUTION

Regardless of how it rules on Washtech's substantive arguments, this Court should order the immediate vacatur of DHS's OPT program. First, if this Court rules for Washtech on the OPT program's substantive invalidity, *see* Section II.B, *supra*, that would compel vacating the program *immediately*. But even the merely procedural APA violations warrant immediate *vacatur*.

The district court's deferring *vacatur* to allow DHS to promulgate a curative rulemaking effectively extended the very APA exceptions that the district court held DHS to have exceeded. If courts will not "set aside agency action … found to be … without observance of procedure required by law," 5 U.S.C. §706(2)(D),

agencies will have no incentive to comply with notice-and-comment procedures. Such back-door extensions of APA exceptions would defeat what "it [is] clear beyond contradiction or cavil that Congress expected … [namely] that the various exceptions to the notice-and-comment provisions … will be narrowly construed and *only reluctantly countenanced*." *N.J. Dept. of Envtl. Protection*, 626 F.2d at 1045-46 (emphasis added); *Mack Trucks*, 682 F.3d at 94 (same).

CONCLUSION

Amicus Eagle Forum respectfully submits that the Court should reinstate Counts I-III and remand with instructions to issue immediate declaratory and injunctive relief against using F-1 student visas to authorize employing former students whose graduation renders them ineligible as current students.

Dated: December 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a), I certify that the foregoing brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,995 words, including footnotes, but excluding this Brief Form Certificate, the Corporate Disclosure Statement, the Statement with Respect to Parties and *Amici*, the Table of Authorities, the Table of Contents, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, I electronically submitted the foregoing brief *amicus curiae* – as an attachment to the accompanying motion for leave to file – to the Clerk via the Court's CM/ECF system for filing and for transmittal of a Notice of Electronic Filing to the participants in this appeal, who are registered CM/ECF users.

Dated: December 28, 2015

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